

# The Three Most Common Estate Litigation Issues



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# THE THREE MOST COMMON ESTATE LITIGATION ISSUES

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## ESTATE LITIGATION SURVEY

- Review of approximately 40 judgments rendered by the Superior Court and Court of Appeal
- Decisions rendered across the province of Quebec in 2018 and 2019



## WHAT THE SURVEY REVEALS

- Spectrum of recurring estate litigation subject matters include:
  - Annulment of wills
  - Probate of codicils
  - Unworthiness to inherit
  - Contestation of the decisions of liquidators
  - Access to information/rendering of account
  - Removal of liquidators
  - Renunciation to succession

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## THREE MOST COMMON ESTATE ISSUES

- Our review of the noteworthy judgments rendered in the past year has shown that the most common estate issues are:
  - Annulment of a will
  - Replacement of liquidators
  - Rendering of account



## ANNULMENT OF A WILL

- Causes for the annulment of a will (other than causes relating to the form of the will):
  - Lack of capacity
  - Invalid consent

## ANNULMENT OF A WILL – CAPACITY

- *Civil Code of Québec*, article 703:

“Every person having the required capacity may, by will, provide otherwise than as by law for the devolution upon his death of the whole or part of his property.”

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## ANNULMENT OF A WILL – CAPACITY

### To assess capacity:

- Capacity to make a will requires the testator to have a sufficient memory, as well as comprehension and judgment skills to understand the nature of the deed and its implications.
- More particularly, in order to make a valid will, the testator must:
  - Know, without being prompted or helped, the nature and scope of the assets to be disposed of
  - Know and understand the nature of the deed that he is about to sign
  - Remember the name and identity of the beneficiaries in the will
  - Know the nature of his relationship with the beneficiaries
  - Understand and recall all of these facts
  - Be capable of understanding the interrelation between these factors
  - Possess the capacity to remember the decision taken

(Iaccuci c. Succession d'Occhionero, 2018 QCCS 319, paras. 54-55)

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## ANNULMENT OF A WILL – CAPACITY

- Capacity is presumed
- Notaries do not have the obligation to check capacity
  - Prudent practice: to refuse to receive the signature to the will if there is a doubt on capacity

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## ANNULMENT OF A WILL – CONSENT

- Consent must be free and enlightened
- It may be vitiated by error, fear and fraud
  - **Error:** When, without this error, consent wouldn't have been given
  - **Fear:** Fear of serious injury induced by violence or threats
  - **Fraud:** Captation

## ANNULMENT OF A WILL – CAPTATION

- Captation: a series of reprehensible operations with the goal of bringing a person to grant a liberality that he/she would not have otherwise granted (*Flibotte c. Flibotte*, 2015 QCCS 1163, para. 73)

## ANNULMENT OF A WILL – CAPTATION

**One or more than one of the following facts have been retained by the Courts as indicia of captation:**

- The lawyer or the notary is chosen by the heir
- The heir plays an active role in the preparation of the will, notably by giving directives himself
- The person designated in the will is present with the notary at the time of the making of the will
- The bonds between the designated heir and the testator intensify and become quasi-exclusive
- The heir obtains a general power of attorney that he uses, whether the situation requires it or not. He confuses the property of the testator with his own and places himself in a conflict of interest during the management

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## ANNULMENT OF A WILL – CAPTATION

- The heir doesn't render account of his administration of the property of the donor during his lifetime or as a liquidator after the donor's death
- The liquidator hastens to split the property after the death
- The testator is vulnerable during or after the period that precedes the will
- The heir meddles in the affairs of the testator
- There exists tensions and resentment between the heir and the other members of the family or potential heirs
- The heir informs the family members of the passing late
- The heir isolates the testator and manifests an interested intention and thoughtfulness, as well as altruism
- The heir tries to erase the other potential heirs from the memory of the testator; by the removal of gifts given by them, of photos representing them and by intercepting their correspondence

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## ANNULMENT OF A WILL – CAPTATION

- The heir is named liquidator
- Before the passing, the heir receives donations and advantages
- A sudden change of attitude of the testator happens towards third parties and potential heirs
- There is an omnipresence and an influence by the heir on the testator
- The will reflects what the heir believes to be fair and legitimate
- The heir disparages the heirs presumptive and irritates the testator against them
- The heir states or exaggerates his/her difficult economic situation
- More than one will or codicils are prepared
- The members of the family and the other third parties are not informed of the funeral, which is held in the strictest intimacy in order to prevent the heirs from having to respond to questions concerning the will and to keep the maximum amount of capital in the estate

(M.P. c. F.D., 2019 QCCS 771, para. 38)

## REPLACEMENT OF LIQUIDATORS

- Frequent judicial request
- Accounts for approximately half of all cases surveyed
- Either as a principal redress or included within other remedies



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## FUNCTIONS OF A LIQUIDATOR

### **Role of the liquidator is to administer and wind up the succession**

- Acts with respect to the property of the succession as an administrator of the property of others charged with simple administration (art. 802 C.C.Q.)
- Makes a search to ascertain whether the deceased made a will. If so, the liquidator causes the will to be probated and takes all the necessary steps for its execution (art. 803 C.C.Q.)
- He is bound to make an inventory in the manner prescribed by law (art. 794 C.C.Q.)

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## FUNCTIONS OF A LIQUIDATOR

- He realizes the property of the succession to the extent necessary to pay the debts and the legacies by particular title (art. 804, al. 1 C.C.Q.)
- If the liquidation takes longer than a year, at the end of the first year and at least once a year thereafter, the liquidator must render an annual account of his management (art. 806 C.C.Q.)
- At the end of liquidation, the liquidator must prepare a final account of the net assets or the deficit of the succession (art. 820 C.C.Q.)

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## OBLIGATIONS OF A LIQUIDATOR

- Comply with the obligations imposed on him by law and the constituting act (art. 1308 C.C.Q.)
- Act with prudence and diligence (art. 1309, al. 1 C.C.Q.)
- Act honestly and faithfully in the best interest of the heirs (art. 1309, al. 2 C.C.Q.)
- Cannot exercise powers in his own interest or place himself in a position where his personal interest is in conflict with his obligations as administrator (art. 1310, al. 1 C.C.Q.)
- Cannot mingle the administered property with his own property (art. 1313 C.C.Q.)

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## GROUNDS FOR REMOVAL OF A LIQUIDATOR

- Deadlock between the liquidators in the decision process relating to the administration and winding up of the succession
- Conflict of interest between the personal interest of the liquidator and the interests of the succession he is called upon to administer for the benefit of the heirs
- Misappropriation or comingling of funds
- Failure to accomplish the principal obligations incumbent upon a liquidator (inventory, paying the debts of the succession, rendering of account, etc.)

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## APPLICATION TO REMOVE A LIQUIDATOR

- **Art. 791 of the Civil Code of Québec:**

“791. Any interested person may apply to the court for the replacement of a liquidator who is unable to assume the responsibilities of his office, who neglects his duties or who does not fulfil his obligations.

During the proceedings, the liquidator continues to hold office unless the court decides to designate a provisional liquidator.”

## GENERAL RULE

- High burden of proof required
- Deference is given to the testator's choice
- Courts are reluctant to interfere in the decision-making process of liquidators
- The removal of a liquidator is an extreme measure, which only occurs when necessary to protect the interest of the estate
- Before removing a liquidator and thereby modifying the intention of the testator, the Court must have evidence that such a remedy is necessary and in the best interest of the estate and its heirs

## EXCEPTION TO THE RULE

***Bohbot c. Weinberger, 2018 QCCS 4186 (currently under appeal)***

### • Overview

- Dispute over the inheritance of David Bohbot
- Will named three liquidators, Thérèse (spouse), Leonard (accountant) and Dan (son)
- Dan institutes proceedings to annul the will, to remove Thérèse and Leonard as liquidators and to declare Thérèse unworthy to inherit
- Thérèse institutes a cross-claim asking that Dan be removed as liquidator due to his uncooperative attitude that has prevented the liquidators from winding up David's estate

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## EXCEPTION TO THE RULE

*Bohbot c. Weinberger, 2018 QCCS 4186 (currently under appeal)*

### • Decision

- Because of the acrimonious litigation, it is unreasonable to expect that Dan could act in concert with Thérèse and Leonard to wind up the estate
- Given the quarrelsome behaviour of Dan and his confusion regarding his role as liquidator, heir and plaintiff, it is unreasonable to expect that he has the objectivity required to act in the superior interest of the heirs and legatees
- Leaving the liquidators in position would impose an unreasonable burden on the estate as the liquidators would continue to engage in sterile discussions and argument, adding delay and cost
- The exceptional measure is necessary and Dan should be removed

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## EXCEPTION TO THE RULE

### *Thériault c. Thériault*, 2018 QCCS 1016

#### • Overview

- Dispute over the inheritance of Jeanne Michaud
- Will named one liquidator, Céline (daughter)
- Roger (son) institutes proceedings to order Céline to provide an inventory and accounting of her administration of the estate
- Roger also asks that Céline be removed as a liquidator because she allegedly misappropriated the sum of \$30,000 from Thérèse before her demise

## EXCEPTION TO THE RULE

- *Thériault c. Thériault*, 2018 QCCS 1016
- **Decision**
  - A liquidator cannot continue to act when he is placed, voluntarily or not, in a situation where he may be called upon to choose between his personally interest and those of the heirs or legatees
  - In view of the allegations of fraud made by Roger, even though they are vigorously contested by Céline, judicial proceedings will inevitably be instituted
  - Under the circumstances, Céline is placed in an untenable situation of conflict of interest (being forced to choose between her personal interest and the interest of the heirs she is supposed to represent)
  - Therefore, it is as a result of this eventual litigious dispute and not because of a proven failure by Céline to honour her obligations, that the Court considers that she be removed as a liquidator

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# RENDERING OF ACCOUNT

## Annual account

- If the liquidation takes longer than one year, the liquidator shall, at the end of the first year, and at least once a year thereafter, render an annual account of management to the heirs, creditors and legatees by particular title who have not been paid (art. 806 C.C.Q.)
  - The account shall be sufficiently detailed to allow verification of its accuracy (art. 1352, al. 1 C.C.Q.)
  - The liquidator shall at all times allow the beneficiary to examine the books and vouchers relating to the administration (art. 1353 C.C.Q.)
  - Any interested person may, on a rendering of account, apply to the court for an order that the account be audited by an expert (art. 1352, al. 2 C.C.Q.)

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# RENDERING OF ACCOUNT

## Final account

- The object of the final account of the liquidator is to determine the net assets or the deficit of the succession (art. 820, al. 1 C.C.Q.)
- The final account indicates the debts and legacies left unpaid, those guaranteed by security or assumed by heirs or legatees by particular title and those whose payment is settled otherwise, specifying the mode of payment for each. Where applicable, it establishes the reserves needed for the satisfaction of potential judgments (art. 820, al. 2 C.C.Q.)
- The account shall be made sufficiently detailed to allow verification of its accuracy; the books and other vouchers pertaining to the administration may be consulted by interested persons (art. 1363, al. 2 C.C.Q.)

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## RENDERING OF ACCOUNT

- The books and other vouchers pertaining to the administration may be consulted by interested persons (art. 1363, al. 2 C.C.Q.)
- It can be done amicably or in court (art. 821 C.C.Q.)
- After acceptance of the final account, the liquidator is discharged of his administration and delivers the property to the heirs (art. 822, al. 1 C.C.Q.)
- Closure of the account is published in the register of personal and movable real rights by registration of a notice identifying the deceased and indicating the place where the account may be consulted (art. 822, al. 2 C.C.Q.)

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## RENDERING OF ACCOUNT – EXAMPLE

### *Succession de Vaillancourt c. St-Pierre, 2018 QCCS 3696*

- The liquidator asked the Court to homologate her final account
- The liquidator refused the repeated requests by the heirs that an annual account be made
- The Court concluded that the liquidator didn't abide by her obligations and that she wasn't transparent, leaving some of the heirs out of her communications with others
- The Court concluded this although a final account was done

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## QUESTIONS ?



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