

SHARING THE CARE:

**Financial and Legal
Considerations in
Planning for
People with
Mental Disabilities
in Quebec**



Borden Ladner Gervais

amiquébec

Agir contre la maladie mentale
Action on mental illness

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BORDEN LADNER GERVAIS LLP

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MENTAL DISABILITIES
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Dear Families:

For many families, planning for the future of an adult relative with a mental illness is a daunting task. Sometimes it's so difficult to decide where to begin, the task is put off. Yet parents, in particular, realize that it's their responsibility to make arrangements for the future care of their son or daughter. And in virtually all cases, the sooner the better.

Planning is a process that can be approached one step at a time. Early planning means that decisions won't have to be made in the emotional turmoil of a crisis. Living arrangements, health care, social support, legal and financial concerns – all these interconnected aspects must be considered. Generally, they can be grouped into two major categories: financial and estate planning, and personal care planning. This guide addresses the first category and may assist you in starting the process.

More help is available in considering your relative's needs. Don't put it off. Call us at (514) 486-1448 for guidance and support.

Sincerely,



Annie Young
President

Retrouver l'espoir L'espoir de se retrouver • The Recovery of hope The hope of Recovery

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Introduction

Too frequently difficult family or financial situations arise which could have been avoided by a few moments of careful planning. Often, parents of a disabled child find it difficult to even consider the process of estate planning, since for them the process is freighted with an unusually heavy burden of fears, anxieties and needs. The planning might result in something as simple as the appointment of a tutor for a child, the transfer of property to a trust, signing a power of attorney or the designation of a beneficiary in a registered retirement savings plan.

We have prepared this guide in order to review some important issues affecting your family and property, with special attention to people with mental disabilities. We hope this guide assists you in addressing the needs of loved ones and helps you plan for your future.

You should be aware that the law does not provide a perfect or even adequate solution to all situations you are facing or may have to face in the future. It may be that your planning may have to be nuanced. Often you will have to arrive at some compromise somewhere between the legal and the practical. You should also keep in mind that everyone's situation is slightly different so that there is no standard type of planning. If you have special needs, you may need a special strategy to meet your needs.

The discussion in this guide is general and not intended to be exhaustive. Some aspects may not be relevant to your particular situation. Other aspects of estate and financial planning such as income tax or inter vivos trusts are not dealt with in depth but may be relevant to your personal circumstances. This guide is intended as a source of general information only and should not be relied upon to address any particular legal issue. It also assumes that only the laws of Quebec apply to you and your property. In addition, the law is constantly changing. We urge you to seek legal advice for your situation. Our

comments reflect the law as of October 2010. In addition, references to organizations and telephone numbers are accurate as of this date.

The author gratefully acknowledges the assistance of Rosie Dikeakos and Elisabeth Evans-Olders in up-dating the guide.

Planning Your Will

Terms used throughout this booklet are defined in the Glossary of Terms found at page 49

What is a Will?

A will is a legal document made by you to take effect upon your death. It gives instructions about how your affairs are to be handled after your death and directs how your possessions are to be divided among the persons you name.

Who Can Make a Will?

To make a valid will, you must be at least 18 years old, unless you are legally married.

A minor may make a will dealing with property of little value (e.g., disks, sports equipment).

In addition to this age requirement you must have testamentary capacity. In other words, you must know what a will is and understand that it will be legally binding upon your death. You must also know what property you own and its approximate value. You must also understand to whom you owe a legal or moral obligation to look after if you should die.

A person of full age under curatorship may not make a will. A person of full age under tutorship may make a will which may be confirmed by the court which will assess the nature of the dispositions and the circumstances surrounding the making of the will (e.g., the testator's ability to understand). A person of full age provided with an adviser may make a will.

Each spouse must have a separate will. A husband and wife (whether legal spouses or *de facto* spouses) cannot use the same will to bequeath their assets. In Quebec, a joint will is not recognized.

What Makes a Will Invalid?

Your will must reflect your wishes. Therefore your will, or a portion of it, may be invalid if anyone has forced you to make your will a certain way. Your will may also be invalid if, at the time you make it, you suffer from any impairment of your powers of reason or judgment or if you lack testamentary capacity as mentioned above.

Why Do You Need a Will?

A will may serve various functions, such as:

1. appointing a liquidator to look after your affairs after your death;
2. appointing a tutor for any of your children under the age of 18 years;
3. selecting the family, friends and organizations whom you would like to inherit your assets;
4. ensuring that your beneficiaries receive their inheritances in the manner and at the age you feel is appropriate;
5. permitting your estate to take advantage of potential tax savings;
6. avoiding the provincial laws which automatically determine who will receive your estate if you die without a will, (see "Distribution of your Estate");
7. reducing the cost of administering your estate; and
8. making adequate and appropriate financial arrangements for a disabled family member.

If you are considering providing in your will for a beneficiary with a mental disability, it is essential that you prepare a will containing carefully thought-out provisions for that person. (See discussions of *Survival of the Obligation to Provide Support and Discretionary Trusts*.)

When Do You Need To Revise Your Will?

You should review your will whenever there has been a material change in your affairs such as a birth, death, marriage or marital breakdown in your family, a death or change in circumstances of a tutor or liquidator-trustee named in your will, a substantial change in your assets or liabilities, a change in your medical condition or that of a family member, or a change in tax, succession, property or family laws.

Your will should also be reviewed periodically even if you are not aware of any changes in circumstances which may affect the will. This will allow you to re-examine the provisions in your will for young beneficiaries as they mature, to consider whether a change of liquidator may be appropriate and whether your will reflects your current wishes as to the disposition of the assets you then may hold.

What Form of Will is Best for You?

You may choose to have your will in one of the three forms of wills which are valid in Quebec; that is, a holograph will, a will made in the presence of witnesses or a notarial will. A notarial will does not have a counterpart in other provinces.

You may draw up your will in any language, but there would have to be an official court translation made (in French or English) for the probate procedure.

Holograph Will

A holograph will is a “home-made” will which is entirely written and signed by the testator. It cannot be written by any technical device whatsoever. It requires no witnesses. It is advisable to date the will, even though it is not a requirement for its validity.

Since it must be entirely in your own writing, this means that if you use the blank forms which can be purchased for a few dollars, on which you need only fill in the blanks, it will not be valid as a holograph will. If it is properly witnessed, it could be considered

valid as a will made in the presence of witnesses. Although these prepared forms do contain instructions to help you do it right, if you plan to use it as a holograph will, copy the entire document in your own writing.

Writing a holograph will does not cost anything at all, but after your death the will must be probated, that is, proven valid as to form or confirmed by the court.

While a holograph will is easy and obviously cheaper to prepare than paying to have a will drawn up, it isn't necessarily the best procedure. If there is a chance of any arguments among the beneficiaries or if the instructions are unclear, then it is much wiser to have a professional draw up the will. Remember, while your wishes may be perfectly clear to you, they may be confusing to others. Unless you're leaving everything to one person and there is no risk of complaints from others, it is best to get professional wording. Court costs for arguments among heirs may consume much of the estate if there is any ambiguity in your instructions.

Will Made in the Presence of Witnesses

A will made in the presence of witnesses, valid in every Canadian province, can be drawn up by or with the advice of a lawyer, but it can also be drafted by the testator (the person making the will) or any other person. Under the old Civil Code, this was called a will in English form. The will must be witnessed by two persons of full age who are not beneficiaries who must sign in the presence of each other and the testator. Each page must be signed or initialled by both witnesses and the testator. If someone is both a witness and beneficiary, the will remains valid, but this person cannot benefit under the will and won't get the inheritance. (The bequest would be redistributed to the other heirs named.) The testator must also declare in the presence of the witnesses that the document is his will but does not have to divulge its contents to the witnesses.

The cost of a will prepared by a lawyer depends on the amount of time required and the complexity of the document and the particular lawyer's fee schedule. Ask the lawyer for an estimate of the charges before you start.

You can use the blank forms available in stores to make a will in the presence of witnesses. Be sure to follow instructions.

This will must also be probated.

This will is advantageous if property is located outside of Quebec, since it is more readily recognized in common law jurisdictions.

Lawyers who retain the original of the will are obliged to advise the Quebec Bar where a register of wills has been maintained since 1979.

Notarial Will

In Quebec, the notarial will must be drawn up before a notary (qualified to practise in this province), read and witnessed by a qualified person and signed by all. In the case of certain handicapped persons (for example, someone who cannot write, a blind person or a deaf person), two witnesses are required as well as the notary. A notarial will does not have to be probated. The notary keeps the original and you get a certified copy. A notarial will is more difficult to contest in court.

No matter how many years elapse between the date the will was written and the death of the testator, the will is always there and easy to find. If the notary dies before the testator, then by simply calling the Quebec Chamber of Notaries (the professional association of notaries in the province) the heirs can find out which notary is handling the files of the original notary or whether his files have been deposited with the Superior Court.

A will register is also maintained by the Chamber of Notaries.

The disadvantage of a notarial will is if one has property outside of Quebec: since it is a form unique to Quebec, it is not readily recognized in some jurisdictions. It may be

necessary to obtain letters of verification from the court for the purposes of transferring assets located outside of Quebec.

What Information Will Your Lawyer Need?

References to “lawyer” include “notary”

Included at the end of this booklet is a "Will Instruction Questionnaire" intended to assist you in compiling information which will aid your lawyer in obtaining your will instructions. Probably your lawyer will want more information, but completing this questionnaire should provide your lawyer with a good start.

Codicils

A codicil is a document amending your will. It may be in any of the three forms recognized as valid for a will discussed above. It is not necessary for the codicil to be in the same form as a will, that is, you may have a holograph codicil to a notarial will, but the codicil will have to be probated. Remember, a codicil is only recommended for minor changes to your will. For complex changes, it is best to redo your will since you may inadvertently revoke parts of your will.

What Does a Will Cost?

The cost of a will is generally based on the time spent by your lawyer in obtaining instructions and preparing the document. The completion of the Will Instruction Questionnaire prior to the meeting with your lawyer will reduce the time spent by your lawyer and assist you in organizing your wishes. Given this basic knowledge of your circumstances and wishes, your lawyer can estimate the time necessary to prepare your will and attend to its execution and therefore will be able to give you a fairly accurate estimate of the cost in your case.

What Happens If You Die Without a Will?

If you die without leaving a valid will, the administration and distribution (now called liquidation) of your estate in Quebec is governed by the laws of this Province. Those laws provide rules for the liquidation of your estate, the distribution of your property and the tutorship of any minor children who survive you.

Administration of your Estate

If you have not named a liquidator in your will, or if the liquidator named in your will is unwilling or unable to act as your liquidator, all your heirs will jointly act as liquidators of your estate on your death. Your heirs may agree to appoint one or two of them to act on behalf of all, but sometimes this is not possible because there is discord among heirs. The process of administration where there is no will may be more time consuming and costly because of family conflicts and disputes.

Distribution of your Estate

The *Civil Code of Quebec* sets out the distribution of your estate if you die without leaving a valid will. Your spouse and children will be provided for first out of your estate and if you do not have a spouse or child, your estate is distributed, in order of priority, to your parents, brothers and sisters, nieces and nephews and then to your closest blood relatives. The following table sets out how, in most cases, your assets would be distributed.

If you die leaving a spouse and children or other lineal descendants surviving you:	Your spouse receives one-third of the balance of the estate and your child or children equally share the other two-thirds (if one or more of your children has already died leaving children, your grandchildren will share their deceased parent's share of your estate).
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If you die leaving a spouse but no children or other lineal descendants:

If you leave parents or a parent and brothers and sisters, two-thirds goes to your spouse and one-third to your parents or parent. Your brothers and sisters are excluded from sharing in your estate.

If you leave brothers and sisters but no parents, two-thirds goes to your spouse and one-third to your brothers and sisters equally. If a brother or sister has already died, his or her children will share their parents' share of your estate.

If you die leaving children or other lineal descendants surviving you but no spouse:

Your entire estate goes to your children and if any child has died his or her children will take the portion that their parent would have received if he or she had survived.

If you die leaving no spouse, children or other lineal descendants surviving you:

One-half of your estate goes to your mother and father equally or to the survivor if one of them has already died and the other half is divided equally among your brothers and sisters. If your parents have both died before you, your entire estate goes to your brothers and sisters equally. If a brother or sister has already died, his or her children will share their parent's share of your estate.

If you die leaving no spouse, children, lineal descendants, parents, brothers or sisters or nephews or nieces:

Your estate goes equally to your next-of-kin who are closest in blood relationship to you.

If you die leaving no next-of-kin surviving:

Your estate passes to the Provincial Government (Revenue Quebec).

If you do not wish your estate to be distributed in accordance with this table, you must make a will.

Tutorship of Children

If you die without a will or fail to appoint a tutor in your will and there is no surviving parent who has legal custody of your children, the director of youth protection or, for property, the Public Curator, will become the tutor of your children. In order for a

relative or other person to become tutor of your children, that person will have to apply to the Superior Court of Quebec or to a notary to convoke a tutorship council which will propose a tutor and this candidate must then be confirmed by the court.

If you wish to appoint a tutor for your under-age children, you should make a will.

What Property Cannot Be Dealt With In Your Will?

Your will does not deal with all the property which you may own at your death. For example, the following property which you might own would not be part of your estate governed by your will:

1. A life insurance policy in which you have designated a beneficiary and an RRSP or RRIF in which you may legally designate a beneficiary;
2. Your spouse's share of property governed by certain matrimonial regimes such as community of property or partnership of acquests;
3. Any trusts established while you are still living;
4. Shares of a company subject to a shareholders' agreement.

Some of these properties which cannot be dealt with by your will (as, for example, life insurance proceeds) are generally not subject to the claims of creditors nor can they be affected by a claim against your estate for alimentary support.

Property With a Named Beneficiary

Most life insurance policies, registered retirement savings plans, registered retirement income funds, annuities, pension benefits and other similar benefits permit you to designate a beneficiary. The asset then transfers directly to the beneficiary on your death. It does not form part of your estate being dealt with by your will unless you either specifically name your estate as a beneficiary or the designated beneficiary has predeceased you. You should be aware that under the laws of Quebec, a designation of beneficiary in some RRSPs or RRIFs is not recognized as a valid designation. You should verify with your lawyer that such a designation is valid.

You should consider what property you are leaving to a designated beneficiary when making your will, particularly where you are providing for a disabled person. If you feel a disabled beneficiary should receive an inheritance in the form of a trust and specifically

a discretionary trust, commonly referred to as a “Henson Trust”, it may defeat the purpose of the trust if property (such as insurance or RRSP or RRIF proceeds) is passing directly to that person as a designated beneficiary.

Matrimonial Property

You may have heard the expression, “You may not give what you do not have”. This is particularly true when it comes to property governed by certain matrimonial regimes.

There are three matrimonial regimes in Quebec: separation as to property, community of property and partnership of acquests. The effects of the regime come into effect when the marriage is dissolved. One of the events that dissolves the marriage is the death of one of the partners. The testamentary clauses in a marriage contract take precedence over wills (unless the contract provides for the possibility of disposing of property by will) and so your estate will be affected by the type of matrimonial regime under which you were married and, possibly, the testamentary clauses contained in your marriage contract, if any.

If you are married “separate as to property”, and you die with a will, it is the will which solely governs the division of your assets among your heirs, unless there are testamentary clauses in your marriage contract. Often, there is a clause that says the last surviving spouse inherits all. If you have no will, and no testamentary clauses in your marriage contract, then the succession passes to your heirs as established by law.

If you were married under the regime of “community of property”, then your assets and those of your spouse, which have been identified as community assets, are put into one pot, along with the debts. Upon the death of you or your spouse, the “community” then gets split, and the surviving spouse receives half of everything. The other half will be distributed according to the deceased’s will, or, if there is no will, to the legal heirs.

If you were married under the regime called “partnership of acquests”, each spouse is entitled to half of the assets earned by the other during the marriage. Upon the death of a

spouse, his or her private property and half of the acquests will be distributed according to his or her will, or, if there is no will, then to his or her legal heirs.

Inter Vivos Trust Property

A trust established by your will on your death is a testamentary trust. A trust established during your lifetime is an *inter vivos* trust. Your circumstances may be such that the creation of an *inter vivos* trust could be beneficial to you and your beneficiaries. The written agreement creating the trust typically contains its own provisions as to how the trust property is to be dealt with on your death. An *inter vivos* trust would seldom form part of your estate governed by the terms of your will.

Shares Subject to a Shareholders' Agreement

Shareholders of a company may have entered into an agreement that obliges the estate of a deceased shareholder to sell his or her shares to the other shareholders. You would not be able to give these shares then in your will.

What Happens to Property Held in Co-Ownership?

Property can be owned jointly with another person or persons. You should be aware that there is no "right of survivorship" in the civil law of Quebec which would enable property to be transferred automatically to the surviving co-owner on the death of the other.

If you own your property jointly with someone, each of you owns an undivided one-half interest and on your death your interest will be dealt with in accordance with the provisions of your will or, if you have no will, according to the intestacy rules previously discussed.

Many individuals, for example, create joint bank accounts as a matter of convenience - where the original holder of the account wishes another individual to be able to access that account. You should be aware that such accounts are "frozen" on the death of one

of the co-owners and, until proper transfer documentation is provided to the bank, you may not have access to the account which may cause cash flow problems for you.

The Terms of Your Will

This section is intended to give you a brief review of some basic provisions of a typical will. Your lawyer will wish to discuss these and consider others with you prior to preparing a draft will for your review.

Appointment of a Liquidator

Your liquidator is responsible for safeguarding your assets and carrying out your wishes under the terms of your will. Your trustee is responsible for administering any trusts which you set up under your will. Usually the liquidator and the trustee are the same person.

Your choice of liquidator must be given careful consideration. Your liquidator will make crucial decisions and it is important that he or she should have good judgment and business sense as well as be able to relate well with the members of your family. You should also consider such factors as availability, willingness, age, health, residency, trustworthiness, impartiality and financial stability. If you are providing for a disabled beneficiary in your will, you should choose a liquidator who will be sensitive to, and knowledgeable about, the special needs of this beneficiary.

It may be appropriate to discuss the appointment with your liquidator and familiarize your liquidator with your affairs. Where you are providing for a beneficiary who is much younger than you, you should consider appointing a younger liquidator who is likely to survive the beneficiary.

You may consider appointing co-liquidators to act together. You may also consider appointing a trust company to be either the sole liquidator or a co-liquidator. Trust companies offer the expertise and complete accounting and investment facilities to administer your estate. They can be objective and impartial and provide continued

administration with little risk that they will not be around to complete the liquidation of your estate. You should inquire about their fees.

You should also consider naming a replacement in case of incapacity, retirement, resignation or death of the originally-named liquidator. Remember that a liquidator is entitled to remuneration unless he or she is an heir. You may wish to provide specifically for remuneration by stating a fixed amount or a percentage of your estate.

In choosing a liquidator, you should also keep in mind that if any of your beneficiaries are minors or adults under curatorship or tutorship, your liquidator will have to settle your estate in accordance with certain formalities prescribed by law, for example, drawing up an inventory and publishing notices.

Appointment of a Tutor

As a parent you may, in your will, appoint a tutor for any of your children under the age of 18. That tutor would be responsible for your children's upbringing after you died.

You should always consult with the person you plan to appoint as tutor to determine if that person is prepared to assume the responsibility.

As well, you should provide for an alternate tutor in the event the person you have appointed is unwilling or unable to act.

Recommendation for Care of a Disabled Person

If you are the parent of a disabled child over the age of 18, you may wish to make recommendations concerning the care of this child after your death, such as suggesting someone as a possible candidate for tutor or curator. Such a suggestion, however, is not binding.

Disposition of Property

The other major function of your will is to dispose of your property. You may do this by leaving particular legacies of specific items of property or amounts of money outright to certain individuals or organizations or by setting up trusts. A trust permits your liquidator to manage a portion of your estate for a period of time while using it for the benefit of your spouse, child or other person such as a disabled beneficiary. Your will should also contain a provision disposing of the residue or balance of your estate not disposed of in any other way.

Family Patrimony

You should consider the effect of the family patrimony provisions when planning your will, especially if you have a mentally ill spouse and plan to leave your property to someone other than your spouse. The effect of the family patrimony provisions is to provide for the partition (i.e., division) of the value accrued during the marriage of the family assets in the event the marriage is dissolved because of the death of one of the spouses, separation or divorce.

Family patrimony claims are settled prior to any division of property resulting from matrimonial regimes.

All legally married couples, no matter when the date of their marriage and regardless of their matrimonial regime, are subject to the provisions of this law unless they signed an exclusion agreement prior to December 31, 1990. As a general rule, spouses are required to divide up the family assets between them, whether or not they have signed a marriage contract before a notary, and whether they have children or not.

The law determines which property constitutes family assets, regardless of who legally owns them. Thus, the family assets include the following:

- the family's principal residence;
- the family's secondary residences;

- the furniture and other household effects furnishing and decorating these residences;
- the motor vehicles used for family purposes;
- the benefits accrued during the marriage under a retirement plan.

However, any such property acquired by either spouse before or during the marriage by way of gift, legacy or inheritance is excluded from the family assets. Computing the divisible value may become complicated in any case when the property was purchased before or during the marriage out of monies received from an inheritance, legacy or gift.

Until the marriage has come to an end, the family assets do not conflict with the right of ownership each spouse has of his or her own property. Each spouse remains free to dispose of his or her property, with the sole restriction enacted to protect the family residence (the owner-spouse may not sell or mortgage it without the consent of the other) and those resulting from the matrimonial regime (for example, a spouse married under the regime of partnership of acquests may not give away any property forming part of his or her acquests without the consent of the other).

When the partition occurs as a result of death, the value of the property is divided between the surviving spouse and the heirs. If the surviving spouse is the sole heir, there is no problem. However, problems may arise when the surviving spouse is not the sole heir.

Remember that the rules concerning the partition of family assets do not apply to persons living as common-law or de facto spouses.

Therefore, if you wish to leave all or part of your estate to someone other than your spouse, for example, in trust for a disabled child, you should review the implications of the family patrimony legislation with your lawyer.

Survival of the Obligation to Provide Support

If you have a spouse or a child, it may be necessary for you to make adequate provision for that person in your will. If you fail to do so, your estate may be involved in litigation after your death.

The *Civil Code of Quebec* permits your spouse or child to claim a financial contribution from your estate after your death as support. The court will take into account numerous factors in considering the application and may grant the application if it feels that you have not dealt fairly with that person under all the circumstances.

For example, a claim for a financial contribution may be granted by the court where a disabled spouse or child has been excluded. The testator may have assumed other members of the family would provide for the disabled individual or that the government benefits which the disabled individual is receiving would be adequate for his or her needs. If, accordingly, you do not make adequate provision, someone on behalf of the disabled individual (perhaps his or her curator, tutor or the Public Curator) may commence legal proceedings against your estate after your death.

Special Provisions in Your Will

If a beneficiary is disabled to the extent that he or she does not have the capacity to manage his or her financial affairs; it may be appropriate to leave your property to that person by way of a trust, rather than outright. A trust may help preserve the property and may avoid the need for the appointment of a curator or tutor to manage it for your beneficiary.

Trusts

When property is being held by someone for the use, benefit and enjoyment of another person then the person holding the property (the "trustee") is holding it in trust for the other person (the "beneficiary").

Different trusts may have different provisions. In one type of trust the beneficiary may be able to demand all of the trust property from the trustee at any time. Another trust might specify that the beneficiary is to receive all the income from the trust property during his lifetime but have no right to any of the trust property (the "capital").

Discretionary Trusts

In a typical discretionary trust the trustee is given the absolute authority (discretion) to decide how much of the income and how much of the capital, if any, will be paid to the beneficiary and at what time.

A discretionary trust may be a particularly useful planning tool when you are planning for a disabled beneficiary. Such trusts are commonly known as "Henson Trusts" and are structured to ensure that a disabled person who inherits or otherwise receives funds from family members or others can retain his eligibility for government benefits. The assets held in a Henson Trust are not included in the disabled person's asset base for the purposes of determining eligibility. However, with the exception of distributions to pay disability-related expenses, the amount that will be received by the disabled person cannot exceed the income threshold amount. Under a discretionary trust, because the beneficiary cannot require the payment of the income or capital from the trust, the trust assets should not be considered in calculating the beneficiary's assets under, for example, the social assistance legislation. Also, because the trustee will pay out only what the beneficiary needs, the beneficiary will not accumulate excess assets which could result in a loss of government benefits. It is important that the trustee not make payments to the beneficiary from the trust on a regular basis, otherwise there is a risk that they will be deemed to constitute income for the beneficiary and result in a loss or reduction of government benefits.

The funds which you leave in a discretionary trust for your disabled beneficiary should last much longer than if you left them outright because your beneficiary should be entitled to continue receiving government benefits. The trust funds will be available to

supplement those benefits in the event they are not adequate to provide for the beneficiary's needs.

You should be aware that under this type of trust you are giving considerable power and authority to your trustee and we emphasize that you should be careful to choose a trustee who will not only ensure that your beneficiary's basic needs for food and shelter are met, but also will provide sufficiently, assuming an adequate trust fund, for your beneficiary to continue worthwhile activities and experience the quality of life you wish him or her to enjoy.

Other considerations in choosing a trustee for a disabled beneficiary would include the following:

- *the age of trustee since the trust may continue for a long time*
- *knowledge of government rules regarding benefits*
- *interest in the beneficiary and his or her activities*
- *proximity to the residence of the beneficiary, preferably to be in the same province*
- *to avoid a conflict of interest and to ensure impartiality, it is preferable if the trustee is not a capital beneficiary of this trust*
- *if the trust property is not sufficiently large, it may not be worth considering a trust company because of its administration fees*

You should also consider naming a replacement. Trustees are also entitled to remuneration.

A discretionary trust may not be the right solution for every situation. Some day, for example, the law may change to make the discretionary trust ineffective, or less effective, in preserving government benefits. It is, however, at this time an estate planning device which you may wish to consider with your lawyer when preparing your will. You should however bear in mind that no two individuals and no two families are exactly alike.

Parents of disabled children should seek individualized legal and professional advice from their own advisors.

Accountability

The law does provide that a liquidator or a trustee has an obligation to account to the beneficiaries. If a beneficiary is disabled, you may wish to specify in your will that the liquidator or trustee is to account to that beneficiary's curator or tutor.

Death Taxes And Tax Planning

Taxes on Death

At present there are no death taxes (succession duties) in any province in Canada on property of a deceased passing to beneficiaries, nor is there any estate tax levied by the Federal Government.

Death may, however, trigger additional income taxes. Taxes may arise as a result of payments which are taxable such as pensions, annuities and certain life insurance payments. Taxes may also arise as a result of the deemed disposition rules in the *Income Tax Act* (Canada) which provide that a deceased individual is, except in certain circumstances, deemed to have disposed of all capital assets at fair market value at the time of death, thereby triggering capital gains (or losses). One-half of the net capital gains (capital gains minus capital losses) is included, for income tax purposes, in your income in the year of your death.

Tax Planning

Your death may result in a significant income tax burden being borne by your estate. It may be possible to reduce this burden by obtaining tax advice in conjunction with the preparation of your will.

Tax planning is not only dependant on your personal circumstances but also requires precise implementation. *Seek advice from a lawyer experienced in tax planning.*

An effective estate plan should result in tax savings on death and provide opportunities for saving tax during your lifetime. Several areas that should be considered as part of an estate plan are discussed below.

Principal Residence Exemption

A capital gain arising on the disposition of one's principal residence will generally be exempt from tax. This favourable treatment is also extended to certain trusts that hold principal residences.

Capital Gains Exemptions

A \$750,000 lifetime capital gains exemption remains available for Canadian resident individuals disposing of Qualified small business corporation (SBC) shares. In general, an individual who owns shares in a qualifying small business corporation may be able to claim a \$750,000 capital gains exemption on the disposition of those shares as long as the shares were owned by the individual of a Canadian-Controlled Private Corporation for a 24-month period prior to the disposition and for that same period at least 50% of the assets of the Canadian-Controlled Private Corporation were used in an active business in Canada. At the time of disposition of the shares, all or substantially all (i.e., 90%) of the fair market value of the assets of the corporation must have been used in the active business. Bonds, stocks and rental property are examples of assets that may not qualify as being used in an active business.

The rules for determining whether the share is a qualified small business corporation share are complex and a tax advisor should be consulted at the time the will is made in order to ensure that the shares will qualify for the capital gains exemption.

In view of the possible future repeal of these exemptions, many recent estate plans incorporate a procedure to preserve or "crystallize" the exemption during the lifetime of the shareholder. This involves a transaction designed to trigger the exempt gains, usually through non-arms' length transfers of shares. The result is generally an increased "tax cost" for the shares, which reduces the capital gain which would be realized on a subsequent sale or a deemed disposition on death.

Spousal Rollover

Spousal "rollovers" or spousal trust "rollovers" are exceptions to the rules that deem a disposition of capital property to occur at fair market value upon death. A spousal trust is a trust in your will which provides that during your spouse's lifetime, he or she is entitled to receive all the trust's income and during your spouse's lifetime no one else may receive any of the capital of the trust. If property is left to a spouse or to a spousal trust and both spouses are Canadian residents, any capital gain on that property is deferred until the death of the surviving spouse or the sale of the property. That is, there is a "rollover" of the tax cost of the property.

You can take advantage of this deferment of taxes even though the property is ultimately to be gifted, for example, to your children or grandchildren.

Estate Freezes

Individuals who wish to leave their businesses or other assets to their children but who wish to maintain control over the assets during their lifetime should consider an estate freeze. This tax planning tool is especially attractive to owner-managers of businesses. The resulting tax deferral can sometimes be the deciding factor which allows the second generation to keep the business going rather than being forced to sell it to pay taxes triggered on their parent's death.

An estate freeze of a business, for example, is designed to allow an owner-manager to "freeze" all or some portion of the value of a company so that the amount which will be subject to capital gains tax on the death of the owner-manager will be based on the fair market value of the assets at the time of the freeze. The future (post-freeze) growth in the value of the company then accrues to the children (and possibly grandchildren) of the owner-manager. Taxation of this growth may be deferred until the death of those children. It is possible to structure an estate freeze so that control of the company is retained by the owner-manager until his or her death.

Corporate-owned insurance on the life of the owner-manager is often used in conjunction with an estate freeze to reduce the tax liability that will occur on the deemed disposition of the "frozen" value at the time of death of the owner-manager. The insurance proceeds are also often used to fund the purchase of the deceased's interest. An effective tax plan should take advantage of those favourable tax rules for corporate-owned insurance as well as maximize the benefit of the \$750,000 capital gains exemption of the deceased owner-manager.

The benefits of an estate freeze are not restricted to owner-managers of business but are available to other individuals with significant investment portfolios.

Income Splitting

Often estate plans provide for the ability to shift income from a high-rate taxpayer to one or more individuals who pay tax at lower effective marginal rates. Generally, these individuals include a spouse and minor children. Many recent estate plans have employed discretionary trusts as part of the estate freeze and income splitting components.

A discretionary trust enables you to retain control over distributions of income or capital and, indeed, to establish procedures for control of your estate which will survive your death.

U.S. Property

Individuals owning U.S. real property (e.g. securities or a vacation property) at their death may be subject to both Canadian tax as a result of the disposition deemed to have occurred on the death of the individual and to U.S. estate tax. The Canada-U.S. Tax Treaty provides relief from double taxation in limited circumstances. In many cases, however, the amendments may be ineffective in providing relief and the combined taxes could be devastating to your estate. You should obtain advice in order to determine if tax planning measures could be taken to reduce or eliminate any double taxation.

Tax Planning for Individuals with Special Needs

The Canadian Government has developed programs to increase support of persons with disabilities. Such support extends to their families and caregivers. The *Income Tax Act* (Canada) contains various provisions that could be of benefit to such persons and a brief discussion of some of them follows.

Registered Retirement Savings Plans (RRSPs) / Registered Retirement Income Funds (RRIFs)

Generally, on the death of an individual, the entire amount of any RRSP/RRIF is taxed as income of that individual. However, special rules apply where the individual's spouse is the designated beneficiary under the plan permitting deferral of any tax. The funds of the RRSP/RRIF will be included in the spouse's income. Where the RRSP/RRIF of the individual has not matured prior to death, the amount may generally be contributed to the spouse's RRSP/RRIF and an offsetting deduction may be claimed.

On death, the RRSP/RRIF funds may be left to a financially dependent child or grandchild or to a child or grandchild who was dependent on the deceased due to "physical or mental infirmity" on a tax-deferred basis. The determination of whether a child was financially dependent is a question of fact.

A dependant child or grandchild who is under age 18 may roll over the RRSP/RRIF funds into an annuity for the number of years, including partial years, that remain until the child turns 18. The payments under the annuity may be received by the child or by a trust solely for the benefit of the child. The tax liability of the child is thereby spread over that term.

A child or grandchild of any age who was a dependent of the annuitant by reason of physical or mental infirmity may roll over the RRSP/RRIF funds to an RRSP, an eligible annuity, or RRIF, as in the case of a surviving spouse.

Since the tax rules are constantly changing, if you wish further or more precise information, you should seek professional advice or call the Canada Revenue Agency at 1-800-959-2221 for English service.

Registered Disability Savings Plan (RDSP)

The RDSP came into force on December 1, 2008. The RDSP plan structure is modelled on the Registered Education Savings Plan (RESP).

The RDSP has a lifetime maximum of \$200,000 which is invested tax-free until its withdrawal. The RDSP includes a government grant, the Canada Disability Savings Grant and the Canada Disability Savings Bond. Both programs will be discussed further below.

Contributions made to an RDSP are not deductible from the contributor's income. Any income earned on the contributions will accrue tax-free until it is paid out to the beneficiary. There is no annual limit on contributions. However, you must bear in mind the maximum lifetime contribution of \$200,000. The contributions to the RDSP are allowed until the end of the calendar year in which the beneficiary turns 59 years of age and payments out of the RDSP are compulsory the following year. Payments out of an RDSP are made to the plan beneficiary or his/her legal representative. Caution should be exercised where funds are withdrawn prior to the time the plan beneficiary turns 60 since certain government contributions may be clawed back in such circumstances.

A parent or legal guardian can open an RDSP account for a minor disabled child. Such individual will be considered the account holder. If the disabled person is an adult, he can be the account holder if he has the required capacity. If the adult disabled person does not have capacity, then a person who is legally authorized to act for the adult (such as a curator or tutor) or a public agency (such as the Public Curator) who is authorized to act for the adult can act as the account holder. The Income Tax legislation seems to permit a parent who was an account holder when the disabled person was a minor to continue

acting in such role once the beneficiary turns 18. Otherwise, it may be necessary for the parent to be appointed to act on behalf of the disabled adult and as will be discussed further by instituting a Regime of Protective Supervision.

Canada Disability Savings Grant

As mentioned previously, the RDSP includes government grants. The Canada Disability Savings Grant is a matching grant. The matching rates are at 100, 200 or 300 percent, depending on the net family income and the amount contributed. The Disability Grant is limited to a lifetime maximum of \$70,000.

Canada Disability Savings Bond

Disability Bonds are not contingent on contributions to an RDSP. The Disability Bonds will be paid into the RDSPs of beneficiaries of lower-income families. There is a maximum annual Disability Bond of \$1,000 that will be paid when the family income exceeds \$20,883. The Disability Bond is limited to a lifetime maximum of \$20,000.

Disability Tax Credit

An individual with a severe and prolonged mental or physical impairment is entitled to a disability credit. If the disabled individual cannot claim the full amount of the credit, a person claiming the individual as a dependent can claim the unused portion of the credit. To qualify for the disability tax credit, individuals must be certified by a medical doctor, optometrist or audiologist, depending on the particular disability.

Tax Credits and Deductions

There are a number of tax credits and deductions available to an individual with a mental disability or to a person claiming that individual as a dependent. The Income Tax Act does recognize a common law relationship as married status so any benefits available to the spouse of a disabled person will be available to a common law spouse.

Personal Credit

A person supporting an individual who has a mental or physical disability may be able to claim the individual as a dependent. For this credit, the definition of “dependent” includes almost all members of the extended family.

Medical Expense Credit

An individual or a person claiming the individual as a dependent can claim allowable medical expenses for any twelve-month period ending in the year. The medical expense tax credit provides total tax relief of about 25% of eligible medical expenses.

Preferred Beneficiary Election

For the purposes of taxation of trusts, the definition of a preferred beneficiary includes adults who are dependent on others by reason of mental or physical infirmity. This preferred beneficiary election allows the income of the trust to remain in the trust but be taxed in the hands of the beneficiary who may be subject to tax at a lower rate than the trust.

Duty-free Goods

The Customs Tariff provides duty-free entry for all goods specifically designed for the use of persons with disabilities.

Refundable Tax Credit

There is a refundable tax credit for low-income working Canadians with higher than average medical expenses.

Income tax returns can be difficult to prepare at the best of times and it is recommended that you seek advice to ensure that you are taking full advantage of any provisions applicable to your situation.

Government Benefits for the Disabled

There are a number of benefits available to a disabled individual. There are, of course, other benefits which may be available to that person regardless of disability arising from age or circumstances. Examples are benefits from Old Age Security (OAS), Quebec Pension Plan (QPP), Employment Insurance (EI), workmen's compensation (CSST), automobile insurance indemnities (SAAQ), veteran's benefits, (GST) and Québec Sales Tax (QST) rebates, etc. *These may all influence any social assistance benefits which someone may be receiving or receive and may have an impact on estate and financial planning which you are contemplating for a disabled family member.*

Social Assistance

Many disabled people are entitled to financial support from the government. The *Individual and Family Assistance Act* and its regulation provide an income support system which comprises last-resort financial assistance: (i) the Social Assistance Program, (ii) the Social Solidarity Program and (iii) the Youth Alternative Program.

The Social Assistance Program and the Social Solidarity Program are of particular interest in the context of estate and financial planning for a parent with a disabled child because a disabled child's entitlement to benefits under these programs will depend on whether this child has money or assets or other sources of income.

Social Assistance Program

The Social Assistance Program is a financial assistance program designed to help people whose capacity for employment is not severely limited and to encourage such persons to engage in activities to promote their entry on the labour market. To benefit from the Social Assistance Program an independent adult or a family must establish that their resources (liquid assets) fall short of the amount that is required to provide for their needs. Such needs are calculated on the basis of the criterion described below.

Social Solidarity Program

The Social Solidarity Program is a financial assistance program to grant last resort financial assistance to persons whose capacity for employment is severely limited. Such program also fosters the inclusion and social participation of such persons and their active contribution to society by providing all the help and support they require.

To determine whether you are eligible for employment-assistance benefits, the following resources are taken into account: work income, liquid assets, residence, motor vehicle, parental contribution (if considered a dependent), shared dwelling, support payments, income from other organizations, etc.

Liquid Assets

The benefits are not available if the disabled individual has liquid assets as defined by the Regulation Respecting Income Support. Liquid assets include cash, bank deposits, term deposits, securities, collectable debts and negotiable instruments.

In the case of a severely limited capacity for employment, liquid assets up to \$2,500 for a single person and, in the case of a family, up to \$5,000, are excluded for the purposes of calculating benefits.

If the capacity for employment is not severely limited, then liquid assets up to \$1,500 for a single person and, in the case of a family, up to \$2,500, are excluded for the purposes of calculating benefits.

Assets Excluded

Among the assets which are excluded when determining eligibility for benefits:

- total value of clothing and furniture
- vehicle up to \$5,000 market value
- residence: value up to \$80,000 (municipal evaluation less mortgage)
- RRSPs and pension plans up to \$60,000

- books, instruments and tools needed for employment, a trade or craft
- prepaid funeral expenses
- overall value of other possessions to a maximum of \$1,500 for a single person and \$2,500 for a family

Shared Dwelling

A shared dwelling may cause benefits to be reduced since cost-sharing constitutes a financial advantage. However, in the case of a person with a severely limited capacity for employment or if a family includes such a person, the shared dwelling reduction does not apply.

Benefits

The monthly welfare benefit is comprised of a basic amount plus any special benefits (housing allowance, medical benefits such as hearing aids, glasses, transportation, etc.) less any deductions (alimony, QPP, CSST and SAAQ benefits). An allowance is added to the basic benefit where a medical report establishes that the person is unable to provide for himself or herself because of a physical or mental condition which severely limits his or her capacity for employment permanently or indefinitely. Monthly work income of \$100 for a single person or \$300 for a family is allowed. Furthermore, the first \$130 of the amount of the employment-assistance allowance is not taken into account in calculating benefits. Some deductions from welfare benefits (e.g., from the Work and Employment Incentives Program) such as the deduction for sharing an apartment and the parental contribution deduction do not apply, however, to FSP.

Reductions and Cancellations

If the allowable asset limitations noted above are exceeded, there will be a reduction in benefits.

People receiving benefits are obliged to report, either with the monthly declaration accompanying the cheque or in any other manner, any change in their situation which

may affect their benefits, as for example, any additional income, and also have to exercise any legal rights or avail themselves of the benefits to which they are entitled by law. Therefore, if a person is entitled to receive EI or support payments, he or she must take the necessary steps to obtain them and keep the government informed of judicial proceedings.

For example, if a single person who has a severely limited capacity for employment and is receiving benefits with \$1,000 in the bank inherits \$5,000, this person will have a total of \$6,000 in liquid assets. Benefits will be cancelled and this person will have to live off his or her savings until he or she has only \$2,500 in savings remaining and can then re-apply.

Benefits may be cancelled or reduced for a variety of reasons. One of the most frequent reasons for a reduction or cancellation is if a recipient is considered to be the common law spouse of a person who is working. Mutual financial assistance is the key issue. You should be aware of the fact that the welfare department does exchange information with other government departments dealing with EI, QPP, SAAQ, etc.

However, there is a mechanism by which a welfare recipient can contest a decision.

The income support legislation is complex and the discussion above only highlights some aspects of it which may be useful for estate and financial planning. Remember that this legislation may change at any time. If you wish to find out more about income support benefits, we recommend that you contact an organization which advises socially-assisted persons, such as Project Genesis ((514) 738-2036) or the Front Commun des personnes assistées sociales du Québec ((514) 987-1989). You may also wish to consult the Quebec government website at http://www.mess.gouv.qc.ca/index_en.asp for updated information.

Preparing for Future Disability and Managing the Affairs of a Disabled Person

You may know someone, perhaps a family member or close friend, who has a mental or physical disability and, therefore, has special needs and concerns. You may also want to prepare for the possibility that you may become mentally disabled yourself. In many cases, parents of a disabled child tend to keep their fears and concerns hidden away, sometimes even from themselves. Such fears may take huge proportions and can result in last minute planning, or in a worst case scenario, parents dying with no plan in place for the protection of a vulnerable disabled child.

There are many causes of mental disability. A mental disability may be caused by a mental illness, mental retardation or a disabling disease. It may be caused by brain damage resulting from such things as accidents, illness or drug or alcohol abuse. It may also be caused by physical handicaps so extreme that they prevent communication and understanding. The disability may be present at birth or may arise later in life.

We use the term "mental disability" in this guide in a very general sense. You should be aware, however, that there are legal tests which determine when a mental disability will have legal consequences and there are different tests for different legal issues.

When a person reaches the age of majority, the law presumes that person has capacity. A mental disability may, however, rebut that presumption with the result that the person may not have capacity for certain purposes:

- to make a will,
- to designate a life insurance beneficiary,
- to enter into a contract,
- to make a gift,
- to appoint an agent,

- to grant a power of attorney,
- to marry or divorce,
- to vote,
- to instruct counsel,
- to grant consent,
- to give evidence,
- to sue or be sued in person or
- for criminal responsibility.

A mental disability may affect the individual's capacity with respect to some of these issues but not others. For example, an individual may lack the capacity to make a will but have the capacity to marry, or may have the capacity to consent to certain forms of medical treatment but not to others. What is important is that you realize that a wide variety of issues may be affected by an individual's mental disability.

It is not always possible to predict a disabled child's needs. With younger children, it may be impossible to predict the full extent of their abilities until they are older. In cases of uncertainty, you must firstly identify the aspects of care that will be required over the long term or that are key in maximizing recovery and independence. Secondly, it is crucial to assess whether the disabled child will ever be able to work or live independently and to address any uncertainty by planning for the worst.

You are encouraged to review your estate plan annually and to revise it as circumstances change. Generally, people with young disabled children should anticipate having to revise their estate planning much more frequently than other people.

Power of Attorney or Mandate

A general or ordinary power of attorney and a mandate given in anticipation of incapacity are devices to give another person the power to represent you for different purposes, including personal care and management of your financial affairs. Such a document is often useful when a person's mental capacity is weakening because of age, disease or other factors and the person no longer feels capable of adequately managing his or her financial affairs.

You may have a general power of attorney which is effective from the time of signing or you may have a mandate given in anticipation of incapacity which only becomes effective when you become incapable.

General Power of Attorney

The general power of attorney can be for either specific or general purposes. A specific power of attorney gives authority to do a certain thing. For example, it may authorize someone to cash your pension cheque or to sell a piece of property. A general power of attorney is a broad authorization for someone to conduct all your financial or business affairs.

You may also incorporate provisions for health-care decisions and the administration of your property in the event of your incapacity in your power of attorney. If such a clause is included, it must be signed before two witnesses and this document must be homologated by the court when you become incapable in order to continue to be effective.

A power of attorney may be cancelled at any time by the person who granted it assuming he or she is still mentally sound. If he or she becomes incapable, any interested person, including the Public Curator, may apply to the court to have the power of attorney revoked.

Mandate in Anticipation of Incapacity

In order to avoid the complexities of the regimes of protective supervision and to enable you, while capable, of appointing the persons you personally choose who will care for you and administer your property, new provisions were introduced in 1990 with respect to the mandate or power of attorney given in anticipation of incapacity. The mandate only becomes effective when homologated by the court upon evidence of incapacity.

Requirements to Grant Power of Attorney or Mandate

You must be 18 years of age and mentally competent to grant a power of attorney or mandate.

Form of the Power of Attorney or Mandate

A power of attorney or mandate may be made in the presence of two witnesses or in notarial form.

Who to Choose as Your Mandatary or Attorney?

It is possible to have one person act as your mandatary or attorney with respect to caring for you and managing your affairs. You may also appoint joint mandataries or attorneys or separate their functions. In Quebec, trust companies cannot act as mandatary with respect to personal care. Therefore, it is frequently the case to have a family member or close friend appointed for personal care and a trust company appointed to administer property.

You should also provide for a replacement. It goes without saying that you should appoint someone who is honest and has integrity. Experience in investment and business matters can also be an asset.

You should, therefore, seek your lawyer's advice with respect to the making of a power of attorney or mandate and carefully consider who you choose to appoint as your attorney or mandatary.

There is a register of mandates maintained by both the Chamber of Notaries and the Quebec Bar.

"Living Wills"

The provisions of the *Civil Code of Quebec* now give you far greater control over your health care. The legislation gives you (or your next-of-kin or legal representative) the right to consent to or refuse health care necessary to preserve life.

While there are many different forms of "Living Wills", generally the document indicates that the person signing it either refuses, in advance, a specific medical treatment or any treatment at all if the treatment is therapeutically useless and hope for recovery is gone.

This document can be a simple directive giving instructions regarding medical care or can be included in a power of attorney or mandate given in anticipation of incapacity.

Unlike most of the states in the U.S., no "Natural Death" legislation exists in Canada and therefore no member of the medical profession is legally bound to consider a "Living Will" when treating a patient. No doctor may ignore the Hippocratic oath or any moral or legal duties to a patient. However, in situations where a mentally disabled patient is terminally ill and no person has been appointed a tutor, curator or mandatary to give or refuse consent to treatment, the doctor and hospital staff will consult the next-of-kin for guidance. In that situation, a "Living Will" may be helpful to guide the family and health care professionals in making a decision by providing evidence of what the patient's decision would have been if the patient were still mentally competent to express an opinion.

A person customarily provides copies of the "Living Will" to the doctor, close family members and any other individual who may be involved in decisions relating to his or her treatment.

As with a will, a "Living Will" may be revoked at any time and should be reviewed periodically in order that any changes in circumstances may be considered and incorporated into the document if necessary.

Coping with the Present

If an individual has recently become, or is progressively becoming, mentally disabled, there are likely a number of matters which should be attended to at an early date. If the individual lacks capacity, his or her curator or tutor or a person holding the individual's power of attorney or mandatarly should seek legal advice as to what steps, if any, may be taken to protect the individual and his or her assets.

Real Estate

The individual, his curator, tutor or a person holding the individual's power of attorney or mandatarly should consider the ownership of any real property owned by the individual. *Professional advice should be sought as to whether it is appropriate to sell the property. In addition, the rules governing tutorships restrict the sale of real estate without court authorization.*

House Insurance

If the individual's house is left vacant at times, perhaps while the individual is receiving treatment in an institution, the premises should be inspected regularly. The terms of the insurance policy should be reviewed; some policies require the house to be inspected periodically or deny coverage if the home is left vacant for a specified period. Also, the insurance policy must be renewed when necessary.

Bank Accounts

Some consideration should be given to bank accounts. A joint account, for example, may let one of the co-owners have access to the funds given after the other co-owner has lost capacity. Joint ownership, however, also carries with it the possibility of abuse of the disabled co-owner by the other co-owner. In addition, joint ownership will result, on death, in the bank account being frozen and the surviving co-owner will not have access to the funds.

At some point, it may be necessary for the curator, tutor or a person holding a power of attorney or mandatary to close a particular account to prevent access to the disabled person where that person is unable to manage finances or is unreliable or irresponsible in the management of finances. In certain circumstances, you may consider notifying the bank in writing of the disability of the account holder as a protective measure. If a curator or tutor was appointed, the bank is to be notified immediately.

Credit Cards

If an individual becomes incapable it may be prudent to have any credit cards in that person's name cancelled or destroyed.

Motor Vehicle

If the individual owns a motor vehicle, the status of the insurance on the vehicle may be affected by the individual's mental disability. If the individual is not driving, it may be appropriate to dispose of the vehicle and arrange to have the individual's driving licence cancelled. The individual should immediately be advised of the revocation of his licence and prevented from driving.

Stocks and Bonds

As with the case of bank accounts it may be appropriate to eliminate the ability of the individual to deal with stocks and bonds and notify the broker of the client's loss of capacity.

Annuities, QPP, OAS and Other Periodic Payments

It may become necessary for the curator, tutor or the person holding the power of attorney or mandatary to provide the company sending payments or the government with a new mailing address for the periodic payments or to arrange for direct deposit.

Life Insurance Policies

If the individual has a life insurance policy it may be important to keep the policy up-to-date as it may be difficult and expensive to reinstate a lapsed policy depending on the circumstances of the individual's mental disability.

Assets of Others

If someone has designated an individual with a mental disability as the beneficiary of a life insurance policy, an RRSP, a pension plan or a company profit sharing plan, it may be prudent to amend the designation of beneficiary to allow, for example, a trust created for the individual to receive the proceeds.

Inheritance

If a minor or an adult under tutorship or curatorship inherits property, this inheritance is deemed by law to have been accepted unless the tutor or curator renounces it within six months. If a minor inherits property over \$25,000, the liquidator of the estate must declare that fact to the Public Curator.

Regimes of Protective Supervision

What is a Regime of Protective Supervision?

While every citizen, whatever his or her condition, enjoys the same civil rights, his or her ability to exercise those rights may vary. The *Civil Code of Quebec* presumes that every person is fully capable of exercising his or her civil rights. However, in certain cases the law provides for representation or assistance. In the case of minors, the form of representation is called tutorship. In the case of adults or persons of full age, there are three regimes of protective supervision intended to ensure representation and assistance to a person of full age and to protect his or her person and property by having an adviser, tutor or curator appointed.

Tutorship of Minors

In the case of minors, full capacity is acquired generally at the age of 18. Minors can act alone for certain matters, for example, a minor of 14 or over can consent to health care. To exercise their civil rights, minors are represented by a tutor. Parents are automatically the legal tutors of their minor children - with respect to their person and their property. Thus, if a minor child is mentally disabled, there is no need to have a regime of protective supervision until the child attains 18 years of age. Tutors, including parents who act as legal tutors of their minor children, are monitored by the tutorship council and are obliged to obtain the authorization of the tutorship council and court to perform certain acts, such as selling real estate belonging to the child, if the amount of the child's property being administered exceeds \$25,000. All tutors must also provide an annual account of their administration to the Public Curator and pay an accompanying fee.

Protective Supervision of Persons of Full Age

A mentally disabled person of the age of majority may be incapable of managing his or her affairs or caring for himself or herself due to illness, age or otherwise. In order to protect such persons, the law of Quebec provides for three regimes of protective

supervision: curatorship, tutorship, adviser. A person may also set up his own protective regime while he still has full capacity: this is the mandate (sometimes called a power of attorney) in anticipation of incapacity.

What Form is Appropriate?

The appropriate form of protection depends on the degree and possible duration of the incapacity. These regimes are subject to periodic review.

Adviser to a Person of Full Age

This regime is suitable for a person affected by a slight or temporary disability since, generally, this person is capable of looking after himself or herself or his or her property. The adviser assists and advises the adult in managing his property for certain acts and for a certain time by offering unenforceable recommendations.

Tutorship to a Person of Full Age

A tutorship is appropriate for partial or temporary incapacity. The tutor, whether a private tutor or the Public Curator, has simple administration of property. This means that the tutor is responsible for doing what is necessary to preserve and maintain the property, including the protected person's home and its furnishings and may not dispose of them without the authorization prescribed by law. The tutor may only make the presumed sound investments listed in the *Civil Code of Quebec*. The tutor must also provide an annual report of his or her administration to the tutorship council and to the Public Curator.

Curatorship to a Person of Full Age

A curatorship is the appropriate regime for total and permanent incapacity. It is the most comprehensive form of protection since the curator is empowered to perform all civil and legal acts on behalf of the adult.

In the case of a private curatorship, the curator has full administration of the property of the protected person except that the curator may only make presumed sound investments as listed in the *Civil Code of Quebec*. Full administration means that the curator is responsible not only for preserving the assets of the protected person but also for seeing that they grow to the extent possible. Accordingly, the curator may borrow, mortgage property, change its use, sell, etc., without prior authorization.

If, however, the Public Curator is acting as curator, then the administration will always be simple administration.

When is a Regime of Protective Supervision Necessary?

The parents or tutors of a mentally disabled child who attains the age of majority, or the family members of a disabled adult, may find that they are able, at least for some period of time, to continue to manage that person's life and assets notwithstanding that they have no status at law to do so.

In many circumstances, however, it will be necessary at some point to have someone in a position to exercise legal control over the disabled person or that person's assets or to make medical and health-care decisions. It may be necessary to be in a position to exercise that control immediately upon a child attaining age 18 or it may become required at some later date. There may, for example, be a need to approve a surgical procedure for the person; make a contract on the person's behalf as a result of a planned move to a group facility or otherwise; preclude the individual from handling his or her finances; or put someone in place to manage those finances.

Who May Apply?

The executive director of a health or social services establishment must report to the Public Curator if the adult needs to be represented or assisted in exercising civil rights due to the person's state of isolation, the nature and state of his or her affairs, and the length of time he or she is expected to be incapable. A family member or close friend is then notified.

Typically, the applicant may be one of the mentally disabled person's next-of-kin, but it may be the adult himself or any person with a particular interest including the mandatory (if the mandate is insufficient) or the Public Curator. The application may be presented to the court or to a notary, however, only the court has the power to establish a regime of protective supervision. Depending on the circumstances and the evidence, the court has discretion to choose another regime which allows for greater autonomy or a stricter regime offering more protection.

Application Procedure

The applicant must provide certain documents to the court or to a notary including:

- (a) a motion to convoke a meeting comprised of at least five family members and/or friends;
- (b) a medical evaluation and a psychosocial evaluation stating that the person is incapable of managing his financial affairs or caring for himself or herself or both and the degree of the incapacity.

The meeting of family members and/or friends (sometimes called a “family council”) gives its advice on the necessity of a regime of protection, the type of regime and the person who will act. If a parent with a disabled child has died, leaving a will in which there is a recommendation of a specific person to act as tutor or curator, it may prove to be useful to consider such recommendation at this point in the deliberations of the family council. This meeting of family members and friends also establishes the tutorship council which is composed of three designated persons whose primary role is to monitor the tutor or curator. The decisions of the meeting are only suggestions which the court may accept in full, in part or disregard.

The entire procedure may take 6-8 weeks, but may take longer depending on the time required to gather the necessary information and documentation and whether it is contested or not.

If no other person applies or is acceptable to the court, then the Public Curator may be appointed. A trust company may only be appointed curator or tutor of the disabled person's financial affairs. It cannot act as curator or tutor to the person.

Cost of the Application

The cost of the proceedings (including legal fees) is usually in the range of \$3,000 to \$6,000, depending on whether proceedings are instituted before a notary or the court, and will be paid out of the protected person's property.

Powers and Responsibilities of a Curator or Tutor

The primary concern of a curator or tutor is to care for the person of full age and to manage the affairs of this person for his or her benefit and always with his or her best interests and needs in mind. Such curator or tutor must be honest and trustworthy since he will be given authority over a vulnerable disabled person. Such person must also be diplomatic as he must often cooperate with others and elicit other's cooperation. Furthermore, the tutor or curator has to have integrity, meaning that he has to have the courage, self-control and tenacity to act properly under pressure.

The powers of the curator or tutor are determined by law according to the form of regime determined in the court order.

The curator or tutor must supply the Public Curator with an inventory of the protected person's assets. If the value of the property exceeds \$25,000, the curator or tutor must provide security to guarantee the performance of his or her obligations in one of three ways: an insurance company bond, a mortgage on real estate owned by the curator or tutor or a freeze on the assets under administration. The annual premium for the bond can be charged to the protected person's property. In addition, the curator or tutor must, every year, provide a summary accounting of the administration of the protected person's property to the tutorship council and to the Public Curator, and, on the protected person's death, is required to account to the liquidator of the protected person's estate and to the heirs through the Public Curator.

Finally, the curator or tutor is responsible for commencing or defending any legal actions on behalf of the person of full age.

Appointing Your Mandatary in Anticipation of Incapacity

While you are mentally capable, you may appoint an individual or trust company, for the administration of your assets, to be your mandatary should you become incapable of looking after yourself or managing your financial affairs or both. As no one is immune to accident or debilitating illness, the signing of a mandate in anticipation of incapacity should be considered when you are next updating your will. *See the following section for more information and the Appointment of Mandatary Questionnaire in the Appendices to this guide. They may assist you in providing instructions to your lawyer.*

Glossary of Terms

Adviser - A person suggested by the tutorship counsel and confirmed by the court to give advice to a person of full age to administer his or her property for certain acts and for a certain time.

Age of Majority - In Quebec the age of majority is eighteen years. Once a child reaches this age his or her parents or other legal tutors cease to have any legal control over the child.

Beneficiary - A person entitled to receive a gift or benefit under a will, insurance policy, RRSP, trust deed or other similar document.

Bequest/Legacy - A gift made by will, often called a particular legacy.

Child or Children - A child or children of any age, whether the parent's natural or adopted child.

Codicil - A legal document which amends a will.

Curator/Curatorship - A person(s) or the Public Curator appointed to make decisions regarding the person, financial affairs, or both, of a person who is permanently or totally incapable of managing his or her affairs, person or both.

Discretionary Trust - A trust in which distribution of income and capital to the beneficiary is solely in the discretion of the Trustee. It is often used in wills when making provision for minors or disabled persons. The beneficiary has no absolute right to any of the trust property.

Estate/Succession - A person's estate or succession consists of all the property which he or she owns at death and which can be disposed of by will. A person's "net estate" is the total value of that property less funeral expenses and any debts owed at death.

Heir - A person who succeeds to an estate, whether a testate estate or an intestate estate, and who has accepted.

Homologation/Homologate - A court procedure of confirmation or approbation whereby the court issues a judgment ordering the execution of an act.

Intestate - A person who dies without leaving a will.

Joint Ownership/Co-ownership - Property owned jointly by two or more persons but without any right of survivorship by which the surviving co-owner automatically becomes the owner of the entire interest in the property when one co-owner dies. When a co-owner dies, his or her interest will pass to his or her heirs.

Letters of Verification - A procedure by which the court issues letters of verification for use outside of Quebec when a person dies leaving property situated outside of Quebec or claims against persons not residing in Quebec.

Liquidation - When used with reference to an estate, liquidation means the actions of the liquidator in managing the assets of the estate and carrying out the terms of the will.

Liquidator/Trustee - A person or trust company appointed by a will to carry out the administration of the estate. The liquidator's function is to probate the will, settle any debts, collect the assets and distribute the estate. The trustee's function is to carry out the terms of any ongoing trusts. Typically, the liquidator and the trustee are the same person or trust company and often the terms are used interchangeably.

Mandatory - A person(s) appointed in a power of attorney or mandate in anticipation of incapacity to administer property and care for one's person; also called an attorney.

Probate/Probated - The procedure by which the court declares a holograph will or codicil or a will or codicil made in the presence of witnesses of a deceased person to be valid as to form and effective.

Property - "*Property*" includes both immovable property (real estate) and movable property (all property other than real estate and including cash, securities, cars, furniture, jewellery etc.).

Public Curator - The Public Curator is the public body that looks after incompetent persons, administers their property and exercises their rights, monitors private curators and tutors and administers unclaimed property. The Public Curator is empowered to protect the estates and financial interests of minors and mentally ill or handicapped persons and to administer the estates of deceased persons where no other person is competent or prepared to act. The Public Curator is appointed by the court or by law.

Regime of Protective Supervision - A form of representation or assistance to an incompetent person of full age to ensure the protection of his or her person and property, which consists of three possible forms: (1) adviser to a person of full age, (2) tutorship to a person of full age, and (3) curatorship to a person of full age.

Residue - The residue of an estate commonly refers to the remainder of an estate after all debts and administration expenses have been paid and all specific gifts of property and cash legacies have been distributed.

Revoke/Revocation - The act of cancelling an existing will or codicil, either in whole or in part.

Spouse - As used in this guide, spouse means the husband or wife in a lawful marriage.

Testamentary Capacity - The mental ability which is recognized in law as being sufficient for the making of a will.

Testate - A person who died leaving a valid will.

Testator/Testatrix - A person who makes a will.

Trust - A trust is a separate patrimony constituted when a person called a settlor transfers property to another person called a trustee to be administered for a period of time on behalf of a beneficiary or beneficiaries. The trust may contain a variety of provisions with respect to how and when the beneficiary is to receive the income and/or capital. A trust may be constituted by someone's will, in which case it is called a testamentary trust, or during someone's lifetime, in which case it is called an *inter vivos* trust.

Tutor/Tutorship to a Minor - The legal tutors to a minor are the parents of the child, or a person appointed by the tutorship council and confirmed by the court to be the tutor, or a person appointed in the will of the child's last surviving parent to be the tutor of that child. Tutorship ceases once the child reaches the age of majority.

Tutor/Tutorship to a Person of Full Age - A person(s) or the Public Curator appointed to make decisions regarding the person, financial affairs, or both, of a person of full age who is temporarily or partially incapable of managing his or her affairs, person or both.

Tutorship Council - A supervisory council composed of three persons designated by a meeting of relatives or friends or, if the court so decides, of only one person, to supervise the conduct of the curator or tutor, to make decisions in those matters prescribed by law for tutorship (whether for minors or adults) and curatorships.

Will - A legal document made by a person in accordance with certain formalities. It takes effect on the death of that person and disposes of his or her property.

Checklist

Do you have a will?

- is it up-to-date?
- any changes in circumstances?
 - yours?
 - of beneficiaries?
 - of liquidators or replacement?
 - trustee(s) or replacement?
- any significant change in assets?
- have you named a tutor to minor children?
- have you recommended someone to act as tutor or curator to a disabled child over 18 years of age or a spouse?
- have you taken advantage of tax rollovers for your RRSP or RRIF?

Do you have

- a power of attorney?
- a mandate in anticipation of incapacity?
- a “living will”?
- a health care directive?

Notes

Will Instruction Questionnaire

This form should be completed as much as possible before meeting with your lawyer because it will provide essential information and help identify the items which should be discussed with you.

The form may not elicit from you all the information you wish to give a lawyer or which a lawyer will wish to obtain from you. Please make note of all additional information concerning you, your family, assets and liabilities you feel may be necessary or helpful to a lawyer in advising you.

The Questionnaire is divided into three parts. The first part asks you for information about you and your family. The second part asks you for information about your assets. There could be a number of reasons why this information is important. The third part of the Questionnaire is intended to assist you to decide what should be in your will. While you may not be able to answer all the questions in Part 3 applicable to you, you will at least have an opportunity to think about them before you meet your lawyer.

Please note that the Questionnaire assumes that only Quebec law applies to you. If this is not the case, it may be necessary for you to consult a lawyer in another jurisdiction about your will. Unless expressly requested to do so, a lawyer typically does not check the names of the registered owners of assets.

Please complete only one questionnaire per couple.
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Part 1 - Client Information

1. Information about you

Name (full)

Other names you are or have been known by
(example: your name is Shaun but you use "Sandy")

Address

Occupation
(if retired please also include former occupation)

dd/mm/yy

City/Province/Country

Date of Birth

Place of Birth

Marital Status (including plans to marry or pending separation or divorce proceedings) and Matrimonial Regime

Citizenship:

☐ Canadian

☐ other:

Telephone No. (home)

Telephone No. (work)

Fax No.

Telephone before faxing?

☐ yes

☐ no

E-mail Address (home)

E-mail Address (office)

Correspondence to be sent to:

☐ home

☐ other:

Should correspondence or e-mail be
marked "Personal and Confidential"?

☐ yes

☐ no

2. **Information about your spouse/partner**

Full Name of spouse/partner

Other names your spouse/partner is or has been known by

Occupation
(if retired please also include former occupation)

dd/mm/yy

City/Province/Country

Date of Birth

Place of Birth

Citizenship:

☐ Canadian

☐ other:

3. **Your marriage**

Date of Marriage

Place of Marriage

Country and Province/State of residence when you married:

Have you signed a Marriage Contract?

☐ yes ☐ no

If we do not have a copy, please provide us with one so that we may determine your Estate's obligations (if any) under it.

Have you signed a Separation Agreement?

☐ yes ☐ no

If we do not have a copy, please provide us with one so that we may determine your Estate's obligations (if any) under it.

Have you signed a Renunciation to the Family Patrimony? ☐ yes ☐ no
If we do not have a copy, please provide us with one.

Have any family law proceedings taken place or been commenced? ☐ yes ☐ no
If yes, please provide details:

4. **Prior marriage(s)**

Have you been previously married? ☐ yes ☐ no

Name of former spouse:

If you were divorced, provide a copy of the divorce judgment:

Do you have to pay an alimentary pension to your children or former spouse? ☐ yes ☐ no

If we do not have a copy of the Agreement or Court Order regarding support provisions, please provide us with one so that we may determine your Estate's obligations (if any) under it.

5. **Other personal relations**

Are you now cohabiting with someone other than a spouse or named above? ☐ yes ☐ no

Name:

If you are not married, but cohabiting with someone, she/he may have limited claims against your estate.

6. **Your children**

The word "child" includes a child of your marriage, a child born outside of marriage, and an adopted child. Please provide the following information for each of your children and your spouse/partner's children.

Full Name*	Birthdate	Is the Child Hers? His? Or from this marriage?	Does the child reside with you?

Please mark with a "" if the child has a disability and a "**" if the child is deceased.

7. **Other dependents**

Is there someone who is dependent upon you for financial support for whom you wish to provide, such as an elderly parent?

☐ yes ☐ no

If yes, please complete the following:

Full Name	Address	Relationship
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8. **Other responsibilities**

Are you now serving the legal tutor for a person under age 18 (other than your own children?) ☐ yes ☐ no

If yes, full name, address and relationship to you:

Are you now serving as the mandatory, tutor, curator or ☐ yes ☐ no
adviser for a disabled or incapacitated adult?

If yes, full name, address and relationship to you:

Are you now serving as liquidator of an Estate of someone ☐ yes ☐ no
who has died?

Part 2 - Financial Information

Assets

Please check off the assets you have and provide the requested information. If you have additional assets, please attach a separate listing.

A. Immovable Property

Residence

	In Your Name	In Spouse/Partner's Name	In Co-ownership
Same Address			
Legal Description, if known			
Estimated Value			
Estimated Hypothec Balance			
Is Hypothec Life Insured?	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> yes <input type="checkbox"/> no
Acquisition Date			
Acquisition Cost			

Recreational immovable property

	In Your Name	In Spouse/Partner's Name	In Co-ownership
Same Address			
Legal Description, if known			
Estimated Value			
Estimated Hypothec Balance			
Is Hypothec Life Insured?	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> yes <input type="checkbox"/> no
Acquisition Date			
Acquisition Cost			

**Investment
immovable property**

	In Your Name	In Spouse/Partner's Name	In Co-ownership
Same Address			
Legal Description, if known			
Estimated Value			
Estimated Hypothec Balance			
Is Hypothec Life Insured?	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> yes <input type="checkbox"/> no	<input type="checkbox"/> yes <input type="checkbox"/> no
Acquisition Date			
Acquisition Cost			

Other Interests in Immovable Property

Have you granted any option to anyone to buy your ☐ yes ☐ no
immovable property?

If yes, details

Do you have any options to buy any other immovable ☐ yes ☐ no
property?

If yes, details

Do you have a life interest or long term lease on any ☐ yes ☐ no
property?

If yes, details

Have you sold any property by way of an ongoing agreement ☐ yes ☐ no
for sale?

If yes, details

Other:

B. Business Interests**Interest in a proprietorship (unincorporated business)**

	In Your Name	In Spouse/Partner's Name	In Joint Names
Description			
Estimated Net Value			
Estimated Original Cost (or adjusted cost base)			

Interest in a partnership*

	In Your Name	In Spouse/Partner's Name	In Joint Names
Description			
Estimated Net Value			
Estimated Original Cost (or adjusted cost base)			

*Please attach a copy of your partnership agreement.

Interest in private company(ies)

	In Your Name	In Spouse/Partner's Name	In Joint Names
Description			
Estimated Net Value			
Estimated Original Cost (or adjusted cost base)			

Location of certificates:

Is there a Shareholders Agreement or a Buy Sell Agreement, ☐ yes ☐ no
or any other restriction on sale?*

Is there Life Insurance to buy out your interest on your death? ☐ yes ☐ no

If you are the only director, do you want to appoint an additional ☐ yes ☐ no
director?

Have you used your capital gains exemption (if shares qualify)? ☐ yes ☐ no

*Please attach a copy of the most recent financial statements and any Shareholders Agreement or Buy Sell Agreement.

C. Personal Property

Bank Accounts & Term Deposits

	In Your Name	In Spouse/Partner's Name	In Joint Names
Financial Institution Name			
Account #			
Amount			

Securities/Bonds/Shares*

	In Your Name	In Spouse/Partner's Name	In Joint Names
Description			
Location			
Value			
Acquisition Date			
Acquisition Cost			

*Please note if any restrictions on sale or trade.

Life Insurance

	On Her Life	On His Life	On Joint Lives
Insurance Company			
Policy #			
Owner			
Designated Beneficiary			
Amount			

Pension Plans & Annuities

	In Your Name	In Spouse/Partner's Name	In Joint Names
Plan Issuer			
Terms			
Beneficiary			
Amount			

RRSPs, RRIFs, LIRAs, LIFs, RESPs, RDSPs & TFSAs

	In Your Name	In Spouse/Partner's Name
Plan Issuer		
Account #		
* Designated Beneficiary or Successor Holder		
Amount		

- * Note: in Quebec, a beneficiary designation is invalid unless the plan issuer is an insurance company.

Collectibles & other valuables

	In Your Name	In Spouse/Partner's Name	In Joint Names
Description			
Estimated Value			

Personal effects (including furniture, automobiles, boats, etc.)

	In Your Name	In Spouse/Partner's Name	In Joint Names
Description			
Estimated Value			

* Indicate if items are not located in or at your home.

Other substantial assets (e.g. does someone owe you money? Do you have a valuable club membership?)

	In Your Name	In Spouse/Partner's Name	In Joint Names
Description			
Estimated Value			

Do you have any interests in any existing estates or trusts? ☐ yes ☐ no

If yes, Description and Location:

Foreign assets

Are any of your assets located outside Quebec? ☐ yes ☐ no

What and where:

Liabilities

1. Do you have any of the following liabilities?

Loans Payable?

☐ yes

☐ no

	In Your Name	In Spouse/Partner's Name	In Joint Names
Name of Creditor			
Amount owing			
Life Insured?			

Guarantees?

☐ yes

☐ no

	In Your Name	In Spouse/Partner's Name	In Joint Names
Name of Creditor			
Amount owing			
Life Insured?			

Indemnities?

☐ yes

☐ no

	In Your Name	In Spouse/Partner's Name	In Joint Names
Name of Creditor			
Amount owing			
Life Insured?			

Miscellaneous?

☐ yes

☐ no

	In Your Name	In Spouse/Partner's Name	In Joint Names
Name of Creditor			
Amount owing			
Life Insured?			

Have you given any securities agreements for any amounts owed by you? ☐ yes ☐ no

If yes, please provide details: _____

Have you agreed to buy any property? ☐ yes ☐ no

If yes, please provide details: _____

2. Environmental Issues

“Industrial Activity” means chemical, construction, dry-cleaning, electrical, electronic, laboratory, machinery, metal fabrication, photo development, printing or publishing, service stations, vehicle maintenance or transportation, textiles and wood preservation and like activities.

Are you now or have you ever in the past been involved in a business (as an owner or operator) which carried on an Industrial Activity? ☐ yes ☐ no

Do you now own, or have you ever in the past owned, land on which an Industrial Activity was carried on? ☐ yes ☐ no

Are you aware of any environmental contamination on land or buildings you now own or you owned in the past? ☐ yes ☐ no

Estimated Net Value of Estate

	<u>Her Name</u>	<u>His Name</u>	<u>Joint Names</u>
Total Assets:	_____	_____	_____
Less Total Debts:	< _____ >	< _____ >	< _____ >
Less Estimated Tax Liability:	< _____ >	< _____ >	< _____ >
Total Net Value of Estate:	_____	_____	_____

Part 3 - Will Instructions

1. **Liquidators/Trustees**

Who do you want to appoint as your Liquidator(s) and Trustee(s)? If appointing more than one person, please indicate whether Primary, Alternate or Joint.

	Person #1	Person #2	Person #3
Full Name			
Address			
Occupation			
Relationship to you			
Capacity	Primary <input type="checkbox"/> Joint with others named <input type="checkbox"/> Alternate <input type="checkbox"/>	Primary <input type="checkbox"/> Joint with others named <input type="checkbox"/> Alternate <input type="checkbox"/>	Primary <input type="checkbox"/> Joint with others named <input type="checkbox"/> Alternate <input type="checkbox"/>

Do you wish a majority of your Trustees to be able to make decisions? ☐ yes ☐ no, all must act unanimously

2. **Personal effects**

This includes clothing, jewellery, household goods, furniture, automobiles, boats, art. Do you want to leave a particular Personal Effect to anyone?

☐ yes ☐ no

Full Name	Address	Relationship to you	Description of Item
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3. **Cash legacy**

Do you want to give a cash gift to anyone?

☐ yes ☐ no

If yes, please complete the following:

Full Name	Address	Relationship to you	Amount
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4. **Charitable gifts**

Do you want to give a gift of cash, securities or other specific assets to charity? ☐ yes ☐ no

If yes, please complete the following:

Name of Charity	Address	Cash Amount/Specific Asset
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• We recommend that you contact the charity to confirm that you have the charity's correct name, that it is a registered charity with the Canada Revenue Agency and, if the gift is to be used for a particular charitable purpose, that the charity in fact carries on that purpose.

5. **Gift of RRSP or RRIF**

Have you filed a designation of beneficiary with the Plan Issuer(s)?

☐ “No/Don’t Know, but I want _____ to be the beneficiary.”

☐ “Yes, but I want to change it to _____.”

☛ In Quebec, except if the plan issuer is an insurance company, the designation of a beneficiary is not valid unless it has been made by particular legacy in your will (or is provided for in your marriage contract).

☛ If your RRSP/RRIF beneficiary is not the beneficiary of your estate, you should know that the estate (not the RRSP beneficiary) may be responsible for the income taxes payable on your death with respect to your RRSP.

6. **Gift of pension plan**

Legislation applicable to your pension plan such as the *Quebec Supplemental Pension Plans Act* may require that your pension benefits be paid to your spouse. Have you filed a designation of beneficiary with the Plan Administrator(s)?

☐ “No/Don’t Know, but I want _____ to be the beneficiary.”

☐ “Yes, but I want to change it to _____.”

☛ Please check with the Pension Plan Administrator as to the Plan’s requirements for making a valid designation. Some Plans require a prescribed form to be filed with them. Others do not permit a designation to be made by will.

7. **Life insurance policies**

If you have already designated a beneficiary with the Insurance Company, you do not have to duplicate the designation in your will.

Do you want to designate a beneficiary or change the ☐ yes ☐ no beneficiary of your insurance policy(ies?)

Which policies? ☐ all; or ☐ some describe (Insurance Company and Policy No.)

Beneficiary's full name and relationship to you

We recommend that you file a designation of beneficiary with the Insurance Company. If you change your designation by will, do not file any further documents with the insurance company without consulting your lawyer.

8. **Specific gifts - other**

Do you want to leave a particular asset such as real estate, shares ☐ yes ☐ no of a family business or a club membership to a particular person?

If yes, describe asset:

Beneficiary's name, address and relationship to you:

Who should pay the property transfer taxes ☐ recipient ☐ residue of estate related to the gift of any real property?

Does the recipient receive the property subject to ☐ yes ☐ no, estate to pay any existing mortgages? before transfer

9. **Trust Fund**

Do you want to set aside a fund for the support of a dependent ☐ yes ☐ no
such as a parent or child with a disability during his or her
lifetime?

Dependent's full name and relationship to you:

Amount to be put in trust fund (or share of residue of your estate – see next page): \$

Is he or she currently receiving income security or other income ☐ yes ☐ no
subject to a means test?

Name(s) of the capital beneficiary(ies):

Name(s) of the income beneficiary(ies):

Names of the trustees:

☛ The *Civil Code of Québec* requires at least one independent trustee, in other words, at least one trustee must not be a beneficiary.

10. **Residue of your estate**

This consists of the assets remaining in your Estate after payment of liabilities, taxes, specific gifts, legacies, etc. If you want the residue of your Estate to go to your spouse and children, please complete "A" and "B" below. If you want it to go to someone else, please go to "11".

(A) Provision for spouse – select 1

☐ Outright gift: My spouse is to receive 100% of the residue of my Estate if he/she survives me for 30 days.

☐ Spouse trust: My Liquidator is to invest my Estate and pay my spouse 100% of the net annual income produced by the residue of my Estate during my spouse's lifetime.

May your Liquidator use capital for your spouse's benefit if your Liquidator thinks it is necessary?

☐ yes ☐ no

On my spouse's death, the remainder is to be distributed as to my Children or Others per (B) below.

☐ Other provision for spouse (please described)

☐ None, why?

☛ If your spouse is not happy with what you leave him or her, your spouse can make a claim under the *Civil Code of Quebec* for a financial contribution as support from your Estate. Please prepare and give us a copy of a draft Memorandum setting out in as much detail as possible the reasons why you have excluded or limited the gifts to your spouse or why he or she is neither in need or deserving.

(B) Provision for children – select 1

What provision do you want to make for your children after any prior provisions for your spouse?

☐ My Estate is to be divided equally among my children. If a child predeceases, his or her share of my Estate is to go to his or her children.

☐ My Estate is to be divided equally among my children but they are not to receive their inheritance until the following age(s):

_____ % at age _____, then _____ % at age _____, then balance at age _____

Before then, my Liquidator can use a child's inheritance for his/her benefit if my Liquidator thinks it is necessary. If a child dies before receiving 100% of his or her share of my Estate, what is left is to go to his or her children.

☐ Other provision for children (please describe if unequal, why?; if loans or advances to them, for give them or deduct from share of estate?):

☐ None, why?

• If your children are not happy with what you leave them, any of them can make a claim under the *Civil Code of Quebec* for a financial contribution as support from your Estate. Please prepare and give us a copy of a draft Memorandum setting out in as much detail as possible the reasons why you have excluded or limited the gifts to that child or why he or she is neither in need or deserving.

(C) Alternate Beneficiaries

Who do you want to receive your Estate if none of your primary intended beneficiaries (i.e. spouse, children, grandchildren) live to inherit?

Full Name

Address

Relationship

☛ Please provide dates of birth for any minors.

11. Residue of Estate – other provisions

If you do not have a spouse or children or do not want to leave your Estate to them, who do you want to receive your Estate? (Full names, addresses and relationships to you.)

12. Liquidator's powers

Investments: If your Liquidator needs to invest the assets of your Estate, what kind of investments can your Liquidator invest in (select one):

- ☐ unrestricted – any investment my Liquidator thinks is appropriate; or
- ☐ restricted – to be discussed with lawyer.

Private Businesses

If your Estate owns shares of a private company, or an interest in a business:

- Can your Estate make loans to the business? ☐ yes ☐ no
- Can your Liquidator carry on that business? ☐ yes ☐ no

Can the loans be unsecured?	<input type="checkbox"/> yes	<input type="checkbox"/> no
Can the loans be interest free?	<input type="checkbox"/> yes	<input type="checkbox"/> no
Can your Liquidator act as a director and get paid as a director?	<input type="checkbox"/> yes	<input type="checkbox"/> no

Loans to beneficiaries:

Can your Liquidator make loans to beneficiaries?	<input type="checkbox"/> yes	<input type="checkbox"/> no
Can the loans be unsecured?	<input type="checkbox"/> yes	<input type="checkbox"/> no
Can the loans be interest free?	<input type="checkbox"/> yes	<input type="checkbox"/> no

Guarantees:

Can your Liquidator renew a guarantee you gave before your death?	<input type="checkbox"/> yes	<input type="checkbox"/> no
Can your Liquidator give new guarantees?	<input type="checkbox"/> yes	<input type="checkbox"/> no

Borrowing power:

Can your Liquidator borrow on behalf of your Estate on the Security of Estate assets?	<input type="checkbox"/> yes	<input type="checkbox"/> no
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Estate Assets:

Can your Liquidator hold, as estate investments, investments you own at your death?	<input type="checkbox"/> yes	<input type="checkbox"/> no
Can your Liquidator give a beneficiary his or her share of the estate by way of specific items or investments?	<input type="checkbox"/> yes	<input type="checkbox"/> no
Can your Liquidator repair assets before selling or distributing them?	<input type="checkbox"/> yes	<input type="checkbox"/> no

The general rule is that a Liquidator cannot purchase an Estate asset.

Can your Liquidator purchase Estate assets?	<input type="checkbox"/> yes	<input type="checkbox"/> no
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13. **Appointment of Tutor(s) for minor children**

Do you have a child under age or do you anticipate having ☐ yes ☐ no children?

Who is to be their tutor(s) should you die before they reach age 18? Indicate whether this person is to be the primary or alternate appointment.

	Person #1	Person #2	Person #3
Full Name			
Address			
Occupation			
Relationship to you			
Capacity	Primary <input type="checkbox"/> Alternate <input type="checkbox"/>	Primary <input type="checkbox"/> Alternate <input type="checkbox"/>	Primary <input type="checkbox"/> Alternate <input type="checkbox"/>

14. **Funeral**

Do you wish to be ☐ buried or ☐ cremated.

Do you have any specific wishes for your funeral or memorial services, and if you are to be cremated, your ashes?

☐ yes ☐ no

If yes, please describe below. Please inform your family of your wishes and request that they honour them.

Have any pre-paid arrangements been made? ☐ yes ☐ no

If yes, where? _____

15. **Reciprocal Wills**

If you and your spouse sign wills leaving your Estates to each other, is your spouse free to change his or her will at any time, including after your death should you die first?

☐ yes ☐ no

• If no, we recommend that your estate be held in trust for your spouse rather than outright gift. (See 10.(A)). Discuss this with your lawyer.

16. **Organ Donor**

Have you completed an Organ Donor card? ☐ yes ☐ no

Please inform your family of your wishes in this regard and request that they honour them.

17. **Living Will**

Have you signed a Living Will or Health Care Directive setting out your wishes as to the medical care you wish to receive if you should become incapacitated?

☐ yes: Please provide us with a copy:

☐ no: Would you like to? ☐ yes ☐ no

If yes, please complete the Health Care Directive Questionnaire later in this booklet

18. **Power of Attorney or Mandate in Anticipation of Incapacity**

Have you signed a Power of Attorney or Mandate in Anticipation of Incapacity giving someone authority to look after your financial affairs if you should become incapacitated?

☐ yes: Please provide us with a copy:

☐ no: Would you like to?

☐ yes

☐ no

If yes, please complete the Health Care Directive Questionnaire later in this booklet

19. **Additional copies**

Do you want to send a copy of your will and any other documents we prepare for you to anyone? ☐ yes ☐ no

If yes, set out name, address and relationship to you:

☛ We typically do not recommend giving copies to friends or relatives – only a corporate trustee or other professional advisor obliged to keep the contents confidential.

20. **Corporate Liquidator**

If you appoint a financial institution as an original or alternate Liquidator and trustee, may we provide to it:

- a copy of your executed will? ☐ yes ☐ no
- information from this questionnaire? ☐ yes ☐ no

21. **Special Instructions**

Is there anything else you want included in your will or to discuss with us about your will or your personal circumstances?

Power of Attorney Questionnaire

Your full name:

Other names you are or have been known by:

(for example, your proper name is Shaun but you use "Sandy")

Your occupation:

(if required, also include former occupation)

Your address:

Attorneys

Who do you want to be your Attorney or co-Attorneys?

For each person, please list the following:

Full Name:

Other names he/she is or has been known by:

Relationship to you:

(example: your spouse, son, daughter, friend)

His/Her occupation:

(if required, also include former occupation)

His/Her Address:

Full Name:

Other names he/she is or has been known by:

Relationship to you:

(example: your spouse, son, daughter, friend)

His/Her occupation:

(if required, also include former occupation)

His/Her Address:

Alternate Attorneys:

Do you want to appoint one or more alternates if your first choice cannot act?

☐

no

☐

yes: please list the following for each alternate Attorney:

Full Name:

Other names he/she is or has been known by:

Relationship to you:

(example: your spouse, son, daughter, friend)

His/Her occupation:

(if required, also include former occupation)

His/Her Address:

Full Name:

Other names he/she is or has been known by:

Relationship to you:

(example: your spouse, son, daughter, friend)

His/Her occupation:

(if required, also include former occupation)

His/Her Address:

Health Care Directive Questionnaire

Your full name:

Other names you are or have been known by:

(for example, your proper name is Shaun but you are "Sandy")

Your occupation:

(if retired, also include former occupation)

Your address:

Representative(s):

Who do you want to appoint to be your Representative(s) to make medical treatment decisions for you? For each Representative, please list the following:

His/her full name:

Other names he/she is or has been known by:

His/her relationship to you:

(for example, my spouse, son daughter, friend)

His/her occupation:

(if retired, also include former occupation)

His/her address:

His/her full name:

Other names he/she is or has been known by:

His/her relationship to you:
(for example, my spouse, son daughter, friend)

His/her occupation:
(if retired, also include former occupation)

His/her address:

If you appoint 2 or more Representatives (*select 1*)

☐ each of them can act separately or ☐ all of them must act together

Alternate Representatives

Do you want to appoint one or more alternates if your first choice is unable to act?

☐ no
☐ yes: please list the following for each Alternate:

His/her relationship to you:
(for example, my spouse, son, daughter, friend)

His/her full name:

Other names he/she is or has been known by:

His/her occupation:
(if retired, also include former occupation)

His/her address:

His/her relationship to you:
(for example, my spouse, son, daughter, friend)

His/her full name:

Other names he/she is or has been known by:

His/her occupation:
(if retired, also include former occupation)

His/her address:

If you appoint 2 or more alternate Representatives (*select 1*)

☐ each of them can act separately or ☐ all of them must act together

Special Medical Decisions

Do you wish your Health Care Directive to contain your instructions on specific types of medical treatment if you are seriously ill? You can leave these decisions to your Representative(s) or you can give instructions on them in the Health Care Directive.

For example:

IF (and only if) there is no reasonable expectation that you will ever recover from a serious physical or mental disability or your suffering is intense and irreversible, do you want to receive the following treatments:

Electronic or mechanical resuscitation if your heart stops beating?

☐ no
☐ yes

Nasogastric tube feeding if you are paralyzed or otherwise unable to take nourishment by mouth?

☐

no

☐

yes

Mechanical respiration if you are unable to sustain your breathing?

☐

no

☐

yes

Other special medical decisions:

Appointment of Mandatary Questionnaire

1. **Information about you** (☐ see my Will Instruction Questionnaire)

Your full name:

☐ male
☐ female

Other names you are or have been known by:
(for example, your proper name is Shaun but you use "Sandy")

Your occupation:
(if retired, also include former occupation)

Your address:

2. **Information about the Mandatary to your Person**

Who do you want to appoint to look after you and your personal affairs (e.g. health care)? For each person, please list the following:

Full name:

☐ male
☐ female

Other names he or she is or has been known by:

Relationship to you:
(example: your spouse, son, daughter, friend)

His or her occupation:
(if retired, also include former occupation)

His or her Address:

Full Name:

☐ male
☐ female

Other names he or she is or has been known by:

Relationship to you:

(example: my spouse, son, daughter, friend)

His or her occupation:

(if retired, also include former occupation)

His or her Address:

3. Information about the Mandatory to your Property?

Who do you want to look after your financial affairs and property?

Same as above ☐

If not, please list the following for each Mandatory for your financial affairs and your property:

Full Name:

☐ male
☐ female

Other names he or she is or has been known by:

Relationship to you:

(example: my spouse, son, daughter, friend)

His or her occupation:

(if retired, also include former occupation)

His or her Address:

Full Name:

☐
☐

male
female

Other names he or she is or has been known by:

Relationship to you:

(example: my spouse, son, daughter, friend)

His or her occupation:

(if retired, also include former occupation)

His or her Address:

4. Have you done a previous Mandate?

☐
☐

no

yes, but I wish to revoke it.

Reasons for change:
