When Did You Last Revise Your Will and Mandate?

Wills and Mandates: Things Change

Marriage (whether for the first or second time), a civil union, choosing a new life partner, and the birth of a child are all times in your life when you should think about updating your will and your mandate. The same goes for divorce, dissolution of a civil union, separation, or even the death of a loved one. If you neglect to revise these documents, you could be placing yourself, and others, in a difficult situation.

Changes in the law, the implementation or abolition of certain tax measures, the occurrence of incapacity, the illness of your spouse or of the person who is legally responsible for you in the event of incapacity, the fact that one of your children has reached the age of majority—these are also events that should prompt you to review the provisions of your will or mandate.

Reread your will and your mandate. You may need to alter one or both of them. Do not hesitate to consult your notary about this. What you decided on yesterday may not necessarily be what you want today!

News from Your Notary

Why a notarial mandate in anticipation of incapacity?

Your notary is the best legal advisor to help you draft a mandate in anticipation of incapacity and he or she can answer all your questions. Consulting a notary will enable you to adapt your mandate to your changing needs and family situation.

It will save you money.

The advantage of drawing up a mandate in anticipation of incapacity in the presence of a notary is the avoidance of the long, expensive process of instituting protective supervision, by which a person is designated to take care of you. In addition, a mandate enables you to avoid the supervisory charges imposed by the office of the Public Curator.

It will ensure that your wishes are faithfully recorded in writing.

When you give a mandate in anticipation of incapacity before a notary, the notary will verify, at the time of signature, that you appear to be of sound mind and fully capable of issuing instructions concerning the proposed protection. The notary prepares an "authentic" act, which makes your mandate more difficult to contest than if you prepare it yourself or with the help of someone else.

Furthermore, a notary can ensure that the mandate is perfectly adapted to your particular situation, by taking into account, for example, specific circumstances such as young children, a spouse with an illness or handicap, or certain property located outside the country. With input from your notary, all interested parties will find it easy to understand.

A notary can also provide you with sound advice on the wording that will enable you to express, accurately and precisely, the care you wish to receive.

Do not prepare your mandate by yourself. It is an important document that must be drawn up with all possible care and written with the help of a professional. If this is not done, certain omissions or irregularities could render it invalid or difficult to understand, and could even set in motion what you were hoping to avoid at all costs—the institution of protective supervision. If your current mandate in anticipation of incapacity is not notarial, have it examined by your notary to find out if the document is complete and satisfactory.

It will provide proper protection and avoid the involvement of the Public Curator.

A mandate in anticipation of incapacity enables you to avoid having a person not of your own choosing, or even the Public Curator, take responsibility for you if you are no longer able to do so.

While incapacity completely disrupts the life of the person affected, it also turns the lives of those who surround that person completely upside down. When incapacity strikes while you are financially responsible for young children, or a spouse, or even a parent, it could have very serious consequences for them—except of course, if you had the wisdom and foresight to arrange for protective measures. Your notary knows how to help you protect the ones you love.

It can never be lost or altered.

Quebec notaries have set up a central registration system to make it easier to access your mandate and guarantee respect for your wishes. Once your mandate has been signed by a notary, he or she will then register it in the Register of Mandates kept by the Chambre des notaires du Québec. When you need it, it can be found quickly. The Register of Mandates does not contain a copy of the document. All it has is information on how to contact you and the notary who prepared the mandate. This way, only you and your notary know the contents of the document. Confidentiality is guaranteed.

Knowing that no one can destroy, alter, or change your mandate, stored safely among the records of your notary, gives you peace of mind.

News from Your Notary

January 2002
reprint
February 2012
BULL02

Writing a Will Won't Kill You

It won't kill you to write a will. As a matter of fact, it will give you peace of mind to know that, when the people you love are struggling to deal with your passing, you have already taken care of everything to eliminate problems and keep everyone on good terms.

Whether you have extensive holdings or few possessions, it is of paramount importance that they be transferred as smoothly as possible to those to whom you have left them upon your death, and that you make it easier for the liquidator of your succession by leaving clear, written instructions.

In the absence of a will, the law determines who your heirs are and how much they will receive. The people designated as heirs in this way may not necessarily be those whom you would have chosen. This situation could give rise to many disagreements.

Don't let the law choose your heirs for you.
Make your last wishes clear.

Is your spouse protected?

Did you know that without a will, a de facto spouse (i.e., a person to whom you are not legally married or joined in civil union) would never be considered an heir, even if you had children with this person and even if this person had been your life partner for many years?

Did you know that, without a will, even a spouse to whom you are legally married or joined in civil union does not have the right to all of your property if you have children or grandchildren? In this case, your spouse would only have the right to one third of your succession. In the blink of an eye, your spouse could find him- or herself as part owner, along with your children, of the property that belonged to you prior to your death.

Without a will, if you are legally married or joined in civil union, have no natural or adopted children, and your mother or father is still alive at the time of your death, your spouse will have the right to only two thirds of your property, the other third goingi to your parent(s). For example, this means that included in the division of property between your parents and your spouse will be RRSPs on which your spouse depends for retirement.

The rules of legal devolution could hold other nasty surprises. For the benefit of your spouse and the ones you hold dear, it is important to make a will, no matter how old you are and regardless of the quantity or value of your possessions. Think of those who are left behind when you die. Your notary can also give you advice on how to provide for split or blended families and children from previous unions.

Why a Notarial Will?

A notarial will offers the most advantages. As a general rule, this type of will is made before a notary and a witness.

It allows the liquidation of the succession to be initiated more quickly.

A notarial will comes into effect immediately upon the death of the testator. All other types of wills—handwritten (holograph) or signed by two witnesses—must be probated. This delays the beginning of the liquidation of the succession and entails legal fees that are undoubtedly higher than the cost of drawing up a notarial will. Writing your own will is not synonymous with saving time and money.

It ensures that your wishes are faithfully recorded in writing.

Your notary is a specialist in succession law and an expert in drafting legal documents. This will ensure that your will is well written, complete and, above all, contains no ambiguity. By going to a notary—a lawyer experienced in estate planning and drafting notarial acts—you can rest assured that your will is perfectly adapted to your financial situation and that there will be no problems interpreting it. Your notary knows the importance of choosing the right words. Your notary will record your last wishes in accordance with the law and your instructions. Furthermore, the advice given to you by your notary will help you to remember everything and plan for all possibilities, which will greatly simplify the task of the person(s) responsible for the liquidation of your succession.

Preparing a notarial will to protect your loved ones is an act of love.

Do not prepare your will by yourself. Certain grounds for nullity could apply. A poorly written will could have very serious consequences for your family and friends. It could also be declared invalid because it runs contrary to the law or because it is hard to interpret. If your current will is not notarial, it is in your interest to have it examined by a notary to ensure that it is complete.

It provides better protection for your loved ones.

Your notary knows the law and may suggest that you include several provisions in your will to provide better protection for your loved ones. This way, your notary can make the property you leave behind exempt from seizure, such that your heirs will be better protected should they find themselves in a poor financial position. Your notary can also explain the advantages and disadvantages of including life insurance proceeds in the legacies of your will.

Your notary can help you draft a clause that allows you to name a tutor to take care of your children and look out for their interests in the event of the death of both parents.

Finally, your notary can advise you on the terms and conditions for releasing property to your heirs, thus avoiding a situation in which a person who is still young and liable to mismanage this new-found wealth is able to access it before reaching a certain age or prior to the existence of specific circumstances.

It lets you save on taxes.

A notarial will allows you to set up income tax planning that could save your heirs a great deal of money. Although succession tax no longer exists in Quebec, the fact remains that the succession of the deceased must file a final income tax return. This is where the tax authorities come knocking at the door, if you haven't planned for proper allocation and delivery of your property.

It can never be lost or altered.

Another advantage of a notarial will is that the original is kept in a safe place by the notary. Your will is thus protected from falsification or destruction by someone who is upset with the provisions it contains. It is also protected against loss.

Your notarial will is listed in the Register of Testamentary Dispositions kept by the Chambre des notaires du Québec. The Register contains your name and other information enabling your family and friends to find your final will and testament after your death. The Register cannot compromise the confidentiality of your will, since it only contains information on its existence, not its content. Only after your death will the Register provide your family with the name of the notary who possesses your will. You are therefore guaranteed that the person entrusted with settling your succession will be able to locate your will.

Notaries: The Best People to Advise Liquidators on the Settlement of a Succession

The liquidation of a succession is a complicated operation. The law imposes strict procedures for liquidators to fulfil their obligations. Furthermore, the liquidation of a succession necessitates the preparation of an inventory of the deceased's property as well as the handling of important fiscal matters: filing the deceased's income tax returns, making the tax elections that could prove beneficial to the heirs, requesting the certificates authorizing the release of property. These measures are important and must be respected by the liquidator (executor), otherwise the heirs could suffer prejudice and the liquidator could be subject to various legal sanctions.

From a legal standpoint, marriage or civil union establishes a special economic relationship between spouses to provide suitable protection for the less financially secure spouse. In certain cases, failure to consult a notary may have serious consequences.

A succession may be in deficit. In certain circumstances, the heirs could also be held personally liable for debts held by the succession in excess of the property they receive. It is therefore sometimes advisable to renounce the inheritance. Unfortunately, it is usually impossible to renounce an inheritance once it has been accepted, even if the acceptance is merely implied. For example, all it takes is for you to register the deceased's car in your name or transfer the balance of one of the deceased's bank accounts into your own. In the eyes of the law, you would, in all probability, be deemed to have accepted inheritance of an insolvent succession and be held personally liable for the payment of all debts—not a very reassuring thought.

If you are responsible for the liquidation of a succession, your notary can help you make the right decisions. Under the Civil Code, it is the duty of a liquidator to act as a reasonable person, and a reasonable person must seek legal advice. Nothing must be left to chance. For peace of mind, consult your notary.

The notary will suggest adding a clause to the will requiring that it be read and explained to the heirs. The reading of the will is the first step on the road to successfully settling a succession. Both liquidator and heirs will feel more comfortable about the procedures to follow in order to respect the final wishes of the deceased.

Thus, following a death, the notary will gather all the heirs together to inform them about the content of the will and its consequences. The notary will also play the role of facilitator by asking questions that no one else would dare ask for fear of ruffling other family members' feathers. The notary can also act as a mediator if the contents of the will give rise to conflicts. Lastly, the notary will explain to the liquidator designated by the testator his or her role and responsibilities.

Mandate in Anticipation of Incapacity

Accidents happen in the blink of an eye.

The idea of losing the ability to decide for oneself is not a pleasant thought for anyone. No one, however, is invulnerable to a serious accident or illness that could result in the loss of one's mental faculties. It doesn't always happen to other people!

Who would take care of you if, suddenly, you could no longer take care of yourself?

If misfortune were to befall you, who would take care of you and your property? Who would have the authority to refuse or consent to medical treatments in your name, or to decide in which health-care institution or long-term care facility you would be placed? Who would see to your comfort and well-being? Temporary or long-term incapacity to manage your affairs could also put you in a very delicate position. That is why it is crucial to choose a person who will make sure your rent is paid, your insurance policies are kept up, your tax returns are filed, and who, if need be, will see that your house is sold for a good price to ensure you have proper financial protection.

Some people tend to assume that, if they are not able to attend to their normal affairs or make decisions in their own best interest because of illness or infirmity, their spouse or children will automatically be authorized by law to do these things. This is incorrect.

In the absence of a mandate given in anticipation of incapacity, parents and friends must be gathered together to give their opinions as to who should take care of you and your assets. In the case of split or blended families, discussions of this nature are often heated, to say the least. Just think what would happen if the spouse from whom you have been separated for 20 years ended up sitting around the same table as your children from your second union. Why let others make decisions that are rightfully yours to make?

The Civil Code allows you to prepare a mandate in anticipation of your incapacity. By doing this, you can name in advance the person(s) who will be authorized to take care of you and your assets should something happen to you. Writing a will protects your loved ones; writing a mandate in anticipation of incapacity protects you.

Don't let others make decisions for you as to who will take care of you when you are no longer able. Take the time now to choose someone you trust.