YOUR WEALTH

JANUARY 2011
N° 4

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MESSAGE FROM THE EDITOR

Thinking of buying property and making your dream home a reality? Maybe you are considering a condo and wonder what you should know to avoid co-ownership problems. Are you dreaming of legalizing your union with your partner? Or maybe you are facing separation or divorce and wonder about partitioning the family patrimony. Recent health problems may have you thinking about making a will and a mandate in the event of incapacity but how do you go about it? Your children have offered to buy the family farm, so what should you do? You are flooded with available information and you have no idea how to disentangle it in order to come up with the best solution in your particular case.

"Learning is experience. Everything else is just information" as Albert Einstein said. In today's world of telecommunications and social networking, there is no doubt that information of every kind is more available than ever. Having said that, there is often a big difference between what you read, see or hear and reality. The key to separating the wheat from the chaff is to consult competent professionals.

As a legal advisor, the notary is there to support your decision-making in each of the above situations. This fourth edition of *Votre patrimoine* magazine takes an objective look at the role that the notary can play at various stages of your life. It also offers solutions to the problems faced by people like Marc, Robert, Marie-Reine and Edgar, who are searching for answers to life's challenges. Who are they? Turn the page to find out.

Happy reading!

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Copywriting: Agence Média Presse
Layout: Pénéga communication inc.
Printing: Imprimerie Transcontinental

"MAUDE AND ALEXANDRE SHOULD KNOW THAT, IN A COMMON-LAW UNION, THEY HAVE NONE OF THE LEGAL PROTECTIONS CONFERRED BY MARRIAGE. THERE IS NO FAMILY PATRIMONY, AND NO MATRIMONIAL REGIMES."

THAT BEING SAID, IF MAUDE AND ALEXANDRE DECIDE NOT TO CHANGE THEIR CURRENT RELATIONSHIP, THEY CAN STILL DRAW UP AN AGREEMENT GOVERNING THEIR RELATIONS (ALSO KNOWN AS A COMMON LIVING OR COHABITATION CONTRACT).

MARRIAGE, CIVIL UNION AND FAMILY PATRIMONY

FOREVER, MY LOVE?

It's been five years already! Alexandre is as in love with Maude today as the first day he met her. The two lovebirds share everything, and that's what has Maude worried. "Maybe it's time we made the relationship official?" she asks her sweetheart softly. Alexandre doesn't answer. He planned to ask Maude to marry him that very evening. The time was right; he had the silver ring he bought in his pocket, but he is hesitating. "What choices do we have?" he wonders silently. "A church wedding? A civil union? Why change things if everything is going so well?" But Maude is worried. The car, the condo…everything is in Alexandre's name. With no marriage or civil union, she knows that her current situation is not ideal, especially since she has a daughter from a previous relationship. If Maude dies, who will take care of Zoé?

M^e^ Isabelle Carrière-Roussin agrees with Maude that the situation is not ideal. While the decision to marry or not is a very personal one, in her opinion it is important for a couple to be cool-headed and examine all their options. "Maude and Alexandre should know that, in a common-law union, they have none of the legal protections conferred by marriage. There is no family patrimony, and no matrimonial regimes," she explains.

That being said, if Maude and Alexandre decide not to change their current relationship, they can still draw up an agreement governing their relations (also known as a common living or cohabitation contract). "This will protect both partners in the event of separation or death," M^e^ Carrière-Roussin explains. "The cohabitation contract includes, for example, a list of the property that each partner owned going into the relationship, as well as the property they purchased jointly while living together. This will make it easier to eventually divide the assets. Financial and family responsibilities can also be divided."

ABOUT MARRIAGES AND UNION

Marriage is another option for couples, and it can be either religious or civil. It is to be noted that same sex couples may marry or contract a civil union. The couple's beliefs and convictions will ultimately determine the choice. A religious marriage respects, first and foremost, the rules of that religion. It can be strictly religious, in which case it will not be recognized by the State, or it can be both civil and religious. For a religious marriage to be recognized by the State, the celebrant must be officially recognized. "For example, M^e^ Carrière-Roussin illustrates, a marriage solemnized in a church by a Catholic priest, who is an officiant authorized by the Directeur de l'état civil, will be recognized both from a civil standpoint and a religious one, because it meets all aspects of the law and the rules of the religion that is represented."

On the other hand, in a civil wedding, the officiant deals only with the civil part of the ceremony. This kind of marriage is automatically recognized by the State. Clerks and deputy clerks of the Superior Court designated by the Minister of Justice, notaries, mayors and certain municipal officers can solemnize a civil marriage. Under certain conditions, a close relative of the couple may also act as an officiant.

The purpose of the civil union is to confer the same protections as those of marriage. Partners joined in a civil union are bound by family patrimony and matrimonial regimes, but their union may not be recognized beyond Québec borders.

In the case of a break-up of a civil union, childless partners who agree on all aspects of the separation can apply to a notary for dissolution, whereas in the case of marriage, a divorce is always decided on by the courts.

FAMILY PATRIMONY

Both in marriage and in a civil union, protections conferred by family patrimony apply as soon as the declaration of marriage or civil union is signed. Family patrimony is governed by public policy and covers certain categories of property, the value of which is divided equally between the partners. The property includes family residences, the furniture in these residences, the family vehicles, benefits accrued during the marriage or civil union as part of a retirement plan, as well as the earnings recorded during the marriage or civil union for each spouse pursuant to the *Act respecting the Québec Pension Plan*.

"As for everything else that isn't part of the family patrimony, you have a choice," Me Carrière-Roussin points out. "If you choose to do nothing, the partnership of acquests regime will apply. You can also choose to sign a marriage contract stipulating partnership of acquests or separation as to property. In the latter case, 'what's mine stays mine.'"

For couples who have been married since July 1, 1970, or in a civil union since 2002 and who have not signed a marriage contract, the partnership of acquests applies by default. This regime facilitates the division of the value of the property accumulated during a marriage or civil union.

THE BLENDED FAMILY

Maude has a 10-year-old daughter, Zoé, from a previous relationship. Although Alexandre is very attached to Zoé and takes part in decisions regarding her education, his rights are limited if Maude dies.

"According to the *Civil Code of Québec,* if the father's name appears on the act of birth, the surviving parent automatically has custody of the child. He will be the child's legal guardian," Me Carrière-Roussin explains. "On the other hand, it's important for Maude to choose someone who will be Zoé's guardian in the event of the death or incapacity of both parents. This choice can be expressed in a mandate in the event of incapacity or in a will. According to the law, decisions must always be made in the child's best interest."

For Me Isabelle Carrière-Roussin, deciding about your future as a couple is a very personal matter. "There are no ready-made answers. There are a variety of solutions," she says. "The couple's best interest and wishes for the future need to be taken into consideration. Ideally you should consult a notary because, regardless of the decision, you will have to plan a will and a mandate in the event of incapacity." ■

LOLA AND ERIC: WHAT TO DO?

On November 3, 2010, the Québec Court of Appeal rendered an important decision on the consequences of the dissolution of a *de facto* union. In the opinion of the Court, the section of the law that entitles married spouses or those in a civil union to receive spousal support discriminates against de facto spouses (living common law).

The effects of the decision have been suspended for 12 months to allow lawmakers to change the law to include de facto partners in the list of those entitled to spousal support.

The Court of Appeal did not, however, make any changes to the division of property after the dissolution of a common-law union. In such cases, the partner who does not own the assets is not entitled to a share of the assets belonging to the other partner.

What can you take away from this information?

There is no simple answer. As this article is being written, the time limit to file a motion for leave to appeal with the Supreme Court of Canada has not yet expired. If such a motion is filed, a decision will have to be rendered on it. If the motion is denied, the Court of Appeal decision will stand. On the other hand, if the Supreme Court agrees to hear the appeal, the effect of the Court of Appeal decision will be suspended until the Supreme Court delivers its final decision.

In the meantime, common-law couples are advised to sign a ***notarized agreement governing relations between de facto partners***. This agreement should set out the:

- contributions to household expenses;
- rules as to the management of relationships between de facto partners who are joint owners of a common residence;
- division of assets other than the common residence; and
- payment of support or break-up compensation in the case of the dissolution of a common-law union. ■

AMICABLE DIVORCE:
SEPARATING SUCCESSFULLY

IT'S OVER, MY LOVE!

That's it, it's over. Julien and Louise are getting a separation. For the children's sake, the couple has decided that the bickering and accusations have gone on long enough. It started out as such a romantic tale… but now, after 12 years of marriage, Julien has come to view Louise's exuberance as hysteria; and for her part, Louise can no longer stand Julien's inane little smile that she once found so charming. For both of them, the constant bickering, accusations, unspoken resentments and daily grind got the better of their relationship. All that remains now is to explain their decision to the twins, Aurélie and Jean-Philippe. The children are clever and realistic and quickly understand what's happening. Now the questions begin: "Where are we going to live? Can we keep our house? Can we go to the cottage?" Louise doesn't know what to say or what Julien thinks. But the couple has made a promise: to separate "successfully."

For M[e] Dominique Lettre, Louise and Julien's desire is not far-fetched. "From the moment a couple decides to negotiate the terms of an amicable separation, it can be done through mediation." The legal term is separation by mutual consent. The process is voluntary and attempts to resolve the matter amicably.

For Louise and Julien, the situation needs to be addressed in two parts: the children, and the couple. First, they have to decide on the custody of the children, child support and the sharing of everyday expenses; for example, who will decide about enrolling the children in extracurricular activities or make doctor's appointments? All this needs to be discussed in mediation. Financial questions, such as family allowances and child benefits, also need to be raised.

Once this is done, they need to decide on the division of property, starting with the family patrimony, which includes five categories of assets: the primary family residence, secondary residences, the furniture in these residences, family vehicles, and retirement funds (RRSPs, pension fund or Québec Pension Plan.)

"The family patrimony is the most important element, and it should be dealt with first in a separation," M[e] Lettre says. "The second element to look at is the matrimonial regime, which includes anything related to bank

accounts, investments other than RRSPs, land, rental property, company shares and savings bonds, for example. Did the couple sign a marriage contract? If so, the contract needs to be consulted because it may contain specific agreements. Once everything has been divided up, the couple's budget is then reviewed and it is determined whether spousal support is to be paid."

"FROM THE MOMENT A COUPLE DECIDES TO NEGOTIATE THE TERMS OF AN AMICABLE SEPARATION, IT CAN BE DONE THROUGH MEDIATION." THE LEGAL TERM IS SEPARATION BY MUTUAL CONSENT. THE PROCESS IS VOLUNTARY AND ATTEMPTS TO RESOLVE THE MATTER AMICABLY.

MEDIATION: A LEGAL PROCESS

While every situation is unique, six meetings are usually required to reach agreement between partners in a divorce. At the initial information meeting, "the notary will assess the situation and try to learn about the couple's history," M[e] Lettre explains. "Are there any children? Is the break-up recent? Which items have already been agreed upon by the couple and which ones require particular attention in mediation?"

All meetings must take place in the presence of both parties. It should be noted that when a couple shares joint custody of at least one child, the Québec government provides one information session and five mediation sessions lasting one hour and fifteen minutes each free of charge. But what if the mediation is unsuccessful? Turning to the courts is always an option. "Everything discussed in the mediator's office, including offers or admissions, cannot be used later in court," the notary points out. "In any case, the success rate of mediation through a notary is close to 85%, which is very high."

"Anyway, people who opt for mediation want to reach an agreement and are ready to take time to carefully examine each question. For example, who will keep the house? We explain the provisions of the law and analyze needs. What is important for the children, for the wife, for the husband? We then examine all the options based on the needs and resources of each partner. Ultimately, what we are looking for is the best and fairest solution, one that both parties can live with in the long run."

DRAFT AGREEMENT

Once the terms of the divorce have been negotiated, the notary writes everything down in a draft agreement, which is a kind of summary of everything that has been agreed to by the parties.

"At this stage, the notary's role is to follow up on the file and ensure a successful outcome for both parties," M[e] Lettre explains. "It is also the time to look at such things as transferring property rights, refinancing the mortgage, and redoing wills and mandates in the event of incapacity."

Certain matters, especially custody of the children, must be endorsed by the courts. Likewise, if child support is to be deducted from a salary, the agreement must be filed and endorsed in court. M[e] Lettre points out that "the notary cannot represent the parties in a divorce proceeding. When the time comes for the decision to be sanctioned by the courts, the couple can either retain the services of a lawyer or represent themselves."

While notaries do not have exclusive jurisdiction over the mediation process, there are benefits to consulting them because of their vast expertise in such legal matters as obligations, family patrimony and matrimonial regimes. "Regardless of the situation, we are mandated by many parties; our goal is to reach an agreement, a consensus. It's our duty to be impartial," M[e] Lettre stresses. ■

MANDATE AND GUARDIANSHIP

WHEN THE DREAM BECOMES A NIGHTMARE

Francine Morin was in her early forties. The newly divorced mother of two young children was dreaming of a Caribbean vacation. "She had been talking about it for some time," her friend and travel companion Marie confides. But the day after they arrived in Jamaica, Francine suffered a violent head injury. After being hospitalized for two weeks in a foreign country, she returned to Québec robbed of all her intellectual capacities. To compound her misfortune, Francine did not leave any written instructions to help her loved ones decide what should be done under such circumstances. Since then, the children have been sent to live with their father for better or for worse, the bills have been accumulating and everyone is powerless to do anything. Worse yet, decisions will need to be made soon about Francine's long-term care. "It's heartbreaking, because we don't know what Francine would have wanted," Marie whispers, trying to hold back the tears.

According to M[e] Gérard Guay, a notary and legal expert in matters involving incapacitated persons, things could have gone completely differently for Francine's loved ones. A mandate in the event of incapacity, also called a "mandate for the protection of persons of full age," would have informed them of Francine's wishes.

"A well-written mandate answers any questions about administering assets, protecting the person and protecting loved ones, including children. It summarizes the wishes of the person who is declared incapacitated and allows one or more designated persons to make the necessary decisions."

Like the will, the mandate in the event of incapacity is tailored to each individual. It can, for example, authorize someone to pay current bills, manage bank accounts or renew the mortgage on a home. The mandate can even allow the home to be sold or, conversely, prevent its sale. These provisions guide the administration of assets.

As for the person himself or herself, the mandate answers certain questions about consent to care: for example, does the person wish to be resuscitated or refuse all treatment? Instructions regarding accommodation and long-term care are also provided.

"A person can express in his or her mandate the desire to be in a private care facility, if possible, or conversely, to be cared for at home," M[e] Guay explains. "The clearer the

"THERE IS NO AGE FOR GETTING A MANDATE OF PROTECTION OF THE PERSON. WE WRONGLY BELIEVE THAT ONLY THE ELDERLY NEED THIS KIND OF PROTECTION. THE TRUTH IS THAT THE YOUNGER AND MORE ACTIVE A PERSON IS, THE MORE SUCH A DOCUMENT COULD BE USEFUL, ESPECIALLY WHEN YOUNG CHILDREN CAN BE AFFECTED OR WHEN THE PERSON IS THE OWNER OF A COMPANY."

wishes, the easier it will be for loved ones to deal with these thorny issues." This is what is called protection of the person.

In cases like Francine's, where children are affected by the tragedy, M[e] Guay believes that a clause protecting loved ones is a must. This clause frees up the person's assets to care for the children's needs: food, clothing, school supplies, and so on. A child guardianship clause also provides for a designated person to be responsible for the children if the other parent is unable to care for them.

Additional clauses can be added to cover certain situations. "Managing a business is very different from administering personal assets or paying current bills," the notary points out. "When someone owns a company, it's important to plan who will take over in the owner's absence. You can't let things go because, most often, the company is the only source of income not only for the person himself or herself but also for the workers."

SHARING THE BURDEN

Handing over these kinds of responsibilities to someone is the equivalent of placing one's life completely in the other person's hands. M[e] Guay insists that this decision should not be taken lightly. "The person designated as mandatary must be someone you trust. You need to be completely convinced that this person will make decisions that are in your best interest," he says.

To ease the burden, responsibilities can be shared between several persons. For example, one relative can be responsible for administering the assets, while another is responsible for protecting the person or loved ones. It is also wise to add a control clause that stipulates that a report must be made once or twice a year to the brothers and sisters. It can also stipulate that one person will be responsible for overseeing the work of the mandatary. Limits should also be set on authorized bank withdrawals. "This will avoid abuses and help maintain family harmony."

As a general rule, you should also provide for the replacement of the originally designated mandatary if he or she is unable to assume

their assigned responsibilities. "A mandatary may have serious health problems or other personal responsibilities that are incompatible with the duties of a mandatary. You need to plan for this possibility and designate other persons who would be able to assume this responsibility," M[e] Guay adds.

A PROCESS TO FOLLOW

No matter how complete it is, a mandate in the event of incapacity does not take effect immediately after the accident. Medical and psychosocial assessments must first be conducted to confirm that the person is truly incapable of taking care of himself or herself and of his or her assets. The notary must then file these two assessments before a judge or court clerk, who will decide on the case. Without this court judgment, no mandate in the case of incapacity or mandate for the protection of the person has legal effect.

It often takes several months to go through all the steps in the process. "Health professionals generally want to ensure that there is no chance of noticeable health improvement before they make a definite statement of incapacity. It is rare for a medical team to confirm beyond a doubt that a person is incapacitated without some time having elapsed," M[e] Guay says. "To help in dealing with certain immediate matters and emergencies, a request for temporary administration can be filed with the court. This will allow the mandatary to do such things as pay bills and care for the children's needs."

Except for the request for temporary administration, none of this will be possible in Francine's case. In fact, the only option available to her loved ones is to request the institution of protective supervision: tutorship if the incapacity is partial or temporary or curatorship if the incapacity is total or permanent.

"The people close to her will have to call a family meeting to name a representative and form a council—usually made up of three people—whose role it will be to oversee the work of the designated representative," M[e] Guay says. "The court will then ratify these choices in a judgment. The process can take a few more months than when there is a mandate in the event of incapacity."

"This goes to show that there is no age for getting a mandate of protection of the person. We wrongly believe that only the elderly need this kind of protection. The truth is that the younger and more active a person is, the more such a document could be useful, especially when young children can be affected or when the person is the owner of a company." ■

LEGAL ADVISOR… AND PUBLIC OFFICER!

While the notary's role as legal advisor is well known by the general public, the role of public officer is less so.

The status of public officer is granted by the State to certain persons to whom it delegates part of its power to make official a document, a procedure or a statement. These documents signed by a public officer have the same probative effect as if they were issued by an authority of the State. In the notary's case, the State gives him(her) the power to confer the authenticity on acts and on contracts that come before him(her) and these legal documents consequently prove their contents without requiring a recourse to another authority, as a court for example. That is why, when executing a notarial document, the notary certifies the identity and of the capacity of the parties signing the document. The notary must be impartial in his(her) dealings with all parties to a deed and ensures, through precise drafting, that the act is a true reflection of the parties' intentions.

The duty to be impartial requires that a notary be proactive. This does not simply mean being neutral, i.e. abstaining from any intervention. On the contrary he(she) has to insure balance between the parties to a contract by advising, if necessary, the party who is the least informed on the subject. Notaries are required to act as advisors with no vested interest and be open and honest with their clients or parties. They must advise them of any foreseeable legal consequences stemming from the acts entrusted to them. They must also inform the parties about any procedures required for an act or agreement to become valid and take effect, and provide them with all the explanations necessary for them to fully understand and appreciate the services being provided.

The rigorous respect of these obligations by the notary is so recognized by our laws by conferring on notarial acts the probative effect that is not given to other types of documents.

Notaries hold exclusive areas of practice. Under the law, certain acts must be notarized because of their importance. Mortgages affecting immovable property, declarations of transmission of immovable property following death, declarations of divided co-ownership, "authentic" wills, gifts, marriage contracts, renunciation to rights in the family patrimony and renunciations to rights in an estate must be executed *en minute* before a notary, otherwise they will be subject to absolute nullity. ■

ESTATE AND WILL

WHAT WILL HAPPEN AFTER I'M GONE?

Marie-Reine and Edgar Lavoie have been married for 54 years and have always been in good health. Well before their six children left home, the couple regularly went for swims and recreational walks. They share a passion for travel and have visited Europe several times. "My parents are always on the go. But recently, I've noticed that they seem more tired and preoccupied," their eldest daughter Suzanne admits. "I guess that's life." Seated at the table lost in thought, Edgar is taking stock of their situation. "We're coming to the last bend in the road. Maybe it's time to slow down and think about the end," he muses. Marie-Reine is also concerned. "What will happen to the house, the furniture, our savings? What if one of us dies tomorrow? I don't want to burden the children with all these decisions."

For notary Dominique Bourgeois, Marie-Reine's and Edgar's concerns are not unusual. Most seniors will be confronted by these same questions sooner or later. "Thankfully, she says, drawing up a will usually provides the answers."

But first you have to know what to include in the will. "In Québec, the freedom of testation principle applies. You can choose almost any clause that you want in your will. There are only a few legal restrictions to this freedom," M[e] Bourgeois explains.

In her practice, she recommends that her clients begin by drawing up a balance sheet of their assets and liabilities. "You need to know what you have to pass on to your heirs—a house, investments, jewellery, family heirlooms or sentimental objects such as antique furniture, a stamp collection or grandpa's gold watch—before you can think of what to include in a will. Drawing up a list of possessions ahead of time will give you a better idea and make it easier to decide once you're at the notary's office."

"After people have done a little pruning in their files and have a good idea of their assets, we can then identify the goals they want to achieve. We also assess the situation of each beneficiary to determine if some have special needs, either in regards to substance abuse or physical or intellectual limitations. The matrimonial situation is also taken into account."

DIVISION OF ASSETS AND PARTICULAR BEQUESTS

"Only after all these questions have been answered can we begin to draft the will. As a general rule, the will specifies how assets are to be divided, making sure to minimize the financial impact caused by the death," M[e] Bourgeois explains.

Bequests can be included in the will that specify, for example, that such and such an object is bequeathed to a specific person, a child, a grandchild or a friend. However, M[e] Bourgeois cautions that prudence is best in these matters. "When you bequeath a specific object in a will, you have to be sure that the person really wants that object and that it will still be in your possession at the time of your death," she stresses. "For example, people often bequeath their car but, when the time comes to execute a will, the deceased has not had a car for a long time. If the car is the only thing the person inherited, it can lead to inequities. To get around the problem, the current trend is to entrust a liquidator (formerly called the executor of the will) with the responsibility of dividing the existing assets at the time of death between the heirs."

ONE OF THE FIRST THINGS TO ESTABLISH WHEN DRAWING UP A WILL IS WHO WILL BE THE LIQUIDATOR. THE RESPONSIBILITY IS QUITE BROAD. THIS PERSON WILL BE RESPONSIBLE FOR EVERYTHING FROM SETTLING THE ESTATE AND SEEING TO THE FUNERAL ARRANGEMENTS TO REMITTING THE CHEQUES TO THE HEIRS.

There can also be specific clauses in the will related to the distribution of assets. For example, a testator can stipulate in the will that assets bequeathed to the heirs are to be excluded from the divisible value should the heirs divorce or separate, regardless of matrimonial regime and family patrimony. Under certain circumstances, the will can also ensure that bequeathed assets cannot be seized by the heirs' debtors. Parents of minors or children with special needs can also opt for one or several testamentary trusts. In this case, the assets will be transferred in their entirety to a trust administered by one or more trustees who will see to it that the beneficiaries are not lacking anything. (See the article on the testamentary trust on page 12).

"Adding clauses to a will also allow people to exercise *post mortem* control by specifying, for example, the age at which beneficiaries can access the monies bequeathed to them or what the bequeathed sums can be used for. Following the same logic, a special clause can also designate a tutor for minors."

LAST WISHES AND RESPECT

The will also provides a special place for the person to express his or her last wishes in regards to his or her funeral and burial. Everything can be specified in the will, from the type of ceremony (religious or not) to the disposition of the body (cremation, burial or other) and ashes (at home, in a columbarium or other). If all these details have been specified ahead of time in a funeral prearrangement contract, the notary need only refer to this document. M^{e} Bourgeois ends by stressing that "one has to be as clear as possible in a will. It's a matter of respecting the heirs and the liquidator who will be responsible for settling the estate."

One of the first things to establish when drawing up a will is who will be the liquidator. The responsibility is quite broad. This person will be responsible for everything from settling the estate and seeing to the funeral arrangements to remitting the cheques to the heirs.

For M^{e} Bourgeois, the first criterion that must guide the choice of a liquidator is trust. "This person will have access to your bank accounts. He or she will pay the bills and divide up the assets. He or she has to be honest and dependable and must know to turn to competent professionals when the situation warrants it."

Neutrality and objectivity are also important. "If there is conflict between the heirs, the liquidator has to show good judgment and fairness. People often tend to confide this responsibility to the eldest member of the family. This is a mistake. The oldest sibling is not necessarily the most competent person to assume this kind of responsibility. You have to look at all the options. The notary can be a valuable advisor in this respect," she adds. ■

TESTAMENTARY TRUST

THE APPLE OF YOUR EYE

In her family's eyes, Johanne Bluteau will always be Little Johanne, even though she is 42 years old. Because she was born severely handicapped, her parents, Andrée and Louis, have always taken care of her. "She's our little princess," they confide candidly. Johanne was declared incapacitated several years ago. Her parents have assumed the role of curators of her property and person since being appointed by the court. They manage her assets and see to her well-being, but they are getting older and realize that soon they will no longer be able to provide Johanne with the care she needs. Andrée has always refused to ask the fateful question: who will take care of Johanne after we die? But reality is catching up with them. Louis now walks with a cane and Andrée often doesn't have the energy to keep Johanne occupied all day long. The time has come to ask the difficult questions.

According to M^{e} Isabelle Fecteau, drawing up a testamentary trust will ensure Johanne's future. This type of will allows the testator to bequeath assets to a trust in the heir's name. The beneficiary is guaranteed a separate patrimony under certain provisions. "Creating a testamentary trust allows a person to bequeath an asset in a will to a trust. The person names trustees who will manage the assets and specifies what the bequest is to be used for."

IT SHOULD BE NOTED THAT THIS TYPE OF WILL IS APPROPRIATE NOT ONLY TO PROTECT AN INCAPACITATED CHILD BUT ALSO TO SPECIFY WHEN A BENEFICIARY CAN ACCESS THE INCOME OR CAPITAL.

NOT KNOWING WHO WILL TAKE CARE OF AN INCAPACITATED CHILD AND MANAGE HIS OR HER ASSETS IS WORRYING FOR PARENTS. THE TESTAMENTARY TRUST, HOWEVER, ALLOWS A CERTAIN DEGREE OF CONTROL BY ENABLING THE TESTATOR TO CHOOSE THE TRUSTEES, AS WELL AS THEIR REPLACEMENTS.

There are three types of parties involved in a trust: the settlor, i.e., the testator who makes out the will, the trustees who administer the trust, and the beneficiary. "For example, Johanne could be a lifetime beneficiary of the income or capital, or both, based on the terms of the will. When Johanne dies, the remainder of the trust assets can then still be administered for Andrée's and Louis's grandchildren, and remitted to them afterward and according to the terms of the will," explains M^{e} Fecteau.

It should be noted that this type of will is appropriate not only to protect an incapacitated child but also to specify when a beneficiary can access the income or capital. One can specify the age at which a beneficiary will begin to receive an income or capital from the trust and the conditions related to that payment. "Some clients are very imaginative when it comes to setting the terms of payment. But you also need to think about the trustees who will be responsible for carrying out those terms," M^{e} Fecteau warns.

CURATORSHIP

Since Andrée and Louis are both Johanne's curators, they assume this responsibility until their death unless they too are declared

incapacitated in the interim. Unlike a case involving minors, parents cannot make provisions in a will for a designated person to take over the role of curator. Nor can Andrée and Louis decide where Johanne will live. Upon their death, the court will name a new curator under the advice of a tutorship council. This council, usually made up of three family members or friends entrusted to monitor the administration of the curator, is legally bound to name a replacement. The public curator will act as curator until a new one is appointed.

Obviously, not knowing who will take care of an incapacitated child and manage his or her assets is worrying for parents. The testamentary trust, however, allows a certain degree of control by enabling the testator to choose the trustees, as well as their replacements.

"The preferred choice is a circle of trustees made up of three people: two family members and a professional administrator, such as an accountant or trust company. Among them, one trustee can be responsible for Johanne's health care, clothing and recreational needs; this person is often the curator. By having several people managing the trust, there is an assurance that decisions will be made by majority rule," Me Fecteau points out.

ADMINISTRATION OF THE TRUST

In principle, trustees are required to administer the trust impartially. "Since the main goal is to provide for Johanne's needs, the trustees should be released of this obligation; if there is any money remaining for other beneficiaries at the time of Johanne's death, all the better, but if not, then too bad. It is preferable when drawing up a will, therefore, not to mention fixed sums as income payments."

The testators can nevertheless give instructions to the trustees. In the event of unforeseen expenses, for example if Johanne requires home care, the trustees can be authorized to draw on the capital in the trust to access additional funds.

To ensure that they successfully complete their task, trustees can be paid for their work. "Where professionals are concerned, this can take the form of fees," Me Fecteau explains. In terms of the monitoring process, certain control regulations apply. While there is no annual inventory produced for the public curator, the trustees are nevertheless required to report their management of the trust to Johanne's curator on a yearly basis. In addition, the potential heirs and beneficiaries have a right to monitor the trustees' work. "If they notice that Johanne does not seem to be benefiting from the trust while the trustees are rolling in money, they can take recourse up to and including dismissal of the trustees. A family council may be held each year to assess the situation." ■

QUESTIONS TO THINK ABOUT…

What will happen to Johanne if her parents die without a will?

Johanne's assets would then be managed by the new curator designated by the tutorship council and appointed by the court. "It can be an arduous process. For example, the curator might be required to seek the advice or authorization of the tutorship council or court to sell assets in order to provide for the beneficiary's needs," Me Fecteau explains. "A trust avoids this process."

If someone is the beneficiary of a trust, can he or she continue to receive social assistance?

"This is a legitimate concern for many parents, since social assistance recipients often benefit from services that would otherwise be extremely costly. A trust is a separate patrimony. Legally, the assets do not belong to the beneficiary. But the fact that a beneficiary who is receiving social assistance is also a beneficiary of a trust may result in a reduction or stop in the benefits. Several court decisions have been rendered on this matter. It may mean readjusting the testamentary trust plan. It is preferable to consult a notary."

Can you put savings away for a loved one who is incapacitated?

The Registered Disability Savings Plan (RDSP) allows you to save directly in the name of a person under the age of 60. The individual must be eligible for the Disability Tax Credit. The federal government also provides grants based on the amount contributed and the beneficiary's family income. A Canada Disability Savings Bond may also be deposited by the federal government into the RDSP of a low-income beneficiary. The RSDP grows tax-free until the funds are withdrawn. ■

"IF THE OFFER CONTAINS OUTRAGEOUS DEMANDS, OMISSIONS OR CLAUSES THAT ARE UNFAVOURABLE TO THE BUYER OR SELLER, YOU WILL HAVE TO LIVE WITH THEM," SHE WARNS. «SEVEN OUT OF TEN OFFERS TO PURCHASE REQUIRE NEGOTIATION BY THE NOTARY WITH THE PARTIES."

BUYING A HOME

THE BIRDS BUILD THEIR NEST

After a long search, Judith and Benoît have finally found a rare pearl: a little cottage for sale by the owner in a quiet neighbourhood. "It's not a castle and it's not new, but we'll be happy here," Benoît muses during the visit. He is handy and is already thinking about the renovations he could do himself. For her part, Judith's attention is focused on the basement. "It's the perfect place to set up the beauty salon I've always dreamed of," she confides to Benoît.

After speaking with her father, Judith learns that their future home is in a residential zone that may not permit her to operate a beauty salon. What's more, the renovations that Benoît was planning to do may also be prohibited by municipal by-laws. Frustrated and disappointed, the couple wonder who they should turn to for the answers to their questions. Do they have to start looking for a house all over again?

One thing is certain: they need to check a few things before signing on the dotted line. Notary Gaétane Baril advises some careful thought before getting into the game. "When a couple is looking at a property, it's the dream that they're buying. They don't see the little flaws. Before signing any document, you should consult your notary."

BEYOND MUNICIPAL BY-LAWS

In an ideal world, potential buyers would check municipal by-laws that apply in the areas that interest them well before they begin their visits. Even if operating a beauty salon may be permitted in the neighbourhood, the building by-law may require that it have a separate entrance and that parking be available. Will the couple's budget allow for this?

According to M^{e} Baril, it is also a good idea to take a look at the certificate of location. "By looking at the surveyor's report, you can establish, for instance, if the fence is actually on the neighbour's property, or if the pool is encroaching on a Hydro-Québec servitude (easement), or if certain views are illegal. You can make your offer conditional on checking the certificate of location. The analysis of the certificate of location can be done with your notary."

"You even find aspect servitudes (easements) in some sectors. For example, all houses might be required to have a single gate or stone facing. The purpose of these servitudes (easements), which are becoming more and more frequent, is to ensure that a neighbourhood is esthetically uniform. Judith's and Benoît's plans could be seriously compromised. Servitudes (easements) normally appear on the certificate of location."

OFFER TO PURCHASE

An offer to purchase can be verbal or written. For more security, the written form is preferable. But beware! Signing the offer automatically binds the parties. According to M^{e} Baril, it is important to consult your notary before signing the document because if this professional is called upon to intervene after the fact, the transaction can only be made based on what has already been signed.

"If the offer contains outrageous demands, omissions or clauses that are unfavourable to the buyer or seller, you will have to live with them," she warns. "Seven out of ten offers to purchase require negotiation by the notary with the parties."

If certain details are missing from the offer to purchase, the notary can amend the document with the approval of both parties. "The interests of one party do not necessarily

correspond to those of the other party. When we want to sell a house, we are prepared to make concessions, but once the offer to purchase is signed, it's hard to get the seller to acquiesce to the demands of the buyer. You need to foresee every possibility in writing." Judith and Benoît think that they have found a rare pearl and don't want to see it slip through their fingers. As visitors jostle one another at the front door, it's hard to resist signing an offer to purchase right away. But M[e] Baril advises potential buyers to consult a notary before beginning their home visits. "The notary can prepare a personalized offer to purchase. You can fine-tune it afterwards by adding certain clauses along the way."

Beware if the seller asks for a deposit. "There is no legal obligation to put down money in advance. A seller may require it to ensure that the buyer has the necessary funds, but never, ever give the seller a cheque," M[e] Baril insists. The deposit should be placed in the notary's trust account. This is an account in which the notary holds clients' money in trust. The deposit cannot be seized by the creditors of a seller in financial difficulty or disappear into the hands of a dishonest seller. The deposit is therefore protected until the deed of sale is signed, since the management of these funds is closely monitored by the Chambre des notaires du Québec.

THE DEED OF SALE

An offer to purchase always includes clauses related to obtaining financing. To buy the property, the buyer will need to take steps to obtain the necessary funds from a financial institution.

"We also suggest including a clause related to inspection of the building. A building inspector will issue an inspection report that will protect the buyer against defects that have not been declared by the seller. This report will enable the buyer to ask that the necessary repairs be done before the deed of sale is signed. Additionally, the buyer can also require that a certain sum originally intended for the seller be withheld by the notary in the trust account until the repair work is completed."

Ideally, Judith's and Benoît's offer to purchase would include a clause related to checking the municipal and building by-laws.

"Before signing the deed of sale, all of the above conditions must be met to the buyer's satisfaction. Once this is the case, the offer to purchase is binding on both parties. The seller is bound to sell to the buyer and vice versa," M[e] Baril explains. "If any deficiencies

are detected at this stage, they can usually be worked out through mediation between the parties, and an agreement can be reached."

The notary will then carry out a thorough legal examination of property titles. "He will look, for example, for any defect in the title, any mortgage charges to be removed, other than those declared by the seller, any public utility servitudes (easements) that might affect the right of use or any other aspect, non construction or right-of-way servitudes (easements). The results of this examination will be brought to the attention of the buyer," Me Baril maintains. "The earlier the notary is involved in the process, the smoother the transaction will go." ■

BEWARE OF LEGAL HYPOTHECS

Anyone who buys a new house or undertakes renovation work on his or her residence could bear the costs of a legal hypothec by the contractor, subcontractor, supplier of materials or workers. Indeed, if contractors, professionals (e.g. architects and engineers) and construction workers are not paid in full for the work they have done, they are covered by a legal hypothec (i.e. one provided for under the law) that binds the constructed or renovated building. They are thus ensured that they will be paid for their work or supply of materials.

"For the duration of the work, the legal hypothec protects the rights of the individuals who have taken part in the construction or renovation of the property," Me Baril explains. "The hypothec continues to be in effect up to 30 days after the work ends, without the need for it to be published in the land register."

Subject to certain conditions under the law, construction industry stakeholders then have six months to take legal action against the owner, regardless of any advances that have been paid to the contractor or money owed to suppliers that has been paid to the builder. It should be noted that the legal hypothec takes precedence over any mortgage the buyer has with a financial institution. The buyer will be required to pay back both mortgages. In the event of a failure to pay, legal action taken by the beneficiaries of the legal hypothecs could force the sale of the property.

Consequently, before signing a contract, it is wise to verify the contractor's reputation and whether he has a guarantee deposit with an insurer in case he is unable to pay his suppliers. Me Baril also advises to have the contract checked to ensure that it contains a clause for the withholding of funds for work done. The withheld funds can be very useful to pay sub-contractors should the contractor fail to pay them. ■

BUYING A CO-OWNERSHIP PROPERTY

MY ROOF? YOUR ROOF?

Marc Dubois is a 32-year-old confirmed bachelor who avoids making commitments. For several weeks now, he has been dreaming of owning his own condo. "No more sharing an apartment," he happily muses, as he listens to his roommate snoring like a locomotive. Marc has started looking seriously but none of the condos have really appealed to him, until he comes across that nice downtown loft: not too old, big enough, well located... it's love at first sight! "It's a good price. I'm buying it!" he tells his friend Julie. "Have you read the declaration of co-ownership?" she asks. Taken aback, Marc admits that he doesn't even know what that is. "I don't care about the neighbours. I just want my own little loft," he fires back. Julie looks at him, half smiling: "Go do your homework and we'll talk again tomorrow."

Julie is right to suggest Marc do his homework. Buying a condo entails its own series of obligations. "When you're a tenant, your responsibility ends with your apartment. But when you're a co-owner, even if the living space looks the same as an apartment, you have to take on more responsibilities, including those related to the common areas, i.e. the building itself, the entranceways, hallways, outer doors and windows, the roof, the grounds and parking. Like all the other co-owners, you will have to see to it that the property in maintained in good condition," M^{e} Antoine Vaillancourt explains.

In other words, whether we want to or not, it is hard to disregard our neighbours. Thankfully, relationships between co-owners are managed by what is called a "declaration of co-ownership." Drawn up by a notary, this document is nothing more than a code for how to live as co-owners. It includes the building regulations, details regarding the use of common areas and restrictions on changes that can be made to each apartment (also called a "unit").

In the declaration of co-ownership you can also find the share of each unit, i.e. the percentage of the common areas of the building that each owner holds. According to M^{e} Vaillancourt, "people often think that if a building has four units, the share will necessarily be 25% per unit. This isn't always the case. Several elements, such as the surface area of the apartment, location of the unit in the building (main floor, second floor, third floor, and so on), materials used or presence of a terrace can result in a greater share."

VARIABLE FEES

The share of each unit determines each co-owner's degree of financial responsibility for the common areas. If the unit's share is 30%, the owner is required to assume the equivalent of 30% of the common expenses, including fees for landscaping, snow removal, heating or air conditioning of common areas.

According to M^{e} Vaillancourt, finding out about common expenses is important in any co-ownership transaction. The building administrators present and approve the annual budget for common expenses at the annual general meeting of co-owners. The annual budget determines the portion of common expenses assignable to each unit, based on the share. These expenses can change from year to year and take into account not only the various maintenance costs of the building but also a reserve fund for emergencies.

All co-ownership buildings must have a contingency fund. According to the law, the

RELATIONSHIPS BETWEEN CO-OWNERS ARE MANAGED BY WHAT IS CALLED A "DECLARATION OF CO-OWNERSHIP." DRAWN UP BY A NOTARY, THIS DOCUMENT IS NOTHING MORE THAN A CODE FOR HOW TO LIVE AS CO-OWNERS.

amount in the fund must be a minimum of 5% of the total budget of the co-ownership. For Antoine Vaillancourt, "it is very important to check that a contingency fund exists and to know its value and what percentage of the budget is dedicated to it. This will make all the difference between a well managed co-ownership and one that holds unpleasant surprises when additional sums must be paid out for unforeseen repairs."

"Even if the law only requires that a minimum of 5% of the annual budget be placed in a contingency fund, it might be wise to increase this amount, sometimes to 20%, depending on the needs of the building," M[e] Vaillancourt adds.

SEEK ADVICE

It is not always easy to fully grasp all the information provided when buying a condo. "The declaration of co-ownership is a lengthy document, written in legal jargon. Buyers who try reading it are often discouraged before they reach the end," M[e] Vaillancourt points out. "A notary can look it over, summarize it and answer the buyer's questions. The notary can also finding out about certain things for the buyer by consulting with the co-ownership syndicate, a kind of board of directors of the condominium."

For all these reasons, it is a good idea to consult a notary at the earliest stages of buying a condo, according to M[e] Vaillancourt. "Usually the offer to purchase only gives a buyer a very short time to check property titles to his or her satisfaction. The wise thing for the buyer to do is to hand the file over to a notary, who will make all the relevant checks before the deadline. Buying a condo often represents a substantial investment, so these checks could prevent a lot of future headaches." ■

GOING INTO BUSINESS

BÉLANGER BROS.

In the early 1990s, the three Bélanger brothers started an advertising agency specializing in new technology. Their formula was a hit and the business was so successful that, in order to meet demand, offices were opened in Trois-Rivières, Montréal and Toronto. Now older brother Pierre feels that the time has come to close the regional offices and concentrate on the head office in Québec City. At the weekly meeting of the three shareholders, he raised the issue, stating that "the team is too big. We need to get back to basics." For their part, Guillaume and Sylvain are firmly opposed to the idea. "The more people we have working for us, the more ideas there will be and the better we can stand out from the competition." But there is no convincing Pierre, who firmly believes that he is right and feels that he is stagnating in his professional career. His work quickly begins to slip, he starts missing important meetings, and some customers are starting to complain. The positive atmosphere that once existed in the family business has now soured, and the two younger brothers are seriously starting to look forward to the older one leaving.

Thankfully the three brothers showed foresight when starting their business. They had a notary draw up a shareholders agreement that will now make it possible to resolve their differences. When investing in a business, people should ask themselves several questions. What will happen if one of the shareholders dies? What do you do if conflicts arise?

Notary and business advisor Michel Perreault explains that a shareholders agreement is "an agreement concluded between shareholders to resolve these kinds of situations. It specifies mechanisms to determine how a shareholder must behave. It can also help the business run smoothly because it encourages communication between the shareholders."

The agreement, which is drawn up in a positive climate and tailored to the business, should ideally be reviewed after a few years. For growth sectors like new technology, a review every two or three years is advisable, if only to sound out the direction that the shareholders want the business to take. The scope and nature of the provisions in the agreement depend on several factors.

STARTING OFF ON THE RIGHT FOOT

One of the primary roles of the shareholders agreement is to provide a framework for establishing the value of the company's shares. This can be done in three ways: shareholders can agree from the start on how to calculate the price of the shares; they can make provisions to review the share value when doing the yearly financial statements; or they can agree that the value of the shares will be set by an independent professional, such as an accountant, when the situation warrants it (e.g. sale, death). Regardless of which option is chosen, the valuation procedure should be specified in writing in the agreement. This is what is called the share valuation clause.

"In the case of shareholders who are also company directors, the agreement can also provide incentives for those who occupy administrative and management positions, e.g. vice-president or secretary."

SALE AND DEATH

"In addition, since the shareholders will not want to sell to just anyone, the process for selling shares should be established from the start." As M[e] Perreault explains: "The notary will plan for all situations in which a person may want to sell his or her shares and ensure that when someone decides to withdraw from the business, his or her shares are offered to the other shareholders first. They then have the right of first refusal. Provisions for response deadlines and methods for valuing shares and paying the selling price will all be stipulated in the agreement. If the shareholders refuse to buy the shares, clauses in the agreement will generally allow third parties to buy them."

To avoid discord among the shareholders that could create an atmosphere in which decision-making becomes impossible, a shotgun clause can be added that allows a shareholder to buy the shares of a dissident shareholder. It all happens quickly, generally over a period of ten days, to prevent any disagreement from leaving the directors at a standstill. If the dissident shareholder refuses the offer, he or she must buy the other person's shares.

There can also be upheaval in the ranks of shareholders following the death of one of the

WHEN DRAFTING A SHAREHOLDERS AGREEMENT, THE NOTARY MUST MAKE PROVISIONS FOR CONFLICT RESOLUTION MECHANISMS THAT WILL AVOID LEGAL ACTION MOST OF THE TIME.

business owners. When a shareholder transfers his or her shares to heirs, partners may find themselves dealing with associates that are unfamiliar with the business but nonetheless have the right to vote for the company directors. A death clause added to the agreement allows other shareholders to buy the shares of the heirs. Mechanisms can be built in to avoid penalizing the heirs financially; for example, the heirs could still be entitled to beneficial tax measures related to the transfer of the shares through a will even if the shares are sold.

FORCED BUYOUT AND MEDIATION

When a shareholder fails to carry out his or her responsibilities, is declared unfit to manage assets, or is found guilty of a crime, what can be done? This is where the forced buyout clause comes into play. The clause, written into the shareholders agreement, forces the shareholder in question to sell his or her shares to the partners when an offer is made to buy them at a set price. Adding a non-competition clause ensures that the shareholder who is forced out is unable to unduly compete or solicit the company's customers or staff.

But the departure of a shareholder does not always resolve a thorny problem. When drafting a shareholders agreement, the notary must make provisions for conflict resolution mechanisms that will avoid legal action most of the time. The purpose of the clause is to keep the lines of communication open between the shareholders. In the case of the Bélanger brothers, this will help them find a solution to their problem.

"Of course, Pierre could leave the company," M^{e} Perreault asserts. "They agree on the price of the shares, Pierre sells his and then he's free to start the new company that he wants. But even with a non-competition clause, his leaving inevitably means that another business will benefit from his skills."

The fact is that Pierre has expertise that his brothers do not want to lose, especially in a leading edge sector like new technology. As M^{e} Perreault sees it, there are several ways to resolve the situation.

"Another possibility is to focus on the activities that interest Pierre. A new shareholders agreement could stipulate that Pierre makes all the decisions related to a given area while Guillaume and Sylvain maintain responsibility for the other areas. Or another solution might be to start a new business and put Pierre in charge of it. In this case, the brothers would have to make sure that the new business would not jeopardize the existing one. A lot of solutions are possible. They have to discuss the situation and take time to think things over before making any decisions. One thing is for sure: when a problem like this arises, business partners need to meet face to face and have a notary present. The notary's goal is to reach an agreement, and he or she must be impartial with regard to all the parties." ■

BUYING A FARM

ANCESTRAL LAND

June 27, 5:30 a.m. The sun is barely up but, like every day for the past 40 years, Madeleine Lalonde kisses her husband Robert before he heads off for another hard day of work on the family farm. The farming enterprise now includes 70 animals and extends over an area of 250 hectares, which is rare for the area. The fields are very fertile and produce wheat, corn and oats, as well as a few seasonal vegetables. Madeleine has always taken care of the paperwork and management of the business. This is why she is seriously considering the offer made by her children Sophie and Felix to buy the farm, her husband's sole property for as long as anyone can remember. The children's offer is appealing but it raises some questions. "Do the children have to buy it all? If so, at what price? Could we keep our home? Could Sophie and Félix also live on the land? And what will the oldest sibling, Marie-Jeanne, think of all this?" ponders Madeleine as she prepares the noonday meal. One thing she knows for sure: it's time to talk to Robert about it.

Transferring a farming enterprise is a complex endeavour that will take more than a simple discussion around the dining room table to solve the issues. M[e] Jean-François Denicourt, a notary who specializes in business and agricultural property rights, is well-versed in the matter. "Transferring a business always presents a certain number of challenges, mainly because this kind of transaction involves several professionals, including accountants and tax specialists, but more importantly it can quickly become emotional, both for the seller who has dedicated years to the business and the buyer who wants freedom of action."

In the agricultural sector, you must also take into account the *Act respecting the preservation of agricultural land and agricultural activities*. In Québec, a person cannot do whatever he or she wants with agricultural land. The sector is controlled by the Act and a permanent commission, the Commission sur la protection du territoire agricole, oversees its application.

Adopted in 1978, the Act prohibits the use of agricultural land except for the purposes of agriculture, the felling of maple trees in a sugar bush except for the purposes of selection and thinning, the sale or donation of a lot or parcel of land if the person owns the adjoining lot, or the removal of topsoil without the prior authorization of the commission.

However, not everything requires the commission's approval; the law does provide for some exemptions. Jean-François Denicourt gives the following example: "Because he owns more than 200 hectares, Robert is not required to sell all his land to his children. If he wants to, he can sell at least 100 hectares to his children without asking for the authorization of the commission, as long as he remains the owner of at least 100 hectares."

ONE ROOF AND ONE LAW

Whether or not Robert chooses to sell all the land that he owns, he can still retain ownership of his house. Because it was built before 1978, Robert's and Madeleine's house has an acquired right. "Based on this right, they can exclude from the original lot the equivalent of 5,000 m^2 or half a hectare of land, including the house, without the authorization of the commission."

As for Sophie and Félix, the law also allows them to build their own house on their newly acquired land. "In fact, all physical persons whose primary occupation is agriculture can build a house on the land they farm, as long as the plans and location comply with the municipal by-laws in effect," M[e] Denicourt explains.

Another constraint is that houses built in this way are thereafter inseparable from the land. "In other words, they must be sold at the same time as the land. It will no longer be possible to divide the house from the land to allow Sophie or Félix to retain ownership of their homes without the authorization of the commission."

Note that the *Act respecting the preservation of agricultural land and agricultural activities* allows farmers to build a residence on their lands for any of their children, even if they do not farm. However, when the land is sold, the same limitation applies as above. The home must be sold at the same time as the land, unless authorization is received from the commission, which is unlikely.

MONEY ISSUES

Beyond the specific issue of the land itself, transferring a farming business is a costly endeavour. "Very often, farmers have invested everything they own in the business. They have bought new lands, expanded

their farm, acquired quotas and, after 20 or 30 years, find themselves with a business that is worth hundreds of thousands, if not millions, of dollars."

In fact, the size of many agricultural enterprises is one of the main obstacles in the transfer. The sums of money in play often make it difficult for the next generation to buy the business.

To facilitate the transaction, many farmers choose to waive a portion of the value of their business and to make an equivalent donation to the children who want to take over the farm. According to M^{e} Denicourt, this choice raises several other questions.

"The children who buy the farming operation have often been working the land for a few years. The seller and buyer are tempted to take that into consideration even though the children were paid a salary for their work," M^{e} Denicourt says. "Parents may also worry that their son or daughter will resell everything for a better price a few years down the line. This can be very emotional and sentimental, especially when there are other children involved and the parents want to be fair."

Jean-François Denicourt recommends transparency to avoid sparking a crisis. "In cases where there are several children in a family and the parents are about to sell their main asset to only one of the children, I suggest they lay their cards out on the table. The better informed everyone is, the better the chance of reducing any resistance or conflict."

To be fair and objective and for tax reasons, it may be a good idea to hire an accredited appraiser to set a fair selling price for the business. The appraiser will take into account the location of the land, the surface area, the soil quality, the type of cultivation or production, the percentage of wooded or drained area, and so on. "Once the seller has this appraisal in hand, an informed decision can be made."

Once a price is set and the monetary benefit to the buyer can be quantified, a balance can be struck with the other children. There are several ways to do this. One of them is through insurance. "If the parents are eligible for insurance coverage, the child who buys the land at a good price can be asked to insure the parents for an amount corresponding to the benefit obtained. His or her brothers and sisters will be listed as the beneficiaries of this insurance and will have their fair share of the patrimony. One point to remember: fairness is not a synonym for equality."

The seller can also add clauses to the deed of sale to prevent any land speculation. For example, the new owner could be required to pay back part of the gains if the land is resold to a stranger within a specified time period, say five or ten years. "As notaries, our role is to assess our clients' needs and prevent them from running into problems. It's up to us to give them good advice about the different options available to them. In complex files like these, the meaning of our role as impartial advisers becomes particularly pertinent." ■

TRANSFERRING A FARMING ENTERPRISE IS A COMPLEX ENDEAVOUR THAT WILL TAKE MORE THAN A SIMPLE DISCUSSION AROUND THE DINING ROOM TABLE TO SOLVE THE ISSUES.

IN THE AGRICULTURAL SECTOR, YOU MUST ALSO TAKE INTO ACCOUNT THE *ACT RESPECTING THE PRESERVATION OF AGRICULTURAL LAND AND AGRICULTURAL ACTIVITIES*. IN QUÉBEC, A PERSON CANNOT DO WHATEVER HE OR SHE WANTS WITH AGRICULTURAL LAND.

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