The topic chosen for this year’s conference is very broad and may be addressed in many various manners. Indeed, in situations where resort is had to the courts to determine relationships between members of the same family, it often involves a society making difficult choices at a given point in time. As the interests of a family and those of each of its members may be different, the legislative choices may be very hard to make indeed.

This is the case, in particular, where the task calls for a codification of patrimonial relationships existing within the framework of the family since the law is never completely “neutral” when the issues at hand are money and the family... Indeed, “an uneasy relationship between love and money befuddles the law of family property, set at it is on the hopeless mission of forcing the patrimonial and the extrapatrimonial onto separate legal paths”. This relationship is all the more complex in the field of the law of succession where one adds to this tandem of “love and money” a third variable, namely death. This is the topic which I have chosen to discuss with you today, i.e. the codification of this stormy relationship between love, money and death in Québec law.

In Québec, the reform of the law of succession gave rise to an interesting debate on the rights of the various members of the family, specifically when reflections bore on the question of testamentary freedom. I remind you that the law of succession in Québec is peculiar in this respect: it emanates from the French law, specifically the Custom of Paris, but it borrowed from British law the principle of the freedom of testation. Indeed, after New France was ceded

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1 Oral presentation.
to England, French civil law was maintained with respect to family and succession law, however with the above significant exception. Since 1774, Canadians in the Province of Québec therefore had the freedom to bequeath all of their property in favour of whomsoever they chose without limitation or reservation. This freedom of testation was so vast that it was frequently regarded as being “unlimited”.

During the reform of Québec civil law, the legislator examined the scope of this freedom of testation. While many civil and common law countries were restricting, directly or indirectly, the freedom of the testator, the question arose as to whether the Québec standard of “unrestricted freedom of testation” still reflected its social values.

Our presentation will focus on the content of discussions pertaining to testamentary freedom in Québec law and on the choices made by the legislator. This legislative reform represents a momentous occasion in the evolution of the law which deals with the family in Québec, in which the legislator has attempted to balance the interests of the family members while advocating priorities relating to the protection of the economic interests of the persons involved.

On one hand, one had to determine whether to preserve the autonomy of the testator’s wishes with respect to the vesting of his property upon his death or to increase the protection afforded to other members of the family. This will be the focus of the first part of the presentation. On the other hand, if the decision leaned towards providing greater protection to the family to the detriment of the individual freedom of the testator, one then had to decide “who” deserved to be protected by the law and according to “which” legal schemes. This question will be the topic for the second part of my presentation. We will see that the Québec legislator has not
chosen to copy the device of heritary reserves which characterizes civil law countries, nor was
he merely satisfied to introduce rules of survival of the support obligation as we often find in
common law jurisdictions.

I. AUTONOMY OF THE TESTATOR’S WISHES OR PROTECTION TO OTHER
MEMBERS OF THE FAMILY

First of all, with respect to our first topic, let us recall that Québec adopted a new Code in
1991 which came into effect in 1994, but that the reform process of the Québec Code started
as far back as 1955. One of the many issues addressed as part of the wholesale reform of
Québec civil law was that of freedom of testation. Should one maintain the broad freedom
enjoyed by Québec testators or should one restrict this freedom in order to guarantee a
minimum degree of protection to certain relatives of the deceased? In other words, should one
preserve the autonomy of the testator’s wishes and his right to the free disposal of his property
upon his death or, on the contrary, should one guarantee that a portion of the deceased’s
patrimony should be devolved to his relatives on a mandatory basis, specifically his spouse
and his children?

Absolute testamentary freedom was little criticized until the beginning of the 20th century. It
started being challenged in the 1930s, mainly by certain social groups and in legal authorities.
Although the majority of authors agreed with the principle of freedom of testation, since it
represented the logical continuation of the recognition of the right to property of each person,
and while testators rarely abused this right in practice, other authors criticized this freedom,
sometimes quite vehemently. Some considered it immoral for a person to be able to disinherit
his spouse and his children to the benefit of a stranger!
As the years went by, more and more authors questioned the relevance of the unlimited freedom of testation in Québec law. In the 1950s, even if authors did not always know “how” to restrict freedom of testation nor in favour of “whom”, more and more of them voiced their wish that a legislative framework be devised for this freedom which many now regarded as a “problem” in Québec succession law.

Upon the tabling of the initial reports of the Civil Code Revision Office, the problematic nature of freedom of testation was alluded to. Incidentally, the restriction of this freedom was the main reform proposed in the law of succession. The Committee of the Office, through an analysis of comparative law, examined the legal vehicles to which one could resort in order to restrict the scope of testamentary freedom.

The Committee then proposed the creation of a reserve for succession purposes in favour of the surviving spouse the amount of which would vary according to whether or not the deceased left behind descendants. The spouse could, however, waive this right by marriage contract.

The Committee also recommended maintaining the deceased’s support obligation after his death in favour of the same persons who were the beneficiaries of his support while he was alive, namely his spouse and his children. The report of the Committee on the law of succession is clear: freedom of testation ought to be restricted as it is more important to protect certain members of the family of the deceased in order, so the argument goes, to safeguard them from the testator bestowing excessive gifts upon others than it is to preserve the autonomy of the testator’s wishes when it comes to the disposal of his property upon his death.
These recommendations of the Office were not followed by the legislator, but the issue of the scope of the freedom of testation remained. Various groups called upon to provide their comments during the study of the bills, several of which advocated women’s rights, brought this question back to the fore during discussions and stated their disagreement with the notion of total freedom of testation. These groups called for changes, mainly in order to avoid a concrete problem, namely the fact that many surviving spouses find themselves financially destitute following the death of a spouse who has not bequeathed them any property. For these women, the status quo was unthinkable. Testamentary freedom should operate within a framework designed to protect women and, indirectly, their children, but how? A claim for alimony, a reserve in full ownership, a reserve in usufruct, a reserve in trust or pension, granting of property to family rights or multiple options? It is difficult to settle on a choice, and I will now discuss the various options.

II. “HOW” TO RESTRICT FREEDOM OF TESTATION AND IN FAVOUR OF “WHOM”

Three bills had to be tabled before a majority of stakeholders could agree upon the “necessity” of protecting the family of a deceased from the deemed “abusive” exercise of his freedom of testation, but still no agreement was reached as to the appropriate legal device to achieve it. In fact, there was hesitation between establishing hereditary reserves and maintaining the support obligation after death.

The reserve is a well-known vehicle in civil law which is considered to be more easily transferable to the Québec Civil Code, but critics argue that the reserve is flawed, vesting as it
does in certain persons rights to the property of the deceased, regardless of their economic or family circumstances.

As for the survival of the support obligation after death, a device which draws its inspiration more from the common law, we are of the view that it upsets established law less since it does not apply in all successions, but it has the significant disadvantage of referring to courts the settlement of successions. Subsidiary question: we still do not know if we should prioritize the surviving spouse or the children of the spouse.

A majority of social groups are not in favour of the heritary reserve established for the benefit of the children of the deceased because, they argue, children have no right to the property of their parents in Québec. They also are of the opinion that the children may always rely on their surviving parent and that, consequently, they require a lesser degree of protection.

As for the reserve for succession purposes in favour of the surviving spouse, views on the issue are more mixed. Many stakeholders consider it to be “normal” that a spouse should be entitled to the patrimony of her deceased spouse, and, incidentally, this is already the case pursuant to certain matrimonial regimes. They consider that the property acquired during the marriage exists due to the contribution of both spouses and that it is therefore logical that this patrimony should be divided. However, if one seeks to recognize actual rights to the property of the deceased which would vest in the surviving spouse regardless of her matrimonial regime, a new problem then arises: how can one explain that it may be otherwise in the event of marriage breakdown while the spouses are alive? Incidentally, one observes that, in reality, more spouses find themselves financially destitute following a divorce or a separation than
following the death of a spouse. Examples in the case law in this respect abound and the problem has been widely reported!

It is further to this acknowledgement of the problems experienced by spouses following a breakdown of their marriage, regardless of their cause, that the debate was broadened in order to simultaneously study the patrimonial situation of the spouses during the marriage, during a separation or during a dissolution, whether by divorce or by death. The dire circumstances in which the more economically disadvantaged spouse may find herself at the end of the marriage, regardless of the root cause thereof, have become the main focus of this concern.

The new direction which this debate took was the focus of a consultation paper on the economic rights of spouses, followed by a new bill introduced in 1989. It is from these documents that the existing legislation stems as it relates to the division of the family patrimony and the survival of the support obligation which are the means decided upon to frame the freedom of testation of Québec residents. Allow me to explain them to you briefly.

First of all, in order to ensure a better protection of spouses following the breakdown of their marriage, for whatever reason, the Québec legislator introduced rules with respect to the family patrimony. Pursuant to these legislative provisions, any marriage automatically leads to the creation of a family patrimony which includes certain property of the spouses listed in the Code, regardless of whom of the two claims to have title to this property.

In case of separation of bed and board, of dissolution or of nullity of marriage, the value of the family patrimony must be shared equally between the spouses, or between the surviving spouse and the heirs. These legislative provisions are mandatory and apply to all persons who
are married. They “indirectly” restrict the testamentary freedom of these persons by forcing them to share with their spouse upon their death the value of certain property which formed part of their patrimony while they were alive. Without regard to any legacies which a person may have provided for in his will, the debt resulting from the division of the family patrimony must be paid before giving effect to any legacy.

The result of the division of the family patrimony creates an indirect restriction on the freedom of testation by diminishing the value of the patrimony which a testator may be able to devise upon his death. Since the family patrimony very often includes most of the property owned by a couple, this restriction in value may represent a significant portion of the value of the whole succession.

In addition to the provisions regarding the family patrimony, the Québec legislator also adopted provisions regarding the survival of the support obligation, this time specifically with a view to protecting certain relatives of the deceased who may be financially disadvantaged following death. The recognized beneficiaries of support are the ex-spouse who was receiving alimony at the time of death, the surviving spouse and the relatives of the direct line at the first degree, regardless of whether they are heirs or devisees of the succession. They have six months following the death in order to file a claim with the succession.

As with the family patrimony, these legislative provisions are of public order, and the testator may not circumvent their application whether by will or by way of gifts. These rules expressly restrict the scope of testamentary freedom by preventing a testator from leaving in dire financial straits certain persons as determined by law. A beneficiary of support may claim a contribution, whether the succession is legal or testamentary in nature, and entitlement to a
contribution exists even if the beneficiary never exercised his or her right to alimony prior to the death of the debtor, with the exception of the ex-spouse.

It is important to underline that the legislative provisions with respect to the support obligation after death have a maintenance objective and that they do not aim to allow certain persons to obtain a portion of the succession of which they believe they were unfairly deprived. The obligation to provide support is designed to enable members of the immediate family or dependents of the deceased to meet their needs. Contrary to a reserve for succession purposes, entitlement in Québec law to a support contribution after death requires that evidence of the needs of the beneficiary be adduced. Consequently, even if the succession has considerable value, the beneficiary of support is not automatically entitled to a contribution. The judge must still assess the needs of the beneficiary of support in order to determine if the succession is required to pay him a financial contribution and in order to determine the amount of this contribution, as the case may be.

The survival of the support obligation has the effect of restricting the value of the patrimony of which the testator may freely dispose upon his death. However, the right to support is extinguished if the succession is not solvent since only the succession is bound to pay the support after death and the devisees and heirs cannot be held personally liable for the payment of claims for alimony.

Those legislative provisions relating to the survival of the obligation for support are those which most expressly restrict the freedom of testation of Canadians living in Québec. As a result, a testator may only dispose of the total value of his patrimony if he has provided for the needs of the beneficiaries of his support. If not, the latter may claim a contribution from the
succession, regardless of the last wishes of the deceased. However, the material effect of these provisions on the succession is very often less than the impact of the family patrimony provisions, since the latter require the sharing with the surviving spouse of the value of a significant amount of the property of the deceased. Incidentally, the support contributions are only paid after the debt resulting from the division of the family patrimony.

**Conclusion**

All in all, the reform of the law of succession in Québec represents an interesting example of the referral to the judicial realm of the relationships that exist between “love” and “money”.

As a principle, it is true that the provisions of the Code still do not directly restrict freedom of testation, no more than they protect anyone from disinheritance by the testator. However, through the rules relating to the family patrimony, Québec law indirectly recognizes rights to the patrimony of the deceased which are vested in the surviving spouse. Furthermore, through the rules relating to the survival of the support obligation, it grants entitlement to support after death to certain specific persons, provided the latter can establish their need. Hence, it is through a combination of the rules relating to family law and those relating to the law of succession that the Québec legislator was able to achieve its goal, namely to ensure better protection for the relatives of the deceased following his death.