

ESTATES: OUT OF THE ORDINARY PROBLEMS

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Quebec Notarial Wills

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QUEBEC NOTARIAL WILLS

The Civil Code of Quebec recognizes three types of wills: the notarial will, the holograph will and the will made in the presence of witnesses.

The notarial will has some additional formalities. It is made before a notary, in the presence of a witness, and in some circumstances (for example if the testator is blind) two witnesses. The notarial will is read by the notary to the testator, either alone or if the testator chooses in the presence of a witness. The testator declares in the presence of a witness that the will contains the expression of his last wishes. The testator, notary and witness or witnesses then sign the will in each other's presence. The date and place of making of the will are noted on the will.

The formalities are set out in Chapter 3, Division II of the Civil Code of Quebec.

The original notarial will is registered and held by the notary.

One advantage in Quebec of the notarial will is that it does not have to be probated in Quebec.

But, if the testator is resident in BC when he or she dies, or if the testator owns land in BC, the testator's personal representative may need to apply to probate the notarial will in BC.

Because the testator signs a Quebec notarial will in the presence of both the notary and at least one other witness, who will be present at the same time, a Quebec notarial will meets the formal requirements of s. 4 of the *Wills Act*, R.S.B.C. 1996, c. 489.

The apparent difficulty is that the notary will keep the original notarial will.

Fortunately, you can probate a certified notarial copy of the notarial will. The authority is in s. 36(1) of the *Evidence Act*, R.S.B.C. 1996, c. 124, which says:

- 36(1) For the purposes of a document purporting to be a copy of a notarial act or instrument made, filed or registered in the Province of Quebec,
- (a) the copy has the same force and effect as the original and must be received in evidence in place of the original if the copy purports to be certified by a notary or prothonotary as a true copy of the original in his or her possession unless it is proved that
 - (i) there is no original,
 - (ii) the copy is not a true copy in some material particular, or
 - (iii) the original is not, by the law of the Province of Quebec, the type of instrument that may be
 - (A) taken before a notary, or
 - (B) filed, enrolled or registered by a notary in the Province of Quebec,
 and
 - (b) the copy must not be received in evidence at trial unless the party intending to produce it has, before the trial, given reasonable notice of that intention to the party against whom it is intended to be produced.

If you are applying to probate a Quebec notarial will, you should draft the affidavit of executor to reflect the fact that you are filing as an exhibit a certified copy of the will instead of the original. For example, you may word the affidavit as follows:

I believe Exhibit A to be a notarially-certified copy of the Deceased's original Last Will and Testament, which is dated [date], certified by [name of notary], Notary, of the City of [city], Province of Quebec, who retains the original according to the laws of the Province of Quebec.