In Defense of Notarial Wills

D. G. Petrie *

At the last meeting of the Canadian Bar Association in Montreal, the writer chanced upon a meeting of the newly constituted Wills and Trusts sub-section. One of the participants in the panel discussion under way made the startling assertion that the Quebec notarial will is "a poor second best". The proposition was that a will drawn in English form, presumably by an advocate, is infinitely superior. The English form will executed before two witnesses is universally recognized. The chief complaint against the notarial will seems to be the difficulty of obtaining probate in foreign jurisdictions. The proposition deserves careful examination in view of the increased mobility of Quebecers. One cannot deny that Quebec people make wills in notarial form and then having changed domicile, die elsewhere and also upon occasion notarial wills are made by persons domiciled outside Quebec.

The section of the Quebec Civil Code dealing with forms of wills is contained in Articles 840 to 855. Briefly, these forms are valid :

a) The holograph will must be entirely written and signed by the testator. It is subject to no other formality; not even a date is required. It is generally agreed that the holograph will must be hand written but the Code does not appear to exclude a will typewritten by the testator. The typing raises some obvious problems of proof.

b) The English form will is executed before at least two competent witnesses who must sign with and in the presence of the testator. This will may be either in handwriting, typewriting or printed.

c) The notarial or authentic will is executed before two notaries or one notary and two witnesses, all of whom must sign in the presence of the others.

The only exceptions permitted to the aforementioned three forms are set forth in Articles 848 and 849 with respect to wills executed in the district of Gaspé where notaries are scarce, and relating to wills made by military men out of garrison.

There are some obvious advantages to the notarial will. First, it is always prepared by someone with legal training. Second, being

* Of the Chamber of Notaries, Province of Quebec.

authentic it is of record in the minutes of the executing notary. He is required by the notarial code to retain the original will in a vault having maximum fire proof standards, burglar and dampness resistance. Therefore, the original is always available and cannot become lost, destroyed or mislaid. Third, when the testator dies while domiciled in Quebec, no probate proceedings are required since the will is already in authentic form and of official word.

Certified copies may be obtained from the notary or the depositary of his records with no other formality. The original will is never delivered except upon Court order in unusual circumstances, e.g. as evidence when the validity of its execution is questioned.

The other provinces of Canada do not admit the authentic character of the notarial will and consequently such wills are subject to probate according to the respective laws of each jurisdiction. Since the common law requires production of the original document for probate, the two systems of law contradict. The original notarial will cannot remain in the notary's repertoire as required by Quebec law and also be delivered for probate elsewhere.

In order to test the familiarity of the courts in the other provinces with wills executed in notarial form, a letter was sent to the appropriate officers of the probate courts in each Province. The response was suprisingly heartening : of the nine common law provinces, replies were received from six. The letter inquired whether any special procedure is required for probate of an authentic copy of a notarial will. Interestingly enough, both bordering provinces, Ontario and New Brunswick, have special legislation dealing with the matter. Presumably the problem arises most frequently in these two provinces.

In Ontario, the special provisions are contained in the *Surrogate Courts Act* [1] and the *Evidence Act*. [2]

Section 38 of the *Surrogate Courts Act* reads as follows :

> "38. Subject to subsection 3 of section 75, a notarial will made in the Province of Quebec may be admitted to probate without the production of the original will upon filing a notarial copy thereof together with the other proper proofs to lead grant."

Section 75 of the same Act reads as follows :

> "75. (1) Where probate or letters of administration or other legal document purporting to be of the same nature granted by a court of competent jurisdiction in the United Kingdom or in a province or territory of Canada or in any other British possession is produced to and a copy thereof deposited

[1] R.S.O. 1960, ch. 388.

[2] R.S.O. 1960, ch. 326.

with the registrar of any surrogate court and the prescribed fees are paid as on a grant of probate, or administration, the probate or letters of administration, or other document shall, under the direction of the judge, be sealed with the seal of the surrogate court, and thereupon, ir, as to personal property, of the like force and effect in Ontario as if the same had been originally granted by such surrogate court, and in so far as regards Ontario, subject to any order made by such court, or on appeal therefrom, as if the probate or letters of administration had been granted thereby.

(2) Subject to subsection 3, letters of verification issued in the Province of Quebec shall be deemed to be a probate within the meaning of this section.

(3) Where it has heen shown that the will was executed in manner and form sufficient to pass real property in Ontario under The Wills Act and the judge so certifies, the sealing has tbe same effect as to real property as if probate had been granted by the surrogate court.

(4) The letters of administration shall not be sealed with the seal of the surrogate court until a certificate has been filed under the hand of the registrar of the court which issued the letters that security has been given in such court in a sum of sufficient amount to cover as well the assets within the jurisdiction of such court as the assets within Ontario, or in the absence of such certificate, until like security is given to the judge of the surrogate court covering the assets in Ontario as in the case of granting original letters of administration."

The *Evidence Act* of the Province of Ontario contains the following provision with respect to notarial deeds generally:

"35. (1) A copy of a notarial act or instrument in writing made in Quebec before a notary and filed, enrolled or enregistered by such notary, certified by a notary or prothonotary to be a true copy of the original thereby certified to be in his possession as such notary or prothonotary, is receivable in evidence in the place and stead of the original, and has the same force and effect as the original would have if produced and proved.

(2) The proof of such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of Quebec, be taken before a notary, or be filed, enrolled or enregistered by a notary."

The foregoing applies equally in the case of the testator dying while domiciled in Ontario and leaving a notarial will and in the case of the testator dying while domiciled in Quebec, leaving a notarial will and assets to be administered in Ontario, in which latter case ancillary Letters Probate must be obtained. The forms for application are the same as for Letters Probate save minor amendments set forth in Ingram's Surrogate Guide as follows :

The Petition :

States the deceased had no fixed place of abode in Ontario but died leaving assets in this Province to be administered. It also recites the amount of the estate in Ontario to be administered.

The Oath of Executor :

Clause 1 of this affidavit is amended to read "That the instrument now produced and shown to me and marked as Exhibit "A" to this my affidavit is to the best of my knowledge and belief a Notarial Copy of the last Will and Testament of the said deceased."

Affidavit of Execution :

This affidavit is completed by the Notary Public; and clause 2 is amended to read :

"That on or about the ——— day of ———, I was personally present and did see the paper writing of which a Notarial Copy is hereunto annexed and marked as exhibit "A" of this affidavit executed by the Testator, etc, etc.".

Due to long and frequent experience with notarial documents, the law of Ontario is explicit. There is no question of requiring a court certificate attesting to the authenticity of the notarial will; the notarial form is recognized in the statute, and the certified copy is submitted for probate in Ontario as though it were the original document.

Similarly, New Brunswick has specific legislation with respect to notarial wills. The *Probate Courts Act* [3] at Section 24 (3) provides:

> "Where any will sought to be proved is a Notarial will, probate may be granted upon the production and filing of a certified copy of the will and a certificate that the will is a valid subsisting and last will under the laws of the place where such will was executed, which certificate shall be under the seal of the officer who has the custody of the will."

It is noteworthy that the notary or officer having custody of the original will must provide a certificate on the copy to the effect that the will is a "valid and subsisting last will ,under the laws of the place where such will was executed". The certified copy does not stand alone as it does in Ontario.

In British Columbia, the matter came before a bewildered Registrar who referred the problem for decision of the Supreme Court of that Province. The judgment of W.B. Farris, C.J., in the case of the *Estate of Isabel Grace Brock, Deceased,*[4] was given on 9th March, 1945.

> "In this matter the deceased person dicd resident in British Columbia. She had made a will dated the 11th day of April, 1928, in the Province of

[3] R.S.N.B. 1952, ch. 175.

[4] Unreported judgment of the Supreme Court of British Columbia.

Quebec, before a Notary of that Province. Later on the 19th of November, 1940, she made in the City of Victoria, Province of British Columbia, a Codicil of the said will.

Probate of the Will and Codicil is now sought. The original will has not been produced before me in that it was made in notarial form in the Province of Quebec, and is held by the Notary there. A document purporting to be a copy of the will made in notarial form, certified to be a true copy of the original in his possession, certified by the Notary, has been duly filed.

I have been asked to accept this notarial copy of the will by virtue of sec. 37 of the Evidence Act, R.S.B.C. 1936, Cap. 90. It is quite obvious to me that sec. 37 of the Evidence Act was enacted to meet the exact situation as is indicated by the facts in this matter. (In this matter the Registrar has approved of the form of the will and codicil and the proof as required by the Wills Act, subject only to failure to produce the original will.)

I direct that Probate of the said Will and Codicil shall issue."

The Section 37 of the *Evidence Act* referred to in the judgment is now embodied in Section 38 (1) R.S.B.C. 1960, Cap. 134.

In the other Provinces, the rules for application for Ancillary Letters Probate are applied by analogy. This procedure applies for any will which is deposited in the Court of the deceased's domicile and needs to be probated in another jurisdiction. In each case there must be annexed to the copy of the will a certificate from the appropriate authority of the court showing that it is a true copy of the original will of record and stating the will is validly executed according to the laws of the "locus actum".

In Saskatchewan, the application is made for a limited grant, that is, a grant of a certified copy to be valid until such time as the original may be produced. Then the rules are followed for grant of Ancillary Letters Probate under Section 29 of the Surrogate Court Rules. Mention is made in this section of wills "impounded in a foreign court", a closer analogy to the notarial will.

To sum up, then, it does appear that notarial wills offer problems in foreign probate mainly due to lack of familiarity with the unique requirement of permanent deposit in the repertoire of the notary. On the other hand, probate is always available through application of ancillary probate rules by analogy and even through such ancillary probate issues from the court of domicile of the deceased testator.

Taking into account the excellent qualities of the notarial will and its unique form in Canada it would be well for the Provinces other than Quebec to consider legislation to remove the conflict resulting from a matter of mere form. Ontario has led the way.