Which Will Work? Court Chooses New York Version Over Argentina

Celia Ampel, Daily Business Review

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The Third District Court of Appeal called Wednesday for more clarity in Florida probate law following a protracted legal battle over an Argentinean-American woman's two wills.

Elena Isleno executed two wills before she died in Florida: a New York will benefitting one set of family and friends and a will in Argentina benefitting others. The Argentine will was notarized, but Isleno and the witnesses did not sign it.

Each set of beneficiaries sought to admit their favorite will to probate in Florida. The New York will was made first, and the Argentine will contained a clause revoking "any other testament that is contrary to the present one."

Miami-Dade Circuit Judge Celeste Hardee Muir ruled the Argentine will revoked the New York will. The appellate court reversed the decision, finding the Argentine will could not be admitted to probate in Florida because it was "nuncupative," or oral.

The Argentinian beneficiaries plan to file a motion for rehearing, contending the Argentine will was not an oral "deathbed" will. Florida law prohibits nuncupative wills but does not define the term.

"This will certainly was reduced to writing, so it wouldn't meet the definition of a nuncupative will," said attorney Sergio Mendez, who represented the heirs under the second will.

Mark Hasner, the attorney for the New York beneficiaries, disagreed.

"Florida law is clear that nuncupative wills are not admissible," he said. "The testator never signed her Argentinean will and therefore it fits into the definition."

The three-judge panel referred to Black's Law Dictionary, Louisiana law and other sources to write the opinion, finding little guidance from Florida probate law.

The court found Florida law clearly accepts notarial wills but then had to rely on an outside treatise defining a notarial will as an orally declared will that is put in writing by a notary, then signed by testator, notary and witnesses.

"The Argentine will obviously fails to comply with the formalities of Florida law because it lacks the

signature of the testators and witnesses," Judge Thomas Logue wrote for the panel.

The judges called for state legislators to update the law to define the terms "notarial," "nuncupative," "holographic" and "nonresident," which "implicate important rights and policy choices."

"Florida is already a global community and global marketplace," Logue wrote. "The people of Florida benefit from the way many citizens of distant states and countries visit, invest and often stay to live out their golden years. … We owe it to them to ensure that their testamentary intentions are strictly honored regarding the disposition of their Florida property."

Judge Vance Salter concurred. Judge Linda Wells wrote a separate concurring opinion, saying Florida does recognize nonresidents' notarial wills but would not recognize a nuncupative will in any circumstance.

Hasner said the opinion also underscored the importance of collaboration when it comes to estate planning for people like Isleno, who had property in two countries.

"I think the big takeaway is estate planning lawyers need to have communication with the offshore planners as well," he said.

The appellant was represented by Hasner of Therrel Baisden in Miami and Terrence S. Schwartz of the Law Offices of Terrence S. Schwartz in Miami.

The appellees were represented by Mendez and Daniel Mendez of Law Offices Mendez & Mendez in South Miami.

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