Governing Law For Dispositions Of Florida Real Property By Non-Resident Decedents

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Does Florida law govern the disposition of Florida real property owned by a nonresident decedent? This was the issue before Florida's First District Court of Appeal in 2001 in the case of *Saunders v. Saunders*.[2] Colorado resident Robert S. Saunders, Jr. died testate and owning Florida real property. Mr. Saunders and his wife, Denise R. Saunders, were married at some point subsequent to the execution of Mr. Saunders' Last Will and Testament. After Mr. Saunders' death, Mrs. Saunders sought a pretermitted spousal share of the Florida real property, pursuant to Florida's pretermitted spouse statute.[3] On appeal, the First District Court of Appeal held that Florida's pretermitted spouse statute was inapplicable and that Colorado's pretermitted spouse statute governed the disposition of Mr. Saunders' Florida real property.[4]

At the center of the controversy in *Saunders* was Fla. Stat. § 731.106, which is entitled **Assets of nondomiciliaries** and provides, in part:

> **(2)** When a nonresident decedent . . . provides in her or his will that the testamentary disposition of her or his tangible or intangible personal property having a situs within this state, **or of her or his real property in this state**, shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law.[5] (emphasis added)

While Fla. Stat. § 731.106(2) explicitly provides that a nonresident decedent may provide by will for Florida law to govern the disposition of the decedent's real property located in Florida, it is silent as to whether Florida law governs when the decedent's will does not contain a provision directing that Florida law governs the disposition of the real property located in Florida. In construing Fla. Stat. § 731.106(2), the court in *Saunders* made its determination of legislative intent by applying the rule of statutory construction which provides that, if the language of a statute is clear and unambiguous, construction should stop at giving effect to the plain meaning of the statutory language.[6] The *Saunders* court applied that rule of statutory construction and concluded that, according to the plain meaning of Fla. Stat. § 731.106(2), "the legislature intended that Florida law apply only to distribute a nondomiciliary testator's property situated in Florida when such testator's last will and testament provides that Florida law shall apply to his or her Florida property."[7]

In November of 2013, the Probate Law and Procedure Committee (the "PLPC") of the Real Property, Probate and Trust Law Section of the Florida Bar (the "Section") formed a subcommittee (the "Saunders Subcommittee") to study *Saunders* and Fla. Stat. § 731.106(2). One of the initial determinations by the Saunders Subcommittee was that the holding by the *Saunders* court cannot be reached by looking to the plain meaning of the words in the statute. Rather, this holding can be reached only by reading into Fla. Stat. § 731.106(2) the negative implication that when the nonresident testator's will is silent, Florida law does not apply to dispositions of Florida real property. Therefore, the Saunders Subcommittee considered additional sources, including legislative history and statutes from other jurisdictions, to try to determine the legislature's intent in enacting Fla. Stat. § 731.106(2).

Fla. Stat. § 731.106(2) has been in the Florida Statutes since the passage of the 1974 Florida Probate Code.[8] Prior to the enactment of Fla. Stat. § 731.106(2), it was well settled that all dispositions of Florida real property were governed by the common law doctrine of *lex loci rei sitae*, which provides that the law of the state where real property is located governs its testamentary disposition.[9] Florida courts applied that common law doctrine prior to, and after, the enactment of Fla. Stat. § 731.106(2).[10]

The 1974 Florida Probate Code was modeled after the 1969 Uniform Probate Code ("1969 UPC").[11] There is no explanation of Fla. Stat. § 731.106 in the legislative history for the 1974 bill, nor for the 1975 bill which made some procedural revisions to the 1974 Florida Probate Code. Section 2-602 of the 1969 UPC titled **Choice of law as to Meaning and Effect of Wills** provides that the meaning and legal effect of testamentary dispositions shall be governed by the law of the state selected in the testator's will, so long as the application of the selected state law is not contrary to the public policy of the state of administration. The approach by the 1969 UPC is broader than Fla. Stat. § 731.106(2) because it allows a testator to select the state's law that will govern his or her property without regard to having property located in that state.

The comment to Section 2-602 of the 1969 UPC provides clues to the origin of Fla. Stat. § 731.106(2). The comment notes that New York and Illinois have statutes that allow nonresident testators to provide that the law of those states will govern the dispositions of the testator's property located in those states.[12] The New York statute applies to both real property and tangible and intangible personal property, whereas the Illinois statute is limited to tangible and intangible personal property.[13] Fla. Stat. § 731.106(2) appears to have been modeled substantially on

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the Illinois statute. The primary difference between the two is the addition to Fla. Stat. § 731.106(2) that allows a nonresident testator to specify that Florida law will apply to the testator's Florida real property, in addition to the testator's tangible and intangible personal property located in Florida. Additionally, after the enactment of a non-resident choice-of-law statute, Illinois continued to follow the common law doctrine of *lex loci rei sitae* and New York continued to have a statutory enactment of the *lex loci rei sitae* doctrine.[14]

After learning of the Illinois statute, the members of the Saunders Subcommittee considered several additional rules of statutory construction. The Saunders Subcommittee was primarily influenced by two such rules. First was the "borrowed statute rule," which provides that "statutes . . . borrowed from other jurisdictions will normally be given the same construction in Florida courts as the prototype statute is given in other jurisdictions."[15] The second was the rule that a statute "designed to change [a] common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard."[16] In conjunction with that rule of statutory construction, Florida courts have recognized a specific presumption against statutory abrogation by implication of an existing common law rule.[17]

Moving beyond a plain meaning analysis of Fla. Stat. § 731.106(2) and applying additional rules of statutory construction, the Saunders Subcommittee concluded that the holding of the court in *Saunders* was too broad. Both Illinois and New York continued to follow the doctrine of *lex loci rei sitae* after the enactment of their nonresident choice-of-law statutes. Therefore, applying the borrowed statute rule, it should be assumed that the Florida legislature — absent some express statement to the contrary — intended for Fla. Stat. § 731.106(2) to be interpreted in the same manner New York and Illinois interpreted their statutes, neither of which overturned the application of *lex loci rei sitae*.

In its opinion, the *Saunders* court concluded that Fla. Stat. § 731.106(2) "clearly, unequivocally, and specifically prescribes a different rule of law from the common law rule."[18] However, Fla. Stat. § 731.106(2) does not explicitly state that Florida law will not apply to the disposition of a nonresident testator's Florida real property when the testator's will does not invoke Florida law. To reach the conclusion that Fla. Stat. § 731.106(2) changed the common law, you cannot look to explicit language of the statute. Instead, you have to read into the statute the negative implication that if a nonresident testator's will does provide for Florida law to govern the disposition of the testator's Florida real property, Florida law will not govern. The Saunders Subcommittee, following the presumption that a change in the common law is not intended when the statute is not explicit in that regard, and the presumption against statutory abrogation by implication of a common law rule, concluded that the legislature's intention was not to change the common law regarding the disposition of a nonresident testator's Florida real property, but to codify it.

Based on the conclusion that the legislature did not intend to change the common law doctrine of *lex loci rei sitae*, the Saunders Subcommittee recommended a revision to Fla. Stat. § 731.106(2) to the PLPC. The PLPC approved the proposed revision in July of 2014. In August 2015, the Section's Executive Council voted unanimously to approve a motion to adopt as a Section legislative position the support of the proposed amendment of Fla. Stat. § 731.106(2). Ultimately, the legislature approved the deletion of the phrase "or of real property in this state" from Fla. Stat. § 731.106(2) and also approved the enactment of new Fla. Stat. §731.1055, which provides that "[t]he validity and effect of a disposition, whether intestate or testate, of real property in this state shall be determined by Florida law."[19]

With those legislative changes, it is now clear that Florida law governs all dispositions of Florida real property.

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Endnotes

1 The Saunders Subcommittee and the author were greatly aided by the research of a member of the Saunders Subcommittee, S. Dresden Brunner, Esq. Much of this article is derived from the research memorandum she prepared for the Saunders Subcommittee. The author thanks S. Dresden Brunner, Esq. for allowing him to use portions of her work product for this article.

2 796 So. 2d 1253 (Fla. 1st DCA 2001).

3 Fla. Stat. § 732.301 (1999).

4 *Saunders*, 796 So. 2d at 1255.

5 Fla. Stat. § 731.106(2) (1999).

6 *Saunders* at 1254 (citing *Aetna Casualty & Surety Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315, 1317 (Fla. 1992); *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).

7 *Id.*

8 See Ch. 74-106, Laws of Fla.

9 *Trotter v. Van Pelt*, 198 So. 215, 217 (Fla. 1940) (holding that the doctrine of *lex loci rei sitae* was absolute).

10 *Kyle v. Kyle*, 128 So. 2d 427, 429 (Fla. 2d DCA 1961); *Beale v. Beale*, 807 So. 2d 797 (1st DCA 2002) (citing 10 Fla. Jur.2d Conflict of Laws § 27 (1997), "[i]t is a universal principle that real or immovable property is exclusively subject to the laws of the country or state within which it is situated, and no interference with it by any other sovereignty can be permitted.").

11 Synopsis of House Bill 997 (1974).

12 Unif. Probate Code § 2-602 cmt. (1969).

13 Illinois Probate Act Sec. 89 b (1957); New York Estates, Powers & Trust Law Sec. 3-5.1(h) (1967).

14 *Lake County Trust Co. v. Two Bar B, Inc.*, 606 N.E.2d 258, 262 (3d Division, Ill. App. Ct. 1992) (citing *Dibble v. Winter*, 93 N.E. 145 (Illinois 1910); New York Estates, Powers & Trust Law Sec. 3-5.1(b) (1967).

15 *Flammer v. Patton*, 245 So. 2d 854, 858 (Fla. 1971).

16 48A Fla. Jur. 2d § 188.

17 *Olmstead v. Federal Trade Comm'n*, 44 So. 3d 76, 82 (Fla. 2010) (citing *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990)).

18 *Saunders*, 796 So. 2d at 1254.

19 Ch. 2016-189, §§ 1 and 2, at 1-2, Laws of Fla.