

SUPPLEMENTAL SUBCOMMITTEE REPORT ON MALLEIRO V. MORI

This subcommittee was assigned the task of studying the recommendations of the Third District Court of Appeal in *Malleiro v. Mori*, 182 So. 3d 5 (Fla. 3d DCA 2015). The subcommittee reported on its conclusions at the meetings of December 9, 2016, June 1, 2017, July 27, 2017, and February 23, 2018. This report will summarize the original issues, the ensuing discussions, and the subcommittee's current recommendations.

I. The Court's Request for Clarifying Legislation

In its opinion in *Mori*, the Third District Court of Appeal requested clarifying legislation for several terms in the Florida Probate Code, stating:

We cannot close this decision, however, without noting that this area of the law would benefit from clarifying legislation. When it comes to the recognition of wills executed by nonresidents or recent residents, the Probate Code lacks definitions of important terms, including “notarial,” “nuncupative,” holographic,” and “nonresident.” The definition of these terms implicates important rights and policy choices.

Florida is already a global community and global marketplace. The people of Florida would benefit from the way many citizens of distant states and countries visit, invest, and often stay to live out their golden years in Florida. Some are drawn by the comfort of Florida's sunshine and coastlines. Others come for the security provided by our low tax economy in which the personal income tax is barred by our traditions and expressly by our Florida Constitution. We owe it to them to ensure that their testamentary intentions are strictly honored regarding the disposition of their Florida property. This goal would be advanced by legislation providing definitions of some of the Probate Code's essential terms.

Mori, 182 So. 3d at 10-11.

II. Subcommittee Recommendations

A. A Definition For The Term “Nonresident Testator” Is Not Necessary

The *Mori* decision suggests that the use of the term “nonresident” in section 732.502(2), Florida Statutes, be clarified because it is not clear whether the term “nonresident testator” refers to a nonresident at the time of the *execution* of the will or at the time of *death*. The Court correctly notes that whether the person is required to be a nonresident at the date of execution or the date of death has a material impact on the statute’s interpretation, stating:

To give one example, as discussed above, the Probate Code provides that the will executed by a nonresident of Florida is “valid as a will in this state if valid under the laws of the state or country where the will was executed.” § 732.502(2). The Probate Code, however, leaves undefined the term “nonresident.” If “nonresident” means “nonresident at the time of death,” then a person moving to Florida must be careful to remake existing wills to conform to the required formalities of Florida law because only wills that conform to Florida law will be recognized as valid for any person who dies a resident of Florida. In contrast, if “nonresident” means “nonresident at the time the will was executed,” a person moving to Florida would not need to remake existing wills because Florida would recognize the wills as valid because they were valid where executed when the person was a nonresident of Florida. Under the latter definition, however, a person, having become a resident of Florida, cannot return temporarily to his or her previous state or country for the purposes of creating a will in that state or country and expect to have that will recognized in Florida unless that will fully conforms to the formalities required by Florida law. We note that the model Uniform Probate Code advocates a very expansive definition. See Unif. Probate Code § 2-506 (amended 2010) (“A written will is valid if executed in compliance with Section 2-502 or 2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at

the time of death the testator is domiciled, has a place of abode, or is a national.”). The policy choice involves balancing comity with the need to limit fraud and mistake regarding the testator’s true intentions.

Id. at 10 n.4.

However, the subcommittee respectfully concluded that, in fact, there is no need for clarification because there is no ambiguity. Specifically, section 732.502, Florida Statutes, provides:

Every will must be in writing and executed as follows . . .

(2) Any will, other than a holographic or nuncupative will, executed by a nonresident of Florida, either before or after this law takes effect, is valid as a will in this state if valid under the laws of the state or country where the will was executed.

The statute clearly refers to *execution* by a nonresident. Additionally, section 731.201(24), Florida Statutes, defines the term “resident”. Therefore, a definition for the term “nonresident” is not necessary.

Notwithstanding the subcommittee’s unanimous recommendation, at the December 9, 2016 meeting the subcommittee was asked to further consider the issue. After further consideration, the subcommittee remained convinced that there was no lack of clarity on this issue and that clarifying legislation was not necessary. The recommendation (that a definition for the term “nonresident testator” was not necessary) was accepted by the committee at the July 27, 2017 meeting.

B. A Definition For The Term “Nuncupative Will” May Be Helpful

A majority of the subcommittee concluded that a definition for the term “nuncupative will” may be helpful.

Despite the term’s use, the Uniform Probate Code and most states’ probate codes do not define the term “nuncupative will”. Black’s Law Dictionary (5th Edition) defines “nuncupative will” as “an oral will declared or dictated by the testator in his last sickness before a sufficient number of witnesses, and afterwards

reduced to writing. A will made by the verbal declaration of the testator, and usually dependent merely on oral testimony for proof.”

The subcommittee originally proposed the following definition:

“Nuncupative will” means a verbal declaration by a person, which directs the disposition of the person’s property on or after his or her death and appoints a personal representative or revokes or revises another will.

At the December 9, 2016 meeting, there were some suggested revisions to the proposed definition. Having considered those comments, the subcommittee proposed the following revised definition:

“Nuncupative will” means an oral declaration by a person, which directs the disposition of the person’s property on or after his or her death, revokes or revises another will, or appoints a personal representative. A will executed pursuant to section 732.502(1)(a)(2) is not a nuncupative will.

Alternatively, the subcommittee proposed the following definition:

“Nuncupative will” means an oral declaration intended to have the effect of a writing described in section 732.502.

At the July 27, 2017 meeting, the committee approved the latter definition.

C. A Definition For The Term “Holographic Will” May Be Helpful

A majority of the subcommittee members concluded that a definition for the term “holographic will” may be helpful.

The *Mori* case seems to suggest that a holographic will is simply a handwritten will that does not comply with section 732.502(1), Florida Statutes. Dictionaries vary on the actual wording, but generally they state that it is “a will entirely handwritten, dated and signed by the testator, but not signed by required witnesses.” Some jurisdictions that authorize the admission of holographic wills require only that the material portions of the will be in the testator’s handwriting.

The subcommittee originally proposed the following definition of the term “holographic will”:

A holographic will is an instrument purporting to make a testamentary disposition, which is handwritten at least in part and signed by the testator, and which may be admitted to probate under a particular jurisdiction’s law even though it is not witnessed as required by section 732.502(1), Florida Statutes. As set forth in section 732.502(2), Florida Statutes, no holographic will may be admitted to probate in this State, even if valid in the jurisdiction where the testator was residing at the time of execution, unless it is executed in conformity with section 732.502(1), Florida Statutes.

This proposed definition was discussed at the meeting on June 1, 2017. It was pointed out that the second sentence merely restated section 732.502(2), Florida Statutes, and was therefore not necessary. Accordingly, the subcommittee instead proposed the following definition:

A holographic will is an instrument purporting to make a testamentary disposition, which is handwritten at least in part and signed by the testator, and which may be admitted to probate under a particular jurisdiction’s law even though it is not witnessed as required by section 732.502(1), Florida Statutes.

At the meeting on July 27, 2017, the proposed definition was rejected because it may serve to invalidate wills that are executed before a notary in accordance with the law of another jurisdiction.

Therefore, the subcommittee considered the following alternative definitions that were discussed at the February 23, 2018 meeting:

- (a) A holographic will is an instrument purporting to make a testamentary disposition that is handwritten, at least in part, and signed by the testator, but is neither witnessed nor notarized.
- (b) A holographic will is an instrument purporting to make a testamentary disposition that is handwritten, at least in

part, signed by the testator, and is neither witnessed nor notarized, and which may be admitted to probate under the law of a particular jurisdiction.

At the meeting, a variety of concerns were expressed. In an attempt to address those concerns, the subcommittee proposes:

A holographic will is an instrument, whether or not witnessed or notarized, which may be admitted to probate under a particular jurisdiction's law solely because the testator's signature and at least the material portions of the document are in the testator's handwriting.

D. A Definition For The Term "Notarial Will" Is Not Necessary

The subcommittee was initially undecided about the need to define the term "notarial will". The term "notarial will" appears only in section 733.205, Florida Statutes, which provides:

§733.205. Probate of notarial will

(1) When a copy of a notarial will in the possession of a notary entitled to its custody in a foreign state or country, the laws of which state or country require that the will remain in the custody of the notary, duly authenticated by the notary, whose official position, signature, and seal of office are further authenticated by an American consul, vice consul, or other American consular officer within whose jurisdiction the notary is a resident, or whose official position, signature, and seal of office have been authenticated according to the requirements of the Hague Convention of 1961, is presented to the court, it may be admitted to probate if the original could have been admitted to probate in this state.

(2) The duly authenticated copy shall be prima facie evidence of its purported execution and of the facts stated in the certificate in compliance with subsection (1).

(3) Any interested person may oppose the probate of such a notarial will or may petition for revocation of probate of such a notarial will, as in the original probate of a will in this state.

Wills prepared or witnessed by civil law notaries are typically retained by the notary. The problem arises when the testator moves to Florida and the original will prepared by the notary is not available for probate. The purpose of section 733.205, Florida Statutes, is to address this issue by facilitating the admission of an authenticated copy of a will where the original will must remain in the possession of the notary.

The UPC treats this issue as follows:

SECTION 3-409. FORMAL TESTACY PROCEEDINGS; ORDER; FOREIGN WILL. After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper and that the proceeding was commenced within the limitation prescribed by Section 3-108, it shall determine the decedent's domicile at death, his heirs and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by Section 3-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

Section 733.205, Florida Statutes, is superior to the UPC. To be clear, the issue is not whether another jurisdiction admits wills to probate, but whether the other jurisdiction will give up possession of the original will for its admission to probate in Florida.

The subcommittee is unaware of any issue that has arisen under section 733.205, Florida Statutes, since its enactment in 1974, much less any issue arising from any ambiguity in the phrase “notarial will”. Accordingly, after further deliberation, the subcommittee has concluded that a definition of the term “notarial will” is not necessary. The committee approved this recommendation at the July 27, 2017 meeting.