26.06 EXECUTION OF NUNCUPATIVE WILL FOR MARINER OR SOLDIER (SPOKEN WILL)

In this case, a claim is made that the Maker made a spoken will by telling another person what the Maker wanted done with [his] [her] property at [his] [her] death and that this other person wrote down what the Maker said.

To make a valid spoken will, a person must make the will in the way that the law requires. The Contestant claims that the Maker did not make [his] [her] spoken will in the required way; the Proponent claims that the Maker did. I will now tell you how the law requires a person to make a spoken will.

The law requires the following:

(1) The Maker must have told another person what the Maker wanted done with [his] [her] property at [his] [her] death.

(2) The other person must have written down what the Maker said.

[(3) The Maker must have been employed on a ship when [he] [her] made [his] [her] will.

(4) The ship which the Maker was aboard must have been on water having a tide; if the water did not have a tide, the ship that the Maker was on must have been on the water only temporarily.]

[(3) The Maker must have been serving in the military service of [name of government] when [he] [she] made [his] [her] will.

(4) At the time the Maker made [his] [her] will, there must have been a state of war.

(5) The Maker must have been actively involved in the war.]

For the Proponent to win on this claim, you must decide that it is more likely than not that the Maker made [his] [her] will in the way that the law requires. If you decide that it is more likely than not that all of these requirements have been satisfied, then you must find that the Maker made [his] [her] will in the required way. If you decide that any of these requirements have not been satisfied, then you must return a verdict for the Contestant.

Use Note

This instruction was not revised in 1995, except to make the language gender neutral and to replace the terms "Challenger" and "Supporter" with "Contestant" and "Proponent."

This instruction should be given when the contest involves the issue of execution of a nuncupative will. This instruction should be used after Instructions 26.01, 26.02, and 26.03.

The first bracketed material is to be used when the testator is allegedly a sailor. When the testator is allegedly a soldier, use the second bracketed material.

The judge should list only the numbered requirements which are at issue in the case.

Comment

Section 13.11.158 of the Alaska Statutes, a virtual copy of Section 4621 of the Compiled Laws of Alaska of 1933, provides: "A mariner at sea, or a soldier in the military service, may dispose of his wages or other personal property as he might have done by common law, or by reducing the same to writing (emphasis added)." The instruction on nuncupative wills reflects the requirements embodied in the statute and those existing in the common law.

To make a valid sailor's will at common law, it is required that a person be employed on a ship which is in tidal water or is in nontidal water for a temporary purpose. In re Gavin's Will, 1 Tuck. (N.Y.) 44 (1865) (captain of gunboat on Yazoo River not at sea). See generally, T. Atkinson, Handbook of the Law of Wills §§ 76, 77 (2d ed. 1953 2 Bowe-Parker, Page on Wills §§ 20.13-30 (3d ed. rev. 1960). This seemingly would be the requirement under Alaska law, despite the paucity of Alaska cases in this area. There is only one reported Alaska Supreme Court case dealing with nuncupative wills. See In re Bradley's Estate, 10 Alaska 610 (1945) (holding that a nuncupative will was invalid for every purpose when testator was neither a soldier in active military service nor a mariner at sea at time of making the will).

With regards to a valid soldier's will, the testator must be in actual military service. Courts have interpreted "actual military service" to require two facts: these must be a state of war and the soldier must be actively involved in pursuing it. See, e.g., Drummond v. Parrish, 3 Curt. 522, 163 Eng. Rep. 812 (1843). See generally, Megany, Actual Military Service and Soldiers' Privileged Wills, 57 L.Q.R. 481 (1941); Powell, Actual Military Service, 61 Jurid. Rev. 172 (1949); Weiss, The Formalities of Testamentary Execution by Service Personnel, 33 Iowa L. Rev. 48 (1947).

In light of courts' general hostility towards oral wills, it seems doubtful that there will be much litigation in this area. Nonetheless, it may be helpful to keep in mind the remaining provisions of § 13.11.158 of the Alaska Statutes dealing with the proof and probate of a nuncupative will:

1. No proof of a nuncupative will shall be received unless it is offered within six months after speaking the testamentary words, or unless the words, or the substance of the words, were reduced to writing within 30 days after they were spoken.

(c) No probate of a nuncupative will is granted for 14 days after the death of the testator, nor shall a nuncupative will be at any time proved, unless the testamentary words, or the substance of the testamentary words are first committed to writing, and a citation issued, accompanied with a copy thereof, to call the widow or next of kin to the deceased so they may contest the will if they think proper.

It is thought that, under § 13.11.158(b) and (c), questions relating to proof and probate of a nuncupative will are preliminary questions for the judge, who may take judicial notice of "indisputable facts." Alaska R. Evid. 201.