IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF THEODORE ERNEST SCHEIDE, JR. ST. JUDE CHILDREN'S RESEARCH HOSPITAL, Appellant, v. THEODORE E. SCHEIDE, III; and SUSAN HOY, SPECIAL ADMINISTRATOR, Respondents.	Supreme Court No. 76924 District Case No. P082619

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete the docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate *Id*. Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107, Nev. 340, 810 P.2d 1217 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District: Eighth Judicial District Court, State of Nevada

   Department: 26 County: Clark

   Judge: Hon. Gloria Sturman District Ct. Docket No. P-14-082619-E

2. **Attorney filing this docketing statement:**

   Attorney: Russel J. Geist, J.D., L.L.M. Telephone: (702) 385-2500

Firm:	Hutchison & Steffen, PLLC	Fax:	(702) 385-2086
Address:	10080 W. Alta Dr., Suite 200, Las Vegas, Nevada 89145	Email:	rgeist@hutchlegal.com

Client(s): St. Jude Children's Research Hospital, Inc., Appellant

If this is a joint statement by multiple applicants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement

3. **Attorney(s) representing respondent(s):**

Attorney:	Cary Colt Payne, Esq.	Telephone:	(702) 383-9010
Firm:	Cary Colt Payne, CHTD.	Fax:	(702) 383-9049
		Email:	carycoltpaynechtd@yahoo.com
Address:	700 South Eighth Street Las Vegas, Nevada 89101		

Client(s): Theodore "Chip" E. Scheide, III, Respondent

4. **Nature of disposition below (check all that apply):**

Judgment after bench trial	**X**	Grant/Denial of NRCP 60(b) relief	
Judgment after jury verdict		Grant/Denial of Injunction	
Summary Judgment		Grant/Denial of declaratory relief	
Default Judgment		Review of agency determination	
Dismissal		Divorce Decree	
Lack of Jurisdiction		Original	Modification
Failure to State a Claim		Other disposition (specify):	
Failure to Prosecute			
Other (specify):			

5. **Does this appeal raise issues concerning any of the following:** NO

Child custody(visitation rights only)
Venue
Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

In re: Estate of Theodore E. Scheide Jr. a/k/a Theodore Ernest Scheide Jr. - P082619

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

NONE

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

This action is a dispute over whether a copy of decedent's will found among decedent's possessions after his death overcame the common law presumption that the original missing will was revoked or intentionally destroyed by the testator, and the copy of the will represents a lost will pursuant to NRS 136.240 subject to admission to probate.

Appellant, as the proponent of the decedent's lost will, had the burden to "prove that the testator did not revoke the lost or destroyed will during his lifetime." *Estate of Irvine v. Doyle*, 101 Nev. 698, 703, 710 P2d 1366, 1369 (1985). The Appellant's was required to show that it is more likely than not that the decedent left his last will unrevoked at the time of his death, not that the will was in physical existence at the time of the testator's death. *Id.*

Appellant presented a copy of the decedent's October 2012 will which the administrator found among the decedent's possessions after his death. The provisions of the copy of the October 2012 Will are identical to the will verified by the two witnesses to the execution of the October 2012 Will by sworn affidavit stating that the copy of the will is the same as the original to which they affixed their signature as requested by the decedent on October 2, 2012 upon its execution. Both of the witnesses, Kristin Tyler, the decedent's estate planning attorney, and Diane DeWalt, have provided sworn affidavits that they affixed their signature to the October 2012 Will, a copy of which was found in the possession of the decedent at his death.

The only difference in the copy verified by the witnesses to the execution of the will and the copy presented by the administrator are the decedent's handwritten notes on the first page of the copy he retained until his death which affirmed the date of the will execution and provided instructions on port-mortem organ donation. The decedent's handwritten notes on the copy of the October 2012 Will he retained until his death do not alter or amend any of the dispositive, testamentary provisions of the October 2012 Will. Therefore, the copy of the October 2012 Will in the decedent's possession and its contents have been clearly and distinctly proved by two credible witnesses, Kristin Tyler and Diane DeWalt, in satisfaction of NRS 136.240(3).

The District Court found that the decedent "lacked the mental capacity to 'revoke' the October 2012 Will after February 2014 [the date that a guardianship of the person and estate of the decedent was established] until his death in August [2014]."

The District Court found that the Appellant failed to meet its burden of proof that the will was not revoked during Decedent's lifetime and denied the petition to admit the copy of the decedent's will as a lost will.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary:

A) Whether the District Court erred in finding that only one witness provided clear and distinct testimony about the contents of lost will.

B) Whether the District Court erred in finding that St. Jude Children's Research Hospital, Inc. failed to meet its burden of proof that the Will was not revoked during Decedent's lifetime (while Decedent was competent).

C) Whether the District Court erred by not considering a copy of the Decedent's lost will on which the Decedent himself wrote post-death instructions, and found among the Decedent's possessions after his death was proof that the Decedent did not revoke his will during his lifetime.

D) Whether the District Court's application of the lost will statute creates an unattainable standard of proof for a proponent of a lost will who provides a copy of the will as attested to by a separate affidavit from the two subscribing witnesses.

E) Other matters currently under investigation.

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

NONE TO MY KNOWLEDGE

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

N/A **X** Yes No

If not, explain

12. **Other issues.** Does this appeal involve any of the following:

Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))
An issue arising under the United States and/or Nevada Constitutions
A substantial issue of first-impression
An issue of public policy
An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
A ballot question
If so, explain

13. **Assignment to the Court of appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstances(s) that warrant retaining the case, and include an explanation of their importance or significance:

The matter involves an estate in which the corpus has a value of less than $5,430,000, and therefore is presumptively assigned to the Court of Appeals under NRAP 17(b)(15).

14. **Trial.** If this action proceeded to trial, how many days did the trial last?

One and a half days.

Was it a bench or jury trial?

Bench trial.

15. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal. If so, which Justice?

No

TIMELINESS OF NOTICE OF APPEAL

16. **Date of entry of written judgment or order appealed from:** August 6, 2018

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. **Date written notice of entry of judgment or order served:** August 8, 2018

(a) Was service by delivery _____ or by mail/electronic/fax __**X**__.

18. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52 (b), or 59,**

(a) Specify the type of motion, and the date and method of service of the motion, and date of filing.

NRCP 50(b) Date of filing_____

NRCP 52(b) Date of filing_____

NRCP 59 Date of filing

Note: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. ***See*** **AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion: _____

(c) Date of written notice of entry of order resolving motion served: _____

Was service by delivery _____ or by mail _____(specify).

19. **Date notice of appeal was filed:** September 6, 2018

If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A

20. **Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other:**

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

NRAP 3A(b)(1)	**X**	NRS 38.205
NRAP 3A(b)(2)		NRS 233B.150
NRAP 3A(b)(3)		NRS 703.376
Other (specify)_____		

(b) Explain how each authority provides a basis for appeal from the judgment or order:

Final judgment.

22. **List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

St. Jude Children's Research Hospital, Inc.
Theodore "Chip" E. Scheide, III
Susan Hoy, Administrator of the Estate of Theodore E. Scheide Jr.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal *e.g.,* formally dismissed, not served, or other:

23. **Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the date of formal disposition of each claim.**

a) St. Jude Children's Research Hospital, Inc. - The decedent's lost will should be admitted to probate; denied by final order on August 6, 2018.

b) Theodore "Chip" E. Scheide, III - The estate should be administered as if decedent died intestate; granted by final order on August 6, 2018.

c) Susan Hoy, Administrator of the Estate of Theodore E. Scheide Jr. - None.

24. **Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below:**

Yes **X** No _____

25. **If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b):

Yes _____ No _____

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment:

Yes _____ No _____

26. **If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):**

27. **Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Name of Appellant: St. Jude Children's Research Hospital, Inc.

Name of counsel of record: Russel J. Geist, J.D., LL.M.

Date: 10/9/2018

Signature of counsel of record

Clark County, Nevada
State and county where signed

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date **DOCKETING STATEMENT CIVIL APPEALS** was filed electronically with the Clerk of the Nevada Supreme Court, and service was made in accordance with the master service list as follows:

Electronic Service
Larry J. Cohen
P.O. Box 10056
Phoenix, AZ 85064
Settlement Judge

Electronic Service
Cary Colt Payne, Esq.
700 S. 8th Street
Las Vegas, NV 89101
Attorney for Theodore "Chip" E. Scheide, III

U.S. Mail
Kim Boyer, Esq.
Durham Jones & Pinegar
10785 W. Twain Ave., Ste. 200
Las Vegas, NV 89135
Attorney for the Administrator

DATED this 9 day of October, 2018.

An employee of Hutchison & Steffen, PLLC

Electronically Filed
09/13/2016 10:27:10 AM

CLERK OF THE COURT

PET
Todd L. Moody (5430)
Russel J. Geist (9030)
HUTCHISON & STEFFEN, LLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
(702) 385-2500
(702) 385-2086
rgeist@hutchlegal.com

Attorneys for St. Jude Children's Research Hospital

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of THEODORE E. SCHEIDE JR. aka THEODORE ERNEST SCHEIDE JR., Deceased.	Case No.: P-14-082619-E Dept No.: PCI

PETITION FOR PROBATE OF LOST WILL (NRS 136.240); REVOCATION OF LETTERS OF ADMINISTRATION (NRS 141.050); ISSUANCE OF LETTERS TESTAMENTARY (NRS 136.090)

Petitioner ST. JUDE CHILDREN'S RESEARCH HOSPITAL, INC. ("St. Jude Children's Research Hospital" or the "Petitioner") hereby petitions the court to admit a copy of the Last Will and Testament of THEODORE E. SCHEIDE JR., also known as THEODORE E. SCHEIDE, to probate pursuant to NRS 136.240 for administration pursuant to NRS 136 *et seq.*, and for issuance of letters testamentary, and in support of this petition respectfully states as follows:

BACKGROUND FACTS

Procedural History

1. THEODORE E. SCHEIDE JR., deceased (hereinafter "Decedent"), died on or about August 17, 2014, in Las Vegas, Nevada where he was a resident at the date of his death. A copy of the official death certificate has been filed previously with the **Ex Parte Petition for**

Appointment of Special Administrator, filed on October 12, 2014 in this matter.

2. In the **Ex Parte Petition for Appointment of Special Administrator**, SUSAN M. HOY, who was the guardian of the Decedent since February 18, 2014, indicated that a copy of the Decedent's Last Will and Testament dated October 2, 2012 was found, but that she was unable to find the original.[1] SUSAN M. HOY was appointed as the Special Administrator of the Decedent's Estate on October 2, 2014 with the authority to open the Decedent's safe deposit box and search for the original Last Will and Testament dated October 2, 2012 ("October 2012 Will"). A copy of the October 2012 Will is attached as **Exhibit 1**.

3. After searching for the Decedent's original October 2012 Will, SUSAN M. HOY petitioned the Court on January 29, 2015 to appoint her as the administrator of the Decedent's Estate with will annexed under full administration. However, the Petition was taken off calendar and withdrawn.

4. On May 6, 2015, SUSAN M. HOY petitioned the Court for instructions regarding the lack of original October 2012 Will, and alleged to the Court the following:

a) The safe deposit box was empty;

b) The drafting attorney gave the original October 2012 Will to the Decedent;

c) SUSAN M. HOY did not receive or find any original estate planning documents during the guardianship; and

d) "[SUSAN M. HOY] believes the Decedent destroyed any original estate planning documents he may have executed prior to his death."[2]

The matter was heard on May 22, 2015, and the Court specifically:

> ORDERED that the Petitioner [SUSAN M. HOY] be appointed Administrator of the intestate Estate of the Decedent and that Letters of Administration be issued to the Petitioner.

---

[1] *See* **Ex Parte Petition for Appointment of Special Administrator**, filed on October 12, 2014, page 1 at ¶ 3.

[2] *See* **Petition for Instructions**, filed on May 6, 2015, page 2 at ¶ 6.

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

ORDERED that in the event the estate assets are liquidated, they be placed in the Durham Jones & Pinegar Trust Account.

ORDERED that no bond be required.

5. SUSAN M. HOY filed her **First and Final Account, Report of Administration and Petition for Final Distribution and Approval of Costs and Fees** on May 18, 2016 and asked this Court to approve distribution of the Decedent's estate by intestate succession to the Decedent's sole heir, THEODORE SCHEIDE, III, the Decedent's estranged son whom the Decedent had specifically excluded.

Discovery of New Information About Decedent's Will

6. Upon information and belief, KRISTIN TYLER, the Decedent's estate planning attorney and the drafter of the October 2012 Will, discovered in or around May 2016 that the Court determined on May 22, 2015 that the Decedent died intestate and that the Decedent's estate was to be distributed to the Decedent's estranged son whom the Decedent had specifically excluded in his estate planning documents.

7. KRISTIN TYLER then contacted ST. JUDE CHILDREN'S RESEARCH HOSPITAL, INC. and informed ST. JUDE CHILDREN'S RESEARCH HOSPITAL, INC. that she recalled speaking with SUSAN M. HOY or her counsel after the Decedent's death about the original October 2012 Will. KRISTIN TYLER recalled informing SUSAN M. HOY or her counsel that the Decedent took the original with him, but that she had the original of the Decedent's prior Last Will and Testament dated June 8, 2012 ("June 2012 Will"), the original of which has been filed with the clerk of the court on May 20, 2016 pursuant to NRS 136.050.[3] A copy of the filed June 2012 Will is attached as **Exhibit 3**. The Decedent's June 2012 Will was the same as the October 2012 Will, except the Decedent had nominated Karen Hoagland as his Executor in the June 2012 Will, whereas he nominated Patricia Bowlin as his Executor in the October 2012 Will.

8. After being presented with this information, SUSAN M. HOY filed a Petition for

[3] *See* **Affidavit of Proof of Lost Will** signed by Kristin Tyler, a copy of which is attached as **Exhibit 2**.

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

Proof of Will and For Issuance of Letters Testamentary Under Full Administration, Petition to Appoint Personal Representative, and Petition to Distribute and Close Estate on May 25, 2016 asking the Court to admit the Decedent's June 2012 Will to probate. Concurrently, SUSAN M. HOY filed her **Amended First and Final Account, Report of Administration and Petition for Final Distribution and Approval of Costs and Fees** on May 25, 2016 and asked this Court to approve distribution of the Decedent's estate to ST. JUDE CHILDREN'S RESEARCH HOSPITAL, the ultimate beneficiary of the Decedent's will since Velma G. Shay had predeceased him.

9. Upon information and belief, counsel for THEODORE SHEIDE, III met with counsel for SUSAN M. HOY and contended that 1) that it was improper for SUSAN M. HOY to present such a petition arguing that SUSAN M. HOY, as the personal representative of the Estate, must remain neutral in any such determination, and 2) neither of the Decedent's Wills may be admitted to probate to permit such determination until the prior Order on Petition for Instructions is "set aside". Thereafter, in a joint meeting with counsel for ST. JUDE CHILDREN'S RESEARCH HOSPITAL, INC., the parties agreed that SUSAN M. HOY would withdraw her Petition for Probate and Petition for Distribution and counsel for ST. JUDE CHILDREN'S RESEARCH HOSPITAL, INC. would prepare a petition to admit Decedent's Last Will and Testament to probate.

LEGAL AUTHORITIES AND DISCUSSION

10. Jurisdiction is proper in this proceeding pursuant to NRS 136.010(2). At the date of death of the Decedent, the Decedent was a resident of Clark County, Nevada.

11. Petitioner is explicitly permitted under NRS 136.070(1) to file this Petition to have the Decedent's Will proved. ("A personal representative or devisee named in a will, or any other interested person, may, **at any time after the death of the testator**, petition the court having jurisdiction to have the will proved, whether the will is in the possession of that person or not, or is lost or destroyed, or is beyond the jurisdiction of the State.") NRS 141.050 also indicates that the Court may consider and allow the Decedent's Will to be proved, even after "after granting

letters of administration on the ground of intestacy." In such case, "the letters of administration must be revoked and the power of the administrator ceases." *Id.*

12. The Decedent left the October 2012 Will, which Petitioner believes and on that basis alleges, is the Last Will and Testament of the Decedent. Petitioner is informed and believes and on that basis alleges, that the Decedent's October 2012 Will was duly executed in all particulars as required by law, and at the time of execution of the Will, the Decedent was of sound mind, over the age of eighteen (18) years and was not acting under duress or undue influence.

13. The original Will has not been found, but Petitioner alleges that the October 2012 Will is merely lost by accident, and is entitled to be admitted to probate pursuant to NRS 136.240. To date, there has been no evidence that the Decedent revoked his will by destroying it. The only reference to the possible destruction of the Decedent's October 2012 Will is in the Petition for Instructions dated May 6, 2015, wherein the Administrator of the Estate opined that she "believes the Decedent destroyed any original estate planning documents he may have executed prior to his death."

14. NRS 133.120 provides the sole means of revoking a written will as follows:

> 1. A written will may only be revoked by:
>
> (a) Burning, tearing, cancelling or obliterating the will, with the intention of revoking it, by the testator, or by some person in the presence and at the direction of the testator; or
>
> (b) Another will or codicil in writing, executed as prescribed in this chapter.

A testator with capacity must intend to revoke a will in destroying the will. A will "lost by accident or destroyed by fraud without the knowledge of the testator" may still be proved as properly executed and valid, and the court may admit such will to probate. *See* NRS 136.230. ("If a will is lost by accident or destroyed by fraud without the knowledge of the testator, the court may take proof of the execution and validity of the will and establish it, after notice is given to all persons, as prescribed for proof of wills in other cases.").

15. In satisfaction of NRS 136.240(3), Petitioner presents the affidavits of DIANE L.

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

DeWALT and KRISTIN TYLER, witnesses to the October 2012 Will who both attest that to the best of their knowledge, "the Decedent did not intentionally destroy or revoke the Last Will, dated October 2, 2012."[4] KRISTIN TYLER, further declared that she "remained in contact with the Decedent after he executed his Last Will dated October 2, 2012, as his health and mental condition declined afterward." Additionally, KRISTIN TYLER, declared that she "continued to represent and advise the Decedent as his estate planning counsel until NEVADA GUARDIAN SERVICES, LLC was appointed his temporary guardian on February 18, 2014 and his general guardian over his person and estate on March 19, 2014."

16. Additionally, KRISTIN TYLER attested that "at no time after executing his Last Will dated October 2, 2012, did the Decedent express to [her] any intention to change the disposition of his residuary estate which was then designated to VELMA G. SHAY, if living, otherwise to ST. JUDE CHILDREN'S RESEARCH HOSPITAL."[5] She further attested that "to the best of [her] knowledge, the Last Will dated October 2, 2012, was in existence at the death of the Decedent."[6]

17. Although SUSAN M. HOY previously indicated in her **Petition for Instructions** that she believes the Decedent destroyed any original estate planning documents he may have executed prior to his death, no one has presented proof of destroyed estate planning documents to this Court. Furthermore, even if destroyed estate planning documents were found, there is no evidence:

1) that the Decedent actually destroyed his October 2012 Will or instructed someone to do destroy it on his behalf;

2) that the Decedent intended to revoke his October 2012 Will by any alleged destruction;

---

[4] **Exhibit 2**, page 2 at lines 21-22; *see also* **Affidavit of Proof of Lost Will** signed by Diane L. DeWalt, a copy of which is attached as **Exhibit 4**, page 2 at lines 1-2.

[5] **Exhibit 2**, page 2 at lines 17-20.

[6] *Id.* at page 2 at lines 17-20.

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

> 3) that the Decedent was not incapacitated at the time of any alleged destruction of the October 2012 Will, since he was subsequently subject to a guardianship; and
>
> 4) that at the time of any alleged destruction of the October 2012 Will, the Decedent could not have had intent or ability to revoke the October 2012 Will due to his incapacity since he was under a guardianship.

Therefore, even if the October 2012 Will is alleged to have been destroyed, there is no proof that such destruction is a valid revocation of the October 2012 Will, nor can there be any proof of such.

18. If a person under a guardianship desires to change his estate plan, such change may only be done by the guardian with the approval of the guardianship court. *See* NRS 159.078(1) ("Before taking any of the following actions, the guardian shall petition the court for an order authorizing the guardian to: (a) Make or change the last will and testament of the ward. (b) Except as otherwise provided in this paragraph, make or change the designation of a beneficiary in a will, trust, insurance policy, bank account or any other type of asset of the ward which includes the designation of a beneficiary.") In order to authorize the guardian to make such change, the court must find by clear and convincing evidence that:

> (A) A reasonably prudent person or the ward, if competent, would take the proposed action and that a person has committed or is about to commit any act, practice or course of conduct which operates or would operate as a fraud or act of exploitation upon the ward or estate of the ward and that person:
>
> > (1) Is designated as a beneficiary in or otherwise stands to gain from an instrument which was executed by or on behalf of the ward; or
> >
> > (2) Will benefit from the lack of such an instrument; or
>
> (b) The proposed action is otherwise in the best interests of the ward for any other reason not listed in this section.

Without such finding and order granting the guardian authority, no change to the ward's last will and testament may be made.

19. At no such time during the guardianship of the Decedent did NEVADA GUARDIAN SERVICES, LLC petition the court to make a change to the Decedent's last will and testament. Additionally, although ultimately withdrawn upon agreement of the parties, SUSAN M. HOY asked this Court to admit the Decedent's October 2012 Will to probate in her verified

Petition dated May 25, 2016.

20. Therefore, based on the Affidavits of KRISTIN TYLER and DIANE L. DEWALT, Petitioner asks this Court to declare that the Decedent's October 2012 Will was more likely than not left unrevoked by the Decedent before his or her death, and order that the Decedent's October 2012 Will be admitted to probate.

21. Alternately, if the Court believes that the lost October 2012 Will is not admissible to probate, Petitioner presents the Decedent's June 2012 Will, the original of which has been filed with the clerk of the court, for admission to probate. Petitioner is informed and believes and on that basis alleges, that the Decedent's June 2012 Will was duly executed in all particulars as required by law, and at the time of execution of the Will, the Decedent was of sound mind, over the age of eighteen (18) years and was not acting under duress or undue influence.

22. Petitioner is the surviving beneficiary of the October 2012 Will and the June 2012 Will. Both the October 2012 Will and the June 2012 Will specifically disinherit the Decedent's son, THEODORE E. SCHEIDE, III, and his descendants. Additionally, both the October 2012 Will and the June 2012 instruct the executor to treat THEODORE E. SCHEIDE, III, and his descendants as if they predeceased the Decedent.

23. As administration of the Decedent's Estate has already occurred and is in fact nearly complete, Petitioner consents to SUSAN M. HOY continuing as the Personal Representative of the Estate to conclude administration and distribution of the Decedent's Estate pursuant to the Decedent's testamentary wishes.

24. The names, relationships, ages and residences of the heirs, next of kin, devisees and legatees of the Decedent so far is known to Petitioner are as follows:

Names/Addresses	Age/Relationship
Theodore "Chip" E. Scheide, III 6016 Wellesley Avenue Pittsburgh, Pennsylvania 15206 or/ 101 S. Lexington Ave. Pittsburgh, PA 15208	Adult/Son

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PEECOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

Velma G. Shay		Deceased/Friend
St. Jude Children's Research Hospital 501 St. Jude Place Memphis, TN 38105		N/A / Beneficiary

25. Petitioner requests that letters testamentary be issued to SUSAN M. HOY and that she serve without bond pursuant to Section 6.01 of Article Six of the Decedent's Last Will and Testament.

WHEREFORE, petitioner prays:

A. That the Court admit a copy of the Decedent's Will dated October 2, 2012, to probate pursuant to NRS 136.230, or alternately that the Court admit the Decedent's original Will dated June 8, 2012 to probate pursuant to NRS 136.090;

B. That the Decedent's Estate be opened for General Administration pursuant to NRS 136 *et seq.*;

C. That Letters of Administration issued to SUSAN M. HOY be revoked and that Letters Testamentary be issued to SUSAN M. HOY, to serve without bond or other security being required of her; and

D. For such other and further relief as the Court deems just and proper.

Dated September 13, 2016.

HUTCHISON & STEFFEN

Todd L. Moody (5430)
Russel J. Geist (9030)
10080 W. Alta Dr., Ste 200
Las Vegas, NV 89145
(702) 385-2500
(702) 385-2086 Fax
tmoody@hutchlegal.com
rgeist@hutchlegal.com
Attorneys for St. Jude Children's Research Hospital

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

VERIFICATION

STATE OF TENNESSEE)
)ss
COUNTY OF SHELBY)

Fred E. Jones, Jr., on behalf of St. Jude Children's Research Hospital, being first duly sworn under penalty of perjury, declares the following: She/He is the agent or authorized representative for the petitioner herein; that she/he has read the foregoing petition and knows the contents thereof, and that the contents are true of her/his own knowledge, except for those matters stated on information and belief, and as to those matters she/he believes them to be true.

ST. JUDE CHILDREN'S RESEARCH HOSPITAL

By, Fred E. Jones, Jr.
(Print Name)

Its Director - Legal / ALSAC

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
FECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, and that on this 13th day of September, 2016, I caused a true and correct copy of the above and foregoing **PETITION FOR PROBATE OF LOST WILL (NRS 136.240); REVOCATION OF LETTERS OF ADMINISTRATION (NRS 141.050); ISSUANCE OF LETTERS TESTAMENTARY (NRS 136.090)** to be served as follows:

☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☐ pursuant to EDCR 7.26, to be sent **via facsimile;** and/or

☒ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

☐ to be hand-delivered;

to the attorney(s) or parties listed below at the address and/or facsimile number indicated below:

Via E-Service
Kim Boyer, Esq.
Durham Jones & Pinegar
10785 W. Twain Ave., Ste. 200
Las Vegas, NV 89135
Attorney for the Estate

Via E-Service
Cary Colt Payne, Esq.
700 S. 8th Street
Las Vegas, NV 89101
Attorney for Theodore "Chip" E. Scheide, III

Via U.S. Mail
Medicaid Estate Recovery
1100 E. William Street, Ste. 109
Carson City, Nevada 89701

An Employee of Hutchison & Steffen, LLC

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

OCTOBER 2, 2012
UP-DATED

Last Will and Testament
of
THEODORE E. SCHEIDE

I, THEODORE E. SCHEIDE, a resident of Clark County, Nevada, being of sound mind and disposing memory, hereby revoke any prior wills and codicils made by me and declare this to be my Last Will and Testament.

Article One
Family Information

I am unmarried.

I have one child, THEODORE E. SCHEIDE, III.

However, I am specifically disinheriting THEODORE E. SCHEIDE, III and his descendants. Therefore, for the purposes of my Will, THEODORE E. SCHEIDE, III and his descendants will be deemed to have predeceased me.

Article Two
Specific and General Gifts

Section 2.01 Disposition of Tangible Personal Property

I give all my tangible personal property, together with any insurance policies covering the property and any claims under those policies in accordance with a "Memorandum for Distribution of Personal Property" or other similar writing directing the disposition of the property. Any writing prepared according to this provision must be dated and signed by me.

If I leave multiple written memoranda that conflict as to the disposition of any item of tangible personal property, the memorandum with the most recent date will control as to those items that are in conflict.

EXHIBIT "2"

NOTE: ORGAN DONOR ... RECORDED ON MY DRIVERS LICENSE

If the memorandum with the most recent date conflicts with a provision of this Will as to the specific distribution of any item of tangible personal property, the provisions of the memorandum with the most recent date control as to those items that are in conflict.

I intend that the writing qualify to distribute my tangible personal property under applicable state law.

Section 2.02 Contingent Distribution of Tangible Personal Property

Any tangible personal property not disposed of by a written memorandum, or if I choose not to leave a written memorandum, all my tangible personal property will be distributed as part of my residuary estate.

Section 2.03 Definition of Tangible Personal Property

For purposes of this Article, the term "tangible personal property" includes but is not limited to my household furnishings, appliances and fixtures, works of art, motor vehicles, pictures, collectibles, personal wearing apparel and jewelry, books, sporting goods, and hobby paraphernalia. The term does not include any tangible property that my Executor, in its sole and absolute discretion, determines to be part of any business or business interest that I own at my death.

Section 2.04 Ademption

If property to be distributed under this Article becomes part of my probate estate in any manner after my death, then the gift will not adeem simply because it was not a part of my probate estate at my death. My Executor will distribute the property as a specific gift in accordance with this Article. But if property to be distributed under this Article is not part of my probate estate at my death and does not subsequently become part of my probate estate, then the specific gift made in this Article is null and void, without any legal or binding effect.

Section 2.05 Incidental Expenses and Encumbrances

Until property distributed in accordance with this Article is delivered to the appropriate beneficiary or to the beneficiary's legal representative, my Executor will pay the reasonable expenses of securing, storing, insuring, packing, transporting, and otherwise caring for the property as an administration expense. Except as otherwise provided in my Will, my Executor will distribute property under this Article subject to all liens, security interests, and other encumbrances on the property.

Article Three
My Residuary Estate

Section 3.01 Definition of My Residuary Estate

All the remainder of my estate, including property referred to above that is not effectively disposed of, will be referred to in my Will as my "residuary estate."

Section 3.02 Disposition of My Residuary Estate

I give my residuary estate to VELMA G. SHAY, if she survives me.

If VELMA G. SHAY predeceases me, then I give my residuary estate to ST. JUDE CHILDREN'S HOSPITAL located in Memphis, Tennessee.

Article Four
Remote Contingent Distribution

If, at any time after my death, there is no person or entity then qualified to receive final distribution of my estate or any part of it under the foregoing provisions of my Will, then the portion of my estate with respect to which the failure of qualified recipients has occurred shall be distributed to those persons who would inherit it had I then died intestate owning the property, as determined and in the proportions provided by the laws of Nevada then in effect (other than THEODORE E. SCHEIDE, III and his descendants).

Article Five
Designation of Executor

Section 5.01 Executor

I name PATRICIA BOWLIN as my Executor. If PATRICIA BOWLIN fails or ceases to act as my Executor, I name NEVADA STATE BANK as my Executor.

Section 5.02 Guardian for Testator

If I should become mentally incompetent to handle my affairs prior to my demise, I request that PATRICIA BOWLIN be appointed guardian of my estate and my person, to serve without bond. In the event that she is unable or unwilling to serve, then I request that a representative from NEVADA STATE BANK be appointed guardian of my estate and my person, to serve without bond.

Article Six
General Administrative Provisions

The provisions of this Article apply to my probate estate.

Section 6.01 No Bond

No Fiduciary is required to furnish any bond for the faithful performance of the Fiduciary's duties, unless required by a court of competent jurisdiction and only if the court finds that a bond is needed to protect the interests of the beneficiaries. No surety is required on any bond required by any law or rule of court, unless the court specifies that a surety is necessary.

Section 6.02 Distributions to Incapacitated Persons and Persons Under Twenty-One Years of Age

If my Executor is directed to distribute any share of my probate estate to any beneficiary who is under the age of 21 years or is in the opinion of my Executor, under any form of incapacity that renders such beneficiary unable to administer distributions properly when the distribution is to be made, my Executor may, as Trustee, in my Executor's discretion, continue to hold such beneficiary's share as a separate trust until the beneficiary reaches the age of 21 or overcomes the incapacity. My Executor shall then distribute such beneficiary's trust to him or her.

While any trust is being held under this Section, my Independent Trustee may pay to the beneficiary for whom the trust is held such amounts of the net income and principal as the Trustee determines to be necessary or advisable for any purpose. If there is no Independent Trustee, my Trustee shall pay to the beneficiary for whom the trust is held such amounts of the net income and

principal as the fiduciary determines to be necessary or advisable for the beneficiary's health, education, maintenance or support.

Upon the death of the beneficiary, my Trustee shall distribute any remaining property in the trust, including any accrued and undistributed income, to such persons as such beneficiary appoints by his or her Will. This general power may be exercised in favor of the beneficiary, the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate. To the extent this general power of appointment is not exercised, on the death of the beneficiary, the trust property is to be distributed to the beneficiary's then living descendants, *per stirpes*, or, if none, *per stirpes* to the living descendants of the beneficiary's nearest lineal ancestor who was a descendant of mine, or if no such descendant is then living, to my then living descendants, *per stirpes*. If I have no then living descendants the property is to be distributed under the provisions of Article Four entitled "Remote Contingent Distribution."

Section 6.03 Maximum Term for Trusts

Notwithstanding any other provision of my Will to the contrary, unless terminated earlier under other provisions of my Will, each trust created under my Will will terminate 21 years after the last to die of the descendants of my maternal and paternal grandparents who are living at the time of my death.

At that time, the remaining trust property will vest in and be distributed to the persons entitled to receive mandatory distributions of net income of the trust and in the same proportions. If no beneficiary is entitled to mandatory distributions of net income, the remaining trust property will vest in and be distributed to the beneficiaries entitled to receive discretionary distributions of net income of the trust, in equal shares *per stirpes*.

Section 6.04 Representative of a Beneficiary

The guardian of the person of a beneficiary may act for such beneficiary for all purposes under my Will or may receive information on behalf of such beneficiary.

Section 6.05 Ancillary Administration

In the event ancillary administration is required or desired and my domiciliary Executor is unable or unwilling to act as an ancillary fiduciary, my domiciliary Executor will have the power to designate, compensate, and remove the ancillary fiduciary. The ancillary fiduciary may be either a natural person or a

corporation. My domiciliary Executor may delegate to such ancillary fiduciary such powers granted to my original Executor as my Executor may deem proper, including the right to serve without bond or surety on bond. The net proceeds of the ancillary estate are to be paid over to the domiciliary Executor.

Section 6.06 Delegation of Authority; Power of Attorney

Any Fiduciary may, by an instrument in writing, delegate to any other Fiduciary the right to exercise any power, including a discretionary power, granted the Fiduciary in my Will. During the time a delegation under this Section is in effect, the Fiduciary to whom the delegation was made may exercise the power to the same extent as if the delegating Fiduciary had personally joined in the exercise of the power. The delegating Fiduciary may revoke the delegation at any time by giving written notice to the Fiduciary to whom the power was delegated.

The Fiduciary may execute and deliver a revocable or irrevocable power of attorney appointing any individual or corporation to transact any and all business on behalf of the trust. The power of attorney may grant to the attorney-in-fact all of the rights, powers, and discretion that the Fiduciary could have exercised.

Section 6.07 Merger of Corporate Fiduciary

If any corporate fiduciary acting as my Fiduciary under my Will is merged with or transfers substantially all of its trust assets to another corporation or if a corporate fiduciary changes its name, the successor shall automatically succeed to the position of my Fiduciary as if originally named my Fiduciary. No document of acceptance of the position of my Fiduciary shall be required.

Article Seven
Powers of My Fiduciaries

Section 7.01 Fiduciaries' Powers Act

My Fiduciaries may, without prior authority from any court, exercise all powers conferred by my Will or by common law or by Nevada Revised Statutes or other statute of the State of Nevada or any other jurisdiction whose law applies to my Will. My Executor has absolute discretion in exercising these powers. Except as

specifically limited by my Will, these powers extend to all property held by my fiduciaries until the actual distribution of the property.

Section 7.02 Powers Granted by State Law

In addition to all of the above powers, my Executor may, without prior authority from any court, exercise all powers conferred by my Will; by common law; by the laws of the State of Nevada, including, without limitation by reason of this enumeration, each and every power enumerated in NRS 163.265 to 163.410, inclusive; or any other jurisdiction whose law applies to my Will. My Executor has absolute discretion in exercising these powers. Except as specifically limited by my Will, these powers extend to all property held by my fiduciaries until the actual distribution of the property.

Section 7.03 Alternative Distribution Methods

My Fiduciary may make any payment provided for under my Will as follows:

Directly to the beneficiary;

In any form allowed by applicable state law for gifts or transfers to minors or persons under a disability;

To the beneficiary's guardian, conservator, agent under a durable power of attorney or caregiver for the benefit of the beneficiary; or

By direct payment of the beneficiary's expenses, made in a manner consistent with the proper exercise of the fiduciary's duties hereunder. A receipt by the recipient for any such distribution fully discharges my Fiduciary.

Article Eight
Provisions for Payment of Debts, Expenses and Taxes

Section 8.01 Payment of Debts and Expenses

I direct that all my legally enforceable debts, secured and unsecured, be paid as soon as practicable after my death.

Section 8.02 No Apportionment

Except as otherwise provided in this Article or elsewhere in my will, my Executor shall provide for payment of all estate, inheritance and succession taxes payable by reason of my death ("death taxes") from my residuary estate as an administrative expense without apportionment and will not seek contribution toward or recovery of any death tax payments from any individual.

For the purposes of this Article, however, the term "death taxes" does not include any additional estate tax imposed by Section 2031(c)(5)(C), Section 2032A(c) or Section 2057(f) of the Internal Revenue Code or any other comparable taxes imposed by any other taxing authority. Nor does the term include any generation-skipping transfer tax, other than a direct skip.

Section 8.03 Protection of Exempt Property

Death taxes are not to be allocated to or paid from any assets that are not included in my gross estate for federal estate tax purposes. In addition, to the extent practicable, my Trustee should not pay any death taxes from assets that are exempt for generation-skipping transfer tax purposes.

Section 8.04 Protection of the Charitable Deduction

Death taxes are not to be allocated to or paid from any assets passing to any organization that qualifies for the federal estate tax charitable deduction, or from any assets passing to a split-interest charitable trust, unless my Executor has first used all other assets available to my Executor to pay the taxes.

Section 8.05 Property Passing Outside of My Will

Death taxes imposed with respect to property included in my gross estate for purposes of computing the tax and passing other than by my Will are to be apportioned among the persons and entities benefited in the proportion that the taxable value of the property or interest bears to the total taxable value of the property and interests received by all persons benefited. The values to be used for the apportionment are the values as finally determined under federal, state, or local law as the case may be.

Section 8.06 No Apportionment Between Current and Future Interests

No interest in income and no estate for years or for life or other temporary interest in any property or trust is to be subject to apportionment as between the

temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder are chargeable against the corpus of the property or trust subject to the temporary interest and remainder.

Section 8.07 Tax Elections

In exercising any permitted elections regarding taxes, my fiduciaries may make any decisions that they deem to be appropriate in any circumstances, and my fiduciaries are not required to make any compensatory adjustment as a consequence of any election. My Executor may also pay taxes or interest and deal with any tax refunds, interest, or credits as my Executor deems to be necessary or advisable in the interest of my estate.

My Executor, in his or her sole and absolute discretion, may make any adjustments to the basis of my assets authorized by law, including but not limited to increasing the basis of any property included in my gross estate, whether or not passing under my Will, by allocating any amount by which the basis of my assets may be increased. My Executor is not required to allocate basis increase exclusively, primarily or at all to assets passing under my Will as opposed to other property included in my gross estate. My Executor may elect, in his or her sole and absolute discretion, to allocate basis increase to one or more assets that my Executor receives or in which my Executor has a personal interest, to the partial or total exclusion of other assets with respect to which such allocation could be made. My Executor may not be held liable to any person for the exercise of his or her discretion under this Section.

Article Nine
Definitions and General Provisions

Section 9.01 Cremation Instructions

I wish that my remains be cremated and buried in accordance with my pre-paid funeral arrangements with Palm Mortuary in Las Vegas, Nevada.

Section 9.02 Definitions

For purposes of my Will and for the purposes of any trust established under my Will, the following definitions apply:

(a) Adopted and Afterborn Persons

A legally adopted person in any generation and his or her descendants, including adopted descendants, will have the same rights and will be treated in the same manner under my Will as natural children of the adopting parent, provided the person is legally adopted before attaining the age of 18 years. A person will be deemed to be legally adopted if the adoption was legal in the jurisdiction in which it occurred at the time that it occurred.

A fetus *in utero* that is later born alive will be considered a person in being during the period of gestation.

(b) Descendants

The term "descendants" means any one or more person who follows in direct descent (as opposed to collateral descent) from a person, such as a person's children, grandchildren, or other descended individuals of any generation.

(c) Fiduciary

"Fiduciary" or "Fiduciaries" refer to my Executor. My "Executor" includes any executor, ancillary executor, administrator, or ancillary administrator, whether local or foreign, and whether of all or part of my estate, multiple Executors, and their successors.

Except as otherwise provided in this Last Will and Testament, a fiduciary has no liability to any party for action (or inaction) taken in good faith.

(d) Good Faith

For the purposes of this Last Will and Testament, a fiduciary has acted in good faith if (i) its action or inaction is not a result of intentional wrongdoing, (ii) the fiduciary did not make the decision with reckless indifference to the interests of the beneficiaries, and (iii) its action or inaction does not result in an improper personal pecuniary benefit to the fiduciary.

(e) Incapacity

Except as otherwise provided in my Will, a person is deemed to be incapacitated in any of the following circumstances.

(1) The Opinion of Two Licensed Physicians

An individual is deemed to be incapacitated whenever, in the opinion of two licensed physicians, the individual is unable to effectively manage his or her property or financial affairs, whether as a result of age, illness, use of prescription medications, drugs or other substances, or any other cause.

An individual is deemed to be restored to capacity whenever the individual's personal or attending physician provides a written opinion that the individual is able to effectively manage his or her property and financial affairs.

(2) Court Determination

An individual is deemed to be incapacitated if a court of competent jurisdiction has declared the individual to be disabled, incompetent or legally incapacitated.

(3) Detention, Disappearance or Absence

An individual is deemed to be incapacitated whenever he or she cannot effectively manage his or her property or financial affairs due to the individual's unexplained disappearance or absence for more than 30 days, or whenever he or she is detained under duress.

An individual's disappearance, absence or detention under duress may be established by an affidavit of any fiduciary. The affidavit must describe the circumstances of an individual's detention under duress, disappearance, or absence and may be relied upon by any third party dealing in good faith with my fiduciary in reliance upon the affidavit.

An individual's disappearance, absence, or detention under duress may be established by an affidavit of my Executor.

(f) Internal Revenue Code

References to the "Internal Revenue Code" or to its provisions are to the Internal Revenue Code of 1986, as amended from time to time, and the corresponding Treasury Regulations, if any. References to the "Treasury Regulations," are to the Treasury Regulations under the Internal Revenue Code in effect from time to time. If a particular provision of the Internal Revenue Code is renumbered, or the Internal Revenue Code is superseded by a subsequent federal tax law, any reference will be deemed to be made to the renumbered provision or to the corresponding provision of the subsequent law, unless to do so would clearly be contrary to my intent as expressed in my Will. The same rule applies to references to the Treasury Regulations.

(g) Legal Representative

As used in my Will, the term "legal representative" means a person's guardian, conservator, personal representative, executor, administrator, Trustee, or any other person or entity personally representing a person or the person's estate.

(h) Per Stirpes

Whenever a distribution is to be made to a person's descendants *per stirpes*, the distribution will be divided into as many equal shares as there are then-living children of that person and deceased children of that person who left then-living descendants. Each then-living child will receive one share and the share of each deceased child will be divided among the deceased child's then-living descendants in the same manner.

(i) Primary Beneficiary

The Primary Beneficiary of a trust created under this agreement is the oldest Income Beneficiary of that trust unless some other individual is specifically designated as the Primary Beneficiary of that separate trust.

(j) Shall and May

Unless otherwise specifically provided in my Will or by the context in which used, I use the word "shall" in my Will to command, direct or require, and the word "may" to allow or permit, but not

require. In the context of my Trustee, when I use the word "may" I intend that my Trustee may act in its sole and absolute discretion unless otherwise stated in my Will.

(k) Trust

The term "trust," refers to any trusts created under the terms of my Will.

(l) Trustee

The term "my Trustee" refers to any person or entity that is from time to time acting as the Trustee and includes each Trustee individually, multiple Trustees, and their successors.

(m) Other Definitions

Except as otherwise provided in my Will, terms shall be as defined in Nevada Revised Statutes as amended after the date of my Will and after my death.

Section 9.03 Contest Provision

If any beneficiary of my Will or any trust created under the terms of my Will, alone or in conjunction with any other person engages in any of the following actions, the right of the beneficiary to take any interest given to the beneficiary under my Will or any trust created under the terms of my Will will be determined as it would have been determined as if the beneficiary predeceased me without leaving any surviving descendants.

Contests by a claim of undue influence, fraud, menace, duress, or lack of testamentary capacity, or otherwise objects in any court to the validity of (a) my Will, (b) any trust created under the terms of my Will, or (c) any beneficiary designation of an annuity, retirement plan, IRA, Keogh, pension or profit sharing plan, or insurance policy signed by me, (collectively referred to hereafter in this Section as "Document" or "Documents") or any amendments or codicils to any Document;

Seeks to obtain an adjudication in any court proceeding that a Document or any of its provisions is void, or otherwise seeks to void, nullify, or set aside a Document or any of its provisions;

Files suit on a creditor's claim filed in a probate of my estate, against my estate, or any other Document, after rejection or lack of action by the respective fiduciary;

Files a petition or other pleading to change the character (community, separate, joint tenancy, partnership, domestic partnership, real or personal, tangible or intangible) of property already so characterized by a Document;

Files a petition to impose a constructive trust or resulting trust on any assets of my estate; or

Participates in any of the above actions in a manner adverse to my estate, such as conspiring with or assisting any person who takes any of the above actions.

My Executor may defend, at the expense of my estate, any violation of this Section. A "contest" includes any action described above in an arbitration proceeding, but does not include any action described above solely in a mediation not preceded by a filing of a contest with a court.

Section 9.04 Survivorship Presumption

If any beneficiary is living at my death, but dies within 90 days thereafter, then the beneficiary will be deemed to have predeceased me for all purposes of my Will.

Section 9.05 General Provisions

The following general provisions and rules of construction apply to my Will:

(a) Singular and Plural; Gender

Unless the context requires otherwise, words denoting the singular may be construed as plural and words of the plural may be construed as denoting the singular. Words of one gender may be construed as denoting another gender as is appropriate within the context. The word "or" when used in a list of more than two items may function as both a conjunction and a disjunction as the context requires or permits.

(b) Headings of Articles, Sections, and Subsections

The headings of Articles, Sections, and subsections used within my Will are included solely for the convenience and reference of the reader. They have no significance in the interpretation or construction of my Will.

(c) Governing State Law

My Will shall be governed, construed and administered according to the laws of Nevada as from time to time amended. Questions of administration of any trust established under my Will are to be determined by the laws of the situs of administration of that trust.

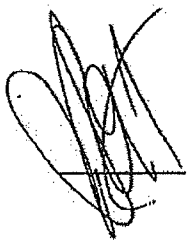
(d) Notices

Unless otherwise stated, whenever my Will calls for notice, the notice will be in writing and will be personally delivered with proof of delivery, or mailed postage prepaid by certified mail, return receipt requested, to the last known address of the party requiring notice. Notice will be effective on the date personally delivered or on the date of the return receipt. If a party giving notice does not receive the return receipt but has proof that he or she mailed the notice, notice will be effective on the date it would normally have been received via certified mail. If notice is required to be given to a minor or incapacitated individual, notice will be given to the parent or legal representative of the minor or incapacitated individual.

(e) Severability

The invalidity or unenforceability of any provision of my Will does not affect the validity or enforceability of any other provision of my Will. If a court of competent jurisdiction determines that any provision is invalid, the remaining provisions of my Will are to be interpreted and construed as if any invalid provision had never been included in my Will.

REST OF PAGE INTENTIONALLY LEFT BLANK



I, THEODORE E. SCHEIDE, sign my name to this instrument consisting of sixteen (16) pages on October 2, 2012, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my Last Will and Testament, that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

THEODORE E. SCHEIDE, Testator

Under penalty of perjury pursuant to the law of the State of Nevada, the undersigned, KRISTIN M. TYLER and DIANE L. DeWALT declare that the following is true of their own knowledge: That they witnessed the execution of the foregoing will of the testator, THEODORE E. SCHEIDE; that the testator subscribed the will and declared it to be his last will and testament in their presence; that they thereafter subscribed the will as witnesses in the presence of the testator and in the presence of each other and at the request of the testator; and that the testator at the time of the execution of the will appeared to them to be of full age and of sound mind and memory.

Dated this 2 day of October, 2012.

Declarant 1 – Kristin M. Tyler

Residing at:

3960 Howard Hughes Parkway
9th Floor
Las Vegas, Nevada 89169

Declarant 2 – Diane L. DeWalt

Residing at:

3960 Howard Hughes Parkway
9th Floor
Las Vegas, Nevada 89169

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 2

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

AFF
Todd L. Moody (5430)
Russel J. Geist (9030)
HUTCHISON & STEFFEN, LLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
(702) 385-2500
(702) 385-2086
rgeist@hutchlegal.com

Attorneys for St. Jude Children's Research Hospital

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of THEODORE E. SCHEIDE JR. aka THEODORE ERNEST SCHEIDE JR., Deceased.	Case No.: P-14-082619-E Dept No.: PCI

AFFIDAVIT OF PROOF OF LOST WILL

I, KRISTIN M. TYLER, being first duly sworn, do hereby declare to the undersigned authority that I was a Witness to the Last Will and Testament dated October 2, 2012 ("Last Will") of THEODORE E. SCHEIDE, JR., also sometimes known as THEODORE E. SCHEIDE ("Decedent") , and did sign as a witness on that Last Will. I can further attest that the Decedent signed and executed the instrument as his Last Will on October 2, 2012, and that he signed it willingly, and that he executed it as his free and voluntary act for the purposes therein expressed and to the best of my knowledge the Decedent was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

I further attest that the Decedent signed and executed the Last Will dated October 2, 2012 in the presence of myself and Diane DeWalt, and we both subscribed the Attestation to the Last Will in the presence of the Decedent.

I further attest that the Decedent contacted me as his estate planning counsel to

discuss changes in his wishes expressed in his previous Last Will and Testament dated June 8, 2012, which I had drafted as the attorney for the Decedent and was the Decedent's regular course of action when he wanted to change the wishes expressed in his prior estate planning documents. Specifically, the Decedent wanted to remove the nomination of KAREN HOAGLAND as the Executor under Article Five of the Last Will and Testament dated June 8, 2012, and instead appoint PATRICIA BOWLIN as the Executor.

I further attest that in discussing the preparation of Last Will dated October 2, 2012, the Decedent did not express any desire to change the disposition of his residuary estate which was then designated to VELMA G. SHAY, if living, otherwise to ST. JUDE CHILDREN'S RESEARCH HOSPITAL.

I further attest that I remained in contact with the Decedent after he executed his Last Will dated October 2, 2012, as his health and mental condition declined afterward, and

I further attest that I continued to represent and advise the Decedent as his estate planning counsel until NEVADA GUARDIAN SERVICES, LLC was appointed his temporary guardian on February 18, 2014 and his general guardian over his person and estate on March 19, 2014.

I can further attest that at no time after executing his Last Will dated October 2, 2012, did the Decedent express to me any intention to change the disposition of his residuary estate which was then designated to VELMA G. SHAY, if living, otherwise to ST. JUDE CHILDREN'S RESEARCH HOSPITAL.

I further attest that, to my knowledge, the Decedent did not intentionally destroy or revoke the Last Will dated October 2, 2012, and that to the best of my knowledge this was the Decedent's Last Will and Testament. I can further attest that, to the best of my knowledge, the Last Will dated October 2, 2012, was in existence at the death of the Decedent.

I further attest that, after the death of the Decedent, I was contacted by NEVADA GUARDIAN SERVICES, LLC or its counsel and asked if I had the original of

Last Will dated October 2, 2012. I informed NEVADA GUARDIAN SERVICES, LLC or its counsel that the Decedent chose to retain the original executed Last Will dated October 2, 2012, but that I had the original of the Decedent's Last Will and Testament dated June 8, 2012, which differed only in the nomination of the Executor. I was not asked for the original of the Decedent's Last Will and Testament dated June 8, 2012, nor was I contacted by NEVADA GUARDIAN SERVICES, LLC or its counsel regarding the Decedent's estate to provide an affidavit of lost will pursuant to NRS 136.240(4) regarding the Last Will dated October 2, 2012.

DATED this September 7, 2016.

KRISTIN M. TYLER

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Subscribed and Sworn to before me this 7th day of September, 2016.

Notary Public

CAROLINE TOFANELLI
Notary Public-State of Nevada
APPT. NO. 15-2302-1
My App. Expires July 07, 2019

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 3

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT
FAMILY DIVISION
FAMILY COURT & SERVICES CENTER
601 N. PECOS ROAD
LAS VEGAS, NEVADA 89101

Steven D. Grierson
Clerk of the Court

Kristina O'Conner
Court Division Administrator

5/20/2016

Case No.: W-16-010344

Filing of the Will of:
Theodore Scheide

Last Will and Testament of Theodore E. Scheide received by the Clerk of the Court

Submitted by:

Garman Turner Gordon

Signature of submitting party:

Valentina Ortega, Deputy Clerk of the Court

W-16-010344

Electronically Filed
05/20/2016
CLERK OF THE COURT

Last Will and Testament of THEODORE E. SCHEIDE

I, THEODORE E. SCHEIDE, a resident of Clark County, Nevada, being of sound mind and disposing memory, hereby revoke any prior wills and codicils made by me and declare this to be my Last Will and Testament.

Article One
Family Information

I am unmarried.

I have one child, THEODORE E. SCHEIDE, III.

However, I am specifically disinheriting THEODORE E. SCHEIDE, III and his descendants. Therefore, for the purposes of my Will, THEODORE E. SCHEIDE, III and his descendants will be deemed to have predeceased me.

Article Two
Specific and General Gifts

Section 2.01 Disposition of Tangible Personal Property

I give all my tangible personal property, together with any insurance policies covering the property and any claims under those policies in accordance with a "Memorandum for Distribution of Personal Property" or other similar writing directing the disposition of the property. Any writing prepared according to this provision must be dated and signed by me.

If I leave multiple written memoranda that conflict as to the disposition of any item of tangible personal property, the memorandum with the most recent date will control as to those items that are in conflict.

If the memorandum with the most recent date conflicts with a provision of this Will as to the specific distribution of any item of tangible personal property, the provisions of the memorandum with the most recent date control as to those items that are in conflict.

I intend that the writing qualify to distribute my tangible personal property under applicable state law.

Section 2.02 Contingent Distribution of Tangible Personal Property

Any tangible personal property not disposed of by a written memorandum, or if I choose not to leave a written memorandum, all my tangible personal property will be distributed as part of my residuary estate.

Section 2.03 Definition of Tangible Personal Property

For purposes of this Article, the term "tangible personal property" includes but is not limited to my household furnishings, appliances and fixtures, works of art, motor vehicles, pictures, collectibles, personal wearing apparel and jewelry, books, sporting goods, and hobby paraphernalia. The term does not include any tangible property that my Executor, in its sole and absolute discretion, determines to be part of any business or business interest that I own at my death.

Section 2.04 Ademption

If property to be distributed under this Article becomes part of my probate estate in any manner after my death, then the gift will not adeem simply because it was not a part of my probate estate at my death. My Executor will distribute the property as a specific gift in accordance with this Article. But if property to be distributed under this Article is not part of my probate estate at my death and does not subsequently become part of my probate estate, then the specific gift made in this Article is null and void, without any legal or binding effect.

Section 2.05 Incidental Expenses and Encumbrances

Until property distributed in accordance with this Article is delivered to the appropriate beneficiary or to the beneficiary's legal representative, my Executor will pay the reasonable expenses of securing, storing, insuring, packing, transporting, and otherwise caring for the property as an administration expense. Except as otherwise provided in my Will, my Executor will distribute property under this Article subject to all liens, security interests, and other encumbrances on the property.

Article Three
My Residuary Estate

Section 3.01 Definition of My Residuary Estate

All the remainder of my estate, including property referred to above that is not effectively disposed of, will be referred to in my Will as my "residuary estate."

Section 3.02 Disposition of My Residuary Estate

I give my residuary estate to VELMA G. SHAY, if she survives me.

If VELMA G. SHAY predeceases me, then I give my residuary estate to ST. JUDE CHILDREN'S HOSPITAL located in Memphis, Tennessee.

Article Four
Remote Contingent Distribution

If, at any time after my death, there is no person or entity then qualified to receive final distribution of my estate or any part of it under the foregoing provisions of my Will, then the portion of my estate with respect to which the failure of qualified recipients has occurred shall be distributed to those persons who would inherit it had I then died intestate owning the property, as determined and in the proportions provided by the laws of Nevada then in effect (other than THEODORE E. SCHEIDE, III and his descendants).

Article Five
Designation of Executor

Section 5.01 Executor

I name KAREN HOAGLAND as my Executor. If KAREN HOAGLAND fails or ceases to act as my Executor, I name NEVADA STATE BANK as my Executor.

Section 5.02 Guardian for Testator

If I should become mentally incompetent to handle my affairs prior to my demise, I request that KAREN HOAGLAND be appointed guardian of my estate and my person, to serve without bond. In the event that she is unable or unwilling to serve, then I request that a representative from NEVADA STATE BANK be appointed guardian of my estate and my person, to serve without bond.

Article Six
General Administrative Provisions

~~The provisions of this Article apply to my probate estate.~~

Section 6.01 No Bond

No Fiduciary is required to furnish any bond for the faithful performance of the Fiduciary's duties, unless required by a court of competent jurisdiction and only if the court finds that a bond is needed to protect the interests of the beneficiaries. No surety is required on any bond required by any law or rule of court, unless the court specifies that a surety is necessary.

Section 6.02 Distributions to Incapacitated Persons and Persons Under Twenty-One Years of Age

If my Executor is directed to distribute any share of my probate estate to any beneficiary who is under the age of 21 years or is in the opinion of my Executor, under any form of incapacity that renders such beneficiary unable to administer distributions properly when the distribution is to be made, my Executor may, as Trustee, in my Executor's discretion, continue to hold such beneficiary's share as a separate trust until the beneficiary reaches the age of 21 or overcomes the incapacity. My Executor shall then distribute such beneficiary's trust to him or her.

While any trust is being held under this Section, my Independent Trustee may pay to the beneficiary for whom the trust is held such amounts of the net income and principal as the Trustee determines to be necessary or advisable for any purpose. If there is no Independent Trustee, my Trustee shall pay to the beneficiary for whom the trust is held such amounts of the net income and

principal as the fiduciary determines to be necessary or advisable for the beneficiary's health, education, maintenance or support.

Upon the death of the beneficiary, my Trustee shall distribute any remaining property in the trust, including any accrued and undistributed income, to such persons as such beneficiary appoints by his or her Will. This general power may be exercised in favor of the beneficiary, the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate. To the extent this general power of appointment is not exercised, on the death of the beneficiary, the trust property is to be distributed to the beneficiary's then living descendants, *per stirpes*, or, if none, *per stirpes* to the living descendants of the beneficiary's nearest lineal ancestor who was a descendant of mine, or if no such descendant is then living, to my then living descendants, *per stirpes*. If I have no then living descendants the property is to be distributed under the provisions of Article Four entitled "Remote Contingent Distribution."

Section 6.03 Maximum Term for Trusts

Notwithstanding any other provision of my Will to the contrary, unless terminated earlier under other provisions of my Will, each trust created under my Will will terminate 21 years after the last to die of the descendants of my maternal and paternal grandparents who are living at the time of my death.

At that time, the remaining trust property will vest in and be distributed to the persons entitled to receive mandatory distributions of net income of the trust and in the same proportions. If no beneficiary is entitled to mandatory distributions of net income, the remaining trust property will vest in and be distributed to the beneficiaries entitled to receive discretionary distributions of net income of the trust, in equal shares *per stirpes*.

Section 6.04 Representative of a Beneficiary

The guardian of the person of a beneficiary may act for such beneficiary for all purposes under my Will or may receive information on behalf of such beneficiary.

Section 6.05 Ancillary Administration

In the event ancillary administration is required or desired and my domiciliary Executor is unable or unwilling to act as an ancillary fiduciary, my domiciliary Executor will have the power to designate, compensate, and remove the ancillary fiduciary. The ancillary fiduciary may be either a natural person or a

corporation. My domiciliary Executor may delegate to such ancillary fiduciary such powers granted to my original Executor as my Executor may deem proper, including the right to serve without bond or surety on bond. The net proceeds of the ancillary estate are to be paid over to the domiciliary Executor.

Section 6.06 Delegation of Authority; Power of Attorney

Any Fiduciary may, by an instrument in writing, delegate to any other Fiduciary the right to exercise any power, including a discretionary power, granted the Fiduciary in my Will. During the time a delegation under this Section is in effect, the Fiduciary to whom the delegation was made may exercise the power to the same extent as if the delegating Fiduciary had personally joined in the exercise of the power. The delegating Fiduciary may revoke the delegation at any time by giving written notice to the Fiduciary to whom the power was delegated.

The Fiduciary may execute and deliver a revocable or irrevocable power of attorney appointing any individual or corporation to transact any and all business on behalf of the trust. The power of attorney may grant to the attorney-in-fact all of the rights, powers, and discretion that the Fiduciary could have exercised.

Section 6.07 Merger of Corporate Fiduciary

If any corporate fiduciary acting as my Fiduciary under my Will is merged with or transfers substantially all of its trust assets to another corporation or if a corporate fiduciary changes its name, the successor shall automatically succeed to the position of my Fiduciary as if originally named my Fiduciary. No document of acceptance of the position of my Fiduciary shall be required.

Article Seven
Powers of My Fiduciaries

Section 7.01 Fiduciaries' Powers Act

My Fiduciaries may, without prior authority from any court, exercise all powers conferred by my Will or by common law or by Nevada Revised Statutes or other statute of the State of Nevada or any other jurisdiction whose law applies to my Will. My Executor has absolute discretion in exercising these powers. Except as

specifically limited by my Will, these powers extend to all property held by my fiduciaries until the actual distribution of the property.

Section 7.02 Powers Granted by State Law

In addition to all of the above powers, my Executor may, without prior authority from any court, exercise all powers conferred by my Will; by common law; by the laws of the State of Nevada, including, without limitation by reason of this enumeration, each and every power enumerated in NRS 163.265 to 163.410, inclusive; or any other jurisdiction whose law applies to my Will. My Executor has absolute discretion in exercising these powers. Except as specifically limited by my Will, these powers extend to all property held by my fiduciaries until the actual distribution of the property.

Section 7.03 Alternative Distribution Methods

My Fiduciary may make any payment provided for under my Will as follows:

Directly to the beneficiary;

In any form allowed by applicable state law for gifts or transfers to minors or persons under a disability;

To the beneficiary's guardian, conservator, agent under a durable power of attorney or caregiver for the benefit of the beneficiary; or

By direct payment of the beneficiary's expenses, made in a manner consistent with the proper exercise of the fiduciary's duties hereunder. A receipt by the recipient for any such distribution fully discharges my Fiduciary.

Article Eight
Provisions for Payment of Debts, Expenses and Taxes

Section 8.01 Payment of Debts and Expenses

I direct that all my legally enforceable debts, secured and unsecured, be paid as soon as practicable after my death.

Section 8.02 No Apportionment

Except as otherwise provided in this Article or elsewhere in my will, my Executor shall provide for payment of all estate, inheritance and succession taxes payable by reason of my death ("death taxes") from my residuary estate as an administrative expense without apportionment and will not seek contribution toward or recovery of any death tax payments from any individual.

For the purposes of this Article, however, the term "death taxes" does not include any additional estate tax imposed by Section 2031(c)(5)(C), Section 2032A(c) or Section 2057(f) of the Internal Revenue Code or any other comparable taxes imposed by any other taxing authority. Nor does the term include any generation-skipping transfer tax, other than a direct skip.

Section 8.03 Protection of Exempt Property

Death taxes are not to be allocated to or paid from any assets that are not included in my gross estate for federal estate tax purposes. In addition, to the extent practicable, my Trustee should not pay any death taxes from assets that are exempt for generation-skipping transfer tax purposes.

Section 8.04 Protection of the Charitable Deduction

Death taxes are not to be allocated to or paid from any assets passing to any organization that qualifies for the federal estate tax charitable deduction, or from any assets passing to a split-interest charitable trust, unless my Executor has first used all other assets available to my Executor to pay the taxes.

Section 8.05 Property Passing Outside of My Will

Death taxes imposed with respect to property included in my gross estate for purposes of computing the tax and passing other than by my Will are to be apportioned among the persons and entities benefited in the proportion that the taxable value of the property or interest bears to the total taxable value of the property and interests received by all persons benefited. The values to be used for the apportionment are the values as finally determined under federal, state, or local law as the case may be.

Section 8.06 No Apportionment Between Current and Future Interests

No interest in income and no estate for years or for life or other temporary interest in any property or trust is to be subject to apportionment as between the

temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder are chargeable against the corpus of the property or trust subject to the temporary interest and remainder.

Section 8.07 Tax Elections

In exercising any permitted elections regarding taxes, my fiduciaries may make any decisions that they deem to be appropriate in any circumstances, and my fiduciaries are not required to make any compensatory adjustment as a consequence of any election. My Executor may also pay taxes or interest and deal with any tax refunds, interest, or credits as my Executor deems to be necessary or advisable in the interest of my estate.

My Executor, in his or her sole and absolute discretion, may make any adjustments to the basis of my assets authorized by law, including but not limited to increasing the basis of any property included in my gross estate, whether or not passing under my Will, by allocating any amount by which the basis of my assets may be increased. My Executor is not required to allocate basis increase exclusively, primarily or at all to assets passing under my Will as opposed to other property included in my gross estate. My Executor may elect, in his or her sole and absolute discretion, to allocate basis increase to one or more assets that my Executor receives or in which my Executor has a personal interest, to the partial or total exclusion of other assets with respect to which such allocation could be made. My Executor may not be held liable to any person for the exercise of his or her discretion under this Section.

Article Nine
Definitions and General Provisions

Section 9.01 Cremation Instructions

I wish that my remains be cremated and buried in accordance with my pre-paid funeral arrangements with Palm Mortuary in Las Vegas, Nevada.

Section 9.02 Definitions

For purposes of my Will and for the purposes of any trust established under my Will, the following definitions apply:

(a) **Adopted and Afterborn Persons**

A legally adopted person in any generation and his or her descendants, including adopted descendants, will have the same rights and will be treated in the same manner under my Will as natural children of the adopting parent, provided the person is legally adopted before attaining the age of 18 years. A person will be deemed to be legally adopted if the adoption was legal in the jurisdiction in which it occurred at the time that it occurred.

A fetus *in utero* that is later born alive will be considered a person in being during the period of gestation.

(b) **Descendants**

The term "descendants" means any one or more person who follows in direct descent (as opposed to collateral descent) from a person, such as a person's children, grandchildren, or other descended individuals of any generation.

(c) **Fiduciary**

"Fiduciary" or "Fiduciaries" refer to my Executor. My "Executor" includes any executor, ancillary executor, administrator, or ancillary administrator, whether local or foreign, and whether of all or part of my estate, multiple Executors, and their successors.

Except as otherwise provided in this Last Will and Testament, a fiduciary has no liability to any party for action (or inaction) taken in good faith.

(d) **Good Faith**

For the purposes of this Last Will and Testament, a fiduciary has acted in good faith if (i) its action or inaction is not a result of intentional wrongdoing, (ii) the fiduciary did not make the decision with reckless indifference to the interests of the beneficiaries, and (iii) its action or inaction does not result in an improper personal pecuniary benefit to the fiduciary.

(e) **Incapacity**

Except as otherwise provided in my Will, a person is deemed to be incapacitated in any of the following circumstances.

(1) **The Opinion of Two Licensed Physicians**

An individual is deemed to be incapacitated whenever, in the opinion of two licensed physicians, the individual is unable to effectively manage his or her property or financial affairs, whether as a result of age, illness, use of prescription medications, drugs or other substances, or any other cause.

An individual is deemed to be restored to capacity whenever the individual's personal or attending physician provides a written opinion that the individual is able to effectively manage his or her property and financial affairs.

(2) **Court Determination**

An individual is deemed to be incapacitated if a court of competent jurisdiction has declared the individual to be disabled, incompetent or legally incapacitated.

(3) **Detention, Disappearance or Absence**

An individual is deemed to be incapacitated whenever he or she cannot effectively manage his or her property or financial affairs due to the individual's unexplained disappearance or absence for more than 30 days, or whenever he or she is detained under duress.

An individual's disappearance, absence or detention under duress may be established by an affidavit of any fiduciary. The affidavit must describe the circumstances of an individual's detention under duress, disappearance, or absence and may be relied upon by any third party dealing in good faith with my fiduciary in reliance upon the affidavit.

An individual's disappearance, absence, or detention under duress may be established by an affidavit of my Executor.

(f) Internal Revenue Code

References to the "Internal Revenue Code" or to its provisions are to the Internal Revenue Code of 1986, as amended from time to time, and the corresponding Treasury Regulations, if any. References to the "Treasury Regulations," are to the Treasury Regulations under the Internal Revenue Code in effect from time to time. If a particular provision of the Internal Revenue Code is renumbered, or the Internal Revenue Code is superseded by a subsequent federal tax law, any reference will be deemed to be made to the renumbered provision or to the corresponding provision of the subsequent law, unless to do so would clearly be contrary to my intent as expressed in my Will. The same rule applies to references to the Treasury Regulations.

(g) Legal Representative

As used in my Will, the term "legal representative" means a person's guardian, conservator, personal representative, executor, administrator, Trustee, or any other person or entity personally representing a person or the person's estate.

(h) Per Stirpes

Whenever a distribution is to be made to a person's descendants *per stirpes*, the distribution will be divided into as many equal shares as there are then-living children of that person and deceased children of that person who left then-living descendants. Each then-living child will receive one share and the share of each deceased child will be divided among the deceased child's then-living descendants in the same manner.

(i) Primary Beneficiary

The Primary Beneficiary of a trust created under this agreement is the oldest Income Beneficiary of that trust unless some other individual is specifically designated as the Primary Beneficiary of that separate trust.

(j) Shall and May

Unless otherwise specifically provided in my Will or by the context in which used, I use the word "shall" in my Will to command, direct or require, and the word "may" to allow or permit, but not

require. In the context of my Trustee, when I use the word "may" I intend that my Trustee may act in its sole and absolute discretion unless otherwise stated in my Will.

(k) Trust

The term "trust," refers to any trusts created under the terms of my Will.

(l) Trustee

The term "my Trustee" refers to any person or entity that is from time to time acting as the Trustee and includes each Trustee individually, multiple Trustees, and their successors.

(m) Other Definitions

Except as otherwise provided in my Will, terms shall be as defined in Nevada Revised Statutes as amended after the date of my Will and after my death.

Section 9.03 Contest Provision

If any beneficiary of my Will or any trust created under the terms of my Will, alone or in conjunction with any other person engages in any of the following actions, the right of the beneficiary to take any interest given to the beneficiary under my Will or any trust created under the terms of my Will will be determined as it would have been determined as if the beneficiary predeceased me without leaving any surviving descendants.

Contests by a claim of undue influence, fraud, menace, duress, or lack of testamentary capacity, or otherwise objects in any court to the validity of (a) my Will, (b) any trust created under the terms of my Will, or (c) any beneficiary designation of an annuity, retirement plan, IRA, Keogh, pension or profit sharing plan, or insurance policy signed by me, (collectively referred to hereafter in this Section as "Document" or "Documents") or any amendments or codicils to any Document;

Seeks to obtain an adjudication in any court proceeding that a Document or any of its provisions is void, or otherwise seeks to void, nullify, or set aside a Document or any of its provisions;

Files suit on a creditor's claim filed in a probate of my estate, against my estate, or any other Document, after rejection or lack of action by the respective fiduciary;

Files a petition or other pleading to change the character (community, separate, joint tenancy, partnership, domestic partnership, real or personal, tangible or intangible) of property already so characterized by a Document;

Files a petition to impose a constructive trust or resulting trust on any assets of my estate; or

Participates in any of the above actions in a manner adverse to my estate, such as conspiring with or assisting any person who takes any of the above actions.

My Executor may defend, at the expense of my estate, any violation of this Section. A "contest" includes any action described above in an arbitration proceeding, but does not include any action described above solely in a mediation not preceded by a filing of a contest with a court.

Section 9.04 Survivorship Presumption

If any beneficiary is living at my death, but dies within 90 days thereafter, then the beneficiary will be deemed to have predeceased me for all purposes of my Will.

Section 9.05 General Provisions

The following general provisions and rules of construction apply to my Will:

(a) **Singular and Plural; Gender**

Unless the context requires otherwise, words denoting the singular may be construed as plural and words of the plural may be construed as denoting the singular. Words of one gender may be construed as denoting another gender as is appropriate within the context. The word "or" when used in a list of more than two items may function as both a conjunction and a disjunction as the context requires or permits.

(b) **Headings of Articles, Sections, and Subsections**

The headings of Articles, Sections, and subsections used within my Will are included solely for the convenience and reference of the reader. They have no significance in the interpretation or construction of my Will.

(c) **Governing State Law**

My Will shall be governed, construed and administered according to the laws of Nevada as from time to time amended. Questions of administration of any trust established under my Will are to be determined by the laws of the situs of administration of that trust.

(d) **Notices**

Unless otherwise stated, whenever my Will calls for notice, the notice will be in writing and will be personally delivered with proof of delivery, or mailed postage prepaid by certified mail, return receipt requested, to the last known address of the party requiring notice. Notice will be effective on the date personally delivered or on the date of the return receipt. If a party giving notice does not receive the return receipt but has proof that he or she mailed the notice, notice will be effective on the date it would normally have been received via certified mail. If notice is required to be given to a minor or incapacitated individual, notice will be given to the parent or legal representative of the minor or incapacitated individual.

(e) **Severability**

The invalidity or unenforceability of any provision of my Will does not affect the validity or enforceability of any other provision of my Will. If a court of competent jurisdiction determines that any provision is invalid, the remaining provisions of my Will are to be interpreted and construed as if any invalid provision had never been included in my Will.

REST OF PAGE INTENTIONALLY LEFT BLANK

I, THEODORE E. SCHEIDE, sign my name to this instrument consisting of sixteen (16) pages on June 8, 2012, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my Last Will and Testament, that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

THEODORE E. SCHEIDE, Testator

Under penalty of perjury pursuant to the law of the State of Nevada, the undersigned, Kristin M. Tyler and DIANE L. DeWALT, declare that the following is true of their own knowledge: That they witnessed the execution of the foregoing will of the testator, THEODORE E. SCHEIDE; that the testator subscribed the will and declared it to be his last will and testament in their presence; that they thereafter subscribed the will as witnesses in the presence of the testator and in the presence of each other and at the request of the testator; and that the testator at the time of the execution of the will appeared to them to be of full age and of sound mind and memory.

Dated this 8 day of June, 2012.

Declarant 1

Diane L. DeWalt
Declarant 2

Residing at:
541 Sierra Morena St
Las Vegas, NV 89144

Residing at:
8209 Jo Marcy Drive
Las Vegas, NV 89131

MAY 20 2016

CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE DOCUMENT ON FILE

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 4

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

AFF
Todd L. Moody (5430)
Russel J. Geist (9030)
HUTCHISON & STEFFEN, LLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
(702) 385-2500
(702) 385-2086
rgeist@hutchlegal.com

Attorneys for St. Jude Children's Research Hospital

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of THEODORE E. SCHEIDE JR. aka THEODORE ERNEST SCHEIDE JR., Deceased.	Case No.: P-14-082619-E Dept No.: PCI

AFFIDAVIT OF PROOF OF LOST WILL

I, DIANE L. DeWALT, being first duly sworn, do hereby declare to the undersigned authority that I was a Witness to the Last Will and Testament dated October 2, 2012 ("Last Will") of THEODORE E. SCHEIDE, JR., also sometimes known as THEODORE E. SCHEIDE ("Decedent") , and did sign as a witness on that Last Will. I can further attest that the Decedent signed and executed the instrument as his Last Will on October 2, 2012, and that he signed it willingly, and that he executed it as his free and voluntary act for the purposes therein expressed and to the best of my knowledge the Decedent was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

I further attest that the Decedent signed and executed the Last Will dated October 2, 2012 in the presence of myself and THEODORE E. SCHEIDE, and we both subscribed the Attestation to the Last Will in the presence of the Decedent.

I further attest that, to my knowledge, the Decedent did not intentionally destroy or revoke the Last Will, dated October 2, 2012, and that to the best of my knowledge this was the Decedent's Last Will and Testament.

DATED this July 26, 2016.

Diane L. DeWalt
DIANE L. DeWALT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Subscribed and Sworn to before me this 26 day of July, 2016.

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
AMBER R. ANDERSON
Appt. No. 05-95684-1
My Appt. Expires March 23,2017

Notary Public

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

Electronically Filed
10/04/2016 02:34:38 PM

CLERK OF THE COURT

OBJ
CARY COLT PAYNE, ESQ.
Nevada Bar No. 4357
CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
(702) 383-9010
carycoltpaynechtd@yahoo.com
Attorney for Theorore E. Scheide III

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Estate of THEODORE E. SCHEIDE JR. a/k/a THEODORE ERNEST SCHEIDE JR. Deceased.	Case No.: P-14-082619-E Dept. No.: 26 Date: 10 /12/16 Time: 9:30 AM

OBJECTION TO PETITION FOR PROOF OF LOST WILL (NRS 136.240), ISSUANCE OF LETTERS TESTMENTARY, ETC.

COUNTERPETITION (RESPONSE TO OBJECTION) TO DISTRIBUTE INTESTATE ESTATE

COMES NOW, Theodore E. Scheide III, son of the decedent, by and through his attorney, CARY COLT PAYNE, ESQ., of the lawfirm of CARY COLT PAYNE, CHTD., and hereby Objects to the Petition to Admit "Lost" Last Will, pursuant to NRS 136.240, and Counterpetition/Response to Distribute Intestate Estate, Etc.

FACTUAL BACKGROUND

This court has already entered orders in this matter that infers the decedent died intestate (**Exhibit "A"**). The relevant pertinent facts are as in the table below:

DATE	*EVENT/NOTES*
6/8/2012	Theodore Schiede executes (first) Last Will on June 8, 2012. The beneficiary was his long time companion, Velma Shay. St. Jude's was a mere contingent beneficiary.
10/2/2012	Theodore Schiede executes (second) Last Will, revoking all prior wills on October 2, 2012, naming new fiduciaries, etc.-takes the original with him.

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

1/31/2013	Velma Shay dies (main beneficiary)
2/13/2014	Susan Hoy commences guardianship proceedings, marshalls all of Mr. Scheide's important papers, etc.
8/17/2014	Theodore Schiede died (almost two years after signing Oct 2012 will)
10/2/2014	Susan Hoy petitions (verified) for appointment as special administrator- asserts that per estate planning attorney, decedent took original Last Will (Oct. 2012-second will)
1/29/15	Susan Hoy petitions (verified) for appointment as administrator, asserts that after a due search (safe deposit box, bag, etc.), the last Will was dated 10/2/12, but original cannot be found. Matter taken off calendar (see 5/22/15 entry)
5/6/2015	Susan Hoy Petitions (verified) for Instructions – stating drafting attorney gave original 10/2/12 will to decedent. Hoy asserts the decedent destroyed the original 10/2/12 (second) Last Will, seeks intestate proceeding.
5/22/15	COURT HEARING: - PETITION FOR INSTRUCTIONS COMMISSIONER STATED ***this matter had been left open to see if anyone came forward to produce a will*** or indicated they wanted to pursue it, but nothing came forward. ***Further, it was the opinion of the Personal Representative that the will had been destroyed. Mr. VanAlstyne stated that is correct and confirmed this will is to proceed based upon the basis of an intestate situation.*** COMMISSIONER RECOMMENDED, Petition GRANTED. The signed Order was provided to Mr. VanAlstyne. [Emphasis added] Minutes as **(Minutes--EXHIBIT "B")**
3/28/16	Inventory filed
5/18/16	First and Final Account, Report, Intestate Distribution, etc. filed by estate
5/20/16	Revoked prior June 8, 2012 (first) Last Will lodged with court by Kristin Tyler, Esq.
5/25/16	Petition to Admit revoked June 2012 (first) Last Will filed- thereafter withdrawn (7/13/16)
8/29/16	First and Final Account, Report, Intestate Distribution, etc. filed by estate 5/18/16 renoticed for hearing
9/13/16	Almost 2 years after the commencement of the probate matter, St. Jude's secures an Affidavit from Kristen Tyler, Esq., and files a Petition to Probate Lost Will.

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

POINTS & AUTHORITIES

A. The Petition Fails to Meet the Statutory Requirement for a "Lost Will"- and two witnesses

The law is clear. St. Jude's petition fails to state a claim upon which relief may be granted. St. Jude's has failed to meet their statutory burden, and requirements of NRS 136.240(3), which states:

> **NRS 136.240 Petition for probate; same requirement of proof as other wills; testimony of witnesses; rebuttable presumption concerning certain wills; prima facie showing that will was not revoked; order.**
>
> 3. In addition, no will may be proved as a lost or destroyed will ***unless it is proved to have been in existence at the death*** of the person whose will it is claimed to be, or is shown to have been fraudulently destroyed in the lifetime of that person, nor unless its provisions are clearly and distinctly proved by at least **two credible witnesses.** [emphasis added]

Also see Howard Hughes Medical Institute v. Gavin, 96 Nev. 905, 621 P.2d 489 (Nev., 1980), the Nevada Supreme Court held that: (1) neither declarations made by decedent or others with personal knowledge of alleged will could be substituted for second credible witness, and (2) institute failed to provide evidence sufficient to support its petition to probate lost will.

The Nevada Supreme Court recognizes that "at common law, when an executed will could not be found after the death of a testator, there was a strong presumption that it was revoked by destruction by the testator", Estate of Irvine v. Doyle, 101 Nev. 698, 710 P.2d 1366 (Nev., 1985). In other words, all that NRS136. 240(3) requires is proof that the testator himself had not revoked the lost or destroyed will, proof that would overcome the common-law presumption of revocation.

The law in this area could not be any clearer, i.e., when an executed will cannot be found after the death of a testator, there is a **strong** presumption that it was revoked by destruction by the testator.

NRS 136.240(3) codifies the common law rule and places the burden of overcoming the presumption on the proponent of a lost or destroyed will to prove it was fraudulently destroyed, and to require the proponent of a lost or destroyed will to prove that the testator did not revoke the lost or destroyed will during his lifetime. See e.g., *Irvine v. Doyle*, 101 Nev. 698, 710 P.2d 1366 (1985).

The fact that the Kristen Tyler, Esq. retained a different (revoked) will has no effect on the presumption of revocation of a later will. The presumption is "applicable in earlier cases where two or more duplicate copies of a will are executed with the required formalities and one executed copy is retained by the testator, but cannot be found after his or her death." (citation omitted)

The (second) October 2012 Will was witnessed by Kristen Tyler, Esq. and Diane DeWalt, both of which have proffered affidavits. However, Ms. Dewalt can only attest to the witnessing said document in October 2012. Kristin Tyler, Esq.'s affidavit states nothing about the will being lost or fraudulently destroyed. Neither have any independent knowledge of what may or may not have happened after Mr. Scheide left the building with the original Last Will. The affidavits state no factual basis that the October 2012 (second) Will was still in "existence", legal or otherwise, at the time of decedent's death. They have no personal knowledge or proof whatsoever – they never saw the document after the decedent took it with him on October 2, 2012.

They have no knowledge of any subsequent events of the decedent not intentionally destroying the document. To the contrary the death of the object of the Will, could very possibly make the document not in existence (legal or otherwise) at the time of decedent's death.

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

St. Jude's has not proffered any evidence whatsoever that the original October 2012 was either "lost" or "destroyed" by accident or fraud, etc. The administrator of the estate has signed verified petitions to the contrary (Pertinent pages as **Exhibits "C" and "D"**). The assertions contained in the pleadings on the record herein and the assertions of counsel at the May 22, 2015 hearing, on the record, clearly confirm that the October 2012 Last Will was, in fact, intentionally destroyed by Mr. Scheide. Everyone knew that Mr. Scheide kept his important papers in a specific bag. In fact, it makes sense in that the natural object of the wills (Velma Shay) had predeceased on January 13, 2013.

St. Jude's cannot meet any of its burdens of proof (clear and convincing) that the October 2012 was in existence (legal or otherwise) at the time of the decedent's death, nor can they prove that there was destruction by fraud or accident not known to the testator/decedent. NRS 136.230 states:

> **NRS 136.230 Jurisdiction of court to take proof of execution and validity of lost or destroyed will.** If a will is lost by accident or destroyed by fraud ***without the knowledge of the testator***, the court may take proof of the execution and validity of the will and establish it, after notice is given to all persons, as prescribed for proof of wills in other cases. [emphasis added]

"The district court may admit a will to probate if it confirms to the requirements of law", See *Estate of Friedman*, 116 Nev. 684, 6 P.3d 473 (Nev. 2000).

It was already held, ordered, etc., on the record that the October 2012 Will, had, in fact, been "destroyed", and the court accepted same, ordering that the matter proceed intestate, due to the destroyed will.

The time for any motion for reconsideration, appeal, or even a motion under NRCP 60(b) as to these orders have long since passed.

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

B. New Information –Kristen Tyler, Esq. Affidavit, Etc.

The affidavit of Kristen Tyler, Esq.[1] is hearsay and possibly a product of a breach of attorney-client privileges. The Nevada Supreme Court has already held that the statements of an attorney do not qualify as under NRS 136.240 (See *HHMI*, supra AND *Johnson v State*, 92 Nev. 241, 548 P.2d 1362 (1976)). Notwithstanding, and upon information and belief, Ms. Tyler was advised that the estate was exercising it's privilege when informed that she was approached to provide an affidavit.

Nevertheless, what is not true is that Ms. Tyler maintained a "relationship" personally with the decedent, after guardianship was established. She was not even aware that the decedent and his son had, in fact, sought to rekindled their relationship. Had she remained in personal contact, she would have known this. Instead, Ms. Tyler has mentioned that she was not in her office due to personal concerns.

Kristen Tyler, Esq., can only attest that the last time she actually saw the original October 2012 Will was the day it was executed, and she gave the original to Mr. Scheide - nothing more.

Ms. Tyler advised that she had only spoken with the guardian at the commencement of the guardianship and when the decedent died. How is it that she only looked in her file (pursuant to her affidavit) at the time the First & Final Accounting/Petition was filed, when she was notified that the decedent had died almost a year earlier.

1 In violation of NRS 136.050.

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

Moreso, why wait almost two (2) years (5/20/16) to then lodge a will ((first) June 2012 Will) she knew had been revoked (by the October 2012 Will), since she authored both wills. An original will, by statute, is required to be lodged with the court within thirty days of death, pursuant to NRS 136.050, which reads:

> **NRS 136.050 Delivery of will after death; liability for nondelivery; record of will; inspection of records.**
>
> 1. Any person having possession of a will shall, within 30 days after knowledge of the death of the person who executed the will, deliver it to the clerk of the district court which has jurisdiction of the case or to the personal representative named in the will.
>
> 2. Any person named as personal representative in a will shall, within 30 days after the death of the testator, or within 30 days after knowledge of being named, present the will, if in possession of it, to the clerk of the court.
>
> 3. Every person who neglects to perform any of the duties required in subsections 1 and 2 without reasonable cause is liable to every person interested in the will for the damages the interested person may sustain by reason of the neglect.
>
> 4. A will that is delivered or presented pursuant to subsection 1 or 2 becomes part of the permanent record maintained by the clerk of the court, whether or not a petition for the probate of the will is filed.
>
> 5. A will that is part of the permanent record maintained by the clerk of the court becomes a court record open to inspection unless the will is sealed pursuant to Part VII of the Nevada Supreme Court Rules.

How is it that a seasoned estate planning attorney waits almost two years to "lodge" a [revoked] will.

C. Standing of St. Jude's to bring Petition

It should be noted that St. Jude's was a mere contingent beneficiary. As the June 2012 Will was revoked by the October 2012 Will, and the October 2012 Will was destroyed, it is questionable that St. Jude's even has standing to bring this latest petition.

St. Jude's, despite notice, did not object to the intestacy pleadings, hearings and/or order(s). The law states that there are two types of will contests. The first is before the will has been admitted to probate, and the second is called a post petition (after probate) will contest. NRS 137.080 states:

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

> **NRS 137.080 Persons qualified to contest will; filing of petition.** After a will has been admitted to probate, any interested person other than a party to a contest before probate or a person who had actual notice of the previous contest in time to have joined therein may, ***at any time within 3 months after the order is entered*** admitting the will to probate, contest the admission or the validity of the will. The contestant must file with the court in which the will was proved a petition containing the allegations of the contestant against the validity of the will or against the sufficiency of the proof, and requesting that the probate be revoked. [Emphasis added]

As the statute indicates, someone without notice only has three months to file. All potential interested parties had notice (**Exhibit "E"**). Finally NRS 137.120 states:

> **NRS 137.120 Period of limitation.** If no person contests the validity of a will or of the probate thereof, within the time specified in NRS 137.080, the probate of the will is conclusive.

The Probate Commissioner allowed for time after notice was given, on the issue of the production of the October 2012 Will, conversely, the issue of intestacy. No one came forward, including St. Jude's, despite their having notice.

The order to proceed in intestacy is a final order, not having been challenged in the time periods allotted by law. The order is binding on all parties who may have an interest, pursuant to NRS 155.140, which states:

> **NRS 155.140 General rules: Contents of pleading; effect of certain orders binding persons; notices; appointment of guardian ad litem or attorney; attorney's fees and costs.**
>
> (c) To the extent there is no conflict of interest between them or among persons represented:
>
> (4) An order binding a personal representative binds persons interested in the undistributed assets of the estate of a decedent in an action or proceeding by or against the estate.

D. Guardianship-"Changes" to Estate Plan/Revocation of Last Will

In 2014, a year and a half after the October 2012 Will was executed, a guardianship commenced. The key in opposition to St. Jude's argument as to guardianship is whether or not the guardian (at that time) wanted to effect a change in the

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

decedent's estate plan, on behalf of the decedent. (NRS Chapter 159) This would entail the execution of new documents, and arguably, requiring permission of the guardianship court.

It is Hornbook law that once a testator has created a valid will under Nevada law, the will remains subject to revocation. Without an expression of irrevocability, the testator may freely modify or revoke his or her will. See *Walleri v. Gorman*, 19 Nev. 488, 853 P.2d 714 (1993).

The decedent did not have to execute new documents to revoke the old document (See argument herein). Since there is no proof, this also presupposes that the October 2012 Will was not destroyed before the guardianship. NRS 133.120 provides for other means of revocation, which states:

> **NRS 133.120 Other means of revocation.**
> 1. A written will may only be revoked by:
> (a) Burning, tearing, cancelling or obliterating the will, with the intention of revoking it, by the testator, or by some person in the presence and at the direction of the testator; or
> (b) Another will or codicil in writing, executed as prescribed in this chapter.
> 2. This section does not prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.

The decedent, during his lifetime, while not executing another will or codicil, may still, despite any possible changes in his condition or circumstances, revoke any prior will by physically destroying (tearing up) the document. As the estate alleges, the decedent physically tore up or otherwise intentionally physically "obliterated" the October 2012 original will. That is sufficient for revocation. St. Jude's petition attempts to revive a revoked document, by using a copy of same, as they cannot prove the decedent's intent after October 2012, or that he did not change his mind, and simply revoke the October 2012 Will by destroying it.

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

Further, without the original October 2012 (second) Will, the true contents is unknown, as Mr. Scheide was free to write and make handwritten changes, etc., on the documents.

It is also possible that Mr. Scheide contacted different legal counsel who, for example, advised how to destroy the October 2012 Will. There is no way of knowing what the decedent had in mind after his long time companion died.

Any further inferences regarding the decedent's abilities are shadowed by the billing records of the guardian in the guardianship matter, wherein they note that the decedent was given money, went shopping, etc., in the last few months of his life. His medical condition is not an issue pursuant to NRS 133.120(2), *supra*. The fact he was under guardianship is meaningless to the instant issue.

It should be noted that in the instant petition (page 7, lines 24-27, ¶19) that St. Jude's wrongfully infers that the estate's petition filed May 25, 2016 sought to admit the October 2012 will. It did not - It sought to admit the revoked June 8, 2012 Will, and was withdrawn.

The presumption herein is that the decedent physically, intentionally destroyed the October 2012 original Will, as confirmed by the court. The decedent retained the original will after execution, kept it in his bag, which was always with him, even during the guardianship. There were assertions made in open court, on the record, that the original was destroyed.

It is St. Jude's burden to absolutely prove that the decedent did not knowingly destroy the October 2012 original Will, which cannot be proven through hearsay, opinion, belief – only admissible evidence. The only assertions proffered was the opinion of Kristen Tyler, Esq., that she "believed" the will was in existence at the time of the decedent's death, but has no proof of same. Again the last date she actually saw the

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

document was the day it was executed, almost two years prior to her affidavit. Unless an individual actually saw the original document at the time of the decedent's death, they cannot attest that it was in existence.

E. The June 2012 Will was Revoked as a Matter of Law

A will, once revoked is not capable of being revived without republication (NRS 133.130, *supra*). The October 2012 (second) Will specifically revoked all prior wills (page 1, line 2), which must include the June 2012 (first) Will. (NRS 133.120(1)(b), supra)

The Nevada Supreme Court has repeatedly held questions of statutory construction are reviewed de novo, "statutes governing the revocation of wills are strictly construed"; see *Estate of Prestie*, 122 Nev. 812, 138 P.3d 520 (courtesy copy attached).

St. Jude's Petition also seeks alternative relief, to wit: if the "lost will" premise fails, to then admit to probate the decedent's June 8, 2012 earlier will. This request violates NRS 133.120(1)(b), supra. See also, *Estate of Melton v Palm*, 128 Nev. Adv. Op. 4, 272 P.3d 668 (Nev. 2012)

In the Ex-Parte Petition for Appointment of Special Administrator (filed 10/2/14), the Petition for Appointment of Administrator (filed 1/29/15) and the Petition for Instructions (filed 5/6/15), the petitioner alleged that there was only a copy of a Last Will, executed by the decedent on October 2, 2012, and that after a search, including contact with the estate planning attorney, that the decedent took the original with him.

In the petition for instructions, the administrator (Susan Hoy) states that she found estate planning documents which the decedent destroyed, there was no original Last Will and this matter proceeded intestate.

At the hearing on the Petition for Instructions (5/22/15-see minutes) the personal representative and current petitioner believed that the original Last Will was destroyed, confirmed by counsel, and ordered by the court.

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

Suddenly, a year and a half after the initial allegations, and Orders of the court providing for this matter to proceed intestate, at the moment of a petition for final distribution, a petition to revive a "lost" Last Will is filed.

The record shows in petitioner's previous pleadings, that the estate planning attorney, Kristin Taylor, Esq., was attributed with the statements (multiple times) that Mr. Scheide took the originals with him at the time of execution. The decedent executed a will on June 8, 2012, only to return a few months later to have the June 2012 revoked and enter into a new Last Will executed in October 2012.

A totally new Last Will (not a codicil) was executed on October 2, 2012. This document clearly, in the first paragraph revokes all prior wills. Why the June 2012 original was not destroyed after the execution of the October 2012 will have to be explained by the estate planning attorney. See NRS 133.120, *supra*.

Susan Hoy has, under oath on multiple occasions stated that she believed the decedent tore up and/or otherwise destroyed the original October 2012 document. She as much admitted same to others. Her counsel has so stated to the court. The decedent's long time companion, Velma Shay had pre-deceased the decedent.

Nowhere in the copy of said October 2012 will does it specifically revive a prior Last Will, nor is there any other such writing by the decedent. As such, the June 2012 Last Will currently alternatively sought to be admitted to probate is a revoked document, and cannot be revived for the purposes of probate. See NRS 133.130, which states:

> **NRS 133.130 Effect of revocation of subsequent will.** If, after the making of any will, the testator executes a second will, the destruction, cancellation or revocation of the second will does not revive the first will, unless it appears by the terms of the revocation that it was the intention to revive and give effect to the first will, or unless, after the destruction, cancellation or revocation, the first will is re-executed.

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

The Administrator and counsel knew of the existence of the destroyed October 2012 will, as the attached copies of it to the initial pleadings.

The decedent's presumed act of revoking the October 2012 will clearly indicates his intent that any of the provisions of the destroyed will were no longer his ongoing intent.

Finally, what was not in the minutes of the May 22, 2015 hearing was the Probate Commissioner's statement that he held the matter open for the production of a valid Last Will, and that the time had passed, and that is where the minutes pick up and almost quote the hearing verbatim.

F. Counterpetition for Distribution

The First and Final Account, Report, Intestate Distribution, etc. filed by estate 5/18/16 renoticed for hearing, has yet to be decided and/or approved and should be calendared at the same time as the within petition.

It is requested that the within petition be denied in it's entirety, and that the matter proceed with the approval of the First and Final Account, Report, Intestate Distribution, etc., and order the intestate distribution of this estate.

CONCLUSION

The destruction of the October 2012 will by the decedent, as on record with the court, clearly indicated his intent of no longer desiring the intent of the document. St. Jude's theories under the "lost will" statute have not and cannot be proven.

The June 2012 will was revoked by operation of law by the execution of the October 2012 will, which did not contain any provision to revive the June 2012 will.

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

Finally, the court has, after allowing time for anyone to appear with a valid Will, entered previous multiple orders that the decedent died intestate, which have not been timely challenged (Motion to Reconsider, Appeal, NRCP 60(b)).

The petition should be denied/dismissed with prejudice, and the matter should immediately proceed to final intestate distribution.

Dated: October 7, 2016

CARY COLT PAYNE, ESQ.
Nevada Bar No. 4357
CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
(702) 383-9010
Attorney for Theorore E. Scheide III

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702.383.9010 • Fax 702.383.9049

DECLARATION OF THEODORE E. SCHEIDE, III

THEODORE E. SCHEIDE, III, hereby declares, pursuant to the laws of the State of Nevada (NRS 53.045), and pursuant to the penalties of perjury as follows:

1. That I am the adult son of the decedent, Theodore E. Scheide, Jr.

2. That Susan Hoy, during the course of the guardianship proceedings told me that she found a ripped up Last Will and Testament which my father had signed. I believe it to be the same Last Will alleged to herein as the one executed October 2, 2012.

3. That during the last year of his life, my father and I had sought to rekindle our relationship.

4. That I have read the foregoing Objection and know the contents thereof and that the same is true of my own knowledge except for those matters therein stated on information and belief and as to those matters I believe them to be true.

Dated: September 30, 2016.

THEODORE E. SCHEIDE, III,

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 4, 2016, a true and correct copy of the foregoing was served to the following at the their last known address(es), facsimile numbers and/or e-mail/other electronic means, pursuant to:

___ **BY MAIL:** N.R.C.P 5(b), I deposited for first class United States mailing, postage prepaid at Las Vegas, Nevada;

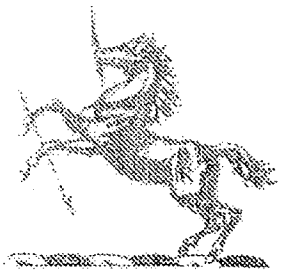
X **BY E-MAIL AND/OR ELECTRONIC MEANS:** Pursuant to Eighth Judicial District Court Administrative Order 14-2, Effective June 1, 2014, as identified in Rule 9 of the N.E.F.C.R. as having consented to electronic service, I served via e-mail or other electronic means (Wiznet) to the e-mail address(es) of the addressee(s).

KIM BOYER, ESQ.
10785 W. Twain Avenue, Suite 200
Las Vegas, NV 89135
Email: kimboyer@elderlawnv.com

Todd L. Moody, Esq.
Email: tmoodyt@hutchlegal.com
Russel J. Geist, Esq.
Email: rgeist@hutchlegal.com
HUTCHINSON & STEFFEN
Peccole Professional Park
10080 W. Alta Drive, Suite 200
Las Vegas, NB 89145

An employee of CARY COLT PAYNE, CHTD.

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049



CARY COLT PAYNE, CHTD.
Attorney at Law
700 S. Eighth Street • Las Vegas, Nevada 89101
(702) 383-9010 • Fax (702) 383-9049

EXHIBIT PAGE INTENTIONALLY LEFT BLANK

COURTESY COPIES

Page 489

621 P.2d 489
96 Nev. 905
HOWARD HUGHES MEDICAL INSTITUTE, Appellant,
v.
June GAVIN, Special Administratrix of the Estate of Annette Gano Lummis, Deceased, Respondent.
No. 12416.
Supreme Court of Nevada.
Dec. 29, 1980.

Fahrenkopf, Mortimer, Sourwine, Mousel & Sloane, Reno, Sherwin J. Markman and Joseph M. Hassett, Hogan & Hartson, Washington, D. C., for appellant.

[96 Nev. 906] Echeverria & Osborne, Chartered, Reno, Morse-Foley, Las Vegas, Andrews, Kurth, Campbell & Jones, Houston, Tex., for respondent.

Page 490

OPINION

BATJER, Justice:

Howard R. Hughes, Jr., died on April 5, 1976. To date, no will executed by Hughes has been found. The appellant, Howard Hughes Medical Institute (HHMI), seeks to establish the terms of a lost will leaving most of the Hughes estate to HHMI.

[96 Nev. 907] HHMI filed its petition to probate a lost or destroyed will of Howard Hughes on January 12, 1977. Respondent, the estate of one of Hughes' next-of-kin, contested the probate. Following extensive discovery and will-search activities, respondent moved for summary judgment, which was granted on February 1, 1980.

As grounds for reversal of the trial court's action, appellant claims:

(a) that alleged declarations of the testator may be considered testimony of one of the two credible witnesses required under NRS 136.240 to prove the contents of a lost will;

(b) that declarations of a deceased person who had personal knowledge of the contents of a lost will can also be considered as testimony of one credible witness required under NRS 136.240; and

(c) that summary judgment was improperly granted.

In this state, a will may not be proved as a lost or destroyed will unless it was in existence at the death of the testator and unless its provisions can be clearly and distinctly proved by at least two credible witnesses. [1]

The evidence in the record on appeal tends to show that Hughes may have executed a will in 1925, although only an unexecuted, unconformed draft has been found. There are also indications that other wills were drafted in 1930, 1938 and sometime during the 1940's. It is claimed that all alleged wills benefited medical research.

Only John T. Pettit, whose deposition was presented to the trial court, allegedly read a will signed by Hughes, which left all his estate to HHMI. The trial court, in granting respondent's motion for summary judgment, reasoned that the failure to show the existence of the two testifying witnesses required by NRS 136.240(3) entitled the respondent to judgment as a matter of law.

1. HHMI argues that declarations made by Hughes, and others with personal knowledge of the alleged will, may be substituted for the second credible witness. We do not agree.

[96 Nev. 908] While NRS 51.105(2) [2] makes hearsay evidence admissible relative to

the execution, revocation, identification or terms of the declarant's will, the testator's declarations cannot be used to supply one of the credible witnesses required by NRS 136.240(3). Courts in jurisdictions with statutes similar to NRS 136.240(3) have required that each of the two witnesses be able to testify from his or her personal knowledge, not from the declarations of others. This court, in In re Duffill's Estate, 57 Nev. 224, 61 P.2d 985 (1936), rejected one witness' testimony because his only knowledge of the contents of the will was based upon statements of the deceased. See e. g., In re Estate of Gardner, 69 Wash.2d 229, 417 P.2d 948 (1966); Loy v. Loy, 246 S.W.2d 578 (Ky. 1952); Day v. Williams, 184 Okl. 117, 85 P.2d 306 (1938); see also 3 Page on Wills (3d ed. 1961) §§ 29.157, 29.161.

The strict statutory requirements for executing a valid will would be rendered ineffectual if a deceased's declarations were sufficient to dispose of his estate. NRS 133.040. While a testator's declarations

Page 491

may be useful in interpreting ambiguous terms of an established will or in corroborating other competent evidence, they cannot be substituted for one of the witnesses required by NRS 136.240(3).

2. HHMI contends that declarations of a deceased person who had knowledge of the contents of a lost will should be considered testimony of one of the two credible witnesses required by NRS 136.240 to prove the contents of a lost will. HHMI asserts that statements by Hughes' attorneys Cook and Andrews should be admissible under NRS 51.315 [3] because they were made under circumstances free from any motivation to lie and they are necessary to prove the contents of the will. See e. g. Johnstone v. State, 92 Nev. 241, 548 P.2d 1362 (1976).

We cannot agree. NRS 136.240 [4] requires living witnesses or signed, sworn testimony reduced to writing.

[96 Nev. 909] Strict compliance with the requirements of NRS 136.240 precludes proof of the contents of a lost will by hearsay declarations of deceased people, unless the declarant's testimony is written and signed by the declarant. While declarations not in this form may be admissible for other purposes, if trustworthy and necessary, they are not sufficient to prove a lost will under the statute.

3. Summary judgment is proper when the moving party is entitled to judgment as a matter of law. Harvey's Wagon Wheel v. MacSween, 96 Nev. 215, 606 P.2d 1095 (1980). In reviewing a summary judgment, this court must accept as true the allegations and reasonable inferences favorable to the position of the non-moving party. Round Hill Gen. Improvement v. B-Neva, 96 Nev. 181, 606 P.2d 176 (1980).

HHMI claims that Dan Newburn [5] may change his mind and testify as a second necessary witness at the trial and therefore a factual issue exists precluding summary judgment. Neither mere conjecture nor hope of proving the allegations of a pleading is sufficient to create a factual issue. See NRCP 56(e); Garvey v. Clark County, 91 Nev. 127, 532 P.2d 269 (1975).

HHMI has failed to provide evidence sufficient to support its petition to probate the lost will, and summary judgment was properly granted.

Because of the requirement of strict compliance with NRS 136.240, the existence of a draft of a will allegedly executed by Hughes in 1925, without more, does not create a factual issue which would preclude summary judgment.

Affirmed.

FONDI, [6] District Justice, [96 Nev. 910] THOMPSON,

Page 492

J., ZENOFF, [7] Senior Justice, and GREGORY, [8] Senior District Justice, concur.

---

1 NRS 136.240(3) provides:

No will shall be allowed to be proved as a lost or destroyed will unless the same shall be proved to have been in existence at the death of the person whose will it is claimed to be, or be shown to have been fraudulently destroyed in the lifetime of such person, nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses.

2 NRS 51.105(2) provides:

A statement of memory or belief to prove the fact remembered or believed is inadmissible under the hearsay rule unless it relates to the execution, revocation, identification or terms of declarant's will.

3 NRS 51.315 provides:

1. A statement is not excluded by the hearsay rule if:

(a) Its nature and the special circumstances under which it was made offer strong assurances of accuracy; and

(b) The declarant is unavailable as a witness.

2. The provisions of NRS 51.325 to 51.355, inclusive, are illustrative and not restrictive of the exception provided by this section.

4 NRS 136.240 provides:

1. The petition for the probate of a lost or destroyed will must state, or be accompanied by a written statement of, the testamentary words, or the substance thereof. If the will is established the provisions thereof must be set forth in the order admitting the will to probate, and the order must be so entered at length in the minutes or a written order signed, filed and recorded.

2. The testimony of each witness must be reduced to writing, signed by him and filed, and shall be admissible in evidence in any contest of the will, if a witness has died or has permanently removed from the state.

3. No will shall be allowed to be proved as a lost or destroyed will unless the same shall be proved to have been in existence at the death of the person whose will it is claimed to be, or be shown to have been fraudulently destroyed in the lifetime of such person, nor unless is provisions shall be clearly and distinctly proved by at least two credible witnesses.

5 In April, 1978, Newburn purportedly told representatives of the Hughes estate that he had read an executed copy of Hughes' will. He refused to be deposed, claiming the news media privilege. See Newburn v. Howard Hughes Med. Institute, 95 Nev. 368, 594 P.2d 1146 (1979).

6 Chief Justice John Mowbray voluntarily disqualified himself and took no part in this decision. The Governor, pursuant to art. 6, § 4, of the Constitution, designated Judge Michael E. Fondi of the First Judicial District to sit in his stead.

7 The Chief Justice designated the Honorable David Zenoff, Senior Justice, to sit in the place of the Honorable E. M. Gunderson, who voluntarily disqualified himself in this case. Nev.Const. art. 6, § 19; SCR 10.

8 Mr. Justice Noel Manoukian voluntarily disqualified himself and took no part in this decision. The Governor, pursuant to art. 6, § 4, of the Constitution, designated the Honorable Frank B. Gregory, Senior District Judge, to sit in his stead.

138 P.3d 520

In the Matter of the ESTATE OF W.R. PRESTIE.
Scott Prestie, Appellant,
v.
Maria Gasper Prestie, Respondent.

No. 43921.

Supreme Court of Nevada.

July 20, 2006.

Page 521

Cary Colt Payne, Las Vegas, for Appellant.

Gerrard Cox & Larsen and Jay R. Larsen and Gary C. Milne, Henderson, for Respondent.

Before MAUPIN, GIBBONS and HARDESTY, JJ.

OPINION

HARDESTY, J.

In this appeal, we consider whether an amendment to an inter vivos trust can rebut the presumption that a pour-over will is revoked as to an unintentionally omitted spouse. We conclude that the plain and unambiguous language of NRS 133.110 does not permit evidence of an amendment to an inter vivos trust to rebut the presumption of a will's revocation as to an unintentionally omitted spouse. Lastly, we conclude that the doctrine of equitable estoppel has no application to the facts of this case. Consequently, we affirm the district court's order revoking the will as to the respondent.

FACTS

In 1987, California residents Maria and W.R. Prestie were married in Las Vegas, Nevada. Maria and W.R. were divorced two years later yet maintained an amiable relationship. W.R. was later diagnosed with macular degeneration and moved to Las Vegas, where he purchased a condominium. Maria also moved to Las Vegas, although she initially resided in a separate residence.

In 1994, W.R. simultaneously executed in California a pour-over will and the W.R. Prestie Living Trust (the inter vivos trust). The pour-over will devised W.R.'s entire estate to the trust. W.R.'s son, appellant Scott Prestie, was named both the trustee and a beneficiary of the inter vivos trust. Neither the will nor the inter vivos trust provided for Maria.

As W.R.'s sight worsened, Maria provided care for W.R. by taking him to his

doctor appointments, cooking, and cleaning his condominium. In 2000, Maria moved into W.R.'s condominium to better assist him with his needs. In 2001, W.R. amended the inter vivos trust to grant Maria a life estate in his

Page 522

condominium upon his death.[1] A few weeks later, Maria and W.R. were married for a second time. W.R. passed away approximately nine months later.

Maria eventually petitioned the district court for, among other things, a one-half intestate succession share of W.R.'s estate on the ground that W.R.'s will was revoked as to her under NRS 133.110 (revocation of a will by marriage). Specifically, Maria argued that because she married W.R. without entering into a marriage contract and after he had executed his will, the will was revoked as to her because it did not contain a provision providing for her or a provision expressing an intention to not provide for her.

The probate commissioner found that W.R.'s will was executed before he remarried Maria in 2001 and that the amendment granting Maria a life estate in the condominium was to the inter vivos trust, not to W.R.'s will. The probate commissioner also concluded that, under NRS 133.110, W.R. and Maria did not have a marriage contract and W.R.'s will did not provide for Maria or express an intent to not provide for Maria. Therefore, the probate commissioner recommended that W.R.'s will be revoked as to Maria. The district court subsequently entered an order adopting the probate commissioner's report and recommendations, and Scott Prestie appeals.

DISCUSSION

On appeal, Scott makes four arguments in support of his contention that the district court erred in concluding that W.R.'s will was revoked as to Maria under NRS 133.110. Scott argues that (1) both W.R.'s will and the inter vivos trust mandate the application of California law, under which the result would have likely been different; (2) W.R.'s amendment to the inter vivos trust rebutted the presumption of revocation of W.R.'s will as to Maria; (3) NRS Title 13 should have barred Maria's claim as an unintentionally omitted spouse under NRS Title 12; and (4) Maria should have been equitably estopped from asserting her claim as an unintentionally omitted spouse because she was provided for by and through the amendment to the inter vivos trust.

California law does not apply

Article Five, Section 3 of W.R.'s will states that "[W.R.'s] estate may be administered under the California Independent Administration of Estates Act." Additionally, Article Four, Section 7(d) of the inter vivos trust states that "[t]his Trust Agreement is a California contract and the validity of this Trust shall be determined by the laws of the State of California." Relying on these provisions, Scott argues that the district court erred in not applying California law, which he asserts defines "estate" as including the right to take pursuant to a will or revocable trust. We disagree.

First, California Independent Administration of Estates Act governs the probate process by permitting the appointment of a personal representative to administer a decedent's estate with limited court supervision.[2] Thus, Article Five, Section 3 of W.R.'s will is not a choice of law provision but rather, allows the California act to apply and for a personal representative to administer the estate. The administration of W.R.'s estate is not at issue in this case. Second, the word "may" contained in section 3 is permissive[3] and therefore, the application of California law with respect to the estate's administration was discretionary at best. Third, with respect to Article Four, Section 7(d) of the trust, the sole issue in this case is whether W.R.'s will is revoked as to Maria under NRS 133.110. The validity of the inter vivos trust has never been at issue. Thus, section 7(d) of the inter vivos trust is inapposite to the issue of whether W.R.'s will is revoked as to Maria. Consequently, we are not persuaded by Scott's argument that California law applies.

W.R. was domiciled and owned real property in Nevada; therefore Nevada law applies.

Page 523

This court has previously addressed its conflict of laws approach in estate matters:

It is clear that the State wherein personal property is located has full power to administer such property. The State has a legitimate interest in requiring probate of property within its borders, to protect creditors. . . . Application of the usual conflict-of-law rule prevailing in such a situation would require that the personal property be distributed in accordance with the law of the decedent's domicile.[4]

Additionally, "[w]hether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs."[5] W.R. was domiciled in Nevada at the time of his death, and his condominium is located in Nevada. Thus, W.R.'s will and estate are governed by Nevada law.

NRS 133.110 — revocation of a will by marriage

NRS 133.110 provides for surviving spouses who are unintentionally omitted from their spouse's will:

If a person marries after making a will and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such a way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation shall be received.

Scott argues that W.R.'s amendment to the inter vivos trust, which gave Maria a life estate in W.R.'s condominium, means that Maria has been provided for under NRS 133.110. Moreover, Scott contends that W.R.'s amendment to the inter vivos trust rebuts the presumption of revocation under NRS 133.110. We disagree

with both of these arguments.

Questions of statutory construction are reviewed by this court de novo.[6] "Statutes governing the revocation of wills are strictly construed."[7] Unless a statute is ambiguous, we attribute the plain meaning to the statute's language.[8] Whether a statute is deemed ambiguous is dependent upon whether the statute's language is susceptible to two or more reasonable interpretations.[9]

NRS 133.110 is unambiguous, and we have previously explained that it "provides for the presumptive revocation of a will if the testator marries after executing his will and his spouse survives him, unless he has provided for the surviving spouse by marriage contract, by provision in the will, or has mentioned her in such a way as to show an intention not to provide for her."[10] "The sole purpose of [NRS 133.110] is to guard against the unintentional disinheritance of the surviving spouse."[11] Thus, the *only evidence* admissible to rebut the presumption of revocation for the purposes of NRS 133.110 is a marriage contract, a provision providing for the spouse in the will, or a provision in the will expressing an intent to not provide for the spouse.[12]

Accordingly, we reject the notion that an amendment to a trust, which provides for the spouse, is admissible to rebut the presumption of a will's revocation.[13] The plain language

Page 524

of NRS 133.110 dictates otherwise, and "we will not engraft, by judicial legislation, additional requirements upon the clear and unambiguous provisions of NRS 133.110."[14]

W.R. executed his will before remarrying Maria; consequently, Maria could invoke the protections afforded to a spouse under NRS 133.110.[15] Scott concedes that W.R.'s amendment to the inter vivos trust does not constitute a marriage contract and that no other marriage contract providing for Maria exists.[16] Likewise, it is undisputed that W.R.'s will did not contain a provision providing for Maria or a provision expressing an intent to not provide for her. Thus, the district court properly concluded that W.R.'s will is revoked as to Maria, as none of the three limited exceptions contained in NRS 133.110 is present.[17]

NRS Title 13 does not incorporate NRS Title 12 with respect to revocation of wills

Scott argues that NRS Title 13 (trusts) bars Maria's claim as an unintentionally omitted spouse under NRS Title 12 (wills) because NRS 164.005, by reference, contemplates the application of trust amendments in satisfaction of NRS 133.110.[18] We disagree.

NRS 164.005 states:

When not otherwise inconsistent with the provisions of chapters 162 to 167, inclusive, of NRS, all of the provisions of chapters 132, 153 and 155 of NRS

regulating the matters of estates:

1. Apply to proceedings relating to trusts, as appropriate; or

2. May be applied to supplement the provisions of chapters 162 to 167, inclusive, of NRS.

We have previously recognized the fundamental rule of statutory construction that "[t]he mention of one thing implies the exclusion of another."[19]

Applying this rule of construction, we conclude that the revocation of a will under NRS 133.110, is unrelated to a trust proceeding. Additionally, NRS 164.005 makes specific mention of NRS Chapters 132, 153, and 155, while making no mention of NRS Chapter 133. By mentioning select chapters, we can imply that the Legislature's exclusion of other chapters was intentional. Nothing in NRS 164.005 or NRS Title 13 contemplates the application of trust amendments in satisfaction of NRS 133.110. Thus, NRS 164.005 has no bearing on the issue of whether W.R.'s will is revoked as to Maria pursuant to NRS 133.110.[20]

The doctrine of equitable estoppel does not apply

Since W.R.'s death, Maria has been living in his condominium, with the expenses being paid from the trust in accordance with the amendment giving her a life estate. Because

Page 525

of this, Scott argues that Maria should have been equitably estopped from asserting her intestate succession rights as an unintentionally omitted spouse. We disagree.

We have explained that "`[e]quitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct.'"[21] The doctrine of equitable estoppel has no application here because Maria was granted a life estate in W.R.'s condominium under the amendment to the inter vivos trust. Maria sought an intestate share of W.R.'s estate on the basis that she was an unintentionally omitted spouse under W.R.'s will. Therefore, Maria's interest in the condominium pursuant to the trust agreement is independent of her claim as an unintentionally omitted spouse under W.R.'s will. Having a beneficial interest in the trust does not preclude Maria from also obtaining an interest under the will. Consequently, we reject the notion that Maria's entitlement under the inter vivos trust estops her from asserting her rights under the will.

CONCLUSION

We conclude that an amendment to an inter vivos trust cannot serve to rebut the presumption that a will is revoked as to an unintentionally omitted spouse. NRS 133.110 unambiguously permits three exceptions to rebut the presumption of revocation, and an amendment to an inter vivos trust is clearly not one of them. We further conclude that the California law referenced in the will and inter vivos

trust does not apply here and that NRS 164.005 does not contemplate the application of an inter vivos trust to rebut the unintentional omitted spouse rule of NRS 133.110. Lastly, we conclude that the doctrine of equitable estoppel has no application to the facts of this case. Accordingly, we affirm the district court's order.

MAUPIN and GIBBONS, JJ., concur.

Notes:

1. The amendment to the inter vivos trust was erroneously labeled a codicil. *See* NRS 132.070 (stating that a codicil is an addition to a will).

2. Cal. Prob.Code §§ 10400-10592 (1991).

3. *Ewing v. Fahey*, 86 Nev. 604, 607, 472 P.2d 347, 349 (1970).

4. *Voorhees v. Spencer*, 89 Nev. 1, 6-7, 504 P.2d 1321, 1324 (1973) (citation omitted).

5. Restatement (Second) of Conflict of Laws § 239 (1971).

6. *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004).

7. *Todora v. Todora*, 92 Nev. 566, 568, 554 P.2d 738, 739 (1976).

8. *Firestone*, 120 Nev. at 16, 83 P.3d at 281.

9. *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist.*, 122 Nev. ___, ___, 131 P.3d 5, 10 (2006).

10. *Leggett v. Estate of Leggett*, 88 Nev. 140, 143, 494 P.2d 554, 556-57 (1972).

11. *Id.* at 143, 494 P.2d at 557.

12. *Id.* at 144, 494 P.2d at 557.

13. We are cognizant of the fact that modern estate planning regularly utilizes revocable inter vivos trusts with pour-over wills. This approach to estate planning usually results in amendments, if any, being made to the revocable trust and not the pour-over will. Given the clear and unambiguous language of NRS 133.110, we caution that a testator must modify his or her will in order to avoid the consequences resulting from the unintentional omission of a surviving spouse pursuant to NRS 133.110.

14. *Leggett*, 88 Nev. at 143, 494 P.2d at 557.

15. *Riesterer v. Dietmeier*, 98 Nev. 279, 281, 646 P.2d 551, 552 (1982) ("Certainly, it is conceivable that a surviving former spouse, who has remarried the testator, could suffer unintentional disinheritance.").

16. *See also* NRS 123A.030 (stating that a premarital agreement is "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage").

17. *Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996) ("As this court has stated on numerous occasions, findings of fact and conclusions of law, supported by substantial evidence, will not be set aside unless clearly erroneous.").

18. Scott also argues that the district court erred in not declaring the rights of the parties. Yet, Scott's claim for declaratory relief derives from an entirely separate district court case, which is not on appeal. Consequently, we lack jurisdiction to address this issue.

19. *State v. Wyatt*, 84 Nev. 731, 734, 448 P.2d 827, 829 (1968).

20. Similarly, Scott's reliance on the district court's erroneous determination that the trust was "never effectuated" is misplaced. While the district court incorrectly stated that the trust was never effectuated when it was properly funded, the district court's mistake was collateral to its conclusion that W.R.'s will was revoked as to Maria. Thus, such error was harmless. NRCP 61; *see also* United Tungsten v. Corp. Svc., 76 Nev. 329, 331-32, 353 P.2d 452, 454 (1960).

21. *Matter of Harrison Living Trust,* 121 Nev. ___, ___, 112 P.3d 1058, 1061-62 (quoting *Topaz Mutual Co. v. Marsh,* 108 Nev. 845, 853, 839 P.2d 606, 611 (1992)).

---

husband's fatal disease. Her burden of proof has been met by establishing that the disease was work-related.

Under the last injurious exposure rule, then, the last in-state employer for whom Mr. Jesch worked, who bears a causal relationship to the disease, is the responsible employer. Once the worker presents substantial evidence of successive-employer work-related disability, a prima facie case for recovery is established. The last injurious employer can then present evidence to show that the disability is with another employer or that the disability is unrelated to employment. The trier of fact will evaluate the evidence and render a decision.

It is hereby ordered that SIIS should conduct a hearing to determine the employer responsible under the last injurious exposure rule. Mrs. Jesch is responsible for providing a complete list of her late husband's employers as there is no dispute that mesothelioma is an occupational disease.

Accordingly, we affirm in part, and we remand with instructions that the district court shall direct a determination of the last responsible employer.

SPRINGER, C. J., and MOWBRAY, GUNDERSON, and STEFFEN, JJ., and ZENOFF, SR. J.,[3] concur.

IN THE MATTER OF THE ESTATE OF ROY D. IRVINE, DECEASED, AND LOLA BYNUM (LAUTE), APPELLANTS, *v.* JACK DOYLE, ADMINISTRATOR OF THE ESTATE OF ROY D. IRVINE, RESPONDENT.

No. 15148

December 10, 1985 710 P.2d 1366

Appeal from an order denying a petition for the removal of an administrator and the submission of a will to probate. Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, Judge.

Will proponent brought action to remove administrator of decedent's estate and to admit copy of decedent's will to probate. The district court granted administrator's motion for dismissal and will proponent appealed. The Supreme Court held that proponent of lost or destroyed will is required to prove that testator did not revoke lost or destroyed will during his lifetime.

Reversed and remanded.

[3]THE HONORABLE DAVID ZENOFF, Senior Justice, was designated to participate in this case. Nev. Const., art. 6, § 19; SCR 10.

Smith & Maurer, Las Vegas, for Appellants.

Jones, Jones, Close & Brown, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   In reviewing a district court's dismissal of an action pursuant to NRCP 41(b), evidence and all reasonable inferences that can be drawn from it must be deemed admitted, and evidence must be interpreted in light most favorable to petitioner.
2. WILLS.
   A will is said to be in legal existence if it has been validly executed and has not been revoked by testator.
3. WILLS.
   Words "in existence" and "fraudulently destroyed" contained in NRS 136.240, subd. 3 regarding circumstances under which a will shall be allowed to be proved as a lost or destroyed will requires proponent of a lost or destroyed will to prove that testator did not revoke the will during his lifetime.
4. WILLS.
   Question of whether a will was revoked by testator under NRS 136.240, subd. 3 regarding circumstances under which a will shall be allowed to be proved as a lost or destroyed will is a matter to be decided by trier of fact.

OPINION

Per Curiam:

This is an appeal from an order of the district court denying a petition requesting the removal of an administrator and the submission of a will to probate. Following appellant Lola Bynum's presentation of evidence at the hearing in this matter, the district court orally granted respondent Jack Doyle's motion for dismissal pursuant to NRCP 41(b). Thereafter, the district court issued the order appealed from which purports to deny the petition on its merits. The district court found that Bynum failed to satisfy the provisions of NRS 136.240(3) concerning lost wills because Bynum could not prove the alleged lost will had been in actual physical existence at the time of the decedent's death. Therefore, the district court concluded that a copy of the purported will could not be probated and denied Bynum's petition. For the reasons set forth below, we reverse and remand for a new hearing.

[Headnote 1]

In reviewing a district court's dismissal of an action pursuant to NRCP 41(b), the evidence and all reasonable inferences that can be drawn from it must be deemed admitted, and the evidence must be interpreted in the light most favorable to the petitioner. Roche v. Schartz, 82 Nev. 409, 419 P.2d 779 (1966); *see also*

Stackiewicz v. Nissan Motor Co., 100 Nev. 443, 686 P.2d 925 (1984); Corn v. French, 71 Nev. 280, 289 P.2d 173 (1955). The evidence when so viewed establishes the following facts.

In 1955, Lola Bynum and the deceased, Roy Irvine, married. While married, they purchased a home in Las Vegas, Nevada. They divorced in 1960, but remained friends. On June 6, 1962, Bynum quitclaimed her entire interest in the Las Vegas property to Irvine.

On January 8, 1973, Bynum and several friends gathered at a local restaurant at Irvine's request. Irvine produced a will which he signed in the presence of these friends. Three of the friends signed the will as witnesses. Irvine gave the original and a copy of the will to Bynum. The members of the group then read and discussed the will. The will left the Las Vegas property to Bynum. The three witnesses to the will predeceased Irvine.

Bynum stored the original will in a box until August 28, 1977, when it was apparently destroyed in a house fire. On July 3, 1982, Irvine died. Because no will was found, the district court declared that Irvine had died intestate and appointed respondent Doyle, a friend of Irvine's, as administrator of the estate. Bynum later found the copy of the will in an old briefcase. She then commenced this action by petitioning the district court to remove Doyle as administrator of the estate and to admit the copy of Irvine's will to probate.

At the hearing in this matter, Bynum attempted to establish that she had quitclaimed the Las Vegas property to Irvine with the understanding that he would leave the property to her in his will. She also attempted to establish that the deceased did in fact execute a valid will leaving the property to her, and that the document presented for probate was an accurate copy of that will. Finally, she attempted to prove that Irvine did not know that the original will had been destroyed in a fire prior to his death. However, the district court refused to allow any of this testimony to be admitted on the ground that it was irrelevant to the issue of whether the original will had been in actual physical existence at the time of Irvine's death. In the district court's opinion, the only relevant question under NRS 136.240(3) was whether the purported lost will had been in actual physical existence at the time Irvine died.

Bynum presented two witnesses whose testimony was severely limited by the district court. Consequently, Bynum elected not to call her remaining witnesses, but made an offer of proof. These witnesses included persons who had been present when the will was executed and others who had known Irvine and could testify concerning his intent to devise the Las Vegas property to Bynum. The district court refused to hear the witnesses because they could not testify as to whether the will was in actual existence at the time of Irvine's death. Thereupon, Doyle made a motion to dismiss based on NRCP 41(b), and the district court granted the motion. This appeal followed.

The question presented for review is whether NRS 136.240(3) requires a lost will to be in actual physical existence at the time of the testator's death in order to be admitted to probate. NRS 136.240(3) provides:

> No will shall be allowed to be proved as a lost or destroyed will unless the same shall be proved to have been *in existence* at the death of the person whose will it is claimed to be, or be shown to have been *fraudulently destroyed* in the lifetime of such person, nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses. (Emphasis added.)

Doyle urges this court to interpret the word "existence" in the statute to require that a will be in actual physical existence at the time of the testator's death to be admitted to probate, as did the district court. According to Doyle, any other interpretation does violence to the English language and to the statutory scheme designed to prevent the probate of spurious wills. Some of our sister states have construed similar statutes to require actual physical existence. *See* In re Estate of Lane, 86 Cal.Rptr. 620 (Ct.App. 1970); In re Estate of Strickman, 55 Cal.Rptr. 606 (Ct.App. 1966); In re Kerckhof's Estate, 125 P.2d 284 (Wash. 1942). Doyle further urges this court to construe "fraudulently destroyed" to require some "intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right," relying on the definition of fraud in Black's Law Dictionary 594 (rev. 5th ed. 1979). While this may be a good definition of "fraud" in some contexts, we refuse to give NRS 136.240(3) such a narrow construction.

The problem with the construction argued for by Doyle is that it has the result of creating a valid yet unenforceable document. NRS 133.110-133.150 provide the possible methods of revoking a will in Nevada. Nowhere is it provided that a will is deemed revoked if it is lost or accidentally destroyed without the testator's knowledge. Further, NRS 136.240(3) does not purport to be an additional method of revoking a will. Therefore, under the construction of NRS 136.240(3) proposed by Doyle, a lost or accidentally destroyed will, although valid, could not be enforced even if the terms of the will could be objectively proved or a valid copy of the will could be produced. A testator could die thinking his affairs in order only to have his desires frustrated by a legal technicality. Even more anomalous under Doyle's interpretation of the statute is the fact that a will which was surreptitiously

destroyed could be admitted to probate if proved by other evidence, while the same will, if accidentally destroyed, could not be probated regardless of whether the testator knew of the will's destruction prior to his death. Similar considerations prompted the Colorado Supreme Court to comment:

> There is no good reason a testator should be decreed to have died intestate, and his wishes, solemnly committed to writing, be defeated by the loss or destruction of what is, after all, merely the best, and not the only, evidence of his desires.

In re Eder's Estate, 29 P.2d 631, 634–635 (Colo. 1934). To ignore a testator's desires when the testator has done all in his power to comply with the laws concerning wills would be an injustice. We do not believe the legislature intended such a result.

[Headnote 2]

Other jurisdictions with statutes similar to NRS 136.240(3), moved by these policy considerations, have construed the term "existence" in their statutes to mean "legal existence." A will is said to be in legal existence if it has been validly executed and has not been revoked by the testator. Thus, a will lost or destroyed without the testator's knowledge could be probated because it was in legal existence at the testator's death. *See* In re Eder's Estate, 29 P.2d 631 (Colo. 1934); In re Estate of Enz, 515 P.2d 1133 (Colo.Ct.App. 1973); In re Havel's Estate, 194 N.W. 633 (Minn. 1923); Matter of Estate of Wheadon, 579 P.2d 930 (Utah 1978).[1]

Doyle argues, however, the acceptance of the legal existence theory effectively amends the words "fraudulently destroyed" out of the lost wills statute. According to Doyle, a fraudulently destroyed will would remain unrevoked and would therefore have been "in existence" at the time of death under the legal existence theory. Thus, "fraudulently destroyed" is rendered nugatory or redundant. Some jurisdictions have refused to construe "in existence" to mean legal existence for this reason. However, these jurisdictions have reached the same result by construing "fraudulently destroyed" to mean destroyed by somebody other than the testator without his consent or direction, or by accident without his knowledge. *See* In re Estate of Newman, 518 P.2d 800, 801-02 (Mont. 1974); In re Fox' Will, 174 N.E.2d 499 (N.Y. 1961). We note that by giving "fraudulently destroyed" this meaning, the term "in existence" is rendered redundant.

[1]Utah's lost wills statute has since been repealed and replaced by the more liberal Uniform Probate Code. However, the views expressed in *Matter of Estate of Wheadon* remain valid. *See* Matter of Estate of Wheadon, 579 P.2d at 931. Minnesota's lost wills statute has been replaced by a statute that requires that a will be unrevoked at the time of death. *See* In re Greenberg's Estate, 82 N.W.2d 239 (Minn. 1957). Thus, the same result was achieved by legislation.

[Headnotes 3, 4]

We conclude that it is unnecessary to so construe either of the terms in this statute in order to reach a just result. Instead, we choose to construe the statute as a whole, giving effect to each word without ignoring the intent of the legislature. *See generally* Nevada Tax Comm'n v. Bernhard, 100 Nev. 348, 683 P.2d 21 (1984) (statute should be read to give meaning to all of its parts); Spencer v. Harrah's Inc., 98 Nev. 99, 641 P.2d 481 (1982) (court will not give statute a construction contrary to its clear meaning). In *Fox*, the New York Court of Appeals made the following pertinent statement:

> By requiring proof that a lost or destroyed will was either "in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime", the Legislature merely intended to require proof that either the will had not been destroyed during the testator's lifetime or that, if destroyed during his lifetime, it had not been destroyed by him or by his authority. In other words, all that section 143 requires is proof that the testator himself had not revoked the lost or destroyed will, proof that would overcome the common-law presumption of revocation.

In re Fox' Will, 174 N.E.2d 499, 504 (N.Y. 1961). We agree with this statement. At common law, when an executed will could not be found after the death of a testator, there was a strong presumption that it was revoked by destruction by the testator. *Id.* at 505; Matter of Estate of Wheadon, 579 P.2d at 932. NRS 136.240(3) codifies the common law rule and places the burden of overcoming the presumption on the proponent of a lost or destroyed will. Accordingly, we hold that the words "in existence" and "fraudulently destroyed" taken together convey the legislative intent to require the proponent of a lost or destroyed will to prove that the testator did not revoke the lost or destroyed will during his lifetime. Further, the question of whether a will was revoked is a matter to be decided by the trier of fact. *See* In re Killgore's Estate, 370 P.2d 512 (Idaho 1962).

Finally, Doyle argues that such an interpretation of the statute will allow spurious wills to be probated. We note, however, that in addition to proving that a will remains unrevoked, a proponent of a lost or destroyed will must prove the provisions of the will clearly and distinctly by at least two credible witnesses under NRS 136.240(3). These provisions will adequately protect against the probate of spurious wills.

Doyle argues that the district court's judgment may be upheld independently of NRS 136.240(3). According to Doyle, the district court decided Irvine knew of the destruction of the will prior to his death. Doyle asserts that the district court properly refused

to consider evidence tending to establish the existence of a lost will pursuant to NRS 136.230.[2] At the hearing, however, the district court refused to allow Bynum to present any evidence relevant to the issue of whether Irvine knew of the destruction of his will prior to his death. Instead, the district court made it abundantly clear that, in its opinion, the only relevant inquiry was whether the purported lost will had been in actual physical existence at the time of Irvine's death. Consequently, the district court's statements about Irvine's knowledge were *mere conjecture and* did not enter into the district court's decision. Therefore, the order of the district court cannot be sustained on the basis of NRS 136.230.

The decision of the district court in this case was based on an invalid construction of NRS 136.240(3), and must be reversed. Bynum attempted, but was not allowed, to prove that Irvine had executed a valid will which was destroyed prior to his death without his knowledge. Bynum's reasons for executing the quitclaim deed were relevant to the inquiry of whether Irvine intended to leave the Las Vegas property to Bynum and whether Irvine revoked his will or intended to revoke his will prior to his death. Further, the testimony of the other witnesses was relevant to the issue of the existence and content of Irvine's purported will. Because the district court excluded this evidence, no factual determinations have been made on these important issues. Accordingly, this case is reversed and remanded for a new hearing.[3]

---

[2]NRS 136.230 provides:

> Whenever any will shall be lost by accident or destroyed by fraud without the knowledge of the testator, the district court shall have power to take proof of the execution and validity of the will and to establish the same, notice to all persons having first been given, as prescribed in cases of proof of wills in other cases.

[3]THE HONORABLE CLIFF YOUNG, Justice, did not participate in the consideration of this case.

STATE OF NEVADA, APPELLANT AND CROSS-RESPONDENT, *v.* CHRYSTAL EATON, RESPONDENT AND CROSS-APPELLANT.

No. 15158

December 10, 1985 710 P.2d 1370

Appeal and cross-appeal from a judgment entered on a jury verdict awarding damages. Second Judicial District Court, Washoe County, Roy L. Torvinen, Judge.

A personal injury and wrongful death action arising out of a car accident caused by icy road conditions was brought by infant decedent's mother against the State of Nevada. The district court entered judgment on a jury verdict awarding damages, and an appeal and cross-appeal were taken. The Supreme Court, MOWBRAY, J., held that: (1) the district court's calculation of damages, as modified for prejudgment interest, was proper and would be affirmed, but (2) a cause of action is now recognized in Nevada for serious emotional distress which results in physical symptoms caused by apprehending the death or serious injury of a loved one due to the negligence of defendant, and therefore plaintiff in this case should have been permitted to present to the jury her claim for negligent infliction of emotional distress.

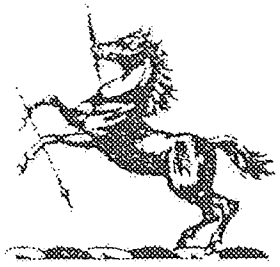
Affirmed in part; reversed in part.

[Rehearing denied April 24, 1986]

Brian McKay, Attorney General, *Steven F. Stucker*, Deputy Attorney General, Carson City, for Appellant and Cross-Respondent.

Erickson, Thorpe, Swainston & Cobb, Ltd., Reno, for Respondent and Cross-Appellant.

1. AUTOMOBILES.
   In personal injury and wrongful death action arising out of car accident caused by icy road conditions, evidence concerning the failure of highway patrol troopers to place flares or otherwise warn motorists of treacherous ice was properly admitted, as the highway patrol knew of the ice one hour before fatal accident occurred, and a trooper was on the scene 20 minutes prior to the accident but did nothing to warn oncoming motorists.
2. DAMAGES; DEATH.
   Trial court, in personal injury and wrongful death action brought against the State, was not required to reduce the jury award on each claim to the statutory maximum recoverable against the State before subtracting the amount plaintiff received for releasing the other codefendants. NRS 41.035, subd. 1.
3. DAMAGES; DEATH.
   Trial court, in personal injury and wrongful death action brought against the State, properly allocated between plaintiff's two claims the amount she received from the settling codefendants in exchange for their release.



CARY COLT PAYNE, CHTD.
Attorney at Law
700 S. Eighth Street • Las Vegas, Nevada 89101
(702) 383-9010 • Fax (702) 383-9049

EXHIBIT PAGE INTENTIONALLY LEFT BLANK

EXHIBIT "A"

Electronically Filed
05/26/2015 06:54:44 PM

CLERK OF THE COURT

ORDR
KIM BOYER, ESQ.
Nevada Bar #5587
10785 W. Twain Avenue, Suite 200
Las Vegas, Nevada 89135
(702) 255-2000
E-Mail: kimboyer@elderlawnv.com
Attorney for Estate

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

THEODORE E. SCHEIDE JR. aka
THEODORE ERNEST SCHEIDE JR.,

Deceased.

Case No.: P-14-082619-E

ORDER ON PETITION FOR INSTRUCTIONS

The Petition of SUSAN M. HOY for Instructions from the Court for the Estate of the above-named Decedent having this date come on for hearing before the undersigned, it appearing to the Court that notice of the hearing on the Petition was duly given; the Court finding that the Decedent at the time of his death left an estate in Clark County, Nevada, and was then a resident of Clark County, Nevada, good cause appearing therefor, it is hereby

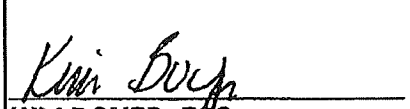
ORDERED that the Petitioner be appointed Administrator of the intestate Estate of the Decedent and that Letters of Administration be issued to the Petitioner.

ORDERED that in the event the estate assets are liquidated, they be placed in the Durham Jones & Pinegar Trust Account.

ORDERED that no bond be required.

DATED this 22nd day of May, 2015.

DISTRICT JUDGE



KIM BOYER, ESQ.
Nevada Bar #5587
10785 W. Twain Avenue, Suite 200
Las Vegas, Nevada 89135
(702) 255-2000
Attorney for the Estate

CARY COLT PAYNE, CHTD.
Attorney at Law
700 S. Eighth Street • Las Vegas, Nevada 89101
(702) 383-9010 • Fax (702) 383-9049

EXHIBIT PAGE INTENTIONALLY LEFT BLANK

EXHIBIT "B"

Register of Actions
Case No. P-14-082619-E

In the Matter of: Theodore Scheide Jr., Deceased

Case Type: Probate - Special Administration
Date Filed: 10/02/2014
Location:
Cross-Reference Case Number: P082619

Related Case Information

Related Cases
W-16-010344 (Companion Case)

Party Information

			Lead Attorneys
Decedent	Scheide Jr., Theodore Ernest	Male DOD: 08/17/2014	
Objector	St. Jude Childresn's Reseach Hospital		Russel J Geist, ESQ *Retained* 702-385-2500(W)
Other	St. Jude Childresn's Reseach Hospital		Russel J Geist, ESQ *Retained* 702-385-2500(W)
Petitioner	Hoy, Susan 6625 S Valley View DR STE 216 Las Vegas, NV 89118	Female	Kim Boyer *Retained* 702-255-2000(W)
Special Administrator	Hoy, Susan 6625 S Valley View DR STE 216 Las Vegas, NV 89118	Female	Kim Boyer *Retained* 702-255-2000(W)

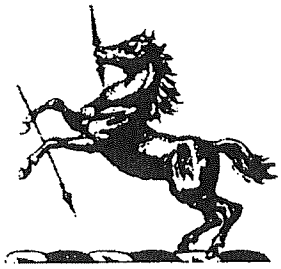
Events & Orders of the Court

05/22/2015 Petition - HM (9:30 AM) (Magistrate Yamashita, Wesley)
Petition for Instructions

Minutes
05/22/2015 9:30 AM
- PETITION FOR INSTRUCTIONS COMMISSIONER STATED this matter had been left open to see if anyone came forward to produce a will or indicated they wanted to pursue it, but nothing came forward. Further, it was the opinion of the Personal Representative that the will had been destroyed. Mr. VanAlstyne stated that is correct and confirmed this will is to proceed based upon the basis of an intestate situation. COMMISSIONER RECOMMENDED, Petition GRANTED. The signed Order was provided to Mr. VanAlstyne.

WILL DESTROYED

Parties Present
Return to Register of Actions



CARY COLT PAYNE, CHTD.
Attorney at Law
700 S. Eighth Street • Las Vegas, Nevada 89101
(702) 383-9010 • Fax (702) 383-9049

EXHIBIT PAGE INTENTIONALLY LEFT BLANK

EXHIBIT "C"

Electronically Filed
01/29/2015 06:41:48 PM

CLERK OF THE COURT

0272
KIM BOYER, ESQ.
Nevada Bar #5587
10785 W. Twain Avenue, Suite 200
Las Vegas, Nevada 89135
(702) 255-2000
E-Mail: kimboyer@elderlawnv.com
Attorney for Estate

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matte

THEODOR
THEODOR

Case No.: P-14-082619-E

PETITION FOR APPOINTMENT OF ADMINISTRATOR OF INTESTATE ESTATE UNDER FULL ADMINISTRATION

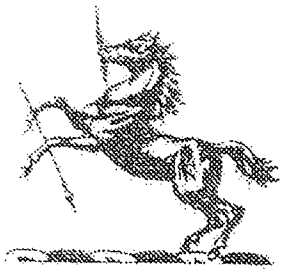
Petitioner, SUSAN M. HOY, of Las Vegas, Nevada, respectfully represents to the court as follows:

1. THEODORE SCHEIDE died on or about August 17, 2014 in Clark County, Nevada. See Certified Death Certificate, attached hereto as Exhibit "1".

2. The decedent was, at the time of his death, a resident of the County of Clark, State of Nevada, and his estate consists of certain personal property in an amount exceeding $200,000.

3. Due search and inquiry has been made to ascertain if the decedent left a valid will and a copy of a Last Will and Testament dated October 2, 2012 was located but the original has not been found. See copy attached hereto as Exhibit "2".

granted — orally received



CARY COLT PAYNE, CHTD.
Attorney at Law
700 S. Eighth Street • Las Vegas, Nevada 89101
(702) 383-9010 • Fax (702) 383-9049

EXHIBIT PAGE INTENTIONALLY LEFT BLANK

EXHIBIT "D"

Electronically Filed
05/06/2015 05:25:13 PM

CLERK OF THE COURT

0272
KIM BOYER, ESQ.
Nevada Bar #5587
10785 W. Twain Avenue, Suite 200
Las Vegas, Nevada 89135
(702) 255-2000
E-Mail: kimboyer@elderlawnv.com
Attorney for Estate

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

THEODORE E. SCHEIDE JR. aka
THEODORE ERNEST SCHEIDE JR.,

Deceased.

Case No.: P-14-082619-E

PETITION FOR INSTRUCTIONS

Petitioner, SUSAN M. HOY, of Las Vegas, Nevada, respectfully represents to the court as follows:

1. On October 6, 2014, the Court entered an Order appointing SUSAN M. HOY as Special Administrator, requiring the posting of no bond, that she enter the decedent's safe deposit box at U.S. Bank to determine if there is a Last Will and if there is one, that she remove it, and that if there are any liquid assets, that she place them in a blocked account. A copy is attached hereto as Exhibit "1." On October 13, 2014, Letters of Special Administration were issued to SUSAN M. HOY. A copy is attached hereto as Exhibit "2."

2. THEODORE SCHEIDE died on or about August 17, 2014 in Clark County, Nevada. See copy of Certified Death Certificate, attached hereto as Exhibit "3".

3. The decedent was, at the time of his death, a resident of the County of Clark, State of Nevada, and his estate consists of certain personal property in an amount exceeding $200,000.

4. Due search and inquiry has been made to ascertain if the decedent left a valid will and a copy of a Last Will and Testament dated October 2, 2012 was located but the original has not been found. See copy attached hereto as Exhibit "4".

5. The Special Administrator, per the above-mentioned Order, entered the decedent's safe deposit box located at U.S. Bank and it was empty.

6. The drafting attorney gave the original Will to the decedent. The Special Administrator was the decedent's guardian prior to his death and no original estate planning documents were received or found during the guardianship. The Special Administrator believes the decedent destroyed any original estate planning documents he may have executed prior to his death.

7. The names and addresses of all known heirs of said decedent and beneficiaries named in the will (only a copy of which has been located) are as follows:

Name and Address	Age	Relationship
Theodore "Chip" E. Scheide, III 101 S. Lexington Avenue Pittsburg, Pennsylvania 15208	Adult	Son
Velma G. Shay	Deceased	Friend
St. Jude Children's Hospital 262 Danny Thomas Place Memphis, TN 38105	N/A	Beneficiary

8. There are no known liens, encumbrances or unpaid debts of the decedent.

9. The Special Administrator hereby requests instructions from the court as to how to proceed with this probate matter.

WHEREFORE, Petitioner prays:

1. That a time be fixed for the hearing of this petition.

2. That the Special Administrator requests instructions from the court as to how to proceed with this probate matter.

CARY COLT PAYNE, CHTD.
Attorney at Law
700 S. Eighth Street • Las Vegas, Nevada 89101
(702) 383-9010 • Fax (702) 383-9049

EXHIBIT PAGE INTENTIONALLY LEFT BLANK

EXHIBIT "E"

Electronically Filed
05/06/2015 05:28:44 PM

CLERK OF THE COURT

CERT
KIM BOYER, ESQ.
Nevada Bar #5587
10785 W. Twain Avenue, Suite 200
Las Vegas, Nevada 89135
(702) 255-2000
E-Mail: kimboyer@elderlawnv.com
Attorney for Estate

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

THEODORE E. SCHEIDE JR. aka
THEODORE ERNEST SCHEIDE JR.,

Deceased.

Case No.: P-14-082619-E

CERTIFICATE OF MAILING

I HEREBY CERTIFY that service of the **Notice of Hearing on Petition for Instructions** was made this 6th day of May, 2015, by depositing a copy of the same in the U.S. Mails, postage prepaid, first class mail, addressed to:

Medicaid Estate Recovery
1050 E. Williams Street, Suite 435
Carson City, Nevada 89701-3199

St. Jude Children's Hospital
262 Danny Thomas Place
Memphis, TN 38105

Theodore "Chip" E. Scheide, III
101 S. Lexington Avenue
Pittsburg, Pennsylvania 15208

Patricia Bowlin
7800 Clarksdale Drive, #102
Las Vegas, Nevada 89128

Jo Smith

Jo Smith, an Employee

Electronically Filed
01/29/2015 06:45:27 PM

CLERK OF THE COURT

CERT
KIM BOYER, ESQ.
Nevada Bar #5587
10785 W. Twain Avenue, Suite 200
Las Vegas, Nevada 89135
(702) 255-2000
E-Mail: kimboyer@elderlawnv.com
Attorney for Estate

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

THEODORE E. SCHEIDE JR. aka
THEODORE ERNEST SCHEIDE JR.,

Deceased.

Case No.: P-14-082619-E

CERTIFICATE OF MAILING

I HEREBY CERTIFY that service of the **Notice of Hearing for Appointment of Administrator with Will Annexed Under Full Administration** was made this 29th day of January, 2015, by depositing a copy of the same in the U.S. Mails, postage prepaid, first class mail, addressed to:

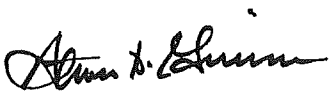
Medicaid Estate Recovery
1050 E. Williams Street, Suite 435
Carson City, Nevada 89701-3199

St. Jude Children's Hospital
262 Danny Thomas Place
Memphis, TN 38105

Theodore "Chip" E. Scheide, III
101 S. Lexington Avenue
Pittsburg, Pennsylvania 15208

Jo Smith

Jo Smith, an Employee



RPLY
Todd L. Moody (5430)
Russel J. Geist (9030)
HUTCHISON & STEFFEN, LLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
(702) 385-2500
(702) 385-2086
rgeist@hutchlegal.com

Attorneys for St. Jude Children's Research Hospital

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of THEODORE E. SCHEIDE JR. aka THEODORE ERNEST SCHEIDE JR., Deceased.	Case No.: P-14-082619-E Dept No.: 26

REPLY IN SUPPORT OF PETITION FOR PROBATE OF LOST WILL (NRS 136.240); REVOCATION OF LETTERS OF ADMINISTRATION (NRS 141.050); ISSUANCE OF LETTERS TESTAMENTARY (NRS 136.090)

THEODORE E. SCHEIDE, III's (hereinafter "Theodore") Objection and Counterpetition, misstates the law in an attempt to subvert the testamentary wishes of THEODORE E. SCHEIDE JR. (hereinafter "Decedent"), and convince the Court that Theodore should get a windfall because no one has been able to find the Decedent's original Last Will and Testament which specifically disinherits Theodore.[1] The law favors a full hearing of the facts and circumstances regarding the Decedent's Last Will and Testament as presented by ST. JUDE CHILDREN'S RESEARCH

[1] The copy of the October 2012 and the original June 2012 Last Will and Testament both have the following statement from the Decedent:

> However, I am specifically disinheriting THEODORE E. SCHEIDE, III and his descendants. Therefore for the purposes of my Will, THEODORE E. SCHEIDE, III and his descendants will be deemed to have predeceased me.

HOSPITAL, INC. ("St. Jude" or "Petitioner"), and its alleged revocation as argued by Theodore.

While there is a strong presumption at common law that a lost will was revoked by destruction by the testator, the Nevada Supreme Court has held that, 1) such presumption is rebuttable by the proponent of the lost will, and 2) the question of whether a will was revoked is a matter to be decided by the trier of fact after considering the evidence. *Estate of Irvine v. Doyle*, 101 Nev. 698, 703, 710 P2d 1366, 1369 (1985). In order to prove a lost or destroyed will was either "in existence at the death of the person whose will it is claimed to be, or ... to have been fraudulently destroyed in the lifetime of that person", the proponent needs to prove that "the will had not been destroyed during the testator's lifetime or that, if destroyed during his lifetime, it had not been destroyed by him or by his authority." *Id.*

While Theodore disagrees with the Petitioner's contention that the Decedent's will was not destroyed during the Decedent's lifetime, or if it was destroyed, it was not destroyed by him or by his authority when he had capacity to do so, the Petitioner has the opportunity to present evidence supporting the proof of the Decedent's lost will. Theodore's arguments that the Petitioner's proof must be limited and must exclude the testimony of the Decedent's estate planning attorney is unsupported by the law.

Despite Theodore confusing numerous times the burden to prove a valid will with the burden of a proponent of a lost will, the law is clear regarding the proof required for a lost will. Petitioner has presented a copy of the Decedent's Will which Petitioner contends is validly executed. In support, Petitioner has presented the affidavits of the living witnesses to the Decedent's Will, both of whom signed a self-proving affidavit at the time the Decedent executed the Will. The witnesses affidavits have therefore satisfied NRS 133.040, and the requirements of living witnesses of a will in HOWARD HUGHES MEDICAL INSTITUTE v. GAVIN, 96 Nev. 905, 621 P.2d 489 (1980). There is no need to consider whether either the witnesses' recent affidavits or the self-proving affidavits executed at the time the Decedent's Will was executed, are admissible. The affidavits do no rely on declarations of the Decedent or others, but they are the witnesses' own declarations of the facts required under NRS 133.050 (1). Therefore, the copy of

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

the October 2012 will are supported by two credible witnesses and on the Will on its own is valid and admissible.

Theodore further claims that the additional statements of KRISTIN TYLER, the Decedent's estate planning attorney, amount to inadmissible hearsay and violate a privilege that he alone holds. Neither claim is valid. The affidavit and any additional testimony KRISTIN TYLER may proffer regarding whether the Decedent revoked his will is specifically admissible under NRS 51.105(2) as "it relates to the execution, revocation, identification or terms of declarant's will." Such testimony would clearly establish the Decedent's "state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health" which is not inadmissible under NRS 51.105 (1), and are relevant to this matter.

Additionally, there is no privilege applicable in this case since any communications discussed between the Decedent and KRISTIN TYLER would be "relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction." NRS 49.115 (2). St. Jude and Theodore are obviously parties who claim through the same deceased client, i.e. the Decedent. Therefore, the communications between the Decedent and KRISTIN TYLER are exempt from the lawyer and client privilege. Despite Theodore's previous attempts to silence KRISTIN TYLER by threats to hold her accountable for alleged breaches of ethical duties to the Estate (i.e., Theodore), KRISTIN TYLER's affidavit and any subsequent testimony on the matter of the Decedent's Will and its subsequent alleged revocation is permissible and should be admitted as "highly probative". *Johnstone v. State*, 92 Nev. 241, 245, 548 P.2d 1362, 1364 (1976). In fact, it would be highly prejudicial to the Petitioner for the Court to exclude the affidavits and testimony of KRISTIN TYLER, which would not only prohibit the Petitioner from presenting necessary proof that the Decedent did not revoke his Will, but would require the Petitioner to produce a second credible witness to the execution of the Decedent's Will. Such a result is not contemplated in the law, and would be inherently unjust in this case.

Theodore further claims that St. Jude lacks standing to present the Decedent's Will for

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

probate and in support states the irrelevant fact that St. Jude is a contingent beneficiary under the Decedent's Will. While it is true that the Decedent named St. Jude as a remainder beneficiary, Velma Shay, the primary beneficiary, predeceased the Decedent which means that the Decedent's estate would pass to St. Jude if the Decedent's Will were admitted to probate. Therefore, by the terms of the Decedent's Will, St. Jude is the only party, other than the administrator of the Decedent's Estate, that has standing to petition the Court to admit the Will to probate.

It should be noted that the only law that Theodore cites in support of his argument that St. Jude lacks standing is the Nevada statute concerning will contests and the timeframe within which to bring a contest of a will offered or admitted to probate. Such statute is obviously not applicable in this case. While the Court previously appointed an administrator based on the lack of an original will presented for probate, nothing in Nevada law prohibits a party from petitioning the Court to admit a decedent's will after such intestate administration commences. In fact, the Petitioner is explicitly permitted under NRS 136.070(1) to file the Petition to have the Will proved without any limitation on the time to do so. ("A personal representative or devisee named in a will, or any other interested person, may, **at any time after the death of the testator**, petition the court having jurisdiction to have the will proved, whether the will is in the possession of that person or not, or is lost or destroyed, or is beyond the jurisdiction of the State.") NRS 141.050 also indicates that the Court may consider and allow the Decedent's Will to be proved, even after "after granting letters of administration on the ground of intestacy." In such case, "the letters of administration must be revoked and the power of the administrator ceases." *Id.*

Finally, Theodore claims that, notwithstanding the fact that the Decedent lacked mental capacity and was subject to a guardianship, the Decedent was still permitted to change his estate plan even after he became subject to a guardianship. It should be noted that while a testator does have the ability to change his estate plan, he may only do so if he is "of sound mind and memory." NRS 133.050. Petitioner believes that there is substantial evidence that the Decedent lacked the requisite capacity to make testamentary decisions, including the revocation of his Will, to the point that if the Decedent destroyed his Will, or directed someone else to do so, such action would be

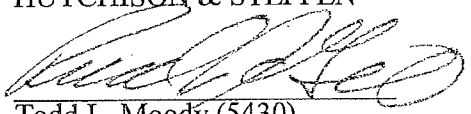
HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

invalid. For example, on February 14, 2014, the Decedent's physician declared that the Decedent was "unable to respond to a substantial and immediate risk of physical or financial harm or to a need for immediate medical attention," that he was "unable properly to manage and take care of [Decedent's] person or property, or both", and that he was incapable of "living independently, with or without assistance." Attached as **Exhibit 5** is the Physician's Statement signed by Dr. Mardip Arora, M.D. presented in support of the need for a guardianship over the Decedent. The Decedent's physician further stated that the Decedent's capacity was limited by "Altered level of consciousness, dementia, chronic bifrontal strokes." *See* **Exhibit 5**. Additional testimony of those who interacted with the Decedent between the time he executed his Will and the Physician's Statement will establish that the Decedent's capacity was diminished and that if the Decedent's Will was in fact destroyed, such destruction of the Decedent's Will by the Decedent was ineffective to revoke the Will, or that the Decedent's Will was fraudulently destroyed, since the Decedent lacked the capacity to revoke his Will or direct someone else to revoke it by destruction.

In conclusion, St. Jude is entitled to conduct discovery and present evidence to support the admission of a copy of the Decedent's Will to rebut the presumption that, because the Decedent's original Will cannot be found he allegedly revoked it. Such determination must be made by the trier of fact, and is not a determination as a matter of law. *Irvine* at 703.

Dated October 26, 2016.

HUTCHISON & STEFFEN



Todd L. Moody (5430)
Russel J. Geist (9030)
10080 W. Alta Dr., Ste 200
Las Vegas, NV 89145
(702) 385-2500
(702) 385-2086 Fax
tmoody@hutchlegal.com
rgeist@hutchlegal.com
Attorneys for St. Jude Children's Research Hospital

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, and that on this 26 day of October, 2016, I caused a true and correct copy of the above and foregoing **REPLY IN SUPPORT OF PETITION FOR PROBATE OF LOST WILL (NRS 136.240); REVOCATION OF LETTERS OF ADMINISTRATION (NRS 141.050); ISSUANCE OF LETTERS TESTAMENTARY (NRS 136.090)** to be served as follows:

☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☐ pursuant to EDCR 7.26, to be sent **via facsimile;** and/or

☒ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

☐ to be hand-delivered;

to the attorney(s) or parties listed below at the address and/or facsimile number indicated below:

Via E-Service
Kim Boyer, Esq.
Durham Jones & Pinegar
10785 W. Twain Ave., Ste. 200
Las Vegas, NV 89135
Attorney for the Administrator

Via E-Service
Cary Colt Payne, Esq.
700 S. 8th Street
Las Vegas, NV 89101
Attorney for Theodore "Chip" E. Scheide, III

Via U.S. Mail
Medicaid Estate Recovery
1100 E. William St., Suite 109
Carson City, NV 89701-3199

An Employee of Hutchison & Steffen, LLC

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 5

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

Electronically Filed
02/20/2014 09:12:01 AM

CLERK OF THE COURT

AFFT
KIM BOYER, CELA
Nevada Bar #5587
10785 W. Twain Ave., Suite 200
Las Vegas, Nevada 89135
(702) 255-2000
Email: kimboyer@elderlawnv.com
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

In the matter of the Guardianship of the Person and Estate of

Scheide, Theodore

An Adult.

Case No.: G-14-039853-A
Dept. No.: E

PHYSICIAN'S STATEMENT

STATE OF NEVADA

COUNTY OF CLARK

Dr. Mandip Arora, M.D., being first duly sworn, deposes and says:

1. I am a physician who is licensed to practice medicine in the State of Nevada.

2. It is my opinion that the Proposed Ward's condition is:

Theodore Scheide

The Proposed Ward is unable to respond to a substantial and immediate risk of physical or financial harm or to a need for immediate medical attention. The Proposed Ward is unable properly to manage and take care of the Proposed Ward's person or property, or both.

///

///

3. It is my opinion that (select one):

___ The Proposed Ward has been subject to abuse, neglect or exploitation.

___ The Proposed Ward has not been subjected to abuse, neglect or exploitation.

✓ Unable to render an opinion.

4. It is my opinion that the Proposed Ward ✓ does ___ does not present a danger to himself/herself or others.

5. It is my opinion that the Proposed Ward ___ is ✓ is not capable of living independently, with or without assistance.

6. It is my opinion that the Proposed Ward would benefit from a guardian.

7. It is my opinion that (select all that apply):

___ The Proposed Ward should be excused from the hearing because the Proposed Ward would not comprehend the reason for a hearing or contribute to the proceeding.

✓ The Proposed Ward should be excused from the hearing because the attendance at a hearing would be detrimental to the Proposed Ward.

___ The Proposed Ward is able to attend the hearing.

8. Describe any limitations of capacity of the Proposed Ward that affect the ability of the Proposed Ward to be able to maintain his/her safety and basic needs:

Reduced level of consciousness, dementia, chronic bifrontal strokes

Under the penalty of perjury, I declare the foregoing to be true and correct.

DATED: 2/12/14.

_____, M.D.

Submitted by:

Kim Boyer

KIM BOYER, CELA
Nevada Bar #5587
10785 W. Twain Ave., Suite 200
Las Vegas, Nevada 89135
Attorney for Petitioner

Electronically Filed
02/02/2017 01:34:05 PM

CLERK OF THE COURT

ORDR
Todd L. Moody (5430)
Russel J. Geist (9030)
HUTCHISON & STEFFEN, LLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
(702) 385-2500
(702) 385-2086
rgeist@hutchlegal.com

Attorneys for St. Jude Children's Research Hospital

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of THEODORE E. SCHEIDE JR. aka THEODORE ERNEST SCHEIDE JR., Deceased.	Case No.: P-14-082619-E Dept No.: PCI Date of Hearing: November 2, 2016 Time of Hearing: 9:30 A.M.

ORDER GRANTING PETITION FOR PROBATE OF LOST WILL (NRS 136.240); REVOCATION OF LETTERS OF ADMINISTRATION (NRS 141.050); ISSUANCE OF LETTERS TESTAMENTARY (NRS 136.090)

The verified Petition of St. Jude Children's Research Hospital, Inc. ("St. Jude") for Probate of Lost Will (NRS 136.240); Revocation of Letters of Administration (NRS 141.050); Issuance of Letters Testamentary (NRS136.090) came on regularly for hearing November 2, 2016. Russel J. Geist, Esq., of the law firm of Hutchison & Steffen, LLC appeared on behalf of St. Jude and Cary Colt Payne, Esq., of the law office of Cary Colt Payne, Chtd. appeared on behalf of Theodore E. Scheide III, who also was present at the hearing. The Court having reviewed St. Jude's Petition, Theodore E. Scheide, III's Objection thereto, and St. Jude's Reply in support of, and all papers filed herein, and having heard the arguments of counsel, now finds and orders as follows:

Pursuant to *Estate of Irvine v. Doyle*, 101 Nev. 698, 710 P.2d 1366 (1985), the proponent for admission of a lost will bears the burden "to prove that the testator did not revoke the lost or destroyed will during his lifetime." In this case, because the Decedent was subject to a

guardianship since February 2014, and lacked testamentary capacity to revoke his will after that date the proponent of Decedent's lost will must prove that the testator did not revoke the will while he was still competent and had testamentary capacity to do so.

IT IS HEREBY ORDERED that the Petition for Probate of Lost Will is hereby granted to proceed to an evidentiary hearing **set for March 16-17, 2017 at 9:30 a.m.** on the issue of fact regarding whether Theodore E. Scheide Jr. did not revoke the will while he was still competent and had testamentary capacity to do so, during the time between when Theodore E. Scheide Jr. signed his will and when he was determined to lack capacity during the guardianship.

IT IS FURTHER ORDERED that the parties shall continue discovery upon the following schedule for completion:

1. Close of discovery: **January 16, 2017**

2. Final date to file dispositive motions: **February 7, 2017**

3. Final date by which all pretrial motions must be submitted for decision (which must be no later than 30 calendar days before trial): **February 7, 2017**

4. Evidentiary Hearing: **March 16-17, 2017**

IT IS FURTHER ORDERED that a Status Check to determine readiness of the parties to proceed toward the evidentiary hearing shall be set for February 1, 2017 at 9:30 a.m.

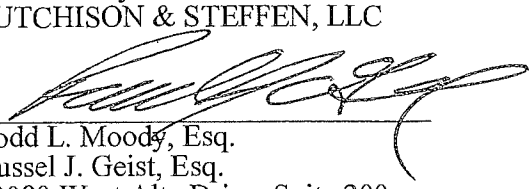
IT IS FURTHER ORDERED that the Counterpetition of Theodore E. Scheide III to distribute the Estate of Theodore E. Scheide Jr. by intestate succession is held in abeyance pending the outcome of the evidentiary hearing on March 16-17, 2017.

DATED this 31 day of January, 2017.

DISTRICT COURT JUDGE

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

Submitted by:
HUTCHISON & STEFFEN, LLC



Todd L. Moody, Esq.
Russel J. Geist, Esq.
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Attorneys for St. Jude Children's Research Hospital

Approved as to Form and Content:
CARY COLT PAYNE, CHTD.

Cary Colt Payne, Esq.
700 South Eighth Street
Las Vegas, NV 89101

Attorney for Theodore E. Scheide III

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

Electronically Filed
02/02/2017 04:23:05 PM

CLERK OF THE COURT

NEO
Todd L. Moody (5430)
Russel J. Geist (9030)
HUTCHISON & STEFFEN, LLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
(702) 385-2500
(702) 385-2086
rgeist@hutchlegal.com

Attorneys for St. Jude Children's Research Hospital

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of THEODORE E. SCHEIDE JR. aka THEODORE ERNEST SCHEIDE JR., Deceased.	Case No.: P-14-082619-E Dept No.: PCI

NOTICE OF ENTRY OF ORDER

NOTICE IS HEREBY GIVEN that on the 2nd day of February, 2017 an Order Granting Petition for Probate of Lost Will (NRS 136.240); Revocation of Letters of Administration (NRS 141.050; Issuance of Letters Testamentary (NRS 136.090) was entered in the above-entitled action, a copy of which is attached hereto.

Dated February 2, 2017.

HUTCHISON & STEFFEN

Russel J. Geist (9030)
10080 W. Alta Dr., Ste 200
Las Vegas, NV 89145
(702) 385-2500
(702) 385-2086 Fax
rgeist@hutchlegal.com
Attorneys for St. Jude Children's Research Hospital

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, and that on this 2nd day of February, 2017, I caused a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF ORDER** to be served as follows:

- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile;** and/or
- ☒ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or
- ☐ to be hand-delivered;

to the attorney(s) or parties listed below at the address and/or facsimile number indicated below:

Via E-Service
Kim Boyer, Esq.
Durham Jones & Pinegar
10785 W. Twain Ave., Ste. 200
Las Vegas, NV 89135
Attorney for the Estate

Via E-Service
Cary Colt Payne, Esq.
700 S. 8th Street
Las Vegas, NV 89101
Attorney for Theodore "Chip" E. Scheide, III

Via U.S. Mail
Medicaid Estate Recovery
1100 E. William Street, Ste. 109
Carson City, Nevada 89701

An Employee of Hutchison & Steffen, LLC

Electronically Filed
02/02/2017 01:34:05 PM

CLERK OF THE COURT

ORDR
Todd L. Moody (5430)
Russel J. Geist (9030)
HUTCHISON & STEFFEN, LLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
(702) 385-2500
(702) 385-2086
rgeist@hutchlegal.com

Attorneys for St. Jude Children's Research Hospital

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of THEODORE E. SCHEIDE JR. aka THEODORE ERNEST SCHEIDE JR., Deceased.	Case No.: P-14-082619-E Dept No.: PCI Date of Hearing: November 2, 2016 Time of Hearing: 9:30 A.M.

ORDER GRANTING PETITION FOR PROBATE OF LOST WILL (NRS 136.240); REVOCATION OF LETTERS OF ADMINISTRATION (NRS 141.050); ISSUANCE OF LETTERS TESTAMENTARY (NRS 136.090)

The verified Petition of St. Jude Children's Research Hospital, Inc. ("St. Jude") for Probate of Lost Will (NRS 136.240); Revocation of Letters of Administration (NRS 141.050); Issuance of Letters Testamentary (NRS136.090) came on regularly for hearing November 2, 2016. Russel J. Geist, Esq., of the law firm of Hutchison & Steffen, LLC appeared on behalf of St. Jude and Cary Colt Payne, Esq., of the law office of Cary Colt Payne, Chtd. appeared on behalf of Theodore E. Scheide III, who also was present at the hearing. The Court having reviewed St. Jude's Petition, Theodore E. Scheide, III's Objection thereto, and St. Jude's Reply in support of, and all papers filed herein, and having heard the arguments of counsel, now finds and orders as follows:

Pursuant to *Estate of Irvine v. Doyle*, 101 Nev. 698, 710 P.2d 1366 (1985), the proponent for admission of a lost will bears the burden "to prove that the testator did not revoke the lost or destroyed will during his lifetime." In this case, because the Decedent was subject to a

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

guardianship since February 2014, and lacked testamentary capacity to revoke his will after that date, the proponent of Decedent's lost will must prove that the testator did not revoke the will while he was still competent and had testamentary capacity to do so.

IT IS HEREBY ORDERED that the Petition for Probate of Lost Will is hereby granted to proceed to an evidentiary hearing **set for March 16-17, 2017 at 9:30 a.m.** on the issue of fact regarding whether Theodore E. Scheide Jr. did not revoke the will while he was still competent and had testamentary capacity to do so, during the time between when Theodore E. Scheide Jr. signed his will and when he was determined to lack capacity during the guardianship.

IT IS FURTHER ORDERED that the parties shall continue discovery upon the following schedule for completion:

1. Close of discovery: **January 16, 2017**

2. Final date to file dispositive motions: **February 7, 2017**

3. Final date by which all pretrial motions must be submitted for decision (which must be no later than 30 calendar days before trial): **February 7, 2017**

4. Evidentiary Hearing: **March 16-17, 2017**

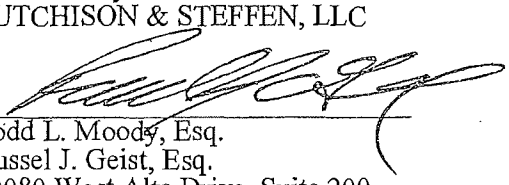
IT IS FURTHER ORDERED that a Status Check to determine readiness of the parties to proceed toward the evidentiary hearing shall be set for February 1, 2017 at 9:30 a.m.

IT IS FURTHER ORDERED that the Counterpetition of Theodore E. Scheide III to distribute the Estate of Theodore E. Scheide Jr. by intestate succession is held in abeyance pending the outcome of the evidentiary hearing on March 16-17, 2017.

DATED this 31 day of January, 2017.

DISTRICT COURT JUDGE

Submitted by:
HUTCHISON & STEFFEN, LLC



Todd L. Moody, Esq.
Russel J. Geist, Esq.
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

Attorneys for St. Jude Children's Research Hospital

Approved as to Form and Content:
CARY COLT PAYNE, CHTD.

Cary Colt Payne, Esq.
700 South Eighth Street
Las Vegas, NV 89101

Attorney for Theodore E. Scheide III

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of: THEODORE E. SCHEIDE, JR. aka THEODORE ERNEST SCHEIDE, JR., Deceased.	CASE NO.: P-14-082619-E DEPT NO.: XXVI

DECISION AND ORDER

The above captioned matter came on for evidentiary hearing on June 15 and 16, 2017, on St. Jude Research Hospital's petition to admit Decedent's October 2, 2012, Will. Susan Hoy, Special Administrator, was represented by Counsel Kim Boyer of Durham Jones & Pinegar; Respondent Theodore E. Scheide III, was represented by counsel Cary Colt Payne and Objector/Petitioner St. Jude Children's Research Hospital, was represented by counsel Todd Moody and Russel Geist of Hutchison & Steffen. After hearing the testimony of witnesses, receiving evidence introduced at the evidentiary hearing, and considering argument of the parties, the matter was taken under advisement.

Upon consideration of the arguments, testimony, exhibits in evidence, in addition to the pleadings and papers on file the Court finds as follows:

FACTS

Decedent Theodore Scheide, Jr., ("Decedent" or "Theo") passed away August 17, 2014. His only statutory heir is his estranged son, Theodore Scheide, III (known as "Chip"). Decedent and his first wife, the mother of his only child, Theodore III, had been divorced for some time; Decedent had only sporadic contact with his son after the

GLORIA L. STURMAN
DISTRICT JUDGE
DEPT XXVI
LAS VEGAS, NV 89155

divorce. A second marriage ended in 1999, but he remained in contact with his step-daughter Kathy Longo; although, they did not see each other on a regular basis. Decedent and Velma Shay were companions for many years and, although they were never married, they made complementary estate plans providing for one another. Decedent was not married at the time of his death.

In June 2012 Decedent executed a Will, disinheriting his son and leaving his estate to Velma Shay; if she predeceased him (she did), then to St. Jude Children's Hospital. In October 2012 Decedent revoked the June 2012 Will with a new October 2012 Will that only changed the Executor. Velma passed away in February, 2013, at which time Theo advised Kristin Tyler, Esq., his estate planning attorney, that everything would now go to St. Jude Children's Hospital. There is no evidence that Theo prepared a new will after Velma's passing.

Decedent had been appointed a guardian, Susan Hoy, in February 2014 due to his dementia and strokes. See G-14-039853-A. After Decedent passed away, his guardian, Susan Hoy, was appointed as Special Administrator of his Estate. Hoy found a copy of the October 2012 Will, but was not able to find the original.

In May 2016 after Hoy filed her First and Final Account, Attorney Kristin Tyler, Decedent's estate planning attorney and drafter of the October 2012 Will, discovered that the Court determined in May 2015 that decedent died intestate.

Ms. Tyler had maintained the original June 2012 Will in her files, but Decedent took the original October 2012 Will with him after executing the document. Ms. Tyler lodged the June 2012 Will with the Court. See W-16-010344.

This litigation was initiated with the Petition of the Special Administrator for Proof of the Will and Issuance of Letters Testamentary; Ms. Hoy later withdrew her Petition. Subsequently St. Jude filed its Petition for Probate of the Will and Revocation of Letters of Administration, and Issuance of Letters Testamentary. The Petition for Probate of the Lost Will was granted with the burden of proof on the proponent to prove

the testator did not revoke the lost or destroyed will during his lifetime. See, Estate of Irvine v Doyle, 101 Nev. 698. 710 P.2d 1366 (1985). Further, since the Decedent had been appointed a guardian in February 2014, he lacked testamentary capacity to revoke his will as of the date of adjudication of the Petition for Guardianship.

Ms. Tyler testified to the preparation and contents of the July and October 2012 Wills. In addition to the October 2012 copy, the original Will, dated June 2012, was also presented to the court. (The "June 2012 Original"). The October 2012 copy was annotated with the word "updated" written by the Decedent. Under the terms of both wills, St. Jude is listed as the beneficiary; neither Will listed Decedent's son as a beneficiary.

Ms. Tyler described the steps she always takes when a client comes to her office to sign a will. In October 2012 Theo confirmed that he understood the contents of his Will, and that no one was forcing him to make the will. Ms. Tyler and her assistant, Diane DeWalt, witnessed Theo sign his Will.

After a search of Decedent's storage facility, no one could find an original version of the October 2012 Will or the document that the guardian recalls being packed and placed in storage. There was no evidence that the Decedent ever visited his storage facility, and he was not capable of transporting himself whereby he could have obtained possession of any of the above-referenced Wills. After the appointment of Ms. Hoy as his Guardian, Decedent would have lacked capacity to have effectively revoked his Will.

BACKGROUND

Approximately six (6) months prior to his death, Decedent was placed under the care of a guardian as a result of a medical/mental examination. After the appointment of the guardian, Decedent was moved into a nursing home and the majority of his belongings were moved to a storage facility. Before his items were placed in storage, the guardian recalls seeing a Will with the words "updated October 2012" printed on it

followed by Decedent's signature, and believes that document was packed with Decedent's personal effects to be placed in storage. The Guardian, Susan Hoy, testified she believed Decedent destroyed his estate planning documents as none could be located after his death.

Decedent maintained his relationship with Kathy Longo, his step-daughter from a 25-year marriage that ended in 1999 with death of his second wife. After Kathy moved to Las Vegas she visited Theo and at his request began assisting him with some of his needs, such as writing checks. As these activities were time consuming (four trips per week from the other side of town), Kathy charged Theo for her time. Kathy refused to take on the responsibility of guardianship as she was not in town on a full time basis. While helping Theo pack up his home office in preparation to move to assisted living, Kathy saw a will on a shelf. Kathy does not know if that document was an original or a copy. Theo originally agreed to the move to assisted living, then he changed his mind. Kathy only saw the will in the Decedent's office prior to his admission into the nursing home and before he was appointed a Guardian. Kathy did not read it, nor could she testify to the date the will she saw was executed. However, the Decedent did inform her that he intended to leave his estate to St. Jude. Theo never talked to her about his son Chip. Kathy also testified that after Theo moved into the nursing home, he told her that his important papers were in storage.

In December 2013 Kathy went out of town for the holidays and notified Ms. Tyler she would not be able to continue and someone else would need to assist Theo. Kathy testified that Theo's behavior the last time she saw him prompted her resignation. Theo was diabetic and refused care; when Kathy arrived at the rehab facility to pick him up, he was unkempt (wearing pajamas, no socks). Kathy testified that Theo's behavior was embarrassing; he had no bladder or bowel control and relieved himself in the bushes at the rehabilitation hospital. That was the last time Kathy saw him.

Decedent's apparent testamentary intent to leave his estate to St. Jude is further supported by the fact that he donated approximately $130,000.00 over 20 years to the organization, with his last donation in the amount of $10,000.00 made in 2013. Kathy recalled being asked to prepare that check for Theo's signature.

Decedent's mental condition prior to death was such that he lacked testamentary capacity. Just days before he passed, Decedent became agitated and attempted to fire those who were responsible for his care, including the guardian.

At the hearing to determine if Decedent's estate would pass by intestate succession or through a testamentary will, the Decedent's son Chip argued that the original October 2012 Will was in Decedent's possession prior to his death, and he intentionally destroyed/revoked it prior to the determination that he was in need of a guardian and lacked capacity.

LEGAL ISSUES

I. Alternative Theories Under Nevada Law

Under common law, a presumption exists that a missing will was revoked and/or destroyed by the testator.[1] NRS 136.240 provides a mechanism to overcome this presumption whereby a lost or destroyed will can be probated when the petitioner is able to provide: (1) two or more credible witnesses that provide clear and distinct testimony concerning the will's provisions, and was (a) in legal existence at the time of the testator's death, or (b) fraudulently destroyed during the testator's lifetime. But a testator's declarations "cannot be substituted for one of the witnesses required by NRS 136.240".[2]

In addition to NRS 136.240, the doctrine of dependent relative revocation has been recognized in Nevada to nullify a prior will's revocation if it was made "in connection

[1] See Estate of Irvine v. Doyle, 710 P.2d 1366, 1369 (1985).
[2] See Howard Hughes Medical Institute v. Gavin, 621 P.2d 489, 491 (1980).

with an attempt to achieve a dispositive objective that fails under applicable law" OR because of a false belief/assumption that is either recited in the revoking instrument or established by clear and convincing evidence.[3] The Nevada Supreme Court stated a "crucial distinction" of the dependent relative revocation doctrine is "that it does not revive a revoked will; rather, it renders a revocation ineffective."[4]

II. Application of Nevada Law to the Facts

In order to prevail in its efforts to probate the October 2012 copy, Petitioner/Objector (St. Jude) must establish that the original Will was in legal existence at the time of Decedent's death and produce two witnesses who can provide "clear and distinct" evidence of the Will's provisions. NRS 136.240[5]

---

[3] See In re Melton, 272 P.3d 668, 671 (2012) where the Nevada Supreme Court formally adopted the doctrine of dependent relative revocation and distinguished it from the doctrine of revival that is expressly prohibited under NRS 133.130. The statute provides that revocation of a subsequent will does not revive the prior will unless there is an express term/provision of the testator's intention to revise the prior will within the revoking document.

[4] See In re Melton at 679, citing to Restatement (Third) of Prop.: Wills and Other Donative Transfers §4.3.

[5] **NRS 136.240 Petition for probate; same requirement of proof as other wills; testimony of witnesses; rebuttable presumption concerning certain wills; prima facie showing that will was not revoked; order.**

1. The petition for the probate of a lost or destroyed will must include a copy of the will, or if no copy is available state, or be accompanied by a written statement of, the testamentary words, or the substance thereof.

2. If offered for probate, a lost or destroyed will must be proved in the same manner as other wills are proved under this chapter.

3. In addition, no will may be proved as a lost or destroyed will unless it is proved to have been in existence at the death of the person whose will it is claimed to be, or is shown to have been fraudulently destroyed in the lifetime of that person, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

4. The testimony of each witness must be reduced to writing, signed by the witness and filed, and is admissible in evidence in any contest of the will if the witness has died or permanently moved from the State.

5. Notwithstanding any provision of this section to the contrary:

(a) The production of a person's lost or destroyed will, whose primary beneficiary is a nontestamentary trust established by the person and in existence at his or her death, creates a rebuttable presumption that the will had not been revoked.

(b) If the proponent of a lost or destroyed will makes a prima facie showing that it was more likely than not left unrevoked by the person whose will it is claimed to be before his or her death, then the will must be admitted to probate in absence of an objection. If such prima facie showing has been made, the court shall accept a copy of such a will as sufficient proof of the terms thereof without requiring further evidence in the absence of any objection.

The record is clear that after moving to the nursing home Decedent was not in physical possession of the October 2012 Will such that he could have "revoked" it by destroying or otherwise tearing it up. The evidence supports a finding that the original version of the October 2012 Will was in his home office and at some point was lost. What is less clear is whether Decedent destroyed the Will before leaving his home, or if it was misplaced in the process of packing the contents of Decedent's home and placing his belongings into storage. No evidence was introduced to establish Decedent visited his storage facility or that he instructed anyone to bring him the original version of the October 2012 Will.

Even if Theo did manage to retrieve the original Will, he lacked the mental capacity to "revoke" the October 2012 Will after February 2014 until his death in August. No evidence was introduced to establish that Theo lacked capacity prior to the date he was appointed a guardian. There is no evidence to establish Theo had possession of the original October 201 Will after moving to assisted living. These facts provide a basis to examine the remaining evidence introduced to prove the October 2012 Will was in legal existence at the time of Decedent's death. [6]

Petitioners were required to offer the testimony of two witnesses who could provide "clear and distinct" evidence of the provisions of the October 2012 Will.[7] The drafting attorney had a clear recollection of drafting the Will and was in possession of a copy of the Will. The second witness to the Will, Diane DeWalt, the legal assistant to the drafting attorney, recalled she prepared the Will and served as a witness, but she did not

[6] NRS 136.240 states in part: "(t)he petition for the probate of a lost or destroyed will must include a copy of the will ... [and] .., no will may be proved as a lost or destroyed will unless it is proved to have been in existence at the death of the person whose will it is claimed to be, or is shown to have been fraudulently destroyed in the lifetime of that person, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses..."

[7] Estate of Irvine v. Doyle, 710 P.2d 1366 (1985) – The Nevada Supreme Court held that a proponent of a lost or destroyed will is required to prove that testator did not revoke the lost or destroyed will, but such proof is not that the will was in "actual" existence at the time of testator's death, only that it was in "legal" existence. To combat "spurious wills", the Court also noted that a proponent must prove the provisions of the will by at least two credible witnesses that can provide clear and distinct testimony as to its provisions.

recall the specific terms of the Will. The remaining witness, Decedent's stepdaughter Kathy Longo, testified that the decedent told her about his testamentary intent, which was to leave his estate to St. Jude's. She also confirmed seeing the Will in the decedent's home office; but she did not read the Will and thus could not confirm the provisions, nor did she know the date the Will she saw was executed.

Under Nevada law the testator's declarations cannot be substituted for one of the witnesses required under NRS 136.240. See, In re Duffill's Estate, 61 P.2d 985 (1936) and Howard Hughes Medical Inst. v. Gavin, 621 P.2d 489 (1980).

In re Duffill's Estate, 61 P.2d 985 (1936) is the case establishing the requirements for proving a lost will. The Nevada Supreme Court upheld the lower court's judgment that decedent's mother failed to prove the existence of a lost will leaving her $200,000.00. The mother produced four witnesses to support the lost will. The first witness actually signed the will as a subscribing witness but testified his only knowledge of its terms was based on the decedent's statements, which the court noted was not sufficient as decedent could not be substituted as one of the two witnesses required to probate a lost will. The other three witnesses all testified to the contents of the will and that their knowledge was gained during separate conversations with the decedent about his failing health and that decedent prompted them to read the will. The trial court rejected the testimony of these three witnesses as not being trustworthy.

In Howard Hughes Medical Inst. v. Gavin, 621 P.2d 489 (1980) the Nevada Supreme Court again noted that a testator's declarations cannot be substituted for one of the witnesses required by the Lost Will Statute, NRS 136.240. The Court found that strict compliance with NRS 136.240 "precludes proof of the contents of a lost will by hearsay declarations of deceased people, unless the declarant's testimony is written and signed by the declarant." Id. at 491. Therefore, Theo's statements to Kathy cannot overcome the statutory requirements.

In the instant matter Decedent's long time estate planning attorney Kristin Tyler has a very distinct recollection of the terms of Theo's final October 2012 Will. The Will was consistent with Theo's historical estate plans, his beneficiary designations did not vary over time, nor did he ever leave anything to his son Chip. Therefore, it can be assumed Theo understood the need to specifically disinherit his only child, as well as the outcome if he failed to leave a Will that did so.

While the testimony of the other witnesses about Theo's stated testamentary intention is credible and consistent, this Court cannot accept the hearsay declarations of the decedent. The Hughes case provides a possible exception if the declarant's testimony is signed. Here Decedent did hand write and sign the words "October 2, 2012 Up-dated." The handwritten statement on the copy of the October 2012 Will does not clarify what provisions were "up-dated"; the statement appears simply to reference the date the Will was executed. This is not sufficient to satisfy the Hughes exception. The Hughes case stands for the principal that strict compliance with the requirements of the statute is necessary. Here, only one witness, the drafting attorney, provided testimony sufficient to satisfy the statute.

III. Dependent Relative Revocation

An alternative theory presented by these facts is whether the June 2012 original Will can be revived, or its revocation under the October 2012 copy deemed ineffective. NRS 133.130 limits the revival of a prior will to only those instances where the revocation occurred with intent to revive or the prior will is reexecuted.[8] Nothing within the above factual background supports either of these situations. In re Melton, 272 P.3d

[8] **NRS 133.130 Effect of revocation of subsequent will.**
If, after the making of any will, the testator executes a valid second will that includes provisions revoking the first will, the destruction, cancellation or revocation of the second will does not revive the first will unless:
1. It appears by the terms of the revocation or the manner in which the revocation occurred that it was the intention to revive and give effect to the first will; or
2. After the destruction, cancellation or revocation, the first will is reexecuted;
....
6. If the will is established, its provisions must be set forth specifically in the order admitting it to probate, or a copy of the will must be attached to the order.

GLORIA J. STURMAN
DISTRICT JUDGE
DEPT XXVI
LAS VEGAS, NV 89155

668 (2012) dependent relative revocation does not revive a revoked will, but only applies where a revocation was ineffective. As with revival, the above factual background does not include any basis upon which the October 2012 copy and its revocation of the June 2012 Original was ineffective.

In Melton the Nevada Supreme Court distinguished NRS 133.130 and its restriction against a revoked will's revival from the doctrine of *dependent relative revocation*. The court found that the "doctrine of dependent relative revocation ... 'does not revive a revoked will; rather, it renders a revocation ineffective.'" Therefore, the Nevada Supreme Court expressly adopted the doctrine of dependent relative revocation, but declined to apply it because the revocation of a prior will, and its disinheritance provision, was not impacted or made conditional by a subsequent holographic will that involved a different dispositive scheme.

The Melton decision is consistent with the longstanding California rule. See, In re Lopes, 152 Cal.App.3d 302 (1984). The fact pattern in Lopes is very similar to the background outlined above and petitioner attempts to argue that all provisions of a lost will, including revocation of a prior will, should be nullified. The appellate court held that a copy of a 1979 will could not be probated because it could not be shown to be in existence on the date of death. Petitioner therefore argued that all provisions found within the 1979 will failed, including the provision that revoked a prior will executed in 1977. The court noted that a will can be revoked by any writing and does not need to meet the standards for proving a lost will and also noted that dependent relative revocation offered an appropriate method to address revocations based upon a false assumption of the effectiveness of a subsequently executed will.

Here the June 2012 Will was expressly revoked by the October 2012 Will, and there is no evidence that revocation was ineffective in its express terms. Subsequently the October 2012 Will was either lost or destroyed, however, there is no evidence it was revoked in writing. Lacking sufficient evidence to prove the October 2012 "lost" will, the

Court finds it is presumed to have been destroyed. Given the absence of a writing to establish the October 2012 Will was revoked with the intent to revive the June 2012 Will, the doctrine of dependent relative revocation cannot revive the June 2012 Will.

CONCLUSION

St. Jude's failed to meet its burden of proof that the Will was not revoked during Decedent's lifetime (while Decedent was competent). The lost will statute must be strictly construed, and here only one witness provided clear and distinct testimony about the contents of the October 2012 Will. None of the witnesses who saw a will in Decedent's home prior to him entering assisted living could testify that the will they saw was the Original of the October 2012 Will. While Decedent was not determined to lack capacity until February 2014, his behavior during the time he was preparing to move to assisted living was increasingly erratic. Decedent had been a careful planner and seems to have understood the need to specifically disinherit his son, and alternatively, the fact that without a will his son would inherit. Although he did not make a formal change to his estate planning documents, he could simply have changed his mind and destroyed the original will in his possession.

WHEREFOR, based on of testimony at trial, the exhibits, and the law that applies in this case as set forth above, the Petitioner/Objector St. Jude Children's Hospital Petition to admit Decedent's lost will dated October 2, 2012, is hereby DENIED.

DATED: This 3rd day of August, 2018

GLORIA J. STURMAN
District Court Judge, Dept. XXVI

Counsel for Respondent is directed to prepare a Notice of Entry of Decision and Order.

CERTIFICATE OF SERVICE

I hereby certify that on the date signed, a copy of the Foregoing Order was electronically served on all parties registered in P-14-082619.

Linda Denman,
Judicial Executive Assistant

GLORIA J. STURMAN
DISTRICT JUDGE
DEPT XXVI
LAS VEGAS, NV 89155

Electronically Filed
8/8/2018 2:34 PM
Steven D. Grierson
CLERK OF THE COURT

NOE
CARY COLT PAYNE, ESQ.
Nevada Bar No. 4357
CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
(702) 383-9010
carycoltpaynechtd@yahoo.com
Attorney for Theodore E. Scheide III

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Estate of THEODORE E. SCHEIDE JR. a/k/a THEODORE ERNEST SCHEIDE JR. Deceased.	)	Case No.: P-14-082619-E Dept. No.: 26

NOTICE OF ENTRY

TO: ALL PERSONS INTERESTED IN THE WITHIN MATTER;

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a Decision and Order, a copy of which is attached hereto and incorporated herein by reference, was entered by the court on August 6, 2018.

Dated: August 8, 2017

CARY COLT PAYNE, ESQ.
Nevada Bar No.: 4357
CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
(702) 383-9010

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702. 383.9010 • Fax 702. 383.9049

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 8, 2018, a true and correct copy of the foregoing was served to the following at the their last known address(es), facsimile numbers and/or e-mail/other electronic means, pursuant to:

___ **BY MAIL:** N.R.C.P 5(b), I deposited for first class United States mailing, postage prepaid at Las Vegas, Nevada;

X **BY E-MAIL AND/OR ELECTRONIC MEANS:** Pursuant to Eighth Judicial District Court Administrative Order 14-2, Effective June 1, 2014, as identified in Rule 9 of the N.E.F.C.R. as having consented to electronic service, I served via e-mail or other electronic means (Wiznet) to the e-mail address(es) of the addressee(s).

KIM BOYER, ESQ.
10785 W. Twain Avenue, Suite 200
Las Vegas, NV 89135
Email: kimboyer@elderlawnv.com

Todd L. Moody, Esq.
Email: tmoodyt@hutchlegal.com
Russel J. Geist, Esq.
Email: rgeist@hutchlegal.com
HUTCHINSON & STEFFEN
Peccole Professional Park
10080 W. Alta Drive, Suite 200
Las Vegas, NB 89145

An employee of CARY COLT PAYNE, CHTD.

CARY COLT PAYNE, CHTD.
700 South Eighth Street
Las Vegas, Nevada 89101
Tel: 702.383.9010 • Fax 702.383.9049

Electronically Filed
8/6/2018 10:08 AM
Steven D. Grierson
CLERK OF THE COURT

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of: THEODORE E. SCHEIDE, JR. aka THEODORE ERNEST SCHEIDE, JR., Deceased.	CASE NO.: P-14-082619-E DEPT NO.: XXVI

DECISION AND ORDER

The above captioned matter came on for evidentiary hearing on June 15 and 16, 2017, on St. Jude Research Hospital's petition to admit Decedent's October 2, 2012, Will. Susan Hoy, Special Administrator, was represented by Counsel Kim Boyer of Durham Jones & Pinegar; Respondent Theodore E. Scheide III, was represented by counsel Cary Colt Payne and Objector/Petitioner St. Jude Children's Research Hospital, was represented by counsel Todd Moody and Russel Geist of Hutchison & Steffen. After hearing the testimony of witnesses, receiving evidence introduced at the evidentiary hearing, and considering argument of the parties, the matter was taken under advisement.

Upon consideration of the arguments, testimony, exhibits in evidence, in addition to the pleadings and papers on file the Court finds as follows:

FACTS

Decedent Theodore Scheide, Jr., ("Decedent" or "Theo") passed away August 17, 2014. His only statutory heir is his estranged son, Theodore Scheide, III (known as "Chip"). Decedent and his first wife, the mother of his only child, Theodore III, had been divorced for some time; Decedent had only sporadic contact with his son after the

divorce. A second marriage ended in 1999, but he remained in contact with his step-daughter Kathy Longo; although, they did not see each other on a regular basis. Decedent and Velma Shay were companions for many years and, although they were never married, they made complementary estate plans providing for one another. Decedent was not married at the time of his death.

In June 2012 Decedent executed a Will, disinheriting his son and leaving his estate to Velma Shay; if she predeceased him (she did), then to St. Jude Children's Hospital. In October 2012 Decedent revoked the June 2012 Will with a new October 2012 Will that only changed the Executor. Velma passed away in February, 2013, at which time Theo advised Kristin Tyler, Esq., his estate planning attorney, that everything would now go to St. Jude Children's Hospital. There is no evidence that Theo prepared a new will after Velma's passing.

Decedent had been appointed a guardian, Susan Hoy, in February 2014 due to his dementia and strokes. See G-14-039853-A. After Decedent passed away, his guardian, Susan Hoy, was appointed as Special Administrator of his Estate. Hoy found a copy of the October 2012 Will, but was not able to find the original.

In May 2016 after Hoy filed her First and Final Account, Attorney Kristin Tyler, Decedent's estate planning attorney and drafter of the October 2012 Will, discovered that the Court determined in May 2015 that decedent died intestate.

Ms. Tyler had maintained the original June 2012 Will in her files, but Decedent took the original October 2012 Will with him after executing the document. Ms. Tyler lodged the June 2012 Will with the Court. See W-16-010344.

This litigation was initiated with the Petition of the Special Administrator for Proof of the Will and Issuance of Letters Testamentary; Ms. Hoy later withdrew her Petition. Subsequently St. Jude filed its Petition for Probate of the Will and Revocation of Letters of Administration, and Issuance of Letters Testamentary. The Petition for Probate of the Lost Will was granted with the burden of proof on the proponent to prove

the testator did not revoke the lost or destroyed will during his lifetime. See, Estate of Irvine v Doyle, 101 Nev. 698. 710 P.2d 1366 (1985). Further, since the Decedent had been appointed a guardian in February 2014, he lacked testamentary capacity to revoke his will as of the date of adjudication of the Petition for Guardianship.

Ms. Tyler testified to the preparation and contents of the July and October 2012 Wills. In addition to the October 2012 copy, the original Will, dated June 2012, was also presented to the court. (The "June 2012 Original"). The October 2012 copy was annotated with the word "updated" written by the Decedent. Under the terms of both wills, St. Jude is listed as the beneficiary; neither Will listed Decedent's son as a beneficiary.

Ms. Tyler described the steps she always takes when a client comes to her office to sign a will. In October 2012 Theo confirmed that he understood the contents of his Will, and that no one was forcing him to make the will. Ms. Tyler and her assistant, Diane DeWalt, witnessed Theo sign his Will.

After a search of Decedent's storage facility, no one could find an original version of the October 2012 Will or the document that the guardian recalls being packed and placed in storage. There was no evidence that the Decedent ever visited his storage facility, and he was not capable of transporting himself whereby he could have obtained possession of any of the above-referenced Wills. After the appointment of Ms. Hoy as his Guardian, Decedent would have lacked capacity to have effectively revoked his Will.

BACKGROUND

Approximately six (6) months prior to his death, Decedent was placed under the care of a guardian as a result of a medical/mental examination. After the appointment of the guardian, Decedent was moved into a nursing home and the majority of his belongings were moved to a storage facility. Before his items were placed in storage, the guardian recalls seeing a Will with the words "updated October 2012" printed on it

followed by Decedent's signature, and believes that document was packed with Decedent's personal effects to be placed in storage. The Guardian, Susan Hoy, testified she believed Decedent destroyed his estate planning documents as none could be located after his death.

Decedent maintained his relationship with Kathy Longo, his step-daughter from a 25-year marriage that ended in 1999 with death of his second wife. After Kathy moved to Las Vegas she visited Theo and at his request began assisting him with some of his needs, such as writing checks. As these activities were time consuming (four trips per week from the other side of town), Kathy charged Theo for her time. Kathy refused to take on the responsibility of guardianship as she was not in town on a full time basis. While helping Theo pack up his home office in preparation to move to assisted living, Kathy saw a will on a shelf. Kathy does not know if that document was an original or a copy. Theo originally agreed to the move to assisted living, then he changed his mind. Kathy only saw the will in the Decedent's office prior to his admission into the nursing home and before he was appointed a Guardian. Kathy did not read it, nor could she testify to the date the will she saw was executed. However, the Decedent did inform her that he intended to leave his estate to St. Jude. Theo never talked to her about his son Chip. Kathy also testified that after Theo moved into the nursing home, he told her that his important papers were in storage.

In December 2013 Kathy went out of town for the holidays and notified Ms. Tyler she would not be able to continue and someone else would need to assist Theo. Kathy testified that Theo's behavior the last time she saw him prompted her resignation. Theo was diabetic and refused care; when Kathy arrived at the rehab facility to pick him up, he was unkempt (wearing pajamas, no socks). Kathy testified that Theo's behavior was embarrassing; he had no bladder or bowel control and relieved himself in the bushes at the rehabilitation hospital. That was the last time Kathy saw him.

Decedent's apparent testamentary intent to leave his estate to St. Jude is further supported by the fact that he donated approximately $130,000.00 over 20 years to the organization, with his last donation in the amount of $10,000.00 made in 2013. Kathy recalled being asked to prepare that check for Theo's signature.

Decedent's mental condition prior to death was such that he lacked testamentary capacity. Just days before he passed, Decedent became agitated and attempted to fire those who were responsible for his care, including the guardian.

At the hearing to determine if Decedent's estate would pass by intestate succession or through a testamentary will, the Decedent's son Chip argued that the original October 2012 Will was in Decedent's possession prior to his death, and he intentionally destroyed/revoked it prior to the determination that he was in need of a guardian and lacked capacity.

LEGAL ISSUES

I. Alternative Theories Under Nevada Law

Under common law, a presumption exists that a missing will was revoked and/or destroyed by the testator.[1] NRS 136.240 provides a mechanism to overcome this presumption whereby a lost or destroyed will can be probated when the petitioner is able to provide: (1) two or more credible witnesses that provide clear and distinct testimony concerning the will's provisions, and was (a) in legal existence at the time of the testator's death, or (b) fraudulently destroyed during the testator's lifetime. But a testator's declarations "cannot be substituted for one of the witnesses required by NRS 136.240".[2]

In addition to NRS 136.240, the doctrine of dependent relative revocation has been recognized in Nevada to nullify a prior will's revocation if it was made "in connection

[1] See Estate of Irvine v. Doyle, 710 P.2d 1366, 1369 (1985).
[2] See Howard Hughes Medical Institute v. Gavin, 621 P.2d 489, 491 (1980).

with an attempt to achieve a dispositive objective that fails under applicable law" OR because of a false belief/assumption that is either recited in the revoking instrument or established by clear and convincing evidence.[3] The Nevada Supreme Court stated a "crucial distinction" of the dependent relative revocation doctrine is "that it does not revive a revoked will; rather, it renders a revocation ineffective."[4]

II. Application of Nevada Law to the Facts

In order to prevail in its efforts to probate the October 2012 copy, Petitioner/Objector (St. Jude) must establish that the original Will was in legal existence at the time of Decedent's death and produce two witnesses who can provide "clear and distinct" evidence of the Will's provisions. NRS 136.240[5]

---

[3] See In re Melton, 272 P.3d 668, 671 (2012) where the Nevada Supreme Court formally adopted the doctrine of dependent relative revocation and distinguished it from the doctrine of revival that is expressly prohibited under NRS 133.130. The statute provides that revocation of a subsequent will does not revive the prior will unless there is an express term/provision of the testator's intention to revise the prior will within the revoking document.

[4] See In re Melton at 679, citing to Restatement (Third) of Prop.: Wills and Other Donative Transfers §4.3.

[5] **NRS 136.240 Petition for probate; same requirement of proof as other wills; testimony of witnesses; rebuttable presumption concerning certain wills; prima facie showing that will was not revoked; order.**

1. The petition for the probate of a lost or destroyed will must include a copy of the will, or if no copy is available state, or be accompanied by a written statement of, the testamentary words, or the substance thereof.

2. If offered for probate, a lost or destroyed will must be proved in the same manner as other wills are proved under this chapter.

3. In addition, no will may be proved as a lost or destroyed will unless it is proved to have been in existence at the death of the person whose will it is claimed to be, or is shown to have been fraudulently destroyed in the lifetime of that person, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

4. The testimony of each witness must be reduced to writing, signed by the witness and filed, and is admissible in evidence in any contest of the will if the witness has died or permanently moved from the State.

5. Notwithstanding any provision of this section to the contrary:

(a) The production of a person's lost or destroyed will, whose primary beneficiary is a nontestamentary trust established by the person and in existence at his or her death, creates a rebuttable presumption that the will had not been revoked.

(b) If the proponent of a lost or destroyed will makes a prima facie showing that it was more likely than not left unrevoked by the person whose will it is claimed to be before his or her death, then the will must be admitted to probate in absence of an objection. If such prima facie showing has been made, the court shall accept a copy of such a will as sufficient proof of the terms thereof without requiring further evidence in the absence of any objection.

The record is clear that after moving to the nursing home Decedent was not in physical possession of the October 2012 Will such that he could have "revoked" it by destroying or otherwise tearing it up. The evidence supports a finding that the original version of the October 2012 Will was in his home office and at some point was lost. What is less clear is whether Decedent destroyed the Will before leaving his home, or if it was misplaced in the process of packing the contents of Decedent's home and placing his belongings into storage. No evidence was introduced to establish Decedent visited his storage facility or that he instructed anyone to bring him the original version of the October 2012 Will.

Even if Theo did manage to retrieve the original Will, he lacked the mental capacity to "revoke" the October 2012 Will after February 2014 until his death in August. No evidence was introduced to establish that Theo lacked capacity prior to the date he was appointed a guardian. There is no evidence to establish Theo had possession of the original October 201 Will after moving to assisted living. These facts provide a basis to examine the remaining evidence introduced to prove the October 2012 Will was in legal existence at the time of Decedent's death. [6]

Petitioners were required to offer the testimony of two witnesses who could provide "clear and distinct" evidence of the provisions of the October 2012 Will.[7] The drafting attorney had a clear recollection of drafting the Will and was in possession of a copy of the Will. The second witness to the Will, Diane DeWalt, the legal assistant to the drafting attorney, recalled she prepared the Will and served as a witness, but she did not

[6] NRS 136.240 states in part: "(t)he petition for the probate of a lost or destroyed will must include a copy of the will ... [and] ... no will may be proved as a lost or destroyed will unless it is proved to have been in existence at the death of the person whose will it is claimed to be, or is shown to have been fraudulently destroyed in the lifetime of that person, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses..."

[7] Estate of Irvine v. Doyle, 710 P.2d 1366 (1985) – The Nevada Supreme Court held that a proponent of a lost or destroyed will is required to prove that testator did not revoke the lost or destroyed will, but such proof is not that the will was in "actual" existence at the time of testator's death, only that it was in "legal" existence. To combat "spurious wills", the Court also noted that a proponent must prove the provisions of the will by at least two credible witnesses that can provide clear and distinct testimony as to its provisions.

recall the specific terms of the Will. The remaining witness, Decedent's stepdaughter Kathy Longo, testified that the decedent told her about his testamentary intent, which was to leave his estate to St. Jude's. She also confirmed seeing the Will in the decedent's home office; but she did not read the Will and thus could not confirm the provisions, nor did she know the date the Will she saw was executed.

Under Nevada law the testator's declarations cannot be substituted for one of the witnesses required under NRS 136.240. See, In re Duffill's Estate, 61 P.2d 985 (1936) and Howard Hughes Medical Inst. v. Gavin, 621 P.2d 489 (1980).

In re Duffill's Estate, 61 P.2d 985 (1936) is the case establishing the requirements for proving a lost will. The Nevada Supreme Court upheld the lower court's judgment that decedent's mother failed to prove the existence of a lost will leaving her $200,000.00. The mother produced four witnesses to support the lost will. The first witness actually signed the will as a subscribing witness but testified his only knowledge of its terms was based on the decedent's statements, which the court noted was not sufficient as decedent could not be substituted as one of the two witnesses required to probate a lost will. The other three witnesses all testified to the contents of the will and that their knowledge was gained during separate conversations with the decedent about his failing health and that decedent prompted them to read the will. The trial court rejected the testimony of these three witnesses as not being trustworthy.

In Howard Hughes Medical Inst. v. Gavin, 621 P.2d 489 (1980) the Nevada Supreme Court again noted that a testator's declarations cannot be substituted for one of the witnesses required by the Lost Will Statute, NRS 136.240. The Court found that strict compliance with NRS 136.240 "precludes proof of the contents of a lost will by hearsay declarations of deceased people, unless the declarant's testimony is written and signed by the declarant." Id. at 491. Therefore, Theo's statements to Kathy cannot overcome the statutory requirements.

In the instant matter Decedent's long time estate planning attorney Kristin Tyler has a very distinct recollection of the terms of Theo's final October 2012 Will. The Will was consistent with Theo's historical estate plans, his beneficiary designations did not vary over time, nor did he ever leave anything to his son Chip. Therefore, it can be assumed Theo understood the need to specifically disinherit his only child, as well as the outcome if he failed to leave a Will that did so.

While the testimony of the other witnesses about Theo's stated testamentary intention is credible and consistent, this Court cannot accept the hearsay declarations of the decedent. The Hughes case provides a possible exception if the declarant's testimony is signed. Here Decedent did hand write and sign the words "October 2, 2012 Up-dated." The handwritten statement on the copy of the October 2012 Will does not clarify what provisions were "up-dated": the statement appears simply to reference the date the Will was executed. This is not sufficient to satisfy the Hughes exception. The Hughes case stands for the principal that strict compliance with the requirements of the statute is necessary. Here, only one witness, the drafting attorney, provided testimony sufficient to satisfy the statute.

III. Dependent Relative Revocation

An alternative theory presented by these facts is whether the June 2012 original Will can be revived, or its revocation under the October 2012 copy deemed ineffective. NRS 133.130 limits the revival of a prior will to only those instances where the revocation occurred with intent to revive or the prior will is reexecuted.[8] Nothing within the above factual background supports either of these situations. In re Melton, 272 P.3d

[8] **NRS 133.130 Effect of revocation of subsequent will.**
If, after the making of any will, the testator executes a valid second will that includes provisions revoking the first will, the destruction, cancellation or revocation of the second will does not revive the first will unless:
1. It appears by the terms of the revocation or the manner in which the revocation occurred that it was the intention to revive and give effect to the first will; or
2. After the destruction, cancellation or revocation, the first will is reexecuted;
....
6. If the will is established, its provisions must be set forth specifically in the order admitting it to probate, or a copy of the will must be attached to the order.

668 (2012) dependent relative revocation does not revive a revoked will, but only applies where a revocation was ineffective. As with revival, the above factual background does not include any basis upon which the October 2012 copy and its revocation of the June 2012 Original was ineffective.

In Melton the Nevada Supreme Court distinguished NRS 133.130 and its restriction against a revoked will's revival from the doctrine of *dependent relative revocation*. The court found that the "doctrine of dependent relative revocation ... 'does not revive a revoked will; rather, it renders a revocation ineffective.'" Therefore, the Nevada Supreme Court expressly adopted the doctrine of dependent relative revocation, but declined to apply it because the revocation of a prior will, and its disinheritance provision, was not impacted or made conditional by a subsequent holographic will that involved a different dispositive scheme.

The Melton decision is consistent with the longstanding California rule. See, In re Lopes, 152 Cal.App.3d 302 (1984). The fact pattern in Lopes is very similar to the background outlined above and petitioner attempts to argue that all provisions of a lost will, including revocation of a prior will, should be nullified. The appellate court held that a copy of a 1979 will could not be probated because it could not be shown to be in existence on the date of death. Petitioner therefore argued that all provisions found within the 1979 will failed, including the provision that revoked a prior will executed in 1977. The court noted that a will can be revoked by any writing and does not need to meet the standards for proving a lost will and also noted that dependent relative revocation offered an appropriate method to address revocations based upon a false assumption of the effectiveness of a subsequently executed will.

Here the June 2012 Will was expressly revoked by the October 2012 Will, and there is no evidence that revocation was ineffective in its express terms. Subsequently the October 2012 Will was either lost or destroyed, however, there is no evidence it was revoked in writing. Lacking sufficient evidence to prove the October 2012 "lost" will, the

Court finds it is presumed to have been destroyed. Given the absence of a writing to establish the October 2012 Will was revoked with the intent to revive the June 2012 Will, the doctrine of dependent relative revocation cannot revive the June 2012 Will.

CONCLUSION

St. Jude's failed to meet its burden of proof that the Will was not revoked during Decedent's lifetime (while Decedent was competent). The lost will statute must be strictly construed, and here only one witness provided clear and distinct testimony about the contents of the October 2012 Will. None of the witnesses who saw a will in Decedent's home prior to him entering assisted living could testify that the will they saw was the Original of the October 2012 Will. While Decedent was not determined to lack capacity until February 2014, his behavior during the time he was preparing to move to assisted living was increasingly erratic. Decedent had been a careful planner and seems to have understood the need to specifically disinherit his son, and alternatively, the fact that without a will his son would inherit. Although he did not make a formal change to his estate planning documents, he could simply have changed his mind and destroyed the original will in his possession.

WHEREFOR, based on of testimony at trial, the exhibits, and the law that applies in this case as set forth above, the Petitioner/Objector St. Jude Children's Hospital Petition to admit Decedent's lost will dated October 2, 2012, is hereby DENIED.

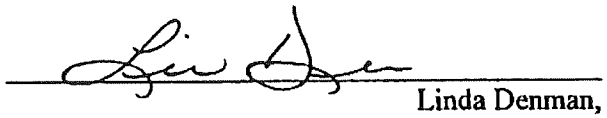
DATED: This 3rd day of August, 2018

GLORIA J. STURMAN
District Court Judge, Dept. XXVI

Counsel for Respondent is directed to prepare a Notice of Entry of Decision and Order.

CERTIFICATE OF SERVICE

I hereby certify that on the date signed, a copy of the Foregoing Order was electronically served on all parties registered in P-14-082619.



Linda Denman,
Judicial Executive Assistant

GLORIA J. STURMAN
DISTRICT JUDGE
DEPT XXVI
LAS VEGAS, NV 89155