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, INC. Appellant, -vs- THEODORE E. SCHEIDE III Respondent.	**Supreme Court No.: 76924** *Eighth Judicial District* *Court Case No.: P-14-082619-E* *Hon. Gloria Sturman, presiding*

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Appellant, St. Jude Children Research Hospital, Inc. is a corporate entity whose state of incorporation is Tennessee. Appellant was represented by Russel J. Geist, Esq. of the HUTCHINSON & STEFFEN lawfirm in the District Court matter below.

Respondent, Theodore E. Scheide III, is a resident of the State of Pennsylvania, and has been represented by Cary Colt Payne, Esq., of the Cary Colt Payne, Chtd. lawfirm in District Court matter below.

Respectfully Submitted,

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ATTORNEY CERTIFICATE NRAP RULE 28.2

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman and is double-spaced.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7)(i)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionately spaced, has a typeface of 14 points or more, and contains 7318 words and does not exceed 30 pages.

3. Finally, I hereby certify that I have read this Motion to Dismiss and Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

CARY COLT PAYNE, ESQ.
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I. Jurisdictional Statement

The Supreme Court has jurisdiction over this matter as it is an appeal from an order of the District Court pursuant to NRAP 3(A)(b)(3), NRS 155.190 (e),(h), (j), (n).

II. Routing Statement

Appellants respectfully submit that this appeal may be appropriate for resolution/decision in the Court of Appeals, pursuant to NRAP 17(B)(15): Cases involving trust and estate matters in which the corpus has a value of less than $5,430,000;

III. Statement of Interested Parties

Appellants: St. Jude Children Research Hospital, Inc.

Respondent: Theodore E. Scheide, III

IV. Statement of Issues

Appellant mistakes the issue on appeal. The matter was tried and the District Court's Decision clearly sets forth Appellant's burden of proof at trial and found that Appellants failed to meet that burden.

If this court does not find that the District Court's Decision and Order was clearly erroneous in light of the evidence presented at trial, that the judgment must stand. See *Bird v. Mason*, 77 Nev. 460, 366 P.2d 338 (1961); *Garaventa v. Gardella*, 63 Nev. 304, 169 P.2d 540 (1946).

V. Statement of the Facts of the Case/Procedural History

Respondent's references to specific documents, etc. will be utilizing Appellant's Appendix.

Theodore E. Scheide Jr., died August 17, 2014 (hereinafter "Theodore" or "Decedent"). Prior to his death the Decedent executed a Last will dated June 8, 2012 ("Second will" or "June will"). This will replaced a last will ("first Last Will") drafted by Jasen Cassady, Esq., according to Kristen Tyler, Esq. Mr. Cassady's continued involvement in these matters was not totally clear. The object of these wills was Velma Shay. She died early in 2013. As discussed further, controversy ensued surrounding her Estate between the Decedent and Ms. Shay's family, in 2013. (AA-834-839)

The sole beneficiary of the June 2012 Will was his then companion, Velma Shay. Appellant had been a contingent reamainderman. Karen Hoagland was the named executor, POA agent, etc. Kristen Tyler, Esq. held on to all the original documents as the Decedent was in the hospital.

In September 2012, Karen Hoagland notifies the Decedent she no longer wishes to be "involved" as his agent or successor. (AA-529) She had previously been charging him $300 to help him. Id. The two had a falling out about his gun. He called the "police on her" (AA-1252). "She is scared of him". Id.

On October 2, 2012, the Decedent executes (third) October 2012 Last Will, revoking all prior wills. The document again identifies Velma Shay as the sole beneficiary and Appellants as a contingent. This time he names named his then bookkeeper/tax-preparer, Patricia Bowlin, as executrix. Nevada State Bank is the alternate. He also executes new (estate planning) documents, including POA (both general and health care), etc. The Decedent takes all of the originals with him. It is presumed Ms. Tyler advised him of the consequences.

Velma Shay dies on January 31, 2013. The Decedent in (proper person) filed his own petition for cremation in the Eighth Judicial District Court. (AA-1065-Supplement to hearing filed 6/1/17) Although the Velma controversy turns (stems) from certain claims against the Decedent for the recovery of Velma's personal property by her own two children, the Decedent was upset. Clearly, the Decedent has his own legal counsel for several months, it was not Kristen Tyler, Esq. (AA-834 and AA-632-633)

In June, 2013, due to disagreement, Patricia Bowlin, bookkeeper, notified the Decedent she no longer wanted to be his attorney in fact. (AA-623) The Decedent signs a formal revocation of her authority June 2013. (AA-541)

Kristen Tyler, Esq. "attempts" to have the Decedent hire Nevada Guardian services as his assistant, as he "fired" stepdaughter Kathy Longo. In February, 2014, Kristen Tyler writes "unfortunately, he [Theodore] never took my advice to get you (or anyone) formally appointed as POA or guardian nominated". (AA-625) The last formal correspondence Tyler has was dated January 17, 2014. (AA-625). Clearly there was a breakdown in her communications.

In early February, 2014, the Decedent had a toe infection, was sent to the hospital, and medical records report mental stability. (AA 818-821) On February 13, 2014, Susan Hoy commences guardianship proceedings. The guardianship was granted without any notice to Chip. (AA-313-314) She marshals all of the Decedent's important personal effects and papers, and no original estate plan documents (Will, POA, etc.) were found. On February 24, 2014, Patricia Bowlin notifies of formal falling out (he accused her of theft) and that she wishes no further involvement. (AA-545)

From February through-May, 2014, even under guardianship, the Decedent continued his normal life. In May 2014 he moved ("loves the facility") to a larger apartment. (AA-829) He continued driving (AA-1242) going to church, shopping, dining, eating out and the like. Although he's clearly upset, demanding (5/14/14) access to his brokerage statements and concerned how other people are spending his money. (AA- 824-826) As of August 6, 2014, Decedent is still keeping his appointments by going to his Doctors offices (AA-826). The Decedent dies August 17, 2014 at the age of 86 from Respiratory Failure, Sepsis and Abdominal Abscess (non traumatic category III). (AA- 004)

On October 2, 2014, this matter was commenced by the Ex-Parte Petition for a Appointment of Special Administrator. (AA-001) In the Petition at ¶3, Ms Hoy states:

> "Due search and inquiry has been made to ascertain if the decedent left a will and a copy has been found but not the original. The decedent has a safe deposit at US Bank. There is a possibility an original may be in the safe deposit box. According to the attorney who drafted the estate planning documents, Theodore E. Scheide took the original Last Will. The undersigned, a guardian, did not find an original Last Will in the decedent's personal property and papers." (Emphasis added).

In the Order appointing Hoy as special administrator, Hoy had the authority to enter the Decedent's Safe Deposit Box. (AA-006). Susan Hoy entered the Decedent's box and it was empty. (AA-050)

In January 2015, Ms. Hoy Petitioned to the Probate Court to be appointed as administrator of intestate estate. (AA- 011) in part again (at ¶3) states:

> "Due search and inquiry has been made to ascertain if the descendent left a valid will and a copy of that Last Will and Testament dated October 2 was located but the original was not found". See copy attached hereto as Exibit"2"."

That copy (Exhibit 2 to the petition) contained handwriting along its left margin and the words "updated" under that "October 2, 2012" on top. (AA-015) Appellant was notified with that petition. (AA- 032) The Petition was later taken off calendar.

On May 6, 2015 Hoy files a Petition for Instructions. (AA-033) In that Petition, Hoy alleged that:

> At pg 2, ¶4: "Due search and inquiry has been made to ascertain if the descendent left a valid will and a copy of that Last Will and Testament dated October 2 was located but the original was not found". See copy attached hereto as Exibit"4"." (Note: is the same document as Exhibit "2" above)
>
> At pg 2, ¶6: "The drafting attorney gave the original (October 2012) 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. (Not only no wills, but no estate planning documents e.g. POA's, etc). The Special Administrator believes the decedent destroyed any original estate planning documents he may have executed prior to his death." (Emphasis added and comment).

Hoy again provided actual notice to Appellant. (Certificate of Mailing –AA- 057) The hearing on the Petition for Instructions was held May 22, 2015, before the Probate Commissioner (AA-058) wherein the petition was granted and the minutes of the hearing state:

> 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. Van Alstyne stated that is correct and confirmed this will is to proceed based upon the basis of an intestate situation. [Emphasis added]
> Letters of Administration were issued, Notice to creditors filed. On March 8, 2015,

Inventory and Record of Value was filed. (AA-066), wherein all of the Decedent's personal effects are listed, including, *inter alia*, a "shredder", "University of PA Diploma & other personal papers," AA 828. No original documents (wills, POA, etc.) were listed

and none were found. Clearly this was all of the Decedent's personal property. The inventory was never amended or challenged.

On May 18, 2015, Susie Hoy filed a First and Final Accounting, etc. indicating the Decedent died Intestate, closing out the Estate to his only heir pursuant to NRS 134.090 to Theodore "Chip" E. Scheide, III the decedents only heir. On May 20, 2016, Appellant files it Notice of Appearance. (AA-070)

On May 20, 2016 Kristen Tyler, Esq. lodges (almost 2 years- later) the original June 8, 2012 Last Will. (W-16-010344) (AA-112)

On May 18, 2016 Hoy files the First and Final Account/Report, and Petition for Final Distribution, etc. (AA-070). An Amended First and Final Account, Report of Administration and Petition for Final Distribution and Approval of Costs and Fees was also filed May 25, 2016. (AA-106) Both the initial Petition and the Amended Petition sought to proceed with intestate distribution to Decedent's son, Theodore Scheide III (hereinafter "Chip" or "Scheide"). Both Petitions were taken off calendar.

Hoy then files (5/25/16) a Petition for Proof of (June) will, etc. (AA-082), later withdrawn.

In contravention to Appellant's argument in their Opening Brief (page 16), Appellant admits that they received notices of hearings.

This probate administration (lasted almost 2 years) proceeded with the prior determinations and orders that the decedent had revoked his last will, that the Decedent died intestate. (AA-060) There was no appeal or other proceedings held as to the Court's previous order declaring intestate succession. There is no order contravening the

"intestate status" of this estate. An order establishing heirship is final. See *Matter of Estate of Miller*, 111 Nev. 12, 888 P.2d 433 (1995)

On September 13, 2016, over two (2) years after the decedent's death (18 months) after the estate was ordered intestate, Appellant filed its Petition for Probate of Lost Will, etc. (AA-141), which was opposed by Scheide. (AA-244)

The Respondent objected (counter petitioned for distribution) requested more definite statements. (AA-244-287) After discovery concluded, Scheide, pursuant to NRCP 12(c) petitioned the court for Judgment on the Pleadings (filed 8/8/17), in that Appellant alleged the October will "merely lost by accident" (AA-141). Appellant had no witnesses that had any facts regarding the will being lost, before the Decedent's death or after. Not a single witness of the Appellant had actually been able to state that they actually ever saw the Original October 2012 will since the date it was actually signed. They had no witnesses claiming it was "accidentally destroyed" as for example some sort of "unforeseeable (fire, flood) event". Both parties filed cross-claims/motions for Summary Judgment. (AA-796) All of the matters were denied in part based Supreme Court's holding in *Irvine vs. Doyle*.

The matter proceeded to non jury-trial June 15 and 16, 2017. (Transcripts – AA-1082 and AA-1364) At trial, Appellant put forth two theories: (1) that a copy (No 2.) of the October 2012 Will could be probated; alternatively, that the June 2012 Will could be probated. The later theory was ultimately abandoned. At the end of Appellants case (day 2), the District Court was concerned with the amount of time Appellant used to bring the petition for Lost Will and it lack of notice to the named fiduciaries. (AA-1369)

On August 6, 2018 (some 14 months later) District Court entered its Decision and Order, with Notice of Entry August 8, 2018 (AA-1471), concluding that Appellant did not meet its burden of proof.

VI. Standard of Review

In *Logan v. Abe*, 131 Nev. Adv. Op. 31350 P.3d 1139, (Nev., 2015) the Nevada Supreme Court held: A district court abuses its discretion when it commits "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State v. Eighth Judicial Dist. Court*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (quoting *Steward v. McDonald*, 958 S.W.2d 297, 300 (Ark. 1997)).

In a probate matter, the Supreme Court will "defer to a district court's findings of fact and will only disturb them if they are not supported by substantial evidence." *Waldman v. Maini*, 124 Nev. 1121, 1129, 195 P.2d 850, 856 (2008). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion". *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013) (quoting *Winchell v. Schiff*, 124 Nev. 938, 044, 193 P.3d 946, 950 (2008)) Legal questions, including matters of statutory interpretation are reviewed de novo. *Waldman*, 124 Nev. at 1129, 195 P.3d at 856.

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 *In re Arnold's Estate*, 60 Nev. 376, 380, 110 P.2d 204, 206 (1941), *Todora v. Todora*, 554 P.2d 738, 92 Nev. 566 (Nev., 1976), *Estate of Prestie*, 122 Nev. 812, 138 P.3d 520 (2006).

VII. Summary of Arguments

Ultimately, the single issue on appeal is whether the record supports the court's factual determination that Appellant failed to meet its burden of proof under NRS 136.240. The Appellants have not presented arguments that the District Court's "finding" that Appellant failed to meet its burden of proof was error. There is nothing in the record that Appellant cites to supports their theory that the trier of fact committed any kind of clear error. The District Court in its Decision and Order (AA-1471) reads:

> "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: (I) 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"." (pg 5, lines 17-23)
>
> "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." (pg. 11, ln. 6-20)

Appellant failed in proving all of the factors necessary under NRS 136.240. Appellant did not present testimony by proffer or other, that the October will was "lost by

accident" or that the original "destroyed by fraud without the knowledge of the testator". Nothing was proved that the Decedent did not revoke the document "by burning, tearing, cancelling or obliterating the same, whether involuntarily of his own free will during his lifetime. (NRS 133.120) Appellant had a duty per the Court in its order to satisfy all the requirements under NRS 136.240 that the will was lost. Appellant failed to prove by any sufficient evidence that the will was lost.

Not one (single) witness had actually been able to state that they actually saw the original October 2, 2012 Will after the date it was executed. Kristin Tyler Esq., Appellant's first witness never saw the original again.

Although the District Court found her testimony credible it was simply insufficient to overcome the presumption that the decedent voluntarily revoked the October 2012 Will. What was obvious to the trier of fact, none of the Appellant's witnesses actually could testify that the will was in fact lost or destroyed. Or if was lost or destroyed, was before or after the Decedent passed.

Simply, Appellant had no facts as to what the Decedent did with the original after October 2012. Appellant, a complete (corporate) "stranger" to the Decedent, had no personal knowledge of any facts or circumstances surrounding the Decedent's Last wishes when he died.

At the end of Appellant's (case in chief) the District Court notes:

> "So I don't know. To me, I have a problem at this point in time think that if there is any more evidence, I'd like to I want to hear all the evidence...
> "But what happened to it [The October Will]? And that's my problem with it, so if there any more evidence, I just think we need to get all the evidence on the record so that we... if there's any further evidence, I want to hear all of it before make a ruling on this so that we have a –we know exactly what each side was contending. (AA-1371, line 8 to 1372, line 2).

At that point the Appellant had rested, and the Respondent called no witnesses.

What was shown at trial was that various individuals may have seen the original October 2012 will at the time of execution. There was no testimony regarding existence. It was undisputed that the Decedent took the original October 2012 with him – no one ever personally saw it again. This included the drafting attorney, Kristen Tyler, Esq., who as the drafter was also the only witness to testify to the "contents". (Decision, pg 9 line15-16) DeWalt did not testify as to the contents. DeWalt was Kristen Tyler's legal secretary. Longo testified that she heard about a will; thought she might be able to speculate where it was kept, but never physically saw it. Never touched it, read it or had any idea of its actual contents from any personal knowledge.

The only issue presented by Appellant at trial, and that Appellant did prove, was that the October 2012 was properly executed by two witnesses/notary. Therefore, it revoked the June 2012 Will as a matter of law. (NRS 133.130[1])

That is where Appellant's case basically ended – with the proof of the execution of the October 2012 will.

Their argument ignores the three step process to prove a lost will under NRS 136.240 as discussed below.

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1 **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.

VIII. LEGAL ARGUMENT(S)

(1) Appellant's Statement of the issue confuses NRS 136.230-136.240 with the proof of a will's "content" with the "proof of a Lost Will".

Original wills (not copies) allow parties to examine the document and test its authenticity. NRS 136.230, 136.240 are clear. "If a will is lost by accident or destroyed by fraud without the knowledge of the testator, the court may take proof…" The Nevada Supreme Court has given the following principles of statutory construction which are applicable here.

First, the Nevada Supreme Court has held that "when the words of a statute are clear and unambiguous, they will be given their plain, ordinary meaning. *State v. Friend,* 118 Nev. 115, 40 P.3d 436 (2002). If a statue is clear and unambiguous, the court gives full effect to the plain and ordinary meaning of its language. *J.D. Costr., Inc. v. IBEX Int'l Grp., LLC,* 126 Nev. 366,375, 240 P.3d 1033,1039 (2010).

Appellant's Opening Brief (at page 29) states "The district court proceeded to discuss the existence of adequate witnesses to support the terms of the will as though the existence of witnesses had a bearing on whether the will was in legal existence at the time of death. *Id.* This was error."

The District Court applied NRS 136.240 and properly concluded that the Decedent's last will had been voluntarily destroyed/revoked under the presumption. There was no evidence that it was "lost by accident", or "destroyed by fraud without the knowledge of the testator". NRS 50.025 requires a witness to have personal knowledge. Not one witness testified as to any personal knowledge of the document's actual existence after the execution in October 2012.

Ultimately, Appellant did not rebut the presumption that the Decedent voluntarily revoked the October 2012 Will.

NRS 136.240 has remained the same since its adoption in 1931. It has some minor revisions to clarify, but has remained virtually unchanged. The critical provision depends whether it was lost or destroyed. Under English common law, which Nevada has adopted, a will which is lost or destroyed during the life of its author is presumed to be revoked. Thus, under common law, if the will was lost or destroyed during the life of the author, a copy is invalid. However, if the will was lost or destroyed after the death of the author, the copy of the lost will if proven can be probated.

Appellant confuses the three elements of their burden of proof, under NRS 136.240 in that proving "contents" and proof of the necessary elements of a "lost will".

In order to prevail in probating a lost or destroyed will, by clear and convincing evidence, pursuant to NRS 136.240, it would be required to prove that:

1. The original document was not voluntarily revoked, and was fraudulently destroyed during testator's lifetime,

2. Testimony of execution and contents are to be proven via those who witnessed the will and two competent witnesses as to the contents.

3. The original document was in actual existence at the time of the decedent's death (actually seen by two (2) persons),

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 (1985). NRS136.240(3) requires proof that the testator himself had not

revoked the lost or destroyed will, proof that would overcome the common-law presumption of revocation.

The Court's Decision found that the gatekeeper test, that the will was voluntarily lost or destroyed, and not merely unavailable, had been met.

Appellant cites no Authority that a mere "copy" supports a "theory of the law" or that there is some legal authority that all copies must be destroyed in order to revoke a will. The Appellant's places great emphasis on the arguments or the legal significance of "copies". The traditional reason that Courts either refuse to admit a will copy or admit it only after complying with extra procedures is that a traditional way to revoke a will it to physically destroy it. There is no requirement that actual copies also be destroyed in order to revoke the will.

The "contents" of the will was not the dispute; rather it was the issues of proofs, or lack thereof of "lost". The issue at trial was could Appellant prove by at least two (2) credible witnesses, that the last will was still in existence (legal or otherwise) and that the testator did not voluntarily revoke the will.

Appellant's Brief states, at page 29: "The District Court specifically found the testimony of Tyler, Longo and DeWalt to be credible, but strictly and incorrectly applied case law to reach the conclusions that the testimony of each witness must independently establish the contents of a lost will." Appellant believes this conclusion to be unwarranted under the case law cited". Despite the fact that Appellant's Opening Brief is 68 pages long, it is fraught with excess pages of emotional factual hair splitting, seeking, in fact, to create the very red herrings Appellant should avoid.

There can be much speculation as to why the Decedent "fired" Ms. Tyler. Did the Decedent "consult" with other attorneys. We know Jasen Cassady, Esq., had spoken with the Decedent before. Was he hired to give his client advice on cancelling the document.

A Testator is presumed to know the law. *Gianoli v. Gobaccia*, 82 Nev. 108, 412 P.2d 439 (1966) Footnote 2 (citations omitted)

What we did know is the Decedent has a history re-writing his wills. He had at least 3 different wills in 2012. We know that he has a habit of getting mad and then changing his mind. We know the object of the June will predeceased-Velma Shay. We know that over a very short time frame he had fallings out with Karen, redoing his prior will, then the June will, when she refused to help him. We also know that had a falling out with bookkeeper/tax consultant Bowlin.

We know that any competent legal counsel would have advised the Decedent to "secure and safe guard" his original documents and what the law provides in the event of dying without a will.

Even under a generous interpretation, the testimony was that they maybe somebody saw a "manila envelope", and simply assumed the envelope contained documents. Again no one actually saw the Last Will itself for the intervening almost two years from execution (October 2012) until the Decedent's death (August 2014) This was clearly noted in the District Court's findings. (AA-1471) Appellant cites nothing to support that the factual findings is unsupported or erroneous.

This was not a case involving "conflicts" of the evidence or questions with the witness credibility.

Under *Duffill v. Duffill*, 57 Nev. 224, 61 P.2d 985 (1936), the Supreme Court affirmed the denial of a lost will. The District Court actually weighed the credibility of the witnesses and found them not to be credible. In doing so the Court clarified that:

> "Our legislature, while making provision for the proof of a lost or destroyed will, realized that the establishment of such documents should be clearly and distinctly proven by at least two credible witnesses. It sought to prevent fraud and a miscarriage of justice in such matters." (at 230)

Appellant takes more than five (5) pages (brief pages 47-51) in an attempt to explain the differences in two different courts (Nevada and California) why the Nevada District Court, the trier of fact, did not believe the witnesses.

Unlike in this case, the District Court, for argument's sake, completely believed Kristen Tyler, Esq., and the other witnesses, but still, Appellant simply failed to meet its burden of proof under NRS 136.240.

Duffill continues, citing to a matter before the supreme court of California, in *Estate of Kidder*, 66 Cal. 487,6 P. 326, 329 (1881), quotes approvingly as follows:

> "To authorize the probate of a lost will by parol proof of its contents depending on the recollection of witnesses, the evidence must be strong, positive, and free from all doubt. Courts are bound to consider such evidence with great caution and they cannot act upon probabilities.' `This strictness is requisite, in order that courts may be sure that they are giving effect to the will of the deceased and not making a will for him.' *Matter of Johnson's Will*, 40 Conn. [587] 589."

If a statute is clear and unambiguous, the court gives full effect to the plain and ordinary meaning of the language. *J.D. Constr., Inc. v. IBEX Int'l Grp., LLC*, 126 Nev. 366,375, 240 P.3d. 1033 at 1039-40 (2010). NRS 136.240 is clear and unambiguous.

Appellant simply could not provide two legally credible witnesses, pursuant to NRS 136.240(3)[2], who could to prove that: The original document was in actual existence at the time of the decedent's death (actually seen by two (2) persons); or that it was fraudulently destroyed (not voluntarily revoked by testator) during testator's lifetime. Appellant failed to present any evidence, or even any plausible arguments, that the Last Will was either "lost" or "accidentally destroyed".

The operative words are "in existence" and "at the time of decedent's death".

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). NRS 136.240(3) requires proof that the testator himself had not revoked the lost or destroyed will, proof that would overcome the common-law presumption of revocation.

There was no evidence or testimony whatsoever to prove this segment of the statute. In *Irvine*, there was an intervening act which destroyed the will. In this matter there was no intervening act. Appellant cites to Irvine as well as *Howard Hughes Medical Inst. v. Gavin*, 96 Nev. 905, 908 (Nev. 1980). When reviewed, these two cases actually support Scheide's position.

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2 **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]

(2) The "Out of Court Statements" by the Testator have no weight under NRS 134.240 or case law.

(2-A) Out of Court Statements cannot "prove" a Lost Will.

Appellant places (great) weight on the statements of the Decedent. In the Court's Decision and Order (AA-1471) at page 11, the court notes:

> "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.

The District Court followed the law in this respect. The Nevada Supreme Court held that the witness requirement in NRS 136.240(3) requires two witnesses who actually saw the original will itself. In *Gavin*, a dispute arose between the Howard Hughes Medical Institute ("HHMI") and an heir of Howard Hughes, who infamously died without a will. HHMI attempted to invoke NRS 136.240(3) to establish that Howard Hughes had executed a will giving his estate to HHMI. HHMI produced one witness who claimed to have personally seen the will. However, HHMI attempted to satisfy the requirement for a second witness by using the testimony of individuals who claimed to have **heard** Howard Hughes say he was leaving his estate to HHMI. In other words, these witnesses did not actually see the original will itself, but only heard Howard Hughes talking about it.

The Nevada Supreme Court found that these witnesses, who had not actually seen a copy of the original will, were insufficient for purposes of NRS 136.240(3):

> "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."

(2-B) Since wills become effective not at the time of execution, but at the time a Testator dies-out of Court Statements as to "Wishes" are unreliable.

The Appellant (Brief page 40) assert that "Everyone knows what Theodore Intended". The problem with that claim is twofold. First the argument does not take into question of the timing i.e., when?

Wills come into existence on death. *Shephard v Gebo*, 226 Nev. 77, 361 P.2d 537 (1961) It is undisputed the object of the Decedent's October 2012 will was his long time girlfriend Velma Shay; deceased beneficiaries cannot be recipients of gifts. Consequently, the testator's estate plan as expressed in his lost will cannot be achieved. It was just as likely that since Velma predeceased the Decedent that the will was destroyed.

We know in this case the object of the Decedent's bounty when the October 2012 was signed was in fact Velma Shay - not Appellant. We also know that when the Decedent passed, the initial object of his estate plan - his companion- no longer existed.

The Appellant's arguments would have the courts overturn not only the common laws but Statute of Wills and the Wills Act. The "timing" of testation relative to the testator's death is as critical (some argue more) than the execution. Hornbook law states a will comes into legal existence at the time of death of the testator, not at its creation.

Will "authentication" of the probate process is critical as to the Statute of Wills. Thus, the law gives will authentication which properly differentiates between authentic wills and inauthentic wills undermine the law's primary objective.

A testator can draft and execute a will at any point in his adult life. That document that he executes will reflect his intent at that moment. The testator's relationship with potential beneficiaries is not resolute and can change over time. Likewise, the nature of the Testator's property can change as he deposes and acquires property during the

ordinary course of his life. When circumstances surrounding the testator's relationship and property change during the period between the execution of a will and its effectives, uncertainty arises regarding whether a will reflects the testator's intent at death.

Will revocation requires the court to evaluate whether the decedent intended a will to be legally effective. Because a will only becomes effective upon death, the decedent can revoke a will at any time during life, and the probate court cannot recognize a prior will as a legally effective expression of the decedent's estate plan. Will revocation raises the issue of whether the decedent no longer intended a valid will to be legally effective.

There can be a lot of "speculation" as to what the Decedent may have thought after his key companion's passing, or on the facts that the Decedent had put strong emphasis on naming his Executors. It was undisputed he had a falling out with both of them. (AA-1175-1177) We can only wonder what effects his step-daughter Longo had on him when she called him "mean". (AA-1252, ln 7)

(3) Adopting the Appellants (confusing) arguments creates uncertainty and more chances of fraud

Ultimately, the District Court gave the Appellant every opportunity to meet its burden of proof. The District Court weighed the testimony presented, and while numerous facts in the decision weighed in Appellant's favor, the record led the District Court to conclude that St. Jude failed to meet their burden of proof. The Appellant simply did not rebut the presumption. The fact that the Decedent made "regular donations" does not relieve a party from establishing all of the statutory elements required to sustain their burden of proof.

The Appellant had no evidence as to how the Decedent may have lost the will? In fact it is not until their brief (pg12) is it addressed. This is the first time they commit to this legal theory. In their responses to the discovery they were still advancing multiple theories. (AA-636-647) Appellant has nothing more than pure speculation as to why the Decedent did anything.

The Appellant is attempting to argue that their burden of proof was met but do not state the clear error that it would take to have this court find clear error - to fault the trier of fact for their failure to prove their case. Appellant seeks to characterize this appeal as a question of "content" – to allow a copy, when Appellant failed to meet the statutory requisites of NRS 136.240.

As a matter of law, in the absence of relevant admissible evidence, the legal presumption of voluntary revocation must be upheld.

Nevada law states that probate estates need to be closed with within 18 months. (NRS 143.037) How long must any estate left "open" on the chance of finding a Last Will? During the proceedings the District Court Judge brought up the issue. The District Court Probate Commissioner, in the early stages of the probate process in 2015, specifically provided time to allow for the potential of the original will surfacing. Appellant had actual notice, and failed to appear – twice. They show up over a year later, and commence their action without having the requisite legal standing to do so.

Appellant's arguments and/or interpretation of this statute gives rise to uncertainty. Appellant has no answers as to how, when and/or where the will was lost. All they did have was testimony as to the document's execution. Only one witness (not two credible

witnesses) testified as to the contents. There were no witnesses to testify that they actually saw the original will with their own two eyes after October 2012. These are the questions Appellant was required to answer and/or prove, and could not.

There was no testimony as to how the document was "lost". In fact, there was no testimony regarding that all estate planning documents were gone. (AA-1349) These are the issues Appellant needed evidence to overcome the presumption, and did not. Misplaced or lost would come under the heading of an intervening act (house fire) where further proofs that the document was in the place of fire at the time. Fraudulently destroyed would be an active participation of an individual to intentionally destroy the document. Neither of these descriptives apply to the facts or evidence in this matter, as there was no testimony/evidence presented regarding same.

There were two copies of the October 2012 will- one with handwriting/notations on it and one without. Was the notation "updated" to mean that this was an updated document or one that has been updated? Without testimony to the contrary, it is pure speculation. The court cannot adopt a position based upon mere speculation, but rather what actually was proven at trial that suffices to rebut the presumption of revocation.

Ultimately NRS 136.240 acts as the statutory barrier to safeguard against fraud in these types of cases. It is a strict hurdle that a proponent must follow and prove in order to rebut the presumption of voluntary revocation to provide answers of how, where, or when the document was lost.

Allowing speculation, not evidence acts as an invitation which could include two "lost documents" found at different times. What would be the effect, if Appellant's arguments are correct: first last will, second last will, and so on; clarifying the definition of last will; was it a document the testator spoke of; the document simply last seen when

it was executed, etc.

The speculation could continue without a cognitive end.

Further legal concerns could be where it concerns codicils, i.e.: a party had an original codicil but only a copy of the last will (or vice versa). What if the documents reference some other third document – would it have to be an original.

It would be defective public policy to allow the probate of a document which has not met the strict criteria set forth in NRS 136.240. To do so would invite chaos and increase fraud.

(4) The Representative found clear evidence that the Decedent physically destroyed the October Will that he was visibly upset with everyone, including Kristen Tyler, Esq, and wanted them fired.

Appellant was presented with overwhelming evidence that the Decedent not only destroyed the October will, that the people around him including Kristen Tyler, Esq. were not around or fired! Ms Hoy documented her extensive efforts to (a) locate the original will and, (b) verify that the document was in fact destroyed.

Hoy the decedent's court appointed guardian prior to his death made a complete inventory of the decedent's belongings and did not find any original estate planning documents, and determined the Decedent destroyed the documents. Contrary to what the Respondents argues in their briefs, Hoy testified that she received "copies" from Kristen Tyler, Esq. A clearer review of the record (AA 632) in an email Tyler is enclosing copies of the October will as wells as the other Estate planning documents. Id. Kristen Tyler, Esq. told Hoy's Attorney that "she would not be surprised if Mr. Scheide destroyed it". (AA-621)

Hoy's efforts to locate the document included, searching his personal (several times) residence, (AA-1326, ln 9-15) his own storage unit (AA-1327) her storage facility. She even personally went to his safe deposit box. (AA-1328, ln 1-55). It turned out the Decedent had not only purchased a shredder (AA-1313) he kept in his possession even when he moved to a new apartment. The shredder remained with him until his passing. (AA-1312-1313).

Longo testified she had taken his gun away (AA-163), took his insurance papers (AA-1244, ln22). She testified he was "mean" and he wanted his own way. (AA-1252, ln.7) She called the police on him. (AA-1253) She didn't like that he called her a thief. (AA 1252, ln 18)

(5) The Appellant Misstates the Decedent's contact with son-Chip.

Appellant misstates the ROA regarding the Decedent's desire to be in contact with his son, Theodore Scheide III. Appellant's brief (starting with pg. 3), attempts to assert Chip's "estrangement" as some sort of concerted effort to "swoop in after his father's death". Appellant has no firsthand knowledge as to these claims. In their footnote 3 (pg 3) Appellant writes: "In his objection to probate of lost will, Chip asserted in an affidavit the "during the last years of his life, my father and I sought rekindle our relationship" (citation omitted). Then Appellant claims: "[t]his lone assertion is supported by nothing in the record".

Ms. Hoy was both guardian and the personal representative of the estate. She testified the Decedent talked about his son to them, at the "Doctors office". (AA-1310, ln 22). It also turns out the Decedent placed his son's name "Chipper" in his medical records. (AA-1310, ln.22) He even asked Ms. Hoy's office to see if they could locate his ex-wife and reunite them (AA-1323, ln.1-2). He even asked Ms. Hoy's office to reach

out to Decedent's ex-wife to find him. (AA-1324; ln.11-14)

Simply, Appellant's attempts to "stake" some sort of "moral" claim clashes which actual facts.

X. Conclusion and Relief Sought

Appellant had a clear statutory burden as prescribed by NRS 136.240, to (1) prove the will was not lost; (2) two (2) witnesses that clearly saw the original Last Will in or around the time of the decedent's death; (3) prove execution; (4) present two (2) witnesses that could testify to contents. The District Court, sitting as trier of fact found that Appellant did not meet their burden with the testimony/evidence produced at trial. Despite the myriad of facts in the opening brief, Appellants have no facts under which to find the District Court erred.

Appellant's arguments confuse the proof of the contents with the proof of a lost will. It is unpersuasive as to existence (legal or otherwise). That theory might be advanced under a different set of allegations (some purported "intervening acts" such as a flood/fire/theft). The presumption is that the Decedent intentionally revoked his documents. Appellants failed to rebut the presumption. Simply because a document was last seen in October 2012, ultimately fails as of 2014, when not one single individual could testify that the document itself was seen ***after*** October 2012, including the Guardian (Hoy), or one of the will's drafting attorney.

It is requested that the court grant the within Motion to Dismiss Appeal; alternatively that the order of the District Court summarily be AFFIRMED in all respects.

Dated: July 19, 2019

Respectfully Submitted,

CARY COLT PAYNE, ESQ. (#4357)

CERTIFICATE OF SERVICE

I certify that pursuant to NRAP 31, on the 22ND day of July, 2019 I have served to the following an electronic filing copy of this Brief by electronic filing through the Supreme Court's E-Flex System:

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