

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.,

Respondent.

) Supreme Court No. 76924

) District Case No. P082619 Electronic

P082619
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Elizabeth A. Brown
Clerk of Supreme Court

) OPPOSITION TO MOTION TO
) DISMISS APPEAL

I. INTRODUCTION

This is an appeal from a final judgment denying a petition for probate of a lost will pursuant to NRS 136.240. The order resolves all claims against all parties with respect to the petition to probate the lost will, and is appealable as a final judgment pursuant to NRAP 3A(b)(1).¹ *Id.* The order also refused to admit a will to probate, and is therefore independently appealable pursuant to NRS 155.190(b)&(m).

¹The probate is not complete and is awaiting a decision by this Court on this appeal, so an argument may be made that the judgment is not final as to all matters before the district court. But this particular matter was commenced by the filing of St. Jude's petition to probate a lost will, and that matter was resolved following trial by a final judgment denying the petition. The order is final as to all claims that were brought in St. Jude's separate petition.

Despite having filed an answering brief in which respondent admits that this Court has jurisdiction over this appeal (albeit based on a citation of the wrong legal authority; the authority cited by respondent does not arguably apply to this appeal), RAB 1, respondent has included in that brief, and now has filed as a separate motion, a motion to dismiss this appeal based on two meritless arguments.

II. RELEVANT FACTS AND PROCEDURAL POSTURE

The facts of this probate dispute have been set forth at length in appellant's opening brief. In response, in the answering brief, respondent has set forth a statement of facts that is more fiction than fact, and that is not tethered to the documents in the record in this appeal.

The only facts that are relevant to the first issue raised by respondent in this motion to dismiss is respondent's correct assertion that St. Jude is not qualified or registered to do business in Nevada, a point St. Jude admits, and the corollary fact that apparently never occurred to respondent's counsel, that St. Jude does no business in Nevada. This fact, which cannot be denied, ends the inquiry with respect to the first issue raised by respondent.

Because, however, the second issue respondent raises is dependent on the factual status of this matter, some additional facts are necessary to demonstrate the lack of merit of respondent's claim (factual background respondent failed to

provide in his short and misguided motion to dismiss). The following facts (and many more) are set forth in the opening brief with careful and applicable citations to the record.

St. Jude Children's Research Hospital ("St. Jude") is a well-known and well respected medical institution that in addition to performing research into the causes and cures of various diseases, provides care and treatment to children suffering from cancer and other diseases, and services to their families, free of charge. Although St. Jude accepts and is dependent on contributions for its very existence, respondent's representation that St. Jude "is a charity" is not correct.

Respondent Theodore E. Scheide III is the estranged son of decedent Theodore E. Scheide Jr. He is referred to as "Chip." His father is referred to as "Theodore."

Theodore and Chip were estranged for more than twenty years before Theodore's death. Theodore disinherited Chip multiple times. He disinherited Chip in a will executed in March of 2011. In June of 2012, he executed another will, which gave everything to his life partner, Velma Shay, with the remainder to go to St. Jude should Velma not survive him. The March will and the June will were the same in all substantive respects; each expressly disinherited Chip. In October of 2012, Theodore executed the will that is at issue in this case. The October will is identical to the June will, except that it appoints a different

executor. It expressly disinherits Chip, gives the entire estate to Velma should she survive Theodore, and to St. Jude should Velma not survive Theodore.

Velma died in January of 2013. Theodore died on August 17, 2014, in Las Vegas, Nevada. St. Jude is the sole beneficiary of Theodore's several wills, including the last one.

When he died, Theodore had in his possession a copy of his October will, although he had been moved from care facility to care facility in his later years. This copy of the October will has Theodore's original signature on it under the words "October 2, 2012, updated." Because only a copy of the October will could be found, Chip believes that the presumption that the October will was revoked by Theodore applies, and has not been rebutted. St. Jude believes it has established that the copy of the October will may be probated under the lost will statute. This is the dispute at the center of this litigation.

Susan Hoy, who was appointed as Theodore's guardian during his last months of life, was later appointed to represent his estate. She found the copy of the October will among Theodore's possessions when she became his guardian, and that same copy among his possession when Theodore died, although he had been moved from care facility to care facility a number of times. She was unable to find the original.

On October 2, 2014, Hoy commenced a probate action by seeking letters of

administration. At that time, she alleged that Theodore died testate, and she was seeking to find the will, a copy of which she had.

On January 29, 2015, Hoy filed a petition seeking to administer Theodore's estate on an intestate basis because she had not been able to locate the original of the October will. She did not serve a copy of this petition on St. Jude, but instead served on St. Jude a certificate of service and a notice of hearing, both of which affirmatively indicated that the petition was "with will annexed under full administration." Thus, so far as St. Jude knew, the probate of the will giving the estate to St. Jude was going forward.

On May 6, 2015, Hoy petitioned the probate court for instructions regarding the lack of the original October will. The Probate Commissioner, not realizing that proper notice had not been provided, noted that no one had come forward to present a will, and "ORDERED that the Petitioner be appointed Administrator of the intestate Estate of the Decedent and that Letters of Administration be issued to the Petitioner." This is the order on which respondent now relies.

According to respondent, this order determines that Theodore died intestate. It does no such thing. It merely issues letters based on a petition alleging that the estate should be probated as an intestacy, contemplating further proceedings. Respondent further asserts, based on this order, that someone should have appealed from this order, and that when no one did so, the determination that

Theodore died intestate became final and unassailable for all time. Respondent asserts that St. Jude, a non-party to the probate action without notice, should have appeared and appealed from this order. This assertion is incorrect.

Further petitions and papers were filed by Hoy, proposing to distribute the estate to Chip on the basis of intestacy and then proposing to distribute the estate to St. Jude on the basis of the will. In May of 2016, Kristin Tyler, the attorney who had prepare Theodore's wills, learned of the attempted probate of Theodore's estate as an intestacy. Knowing that Theodore did not die intestate, Tyler contacted both Hoy and St. Jude. Hoy withdrew her pending petitions and accountings when she learned there was a lost will and there would be a will contest. This was the first notice St. Jude had that Theodore's will was not being probated. St. Jude immediately contacted counsel.

Immediately, St. Jude commenced this action from which this appeal arises in district court by filing a separate petition to probate the lost will from October 2012. After that petition was erroneously denied, St. Jude pursued this appeal.

III. DISCUSSION

A. St. Jude Does No Business in Nevada.

Relying on NRS 82.5234, respondent argues that St. Jude has no standing to pursue this appeal because St. Jude has failed or neglected to qualify to do business in Nevada. NRS 82.523 *et seq.* sets forth regulations for a foreign

nonprofit corporation to qualify to conduct business in Nevada. NRS 82.5234 provides for administrative penalties against entities that do business in Nevada but do not register and obtain permits and licensing. Such businesses “may not commence or maintain any action” in Nevada. *Id.*

What respondent fails to appreciate is that NRS 82.523 *et seq.* and NRS 82.5234 apply to “every foreign nonprofit corporation which is doing business in this state.” *Id.* St. Jude is a foreign corporation, but it does no business of any kind in Nevada. It has no offices here. It has no hospital here. It provides no services here. It has no employees here. Accepting donations from Nevada residents is not doing business in Nevada.

Although NRS 82.523 *et seq.* has no definition of doing business, NRS 80.015 (Foreign Corporations) defines activities which do not constitute doing business:

NRS 80.015 Activities not constituting doing business. [Effective through December 31, 2019.]

1. For the purposes of this chapter, the following activities do not constitute doing business in this State:

(a) Maintaining, defending or settling any proceeding;

2. The list of activities in subsection 1 is not exhaustive.

3. A person who is not doing business in this State within the

meaning of this section need not qualify or comply with any provision of this chapter

Although this statute does not state that it applies to Chapter 82, both deal with foreign corporations and their need to register if they do business here. St. Jude does no business here. It may commence and maintain an action here to protect its rights as a named beneficiary of a will.

B. This Court has Subject Matter Jurisdiction Over This Appeal.

Respondent argues that because St. Jude did not appeal from the district court's order appointing Hoy as administrator of Theodore's intestate estate this Court has no subject matter jurisdiction over this appeal. Respondent is wrong.

The order of the district court appointing Hoy as the administrator of Theodore's intestate estate and issuing letters of administration was appealable pursuant to NRS 155.190(a), but St. Jude was not a party to the probate action, had no notice of the order or that administration under a theory of intestacy was being contemplated, and was not aggrieved by the appointment of Hoy. In such an appeal, had St. Jude known of the issue, St. Jude could only have contested the appointment of Hoy, to which St. Jude had and has no objection.

The order does not, as respondent continually insists both below and in his brief on appeal, decide that Theodore died intestate. It merely appoints an administrator and gives her authority to proceed. That administrator has never

proceeded to a final order regarding intestacy. She filed a petition seeking a determination of intestacy, she amended that petition to seek instead distribution to St. Jude based on the June will, and then withdrew both requests when she learned there would be a will contest. The finality of the appointment of Hoy as administrator is in no way at issue in this appeal.

Further, pursuant to NRS 136.070(1) (emphasis added):

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.

Anyone interested may petition. St. Jude is interested. The petition may be brought at any time. St. Jude brought its petition immediately upon learning that Hoy was attempting to probate Theodore's estate as an intestacy.

Had there been prior proceedings that had reached some finality, that fact may have impacted on the merits of the petition to probate the lost will, and on the remedies available based on doctrines of finality, and the like. But they would not have deprived St. Jude of the right to bring the action, or the district court of subject matter jurisdiction to hear it. As the case is, at the time the petition was filed, there had been no adjudication of Theodore's estate. There are no issues of *res judicata*, collateral estoppel or former adjudication. St. Jude filed a petition for the probate of a lost will. The district court had subject matter jurisdiction

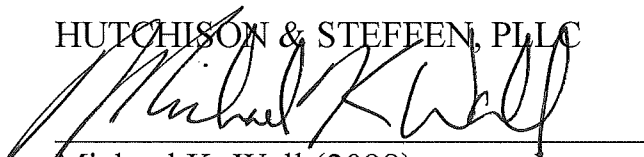
over that petition. Following a bench trial, the district court denied the petition. St. Jude believes the district court's order denying its petition is unsound. Therefore, St. Jude filed a timely notice of appeal from an order respondent admits is independently appealable. The appellate jurisdiction of this Court has been properly invoked, and is unaffected by the fact that no one challenged on appeal the appointment of Hoy as administrator of the estate.

CONCLUSION

Respondent's motion should be denied.

Respectfully submitted this 23 day of July, 2019.

HUTCHISON & STEFEEN, PLLC



Michael K. Wall (2098)
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Telephone: 702/385-2500
mwall@hutchlegal.com

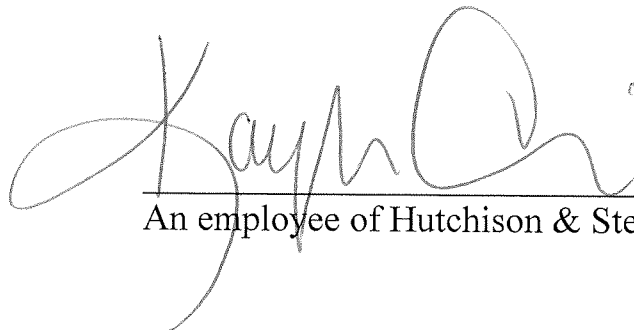
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date **OPPOSITION TO MOTION TO DISMISS APPEAL** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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

DATED this 23rd day of July, 2018.

A handwritten signature in dark ink, appearing to read 'Cary Payne', is written over a horizontal line.

An employee of Hutchison & Steffen, PLLC