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,

-vs-

THEODORE E. SCHEIDE III
Respondent.

Supreme Court No.: 76924
District Court Case No.: P-14-082619-E

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

COMES NOW, Respondent, Theodore Scheide III, and pursuant to the Supreme Court's Order filed May 7, 2020, hereby submits the within Answer to the Petition for Review.

Filed by:

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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:

That there are no such corporate entities as described in NRAP 26.1(a) as it relates to the Respondent.

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.

Dated the 20 day of May, 2020.

Respectfully Submitted,

CARY COLT PAYNE, ESQ. (NVB# 4357)
Attorney for Respondent

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), NRAP 40B(d), it is: Proportionately spaced, has a typeface of 14 points or more, and contains less than 4667 words.

3. Finally, I hereby certify that I have read this Answer, 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.
Attorney for Respondent
Dated: May 20, 2020

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ANSWER TO PETITION FOR REVIEW

INTRODUCTION

The Court of Appeals (COA) issued an Order of Affirmance on March 26, 2020 in this matter. The Appellant filed (electronically) on April 13, 2020: "In the Court of Appeals of the State of Nevada" a pleading entitled "Petition for Review". The Petition references "Standard for Rehearings; NRAP 40(c)(2)". Specifically, Appellant states (at top page 3) "This Court may consider Rehearing when this Court has overlooked or misapprehended a material fact in the record or a material question of law in the case." Citation to "NRAP 40(c)(2)(a)". If it is a Petition for Rehearing it should be heard in the COA.

If, in fact it is, a Petition for Review it was not timely. The Petition filed April 14, 2020 is one day late, and past the 18 days to file (NRAP 40B(c)) - if it was supposed to be filed in the Supreme Court. Since it was not timely filed in the proper Court, it should be summarily denied.

The Petition also combines the arguments regarding the standard for a Petition for Review as well as a Petition for Rehearing. If it is a Petition to Rehear, the entire petition is devoid of any references to the appendix as proscribed by NRAP 40(a)(2). Lastly, pursuant to NRAP 40B(c), a party cannot request a "review" if a petition for "rehearing" has been filed. Again if it is a petition for review it violates NRAP 40B(c) late (filed in the wrong court).

I.

REASONS REVIEW SHOULD BE DENIED

Notwithstanding the above defects; in accordance with this Court's order (5/7/20) the Respondent submits this Answer to the "combined" nature of the Petition, despite any uncertainty in identifying the nature of the petition with the words review, reconsideration, rehearing all utilized.

Pursuant to NRAP 40B(a), the standards under which the Supreme Court could review a Court of Appeals decision include:

> (1) Whether the question presented is one of first impression of general statewide significance;
>
> (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or
>
> (3) Whether the case involves fundamental issues of statewide public importance.

The Petition asserts it meets all three factors. These factors were not intended to reach garden variety issues in the Appellants' petition for review. In reality, Appellant's Petition does not meet any of the factors; Appellant only seeks to essentially "re-appeal" while ignoring these requirements.

The first factor (first impression): this matter did not involve any questions of any statewide significance, and there is nothing which is new to probate

litigation in this case. This case has importance only to the parties to this appeal. The "burden of proof" is the same as any civil matters.

The second factor (conflicts): Appellant argues: "both the District Court and the Court of Appeals construed past cases from this court in a manner inconsistent with the past case law". Appellant does not cite to any inconsistent past case law. The appellant does not argue the Court of Appeals applied the wrong standard, only that the Court of Appeals misconstrued their argument. The standard (Appellant's burden of proof) has always been consistent when applied to any civil trial matter.

The District Court found Appellant had not met their statutory burden. The analysis that one witness, even if found to be credible, still does not meet the statutory requirements of NRS 136.240(3), which requires two witnesses.

The Court of Appeals used the correct standard upon review. The Court of Appeals applied this court's precedents, and found the evidence supported the Trial Court's decision.

The third factor (fundamental issues of state wide public importance): also does not exist. Courts are not responsible for intestate succession of any particular estate, but rather make a determination based upon the facts of the case. There was no fundamental issue between (private party) litigants over an estate that has no connection to any public matters. Lastly, NRS 136.240(3) was

amended/replaced after this litigation. In applying this statute, old or new, the issues therein were never a "public matter"; therefore, the issue is moot.

II.

THE COURT OF APPEALS APPLIED THIS COURT'S STANDARD/PRECEDENTS

Appellants seek to obtain a different result once again ignoring the NRS requirements to prevail. Ultimately Appellant failed, at the time of trial, to prove the necessary elements to rebut the presumption and prove a lost will.

Appellant's Petition now sets forth multiple (unsubstantiated) never raised and never resolved matters, as a way to contrary argue the determination of the District Court and Court of Appeal- as the new facts of the case and then premised on their asserted facts argue that there was an error of law.

The Appellant offers no suggestion of any sort of error why the Court of Appeals might have improperly followed the requirements of NRS 136.240(3)(a)-(c).

There was no order contravening "the intestate status" of the District Court's Orders. Orders establishing heirship are final. *Matter of Estate Miller*, 111 Nev. 12, 888 P.2d 433 (1985).To the extent Appellant now wants to argues intent, disinheritance, etc. that given the absence of its ability to proof its lost will those contentions must be rejected.

Thus, Appellant's (incorrectly) assertion:

> "The erroneous decision approved by the Court of Appeals has the result that Theodore has been determined to have died intestate, although he undeniably died testate, and his estate goes to his son. That would not be such an unfortunate (and unjust) result were it not for the extraordinary lengths Theodore went to disinherit Chip."

These are very strong words, not the issues that were on appeal or even a correct statement of the case. It was not the Court of Appeals affimration which resulted in the decedent to have died intestate. It was the Appellant's failure to meet its statutory burdens and rebut the presumption of revocation.

Appellant filed their Petition to Probate the lost will some 16 months (over two years after Mr. Scheide passed) after the district court originally determined the Estate was to be intestate. That order was never appealed.

Appellant had the burden of proof at trial and as the Court of Appeals opinion correctly points out, it is accomplished in multiple phases: (1) provide evidence that the original was actually in existence at time of death, and not accidentally lost or destroyed; (2) prove the execution of the Will, (3) contents, etc., all by testimony from two credible witnesses.

Without completely restating the Answering Brief, the only issue Appellant brought forward at trial was that of execution; they presented only a single witness alleged existence (with no personal knowledge). The District Court and the Court of Appeals (And this Courts similar rulings) both hold that a culmination of

statements by multiple witnesses cannot be combined to create a single credible witness. Appellants ignored completely and did not provide any evidence and/or testimony whatsoever that the document was actually in existence, and not simply accidentally lost, by some intervening act creating the loss.

The District Court had previously entered orders that the October will had been revoked. In other words there was already a prima facie showing intestacy, thereby shifting the burden of proof to Appellant to rebut the presumption, which they failed to do proving their lost will. Hence there is no error by either the District Court or the Affirmation by the Court of Appeals as a matter of law.

Appellant now argues in its Petition as to the level of proof necessary to overcome the presumption, which would indicate Appellant was aware of what was necessary, yet failed to do so at trial. This is an attempt to have another trial in this matter by way of this Petition. Nevertheless, it is clear that Appellant seeks to creatively re - assert some of the arguments in the appellate process, as well as some arguments brought up for the first time in this Petition - statements which are either not supported by the record or in direct opposition to the record.

III.

THE COURT OF APPEALS APPLIED THE CORRECT STANDARD

Appellants set forth unsubstantiated facts contrary to the determination of the District Court and Court of Appeal as the facts of the case and then premised on their asserted facts to argue that there was an error of law.

The Appellant offers no suggestion of any sort of error why the Court of Appeals improperly followed NRS 136.240(3)(a)-(b). This is particularly true in Appellant's introduction wherein the Petition seeks to place the District Court and the Court of Appeals as responsible for the outcome of intestate estate.

The Appellant transmutes revocation of the will into the necessary proof of execution/content, and that both courts somehow conflicted the issue of revocation with the number of witnesses. Revocation has nothing to do with the number of credible witnesses required to prove a lost will. Both the Trial Court and Court of Appeals recognized these are separate issues.

Appellant's case (the trial, their appeal and now this Petition) is predicated what the Decedent "may have said, or not said", to someone.

Appellant, in a second attempt to meets its burden of proof to retry this case, now on the appellate level, argues that the Court of Appeals misconstrued their arguments, or that the Court of Appeals overlooked material facts in its application

NRS 136.240. The Court of Appeals simply applied the standard of review to the Trial Courts application of NRS 136.240(3).

The Court of Appeals well reasoned opinion affirmed the lowers courts finding that the Appellants did not meet its statutory burden under NRS 136.240. Specifically, Appellant did not satisfy the two (2) witness requirements and as a matter of law to meet its burden. More importantly, Appellant had not proved as a matter of law that the Decedent had not voluntarily revoked or destroyed his Original documents or its legal existence. As the Court of Appeals states Appellant failed on not one, but two prongs, to meet any provisions of NRS 136.240(1-3). Order of Affirmance pg. 8.

The Court of Appeals cited to the District Court's decision because the District Court rested on reasons apart from Appellant's failure to prove the will was lost or destroyed its legal existence arguments failed.

As a matter of law, in the absence of relevant admissible evidence, the legal presumption of voluntary revocation was upheld by the Court of Appeals, and it was not that they misconstrued facts or arguments. Again, they simply found the Appellant had not met its statutory burdens as decided by the District Court.

The single most misconstrued assertion of Appellant's Petition was that Appellant was the object of Mr. Scheide's bounty. What was known was when

Theodore executed (on that day) the document, at that moment, Velma Shay was the sole beneficiary. Intent was never addressed in the trial court.

The next misconstrued fact (also never established at trial) was that he wanted his son disinherited. In *Howard Hughes Med. Inst. v. Gavin*, 621 p 489 (1980) this Court again noted that a testator's declarations cannot be substituted for one of the witnesses requirements by the Lost Will Statute NRS 136.240.

Interestingly, Appellant never argues as to why Mr. Scheide simply did not make a new will, or why Mr. Scheide failed to maintain the original document. The District Court, in its decision did address in its conclusion that Mr. Scheide had been a careful planner and understood the ramifications.

It should be noted that many of Appellant's arguments in this regard are brought up for the first time in this Petition, and are "red herrings" as it pertains to multiple copies, disinheritance and intent in assertions that the Court of Appeal's decision somehow is wrong.

The Court of Appeals stated: "while one can speculate what may have happened to the original October 2012 will, Appellant failed to meet its burden under a preponderance of the evidence".

In doing so, Appellant wants this Court to confuse "intent" in its interpretation of NRS 136.240(3). Appellant seek to have this court decide intent

that was not event tried below. This was never raised and never resolved because NRS 136.240 establishes what must be proven at trial.

As to the repeated assertions relating to the "intent of the testator", mere allegations of intent are insufficient as a matter of law. Appellant offers no suggestion of any sort of error why the Court of Appeals might have improperly followed the four corners of NRS 136.240. The lower Court did. This Court should not now conclude any differently.

Ultimately, both the District Court and this Court of Appeals opined that Appellant failed to rebut the presumption as to revocation, and applied the correct standard.

IV.

NRS 136.240 HAS BEEN SUBSTANTIALLY AMENDED/REPLACED

After the trial, the Nevada Legislature revised the "Lost Will Statute", NRS 136.240. Appellant's final argument regarding the replaced statue is made for the first time in the petition and were not raised on Appeal. (See Appellant's Opening Brief)

Appellant now concedes (after four years and vigorous pre-trial practices) and this "2nd attempt to Appeal, when on its face the statute is clear-the 2 person-requirement is astounding. This concession confirms both the lower Court decision and the Order of Affirmance as correct. This single concession alone denotes why

the Petition should be denied. Candidly, such an concession at this final stage is frustrating-since this has been so costly time consuming and an enormous waste of Judicial Resources at all levels.

Although though both District Court and the Court of Appeals utilized the prior statute, the one in effect at the time of trial in their decisions as noted therein. The amendment supports the Court of Appeals analysis by reaffirming "2 (witnesses) means 2" and clarifying NRS 136.240(3). It supports the benefit of the Appellants current arguments in its petition (NRS 136.240(5)(b)) as the basis for denial of the Petition.

The Appellant finally makes an emotional plea: "The end result is a travesty of justice this court cannot let stand!", and "The Court of Appeals decided that the known will of Mr. Scheide should be ignored and that the estate should go to the sole individual Theodore did everything in his power to disinherit". This is hyperbole. What is true is that Mr. Scheide had every opportunity to protect the original documents.

Appellant argues and urges that this court utilize the new, more "relaxed standard" of the revised statute. Unfortunately for Appellant, the prior version of the statute prevails in matters decided under the prior statute.

V.

CONCLUSION

Whether this is Review or Rehearing, two courts have determined and based their ruling on the Appellants failure to meet its burden under Nevada Law.

It is submitted that Appellant has not brought forth sufficient cause for a review, and the Petition should be denied.

Dated the 21 day of May, 2020.

Respectfully Submitted,

CARY COLT PAYNE, ESQ. (#4357)

CERTIFICATE OF SERVICE

I certify that pursuant to NRAP 31, on the 20th day of May, 2020, 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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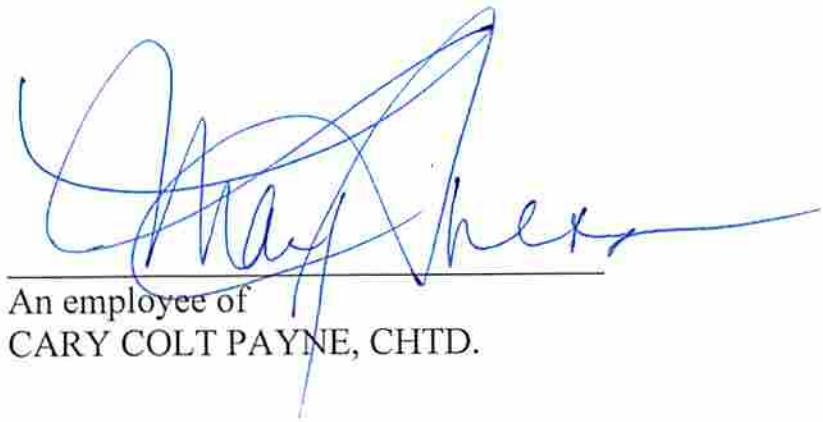

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