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

REPLY TO ANSWER TO PETITION FOR REVIEW

HUTCHISON & STEFFEN, PLLC

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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(1), and must be disclosed:

Appellant St. Jude Children's Research Hospital has no parent company. There is no publicly traded company that owns more than 10% of the stock of St. Jude Children's Research Hospital.

The attorneys who have appeared on behalf of appellant in this Court and in district court are:

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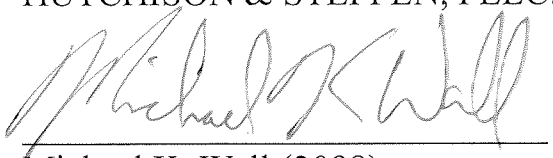
These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 1 day of July, 2020.

HUTCHISON & STEFFEN, PLLC.



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CASE LAW

This is a petition for review by this Court of an order of affirmance by the Court of Appeals. On June 22, 2020, this Court directed St. Jude to file a reply to the assertion in respondent's answer to St. Jude's petition for review that the petition for review is untimely. St. Jude respectfully submits this reply.

PROCEDURAL FACTS

On March 26, 2020, the Court of Appeals entered an "Order of Affirmance" in this appeal. Exhibit 1.

Undersigned counsel (hereinafter "I" or "me") prepared for filing with this Court a petition for review on behalf of St. Jude. From the title and the text of the petition, it is clear and apparent that St. Jude is seeking from the Nevada Supreme Court review of the Order of Affirmance entered by the Court of Appeals. Indeed, there is nothing in the petition that could be construed in any other manner.

When my assistant[1] placed the text I drafted into a document for filing, she believed that because the case had been assigned to the Court of Appeals, the document had to be captioned and filed in the Court of Appeals, much like a notice of appeal to this Court is filed in the district court where the challenged

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[1]I am not blaming my assistant; I am just explaining how this happened. Nor am I suggesting that the Clerk of this Court did anything wrong. She clearly did not. I am setting forth what happened, to the best of the information I have. I take full responsibility for the clerical mistake that has prompted this issue.

decision was entered. Therefore, she used the caption that had been used on prior documents filed in the Court of Appeals.

At the top of the first page of the document (as with every document filed with the Court), the document says: "IN THE COURT OF APPEALS OF THE STATE OF NEVADA." Exhibit 2. The Docket Number also includes "COA," the Court to which the case is assigned *Id.* These are the only places where the document mentions the Court of Appeals.

On the same page, the document is boldly entitled "APPELLANT'S PETITION FOR REVIEW." Since a petition for review could only be addressed to this Court, the document is at least ambiguous as to in which Court it was intended to be filed. There is no ambiguity as to which Court is addressed.

When I signed the document and returned it to my assistant for filing, I did not notice that the first line addressed the Court of Appeals. If there has been an error in this matter, it was mine. It is St. Jude's (and my) position that this mistake is not jurisdictional, and should not be fatal.

The document was delivered for filing to the Clerk of the Supreme Court, who just happens to also be the Clerk of the Court of Appeals. When filing a document with this Court or the Court of Appeals, one goes to the same website and submits the document in the same way. The only difference is that "COA" is

included in the Docket Number.

As noted, the Clerk of this Court (and the Court of Appeals) timely filed the document on April 13, 2020, the deadline for filing such a petition. The file stamp indicates that "Elizabeth A. Brown, Clerk of the Supreme Court" filed the document. There is nothing on the filed document that would indicate that the document was placed on the Docket of the Court of Appeals, rather than on the Docket of the Supreme Court, so when I received notice on April 13, 2020, that St. Jude's petition for review had been filed, nothing on the file stamp alerted me that the document had been filed in the Court of Appeals. In fact, the electronic notice of filing that I received was captioned "Supreme Court of Nevada," and stated that my petition for review had been accepted and filed at 4:26 p.m. Exhibit 3.

Within three business hours, with no input from me (or anyone else, so far as I know), the Clerk of the Court unilaterally recognized that the petition should have been filed on the Supreme Court's Docket.[2] Therefore, on April 14, 2020, one day after the filing deadline, at 9:48 a.m., the Clerk of both the Supreme Court

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[2]I am unfamiliar with how the Dockets are internally managed by the Clerk of the Courts, but to me, it appears to be a ministerial function to transfer a case from the docket of one appellate court to the other, especially where all appeals are originally filed with the Supreme Court and transfers are made; necessarily, there are going to be transfers of documents inadvertently directed to the wrong appellate court.

and the Court of Appeals transferred the petition from the Docket of the Court of Appeals to the Docket of the Supreme Court. Exhibit 4. A new filing stamp was placed on the document, but it was still filed by "Elizabeth A. Brown, Clerk of the Supreme Court." *Id.* Interestingly, the electronic notification of refiling on April 14, 2020, is also captioned "Supreme Court of Nevada," and states: "Issued by the Court." Exhibit 5. Until appellant argued that the petition had been filed one day late, I had no notice that there had been an issue as to which Court it was filed with.

Appellant argues that the petition was filed one day late, but St. Jude contends that because the document was placed into the hands of the proper filing agent for the Court on time, the petition is timely. The single typographical mistake of naming the wrong Court on the first line of the document (before the caption which properly identified what the document was) should not affect its timeliness, and should not be fatal.

DISCUSSION

NRAP 1(e)(3) states: "'Clerk' and 'clerk of the Supreme Court' means the person appointed to serve as clerk of both the Supreme Court and Court of Appeals." Elizabeth A. Brown is the Clerk of both the Supreme Court and the Court of Appeals.

NRAP 40B(a), entitled "Petition for review by the Supreme Court," states that "[a] party aggrieved by a decision of the Court of Appeals may file a petition for review with the clerk of the Supreme Court." This is precisely what St. Jude did; it electronically delivered its timely petition for review to the Clerk of the Supreme Court.

NRAP 40B(c), entitled "[t]ime for filing," states: A petition for review of a decision of the Court of Appeals must be filed in the Supreme Court within 18 days after the filing of the Court of Appeals' decision . . . ." The rule primarily concerns timing, not the Court designation. The "must" should be read as applying to the 18 day deadline, not to the correct naming of the Court in the first line of the petition. By definition, a petition for review can only be directed toward one Court. The filing on time is critical; naming the Court correctly is clerical.[3]

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[3]This is not a situation where one court is at a different location and filing at the wrong location has real consequences. But it is similar to where the district court needs to be informed of the action because the filing affects its jurisdiction, such as with the filing of a notice of appeal. Like the district court, the Court of Appeals' jurisdiction to issue a remittitur or otherwise proceed with the appeal assigned to it is affected by the filing of a petition for review. Since the same Clerk handles the filing, the Court of Appeals is made aware, but when the Court of Appeals grows and become more separated from the Supreme Court, it will become necessary for the Court of Appeals to be separately notified of the filing of a petition for review. Such concerns do not now exist, with one Clerk's office. This Court should not, under these circumstances, elevate the correct designation

In other words, the Rule need not be read, "must be filed in the Supreme Court and must be filed within 18 days." It can be read, "must be filed within 18 days." The "in the Supreme Court" language can be viewed as precatory, while the date of filing is mandatory.

Pursuant to NRAP 1(e)(4), "'Court' means the Supreme Court or Court of Appeals." The terms are somewhat interchangeable throughout the Rules. The Court of Appeals functions at this time somewhat as an adjunct of the Supreme Court. Where filing requirements are overlapping, there is no policy reason to conclude that when a document is timely delivered to the correct judicial officer for filing, a mistake in designating the proper court on the top of the cover page should not be jurisdictional or case ending.[4]

In a different but analogous context, this Court has traditionally insisted on the timeliness of filings, but has not insisted on clerical aspects of the document. When the clerk of the Eighth Judicial District Court as a practice was returning or

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of the Court on the top of the document to the status of a jurisdictional requirement.

[4]For example, if a notice of appeal were time filed in the district court and the notice of appeal stated "appeal to the Supreme Court", but the line on the top of the document incorrectly said "Court of Appeals," the clerk of the district court would likely file it, or at least note the receipt date thereon, and it would greatly surprise me if this Court found such a notice to be untimely or ineffective.

refusing to file defective or irregular notices of appeal, this Court made clear that the date of receipt of the notice of appeal by the clerk was critical. Even if the document was defective, the Clerk had to keep it, keep a record of the date of receipt, and the document was considered timely if it was received on time, even if it was not filed on time, and even where it was defective. *See Huebner v. State*, 107 Nev. 328, 329, 810 P.2d 1209, 1210 (1991) (the clerk of the district court was admonished because of its practice of not filing or noting officially the date of receipt of proper person documents where there were irregularities with the documents because the jurisdiction of this Court turns on the date of receipt, not the date of filing, of such documents); *Kellogg v. Journal Commc'ns*, 108 Nev. 474, 476, 835 P.2d 12, 13 (1992) (although the rule required filing of notice of appeal with clerk of district court, this Court ruled that for prisoners, delivering the notice to prison authorities was sufficient, because timeliness was the point of the rule and receipt of the document was the critical factor in determining jurisdiction). Indeed, I am aware of instances where this Court has treated documents entitled "opening brief on appeal" as timely notices of appeal, where the documents were timely submitted.

Similarly, in *Whitman v. Whitman*, 108 Nev. 949, 951, 840 P.2d 1232, 1233 (1992), a notice of appeal received by the district court clerk was not filed because

it was not accompanied by a filing fee. This Court considered the notice to be timely, stating: "Although the clerk of the district court had no duty to file appellant's notice of appeal before appellant paid the requisite filing fee or was relieved of the duty to pay the filing fee by order of the district court, *see* NRS 19.013(2), the clerk had a duty to receive the document and to keep an accurate record of the case pending before the district court." The notice that was defective but was received on time was effective. *Id.*

This Court has often disregarded clerical mistakes in the text of notices and filings where the documents were timely filed, and the intent of the filer was clear from the document itself. Recently, this court quoted with approval:

> *See Abdullah v. State*, 129 Nev. 86, 90–91, 294 P.3d 419, 421 (2013) ("Because the notice of appeal is not intended to be a technical trap for the unwary draftsman, this court will not dismiss an appeal where the intent to appeal from a final judgment can be reasonably inferred and the respondent is not misled." (internal quotations and alterations omitted)); *Ross v. Giacomo*, 97 Nev. 550, 555, 635 P.2d 298, 301 (1981) (allowing an appeal from an underlying judgment when such can be inferred from the notice of appeal and the designation of the record), abrogated on other grounds by *Winston Prods. Co., Inc. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006).

St. Mary v. Damon, 385 P.3d 595 (Nev. 2016) (unpublished).

In *AA Primo Builders, LLC v. Washington,* 126 Nev. 578, 585, 245 P.3d 1190, 1194–95 (2010), this Court relaxed the requirements for what qualifies as a

tolling motion, looking to the substance of the motion, rather than its title. This Court stated:

> In *Winston Products*, we declared as an overarching rule that "[o]ur interpretation of [modern] NRAP 4(a)(4) tolling motions should reflect our intent to preserve a simple and efficient procedure for filing a notice of appeal" and "not be used as a technical trap for the unwary draftsman." *Id.* at 526, 134 P.3d at 732 (quotation omitted).

In *Portland Fed. Employees Credit Union v. Cumis Ins. Soc., Inc.*, 894 F.2d 1101, 1103 (9th Cir. 1990) (alterations in original), a notice of appeal was timely filed with the appellate court instead of the district court. The Ninth Circuit overlooked the irregularity and considered notice of appeal effective. *Id. See also, Montgomery v. Duncan*, No. CIVS042116FCDDADP, 2006 WL 224447, at *3 (E.D. Cal. Jan. 26, 2006), report and recommendation adopted (Mar. 6, 2006) (where petition for habeas corpus was filed in wrong district court, and it took over a year before it was finally transferred to the correct district court, the petition was considered effective on filing, and was transferred to correct court).

Of course, the federal rules for filing notices of appeal are more flexible than Nevada's, and this Court would likely not consider a notice of appeal filed in the wrong court to be timely and effective. But that is because in Nevada, the timely filing of a notice of appeal is mandatory and jurisdictional, and this Court has enforced that rule strictly. But the policy of not dismissing based on a

harmless mistake is applied by this Court in many areas where the action is not jurisdictional, including in the text of timely but otherwise defective documents. There is no reason to conclude that properly naming the Court on the top of the petition where the petition for review is correctly named in the caption and delivered to the proper judicial officer is mandatory and jurisdictional; there is no historical precedent for strict construction of a rule regarding naming of the Court at the top of the page.

No commandment states "thou shalt not incorrectly name the court on thy petition or thy petition shall be dismissed." And no policy reason exists that would justify the harsh result of refusing a petition for review because of a typographical or technical error in the first line of the document. Indeed, this Court has a long history of ignoring errors in the text of a notice of appeal (*i.e.*, it identifies the wrong order or party or has some other clerical deficiency) so long as the notice is filed on time. *See Collins v. Union Fed. Sav. & Loan Ass'n,* 97 Nev. 88, 89–90, 624 P.2d 496, 497 (1981). And there are much greater reasons to overlook a labeling mistake on a petition for review that is delivered on time to the correct judicial officer, where the text of the document is correct and clear as to the intent of the filer to seek review of a decision of the Court of Appeals by the Supreme Court.

The mistake was made. Should the penalty be death of the petition?

The jurisdiction of this Court over a petition for review should turn on the date of receipt of the document by the Clerk of the Supreme Court, who also functions as the Clerk of the Court of Appeals. The petition should be considered filed on the date it was received by the Clerk of the Supreme Court, not on the date that Clerk transferred the case from the Court of Appeals to the Supreme Court. In this case, the petition was delivered to the correct judicial officer, but that officer filed it where I had unwittingly directed it, on the docket of the Court of Appeals. It was transferred the next day with no input from me to the correct docket by the Clerk. Had the Clerk noticed my mistake a day sooner, there would be no argument regarding the timeliness of the petition. So the language on the top of the document is not the offending mistake that cannot be corrected. The document was not late, so timeliness is not the issue. So what mistake was made that cannot be corrected?

I would answer the question, even were I on the other side of the case, that the timeliness of the document must be determined by when the document was received. So the petition was timely. The sufficiency of the document must be judged by the text of the document. So it is sufficient. Nothing should turn on the mistake of incorrectly naming the court on the top of the document.

I am aware of dozens of cases where documents with deficiencies were submitted for filing to the Clerk of this Court, and notices to correct the deficiencies were issues by the Clerk. Indeed, a process of review and correction before acceptance and filing is in place in the Clerk's office. Once the mistake is corrected, the documents are routinely considered filed on the date they were initially received, not the date the technical deficiencies were corrected.

For example, in *OPH v. Sandin*, Case No. 76966, a case in which I was counsel, opposing counsel petitioned this Court for review. The petition was due on February 5, 2020, and was submitted on that day. It was rejected due to a missing certificate. This Court gave appellant five days to fix the deficiency. Appellant re-filed on February 7, 2020, and its petition was file stamped February 7, 2020, but it was not considered late because it had been received on time.

Is the failure to name the correct court on the title page so significant that the result here should be different? Had the Clerk of this Court noticed my mistake and instead of filing the document in the wrong court, issued a notice to correct mistake, would St. Jude have been given five days to correct the mistake, but the document still have been considered timely? St. Jude suggests that the mistake of incorrectly naming the court at the top of the page when the intent to seek review of a decision of the Court of Appeals by the Supreme Court is a

mistake of so little moment as to hardly deserve more notice than a request that the typo be corrected.

The Clerk of the Court of Appeals, who is also the Clerk of the Supreme Court, might just as well have caught the mistake and filed the petition for review with the correct court, or if the petition had been filed a day earlier, and then transferred, this Court would not likely have dismissed the appeal because of the original mistake of naming the wrong Court on the title page. So timeliness is not the issue; the notice was timely. And naming the wrong court is not the issue; had the document been misnamed but found its way to the Supreme Court's docket anyway, this Court would not dismiss. Without a rule that says "the misnaming of a document to direct it at the Court of Appeals when it should be directed at the Supreme Court is a jurisdictional mistake that cannot be corrected," the remedy of dismissal for this error seems particularly harsh.

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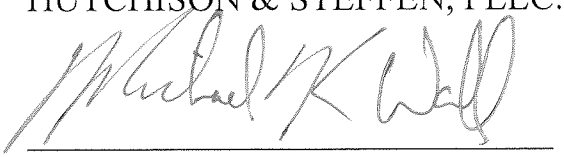
CONCLUSION

The petition is timely. I also has merit. This Court should grant the petition.

DATED this 1 day of July, 2020.

HUTCHISON & STEFFEN, PLLC.



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ATTORNEY'S CERTIFICATE

1. I certify that this petition 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 it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this petition complies with the type-volume limitations of NRAP 40B(d) because, excluding the parts of the petition exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 3,412 words.

3. Finally, I certify that I have read this reply to answer to petition for review, 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 petition 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 supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the

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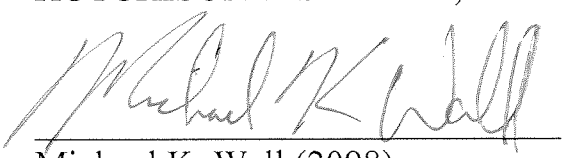
accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1 day of July, 2020.

HUTCHISON & STEFFEN, PLLC.



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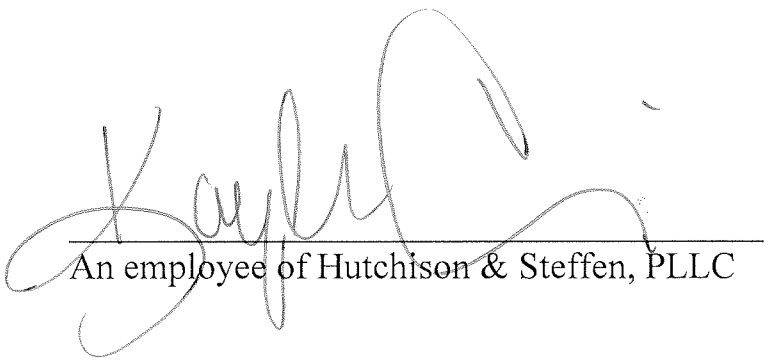
CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date **REPLY TO ANSWER TO PETITION FOR REVIEW** 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 1 day of July, 2020.



An employee of Hutchison & Steffen, PLLC

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EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF THEODORE ERNEST SCHEIDE, JR.	No. 76924-COA
ST. JUDE CHILDREN'S RESEARCH HOSPITAL, Appellant, vs. THEODORE E. SCHEIDE, III, Respondent.	

ORDER OF AFFIRMANCE

St. Jude Children's Research Hospital, appeals from a district court order denying its petition to admit a lost will in a probate action.[1] Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Theodore E. Scheide, Jr. executed a will in June 2012.[2] Theodore's will left his entire estate, in excess of two million dollars, to his longtime girlfriend, Velma Shay, and then to St. Jude, if Shay were to predecease Theodore. During his lifetime, Theodore regularly donated to St. Jude. The will also included a provision that expressly disinherited Theodore's estranged son, respondent Theodore E. Scheide, III (Chip).

In October 2012, Theodore executed a second will. The October will contained the same beneficiaries and provisions as the June will, but changed the named executor. Theodore asked his attorney, Kristin Tyler, to keep the original of the June will in her possession, while he retained the

[1]The Honorable Jerome T. Tao, Judge, voluntarily recused himself from participation in the decision of this matter.

[2]We do not recount the facts except as necessary to our disposition.

original of the October will. Tyler, along with her assistant Diane DeWalt, witnessed both wills.

In 2013, Shay passed away, predeceasing Theodore. Theodore's stepdaughter from a previous marriage, Kathy Longo, began to assist him with weekly errands. However, Longo eventually withdrew from this informal position, and Theodore moved into a group home. In February 2014, due to Theodore's declining health, the district court appointed Susan Hoy from Nevada Guardian Services (NGS) to serve as Theodore's guardian. Six months later, Theodore died.

After Theodore's death, the district court appointed Hoy to be special administrator of Theodore's estate and ordered her to enter Theodore's safe deposit box to find Theodore's last will. Hoy filed a Petition for Instructions reporting that only a photocopy of Theodore's October will could be found, not the original. Hoy also stated she believed "decedent destroyed any original estate planning documents he may have executed prior to his death." The district court subsequently gave Hoy official Letters of Administration for Theodore's apparent intestate estate.

Hoy filed a First Account and Report of Administration on May 18, 2016. The document requested that Theodore's total estate be distributed to Chip by intestate succession. After learning of the proceedings, St. Jude appeared for the first time, objecting to Hoy's report and asking the district court not to distribute Theodore's estate until its petition to admit the lost will was heard. On May 25, 2016, Hoy withdrew her first report and filed an amended report stating Theodore died testate and requesting distribution to St. Jude. St. Jude filed its Petition for Probate of Lost Will in September 2016. Chip objected, claiming St. Jude could not overcome the presumption under NRS 136.240 that Theodore

revoked the October will. The district court then set the matter for an evidentiary hearing. The district court also concluded that Theodore lacked capacity to revoke his will after February 2014 because he was under guardianship of his person and estate.

At the hearing, St. Jude relied on the testimony of Tyler, DeWalt, Longo, and Hoy to prove the contents and legal existence of Theodore's October will at the time of Theodore's death. The district court denied St. Jude's petition, concluding that St. Jude failed to meet its burden of proof because only one witness provided "clear and distinct" testimony of the will's provisions, and St. Jude did not prove that Theodore lost instead of destroyed the will. St. Jude appealed the court's order denying its petition.

On appeal, St. Jude contends that the district court erred in denying its petition to probate the lost will for three reasons: (1) the court improperly interpreted NRS 136.240; (2) substantial evidence proved the lost will's contents and its legal existence; and (3) the court conflated the elements required to prove legal existence. We will address each argument in turn.

Standard of review

In probate proceedings, we will not disturb a district court's findings of fact if they are supported by substantial evidence, and we review a district court's legal determinations, including issues of statutory interpretation, de novo. *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013); *Waldman v. Maini*, 124 Nev. 1121, 1129, 195 P.3d 850, 856 (2008). "When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words." *In re Estate of Melton*, 128 Nev. 34, 43, 272 P.3d 668, 674 (2012). Moreover, "[s]tatutes governing the

revocation of wills are strictly construed." *In re Estate of Prestie*, 122 Nev. 807, 812, 138 P.3d 520, 524 (2006).

The court's interpretation of NRS 136.240

Under 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, 703, 710 P.2d 1366, 1370 (1985). Now, NRS 136.240 governs petitions for the probate of lost or destroyed wills, codifying the presumption and detailing how it may be overcome.[3] NRS 136.240 states in pertinent part:

> (1) The petition for the probate of a lost or destroyed will must include a copy of the will. . . .
>
> . . . .
>
> (3) In addition, no will may be proved as a lost or destroyed will unless its *provisions* are *clearly* and *distinctly* proved by *two or more credible witnesses* and it is:
>
> (a) Proved to have been in *legal existence* at the death of the person whose will it is claimed to be and has not otherwise been revoked or destroyed without the knowledge, consent, or ratification of such person; or

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[3]After the evidentiary hearing, but before the district court issued its decision, NRS 136.240 was amended effective October 1, 2017. Thereafter, the Legislature further amended NRS 136.240 effective October 1, 2019. We note here that the district court's order incorrectly recites the language from the 2017 amendment—which was in effect at the time the district court entered its order—instead of the prior 2009 amendment, which applied. Nevertheless, as the updates contained in the 2017 amendment do not affect the disposition of this appeal, and our review of the probate code indicates that the district court reached the correct conclusion, we cite to the language from the 2017 version in order to maintain consistency with the district court's order and to avoid further confusion.

(b) Shown to have been fraudulently destroyed in the lifetime of the person.

NRS 136.240 (2017) (emphasis added).

Strict compliance with NRS 136.240 is required. *See Howard Hughes Med. Inst. v. Gavin*, 96 Nev. 905, 907-09, 621 P.2d 489, 490-91 (1980) (holding that "because of the requirement of strict compliance with NRS 136.240" the existence of a draft will without the supporting witnesses required by the statute does not preclude summary judgment). Accordingly, the conjunctive test set forth in NRS 136.240 provides that St. Jude may only overcome the presumption that the October will was destroyed by (1) providing two or more credible witnesses who can clearly and distinctly testify about the will's provisions and (2) providing proof the will was in legal existence at the testator's death or providing proof of fraudulent destruction. NRS 136.240(3). We agree with the district court and conclude that St. Jude fails on both accounts.

The two-witness requirement was not satisfied

On appeal, St. Jude argues the district court improperly interpreted the phrase "clearly and distinctly" in NRS 136.240(3). St. Jude contends that the standard is satisfied when a witness authenticates a copy of the will as well as by the collective testimony of all witnesses, even if some lack personal knowledge of the will's contents. We do not agree.

NRS 136.240 requires a petitioner to "clearly and distinctly" prove the provisions of a lost will through the testimony of two or more credible witnesses. The Supreme Court of Nevada has clarified that this provision requires that the two witnesses must be able to testify from their personal knowledge, not from the testimony or declarations of others. *See Hughes*, 96 Nev. at 907-09, 621 P.2d at 490-91. Indeed, the supreme court in *In re Duffill's Estate*, 57 Nev. 224, 61 P.2d 985 (1936), expressly rejected

one witness' testimony because his only knowledge of the contents of the will was based on the statements of the decedent, and not on his personal knowledge of the provisions of the will. The supreme court then stated "[c]learly, his testimony does not pretend to show the provisions of the will." *Id.* at 228, 61 P.2d at 986.

Consequently, it does not follow that a proponent of a lost will can "clearly and distinctly" prove a will's provisions merely by a providing a witness who can authenticate a copy of the lost will. Neither can a proponent of a lost will "clearly and distinctly" prove a will's provisions by the collective testimony of its witnesses when each individual witness does not have personal knowledge of the contents of the will.

St. Jude directs this court to other jurisdictions that permit a copy of the will to substitute the witness testimony requirement.[4] However, those statutes expressly provide for this exception, while Nevada's statute specifically excludes such a substitution by requiring both a copy of the lost will and two witnesses to testify to its provisions. We decline to adopt St. Jude's interpretation because it is within the purview of the Legislature as to whether to expand our lost will statute. Thus, we conclude that the district court did not err when it found that collective testimony and authentication of a will copy were insufficient methods to prove the contents of a lost will under NRS 136.240. Having determined that the district court did not err in its interpretation of NRS 136.240, we next turn to the testimony of the four witnesses called by St. Jude.

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[4]*See, e.g.*, RCWA § 11.20.070 (permitting provisions of a lost will to be proven by a witness's personal knowledge or authenticity of a copy); Ark.Code Ann. § 28-40-302 (Repl. 2004) (an authenticated will copy satisfies one of the two witness requirements for proving the contents of a lost will).

Out of the four witnesses, the district court determined that "only one witness, the drafting attorney [Tyler], provided testimony sufficient to satisfy [NRS 136.240]." As the attorney who drafted both the June and October wills, there is no question that Tyler's personal knowledge of the will is sufficient to qualify her as one of the witnesses required by NRS 136.240(3). However, the next witness, Tyler's legal assistant DeWalt, could not provide any testimony relevant to the will's provisions besides verifying her signature as a witness on the October will. Because DeWalt had no personal knowledge of the lost will's provisions, and because mere authentication of a copy of a lost will cannot act as a substitute for clear and distinct testimony proving the lost will's provisions, DeWalt cannot be a witness under NRS 136.240.

The third witness, Theodore's stepdaughter, Longo, was able to recite the dispositive provisions of the October will. However, Longo testified that she had never read the will and only knew of its existence because she saw it on a shelf in Theodore's home. Longo further testified that she knew the contents of the October will solely because Theodore told her his estate was going to St. Jude. The supreme court expressly stated in *Hughes* that witnesses could not prove lost will contents in this manner, noting, "[w]hile a testator's declarations may be useful in interpreting ambiguous terms of an established will or in corroborating other competent evidence, it cannot be substituted for one of the witnesses required by statute." *Hughes*, 96 Nev. at 909, 621 P.2d at 490-91; *see also Duffill*, 57 Nev. 224, 61 P.2d 985 (concluding that a witness who had not read the purportedly lost will, but learned of its provisions through conversations with the testator, did not satisfy NRS 136.240). Consequently, Longo's testimony is inadequate under NRS 136.240 as she has no personal

knowledge of the will's provisions outside of what she learned from her conversations with Theodore.

Finally, Hoy's testimony relates to her time as Theodore's guardian, and as she had no personal knowledge of the provisions of the will, she is likewise unable to be the second witness under NRS 136.240.

The district court ultimately determined that each of the witnesses were credible, however, the court further determined that only one of those four witnesses met the requirements of NRS 136.240. In light of our discussion above, we conclude that substantial evidence supports the district court's decision. Moreover, because St. Jude failed to clearly and distinctly prove the will's provisions by two or more credible witnesses, it cannot meet its burden under NRS 136.240. Nevertheless, we discuss the second prong of NRS 136.240 below.

Whether the will was in legal existence at the time of Theodore's death

Although we need not reach the second prong of the test, we take this opportunity to consider whether substantial evidence supported the district court's decision that St. Jude failed to prove the October will remained in legal existence at the time of Theodore's death. St. Jude argues that (1) NRS 136.240 required it to prove legal existence by a preponderance of the evidence and (2) it met this standard by providing evidence of Theodore's desire to leave his estate to St. Jude, failure to ask his attorney to change his will, refusal to reconnect with Chip, and decision to keep a copy of the October will. However, because St. Jude failed to satisfy the first prong of NRS 136.240(3), it cannot meet its burden as a matter of law.

NRS 136.240(3)(a)-(b) requires that the proponent of a lost will prove the will was in "*legal existence* at the death of the person whose will it is claimed to be and has not otherwise been revoked or destroyed without the knowledge, consent or ratification of such person." *Id.* "A will is said to

be in legal existence if it has been validly executed and has not been revoked by the testator." *Estate of Irvine*, 101 Nev. at 702, 710 P.2d at 1368. "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." *Id.* (internal citations omitted). Proof of actual physical existence is not required. *Id.* at 703, 710 P.3d at 1369. Because NRS 136.240 does not specify the degree of proof required, and no authority dictates one, we apply a preponderance of evidence standard. *See Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165, 232 P.3d 433, 435 (2010) ("[A]bsent a clear legislative intent to the contrary . . . the standard of proof in [a] civil matter must be a preponderance of the evidence." (internal quotation marks omitted)); *see also* 80 Am. Jur. 2d Wills § 852 (2nd ed. 2020) ("A proponent in probate court must prove his or her case by a preponderance of the evidence.").

Here, the district court correctly determined that, at one point, Theodore had validly executed the October will. However, the valid execution of a will is not the only requirement under NRS 136.240(3). NRS 136.240(3)(a) requires the proponent of a lost will to prove that the testator had not revoked the lost or destroyed will by a preponderance of the evidence. It is under this requirement that St. Jude falls short.

At the evidentiary hearing, it became clear that no witness had seen the original of the October will since it left Tyler's office in 2012. By the time the court appointed Hoy as Theodore's legal guardian, only a signed *copy* of the will was found among Theodore's possessions.[5] Although

[5]We note that Theodore's testamentary capacity may have been limited during his guardianship, thus impacting his ability to revoke the October will at that time. However, because the original October will could not be located after Theodore entered into the guardianship, and we have

Tyler and Longo testified that Theodore desired to leave his estate to St. Jude, Hoy testified that Theodore was thinking about reconciling with Chip. St. Jude presented no evidence that Theodore did not revoke his prior will, or that the original will was lost or otherwise destroyed without Theodore's consent. While one can speculate what may have happened to the original October will, St. Jude has failed to meet its burden under a preponderance of the evidence. Thus, we conclude that substantial evidence supports the decision of the district court that the October will was not proved to be in legal existence at the time of Theodore's death.

Next, St. Jude argues the district court erred by concluding the October will was not in legal existence based solely on its finding that the will's contents could not be proven. We conclude the district court did not conflate or misapply NRS 136.240's legal existence requirement. The district court recognized Theodore's knowledge of his estate plans and the repercussions of revoking his will. But it ultimately concluded that "[a]lthough [Theodore] did not make a formal change to his estate planning documents, he could have simply changed his mind and destroyed the original will in his possession." Because the district court's decision rested on a reason apart from St. Jude's failure to prove the will's contents, we conclude it did not conflate NRS 136.240's legal existence requirement.

Accordingly, we conclude that the district court did not err in denying St. Jude's petition to admit the lost will to probate because St. Jude failed to satisfy the requirements of NRS 136.240.[6]

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no testimony showing that the will was not revoked prior to the guardianship, we will not speculate as to this issue.

[6]Chip filed a motion to dismiss this appeal on July 22, 2019. Having considered the arguments contained therein, we deny the motion, as

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

cc: Hon. Gloria Sturman, District Judge
Hutchison & Steffen, LLC/Las Vegas
Cary Colt Payne
Eighth District Court Clerk

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capacity to sue is not a jurisdictional issue and was not raised below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *see also Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 50-52, 38 P.3d 872, 874-77 (2002); *Las Vegas Land Partners, LLC v. Nype*, Docket Nos. 68819 & 70520 (Order Affirming in Docket No. 68819, and Reversing in Part and Remanding in Docket No. 70520, Nov. 14, 2017). Further, we hold that St. Jude timely and properly brought this appeal under NRS 155.190.

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EXHIBIT 2

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF THEODORE ERNEST SCHEIDE, JR.	Supreme Court No. 76924-COA District Case No. P082619
ST. JUDE CHILDREN'S RESEARCH HOSPITAL, Appellant, v. THEODORE E. SCHEIDE, III,, Respondent.	

APPELLANT'S PETITION FOR REVIEW

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Attorneys for Appellant

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EXHIBIT 3

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

Kaylee Conradi

From: efiling@nvcourts.nv.gov
Sent: Monday, April 13, 2020 4:27 PM
To: Kaylee Conradi
Subject: Notification of Electronic Filing in IN RE: ESTATE OF SCHEIDE, JR., No. 76924-COA

Supreme Court of Nevada

NOTICE OF ELECTRONIC FILING

Notice is given of the following activity:

Date and Time of Notice: Apr 13 2020 04:27 p.m.

Case Title:	IN RE: ESTATE OF SCHEIDE, JR.
Docket Number:	76924-COA
Case Category:	Civil Appeal
Document Category:	Petition for Review
Submitted by:	Michael K. Wall
Official File Stamp:	Apr 13 2020 04:26 p.m.
Filing Status:	**Accepted and Filed**
Docket Text:	Filed Petition for Review Appellant's Petition for Review

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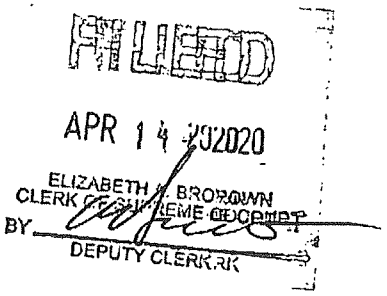
EXHIBIT 4

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF THEODORE ERNEST SCHEIDE, JR.	)	Supreme Court No. 76924-COA District Case No. P082619
ST. JUDE CHILDREN'S RESEARCH HOSPITAL, Appellant, v. THEODORE E. SCHEIDE, III,, Respondent.	)	



APPELLANT'S PETITION FOR REVIEW

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EXHIBIT 5

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

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From: efiling@nvcourts.nv.gov
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Supreme Court of Nevada

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Case Title:	IN RE: ESTATE OF SCHEIDE, JR.
Docket Number:	76924
Case Category:	Civil Appeal
Document Category:	Filed Appellant's Petition for Review. (SC)
Submitted by:	Issued by Court
Official File Stamp:	Apr 14 2020 09:48 a.m.
Filing Status:	**Accepted and Filed**
Docket Text:	Filed Appellant's Petition for Review. (SC)

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