IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER IN THE ESTATE OF MARILYN WEEKS SWEET, DECEASED.	Case No. P-20-103540-E Docket No. 83342
CHRISTY KAY SWEET, Appellant, vs. CHRISTOPHER WILLIAM HISGEN, Respondent.	

On appeal from the Eighth Judicial District Court, Clark County

Hon. Gloria J. Sturman, Department XXVI

District Court Case No. P-20-103540-E

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APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the Appellant in this proceeding is an individual and there are no persons and entities as described in NRAP 26.1(a) that must be disclosed. There are no parent corporations and no publicly held company that owns 10% or more of the party's stock. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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I. JURISDICTIONAL STATEMENT

This appeal is brought pursuant to NRS 155.190(1)(b), which permits an aggrieved party to appeal "to the appellant court of competent jurisdiction" an order "admitting a will to probate." The district court's order admitting decedent's will to probate was entered on July 14, 2021 and Appellant's Notice of Appeal was timely filed on August 4, 2021.

II. ROUTING STATEMENT

This matter should be considered by the Nevada Supreme Court pursuant to NRAP § 17(a)(11) because this case involves a principal issue of first impression, specifically: whether a foreign will can be admitted to Nevada probate when it fails to comply with NRS 133A and the content is in dispute.

III. STATEMENT OF ISSUES

1. Can a will, executed in a foreign country and written in another language, be properly admitted to probate in Nevada when it fails to comply with the requirements of NRS 133A?

2. Is the general rule favoring testacy over intestacy a sufficient basis for disregarding the rules of grammar and revising the contents of a will?

3. Can a will be properly admitted to probate without first holding a trial pursuant to NRS 137.020 when a written objection to a Petition for General Administration and Admittance to Probate contests the validity of the will?

IV. STATEMENT OF THE CASE

This case arises from a probate court matter regarding the estate of decedent, Marilyn Weeks Sweet ("Decedent"), incorrectly named Marilyn Sweet Weeks. The Decedent's estate is comprised of one parcel of real property—a home bearing APN 139-32-403-004 (the "House")—estimated to be worth approximately $530,000.00 at the time of Decedent's passing. Record on Appeal, Vol. 1 ("1 ROA") 3.[1]

Respondent, Christopher Hisgen ("Respondent") filed a Petition for General Administration of Estate, Appointment of Personal Representative for Letters Testamentary and to Admit Will to Probate (the "Petition") on July 14, 2020. 1 ROA 1-33. The will at issue in this case (the "Will") was purportedly made by Decedent on May 3, 2006, while she and Respondent were in Portugal. The Will is written entirely in Portuguese. 1 ROA 10–11.

Appellant, Christy Kay Sweet ("Appellant"), Decedent's daughter, filed an Objection to the Petition (the "Objection") on August 11, 2020. 1 ROA 41–44. Therein, Appellant contested the validity of the Will, requested that the Will be denied admission to probate, and requested that the court distribute Decedent's assets pursuant to the Nevada intestacy laws. 1 ROA 44. In her Objection, Appellant asserted three arguments: (1) that the Will was invalid because it was signed in a

[1] The Record on Appeal ("ROA") refers to the records that was transmitted in two volumes to the Court on August 31, 2021. Contemporaneous with this filing, Appellant shall be filing a Joint Appendix in accordance with NRAP 30, which contains copies of the hearing transcripts from the proceeding below.

foreign country; (2) that the Will should not be admitted to probate because Respondent did not obtain attestations from the subscribing witnesses; and (3) that even if the Will were valid and admitted to probate, the Will only disposed of Decedent's assets in Portugal. 1 ROA 41–42.

Nearly two months later, on September 29, 2020, Respondent filed a "First Supplement" to his Petition (the "Supplement"). 1 ROA 48. This Supplement contained a declaration from someone who claimed to be an attorney in Portugal who stated that the Will met the requirements for a will in Portugal and a translation of the Will by that attorney. 1 ROA 53.

Thereafter, on November 12, 2020—one day before the hearing on the Petition—Respondent filed a Reply in Support of his Petition. 1 ROA 65. On the same day, Respondent also filed two unsworn declarations purportedly from the subscribing witnesses to the Will, Ms. Isabel Pires Cruz Santos and Ms. Gilda Dos Santos Barradas. 1 ROA 79–80; 85–86).

The following day, on November 13, 2020, the Probate Commissioner held a brief hearing on the Petition. *See* App. 1–11. The Probate Commissioner rejected all of Appellant's arguments and found the following: (1) wills made in foreign countries may properly be admitted to probate in Nevada; (2) that the Will is valid under NRS 133A; (3) that the Will is valid under NRS 133; and (4) the Will intended to, and did, dispose of all of Decedent's assets, whether located in Portugal or

elsewhere. 1 ROA 93–101. The Commissioner's Report and Recommendation (the "R&R") was filed and entered on March 3, 2021. 1 ROA 103. Appellant timely filed an Objection to the R&R on March 15, 2021. 1 ROA 116.

On May 10, 2021, Respondent filed an Opposition to Appellant's Objection to the R&R. 1 ROA 130. On May 20, 2021, Hon. Gloria Sturman for the Eighth Judicial District Court held a hearing on Appellant's Objection to the R&R. App. 12. Thereafter, on July 14, 2021, the Court entered an Order affirming the R&R in full. 1 ROA 178–179. Appellant timely filed her Notice of Appeal on August 4, 2021. 1 ROA 217.

V. STATEMENT OF RELEVANT FACTS

It appears that Decedent was involved romantically with Respondent for a number of years prior to her passing. *See generally* App. 13–14 (discussing their relationship). In 2006, Decedent and Respondent went on an extended holiday in Portugal. *Id.* at 28. While there, Decedent signed the Will at issue in this matter. *Id.* Some years later, Decedent and Respondent returned to America and eventually got married. *Id.* at 14.

The record before this Court does not indicate when Decedent and Respondent were married or where they were living when they were wed. The record before this Court notes that the House is Decedent's only asset, however, the record is devoid

of information regarding when Decedent purchased the House, how she took title to it, or whether Decedent and Respondent shared the House.

The record does, however, contain two *different* translations of the Will, both of which were obtained and submitted by Respondent. *Compare* 1 ROA 12 *with* 1 ROA 53. Of particular importance is the translation of the following phrase:

> Institui herdeiro universal de todos os seus bens, direitos e acções em Portugal, Christopher William Hisgen. . .

1 ROA 10. The first translation that Respondent submitted added a comma and translated the foregoing phrase to read:

> She establishes as universal heir of all her goods, rights, and actions in Portugal, Christopher William Hisgen. . .

1 ROA 12. The translator who provided that interpretation also provided a letter in which she states that the document she translated was "the will of Marilyn Weeks Sweet in which she names Christopher Hisgen as her universal heir for all her goods in Portugal." 1 ROA 17.

The second translation that Respondent submitted retained the original punctuation and translated the above-referenced phrase thusly:

> Establishes universal heir to all her assets, rights and shares in Portugal, Christopher William Hisgen. . .

1 ROA 53. The Probate Commissioner analyzed and referenced the first translation when deciding to admit the Will to probate. *See, e.g.*, 1 ROA 182.

Respondent submitted three separate declarations in connection with his Petition. One purportedly from "Dr. Maria Isabel Santos," a licensed attorney in Portugal. 1 ROA 74. One purportedly from "Isabel Pires Cruz Santos," one of the subscribing witnesses to the Will. 1 ROA 79.[2] The final declaration was purportedly from "Gilda Dos Santos Barradas," the second subscribing witness. 1 ROA 85.

All three of these declarations were unsworn and apparently submitted pursuant to NRS 53.045, because they contain the language "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct." 1 ROA 74, 80, 86. The record does not indicate where these declarations were signed or how Respondent obtained them. None of the witnesses who submitted declarations regarding the validity of the Will were produced at the hearing before the Probate Commissioner. *See generally* App. 1–11. Appellant did not have the opportunity to question these witnesses or verify their identities. *Id.* At the district court hearing on Appellant's Objection to the R&R, counsel for the Appellant queried: "can we go back and ask the Portuguese attorney what the [Decedent's] intention was?" App. 34:17–18. The Court responded:

> You know, I guess that could, you know, that's certainly an option is if – I wouldn't say no. I mean, I think that certainly if that's what she intended, and she had the

[2] It is unclear whether Dr. Maria Isabel Santos and Isabel Pires Cruz Santos are the same person, however, a stamp below Dr. Maria Isabel Santos' signature bears the name and title: "Isabel Pires Cruz Santos // Advogada." 1 ROA 74. Further, the signatures appear to match. *Compare* 1 ROA 74 *with* 1 ROA 79. Thus, for purposes of this Appeal, Appellant presumes they are the same.

> communication with that attorney to that effect that would change things. But as we know right now, we're just interpreting the document that we have before us.

Id. at 34:19–24.

VI. SUMMARY OF THE ARGUMENT

The Probate Commissioner made three key errors of law that were not rectified by the District Court. First, the lower courts improperly held that a foreign will could be admitted under both NRS 133A and NRS 133, despite failing to comply with the international will requirements set forth in Chapter 133A. In NRS 133.080(1), the statutory provision addressing foreign execution of a will, the Nevada legislature expressly began with the words "Except as otherwise provided in chapter 133A." The lower courts erred by concluding that this provision should be interpreted as "notwithstanding the provisions of chapter 133A."

Second, the lower courts erred by ignoring the grammatical structure of the Will and, instead, interpreting the Will translation that added a comma. The lower courts improperly interpreted the Will in the broadest manner possible so as to avoid intestacy, despite the Will's clear restrictive language.

Finally, the lower courts committed reversible error when they failed to hold a trial of contest in accordance with NRS 137.020 after receiving Appellant's Objection contesting the validity of the Will. This error was compounded by the

lower court accepted as evidence the unsworn declarations of Ms. Santos and Ms. Barradas without requiring them to be produced and examined.

Based on these errors, Appellant respectfully requests that the Court REVERSE the Order Affirming the Probate Commissioner's R&R and FIND that the Will applies only to Decedent's property located in Portugal. In the alternative, if the Court does not wish to interpret the Will on the Record before it, this Court should REMAND the matter to probate court for a trial of contest as required by law.

VII. ARGUMENT

A. Standard of Review

Whether a document is a valid will is a question of law reviewed de novo. *In re Est. of Melton*, 128 Nev. 34, 42–43, 272 P.3d 668, 673 (2012). Further, the interpretation of a will is typically subject to plenary review by the Court. *Matter of Estate of Meredith*, 105 Nev. 689, 691, 782 P.2d 1313, 1315 (1989). This Court need not defer to the judgment of the lower courts other than to the extent that interpretation of the will turns on the assessments of credibility or conflicting evidence. *Id. (citing Estate of Dodge*, 6 Cal.3d 311, 98 Cal.Rptr. 801, 491 P.2d 385, 389 (1971)).

"[Q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which [are] review[ed] de novo." *City of Reno v. Reno Gazette–Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). The Court's primary

consideration is the Legislature's intent. *Cleghorn v. Hess*, 109 Nev. 544, 548, 853 P.2d 1260, 1262 (1993). When the statue is clear and unambiguous, the Court interprets it in accordance with the plain, ordinary meaning of its words. *Cromer v. Wilson*, 126 Nev. 106, 109–10, 225 P.3d 788, 790 (2010). If there is more than one reasonable interpretation of a statute, the Court will consider the policy of the statute, so that its interpretation does not nullify its operation. *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 714 (2007). The Court has a duty to construe statutes as a whole, so that no part is rendered superfluous and so that all provisions can be reconciled and harmonized. *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

B. The Will is Invalid Because it Fails to Comply with NRS 133A

Since the early 1960s, as the world has gotten smaller and increasingly globalized, there has been a push among many countries to standardize estate planning documents. *See* Richard D. Kearney, *The International Wills Convention*, 18 Int'l Lawyer 613, 619. Ultimately, in 1973, the United States hosted the "Washington Conference," where numerous member States of UNIDROIT negotiated and agreed upon the "Uniform Law" for international wills. *Id.* at 620. Under this Uniform Law:

> [A] will is valid as regards to form—no matter where the will is made, or what is the location of the assets disposed of or what is the nationality or domicile or residence of the testator—if it is

> made in the form of an international will complying with the provisions set out in Articles 2 through 5 of the [uniform] law.

Id. at 621. Importantly, Portugal was one of the countries in attendance at the Washington Conference, and the Uniform Law entered into force in Portugal on September 2, 1978. *See* UNIDROIT, Status Map–Will (Washington D.C., 1973), *available at* https://www.unidroit.org/instruments/international-will/status-map-will-washington-d-c-1973/ (last accessed March 4, 2022).

Here, Decedent made the Will while on holiday in Portugal with Respondent in 2006 – nearly 30 years after Portugal adopted the Uniform Law for International Wills. However, the Will indisputably fails to comply with the provisions set out in the Uniform Law, which Nevada has codified in NRS 133A. Therefore, it was an error of law for the court to admit the Will to probate as an International Will intended to direct the disposition of Decedent's assets worldwide.

1. The Will Facially Fails to Meet the Requirements of NRS 133A

The requirements for international wills are set forth in NRS 133A.050 through 133A.080, inclusive. Three requirements set forth therein are of importance to the Will at issue here. First, a valid international will requires the signature of an "authorized person." NRS 133A.060(2). Second, a will that spans several sheets must bear the testator's signature on each page. NRS 133A.070(1). And finally, an authorized person must complete and affix a certificate establishing compliance with the Uniform Law. NRS 133A.080. None of these requirements were met.

To be a valid international will, the will must be made in the presence of two witnesses and an "authorized person." NRS 133A.060(2). Nevada law defines an "authorized person" as: "a person who, by NRS 133A.120 or by the laws of the United States, including members of the diplomatic and consular service of the United States designated by Foreign Service Regulations, is empowered to supervise the execution of international wills." NRS 133A.030. NRS 133A.120, in turn, specifies that Nevada attorneys in good standing qualify as "authorized persons."

Here, even a cursory review of the Will at issue in this matter shows that it does not comply with the requirements set forth in NRS 133A. *See* 1 ROA 10–11. There is no indication that it was witnessed or signed by an "authorized person." Although the Will was signed by a Portuguese Notary, that does not constitute an "authorized person" under Nevada law. Thus, the Will fails to comply with the initial requirement of NRS 133A.060(2).

Furthermore, the Will consists of two sheets. 1 ROA 10–11. However, the Decedent only signed at the end of the Will, and did not sign each page as required by NRS 133A.070(1). Finally, there is no certificate establishing that the Will was validly executed in accordance with the provisions of the International Will, as mandated by NRS 133A.080.

The lower courts plainly made an error of law in their interpretation and application of NRS 133A. The Probate Commissioner's Report & Recommendation,

which was then adopted in full by the District Court, found that as a matter of law, "[t]he Will should be admitted to probate as an international will under NRS 133A." 1 ROA 96. This improper conclusion was elaborated upon in the following paragraph, in which the Commissioner grossly oversimplified the NRS 133A requirements stating only that "[i]n essence, an international will needs to be in writing, signed in the presence of two witnesses, and signed by the testator." *Id.* That is simply not the law. For a will to be deemed an international will and admitted to probate under NRS 133A, it must adhere to the requirements set out by the Nevada Legislature precisely because those are the standardized requirements agreed to by the UNIDROIT countries as the Uniform Law.

Accordingly, because the Will failed to comply with the provisions of NRS 133A.060(2), .070(1), and .080, it should not have been admitted to probate as an international will. Therefore, Appellant respectfully requests that this Court reverse the district court's order adopting the Report & Recommendation and hold that the Will is invalid as an International Will and, therefore, cannot properly be admitted to probate in Nevada under NRS Chapter 133A.

2. An International Will May Not Be Admitted Under NRS 133

The lower courts further erred by determining that the Will could be admitted to probate in Nevada (and thus applied to property located in Nevada) pursuant to NRS 133.040. 1 ROA 97. By its terms, NRS 133.040 applies to wills executed in

the State of Nevada. NRS 133.040 ("No will executed *in this State*. . .") (emphasis added). There is no dispute that the Will at issue here was executed in Portugal. Thus, NRS 133.040 is facially inapplicable.

The provision of NRS 133 that could arguably apply to the Will (and which was discussed at the District Court hearing on Appellant's Objection) is NRS 133.080. That provision, which bears the heading "Foreign execution," applies to wills executed outside the State of Nevada. Although the Report & Recommendation does not reference this statute, instead relying solely on NRS 133.040, the transcript of the district court hearing indicates that the district court considered the language of NRS 133.080. Accordingly, Appellant addresses that statutory provision here.

The first words of NRS 133.080 are: "Except as otherwise provided in chapter 133A of NRS." Although Appellant raised this issue before the lower courts, the lower courts concluded that this portion of the statute was intended to expand the reach of NRS 133A, so that wills made internationally could be admitted to Nevada probate under either NRS 133A or NRS 133.080. App. 32:14–24. That interpretation defies the plain language of the statute and should be rejected.

The District Court concluded that the Nevada Legislature intended "except as otherwise provided in chapter 133A," to mean "notwithstanding the requirements set forth in chapter 133A." *See* App. 24. That conclusion is unfounded and contrary to the cannons of statutory interpretation and the statute's plain language. Had the

Legislature wanted NRS 133.080 to mean "notwithstanding the requirements set forth in chapter 133A," the Legislature very easily could have written that. In fact, the Legislature began the text of NRS 133.087 with the words "notwithstanding any other provision of law." The Legislature, therefore, was clearly aware of the difference between the two introductory clauses.

The plain language of NRS 133.080 is properly interpreted as saying: this statute applies to all wills executed outside the State of Nevada, except for international wills governed by the provisions of NRS 133A. This interpretation would apply to wills made in other states or wills made in countries that have not adopted the UNIDROIT International Will. Importantly, this interpretation of NRS 133.080 would not nullify the requirements set forth in chapter 133A.

The lower courts' interpretation, however, renders the language "except as otherwise provided in 133A" superfluous. Moreover, the lower courts' interpretation arguably renders the entirety of chapter 133A superfluous. For example, NRS 133A.110 addresses purpose of the international will stating, "[i]n interpreting and applying this chapter, regard must be given to its international origin and to the need for uniformity in its interpretation." This stated need for uniformity would be totally undermined if usurped by the provision of NRS 133.080.

The plain language of NRS 133.080 states that the provisions of NRS 133A trump the provisions of NRS 133.080. The lower courts' interpretation, however,

construes this language to render NRS 133.080 as a savings clause for international wills that fail to meet the requirements of NRS 133A. The ordinary meaning of the text of NRS 133.080 does not support that interpretation. Moreover, that interpretation obviates the need for Chapter 133A. Therefore, Appellant respectfully requests that this Court hold that if an international will fails to meet the requirements set forth in Chapter 133A, it cannot properly be admitted to probate in Nevada under Chapter 133. Accordingly, Appellant requests that the Court reverse the district court's order adopting the Report & Recommendation and hold that the Will cannot properly be admitted to probate in Nevada under NRS Chapter 133.

3. In the Alternative, the Failure to Comply with the International Will Standards is Evidence that the Will was Intended to Apply Only to Assets in Portugal

If the Court concludes that the Will is valid despite failing to comply with the requirements of chapter 133A, the Court should look to that failure as evidence that Decedent did not intend for the Will to be applied internationally. The International Will was adopted by Portugal in 1978. By 2006, Portugal had nearly 30 years of experience handling international wills. However, the Will here does not meet the clearly defined requirements of the UNIDROIT Uniform Law.

Here, the lower courts did not consider the circumstances surrounding the creation of the Will. The lower courts merely saw that the Will bore multiple signatures and declared it valid and applicable to all of Decedent's assets worldwide.

This conclusion ignores the intention of the international will: to be a standardized document, with uniform components, that allows for a predictable distribution of a testator's assets after death regardless of where those assets are located.

Here, the Will is clearly not a standardized, uniform international will. It is a public will used by the people of Portugal. *See, e.g.*, 1 ROA 12 (translating the title of the Will). It is improper for the lower courts to simply presume that this Will was intended to dispose of international assets when Decedent chose to sign a public will rather than an international will. If nothing else, this fact highlights that the record below was insufficiently developed. Therefore, if the Court is not inclined to declare the Will invalid based on the record before it, Appellant respectfully requests that this Court reverse the district court's order adopting the Report & Recommendation and remand this matter for further proceedings.

C. The Lower Courts' Interpretation of the Will Defies its Plain Language

The interpretation of a will is typically subject to plenary review by the Court. *Est. of Meredith*, 105 Nev. at 691, 782 P.2d at 1315. Here, the lower courts were tasked with interpreting a Portuguese will and determining if it disposed of **all** of Decedent's property regardless of its location, or if it disposed of only those assets located in Portugal. Appellant contends that the plain language of the Will clearly shows that it is intended to devise only property located in Portugal.

The lower courts concluded that the Will should apply to all of Decedent's property, located anywhere in the world. The two reasons given by the Probate Commissioner for this interpretation were: (1) the modifier "in Portugal" only refers to the word "actions" and not to the entire clause; and (2) interpreting the Will in this way was preferable because it avoided partial intestacy. Those conclusions are contrary to the rules of grammar and the law. Accordingly, this Court should exercise its plenary power to properly interpret the Will and hold, as a matter of law, that it applies only to Decedent's property located within Portugal.

1. The "in Portugal" Modifier Applies to the Entire Clause

The Will includes the modifier "in Portugal" after naming Respondent heir. The Probate Commissioner rejected Appellant's argument that this modifier means the Will only affected property located in Portugal, concluding instead that the Will applied to assets worldwide. To justify this incorrect interpretation, the lower courts engaged in grammatical gymnastics and determined that the Will bequeathed three sets of assets: (1) goods, located anywhere; (2) rights, located anywhere; and (3) actions located in Portugal. *See* 1 ROA 98-99. That interpretation should be rejected.

Although not specifically stated or discussed in the proceedings below, it appears that the lower courts applied the so-called "rule of the last antecedent," which states that "when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." *Lockhart v. United States*, 577 U.S.

347, 351, 136 S. Ct. 958, 963, 194 L. Ed. 2d 48 (2016). However, the last-antecedent rule should be employed only when "the nouns in a list are so disparate that the modifying clause does not make sense when applied to them all." *Id.* at 364 (Kagan, J., dissenting). The last-antecedent rule is not the appropriate grammatical rule to use when there is a short list of related nouns and it is not "a heavy lift to carry the modifier across them all." *Id.* at 347.

Instead, "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series [a modifier at the end of the list] normally applies to the entire series." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012). This grammatical rule is commonly known as "series-qualifier cannon." *Lockhart*, 577 U.S. at 364 (Kagan, J., dissenting). When the modifier at the end of a list "is applicable as much to the first and other words as to the last," the United States Supreme Court has held that "the natural construction of the language demands that the clause be read as applicable to all." *Paroline v. United States*, 572 U.S. 434, 447, 134 S.Ct. 1710, 1721, 188 L.Ed.2d 714 (2014).

a. The Last-Antecedent Rule Does Not Work With the Will

Importantly, the lower courts did not interpret the actual words and sentence structure of Decedent's Will. Rather, the lower courts construed an interpretation of the Will which was not faithful to the original. Appellant, therefore, requests that

this Court interpret the Will as it was written. The Will's plain language clearly shows that it was intended to apply only to property located in Portugal.

The actual words of the Will, written in Portuguese, are as follows:

> Institui herdeiro universal de todos os seus bens, direitos e acções em Portugal, Christopher William Hisgen. . .

1 ROA 10. The lower courts referred to this phrase as the "Disposition Clause." Respondent attached to his Petition a translation of the Disposition Clause by Lori Piotrowski. 1 ROA 17. Ms. Piotrowski interpreted it as saying:

> She establishes as universal heir of all her goods, rights, and actions in Portugal, Christopher William Hisgen. . .

1 ROA 12 (the "Piotrowski Translation"). Importantly, neither the translator, nor the Respondent, nor the lower courts noticed that the Piotrowski Translation inserted a comma after the word "rights." *Compare* 1 ROA 10 *with* 1 ROA 12.

Months later, Respondent provided the lower court with a second translation of the Will, ostensibly from Ms. Santos, a Portuguese attorney who was one of the subscribing witnesses to the Will. 1 ROA 53 (the "Santos Translation"). According to the Santos Translation, the Disposition Clause says that Decedent:

> Establishes universal heir to all her assets, rights and shares in Portugal, Christopher William Hisgen. . .

1 ROA 53.

There are three key differences between the Piotrowski Translation and the Santos Translation. First and foremost is the comma that the Piotrowski Translation

added after the word "rights." Secondly, the Piotrowski Translation interpreted "bens" to mean "goods," while the Santos Translation interpreted it to mean "assets." Finally, the Santos Translation interpreted the word "acções" to mean "shares," whereas the Piotrowski Translation interpreted "acções" to mean "actions."

i. The Piotrowski Translation

The Piotrowski Translation of the Disposition Clause inserted a serial comma immediately following the word "rights." 1 ROA 12. This is the translation of the Disposition Clause upon which the Probate Commissioner based his R&R. 1 ROA 94. Reviewing the Piotrowski Translation, the Probate Commissioner determined that a "plain, straightforward interpretation of 'actions in Portugal' recognizes that 'in Portugal' modifies only 'actions.'" 1 ROA 98. The Probate Commissioner did not further elaborate on his grammatical interpretation other than to say that Appellant's interpretation should be rejected to avoid partial intestacy. 1 ROA 99.

Although the law certainly favors testacy, there is no rule permitting a court to effectively rewrite a testamentary instrument simply to avoid partial intestacy. However, that is precisely what the lower courts did here. By choosing to construe the Piotrowski Translation, the lower courts availed themselves of the serial (or "oxford") comma that Ms. Piotrowski mistakenly inserted and the interpretation of the word acções as "actions."

By accepting the inserted oxford comma, the lower courts created a clear delineation between the nouns "rights" and "actions." Without this additional comma, the rule of the last antecedent would have been harder to apply because of the inherent ambiguity about *what* constituted the "last antecedent." Without the final serial comma, it is unclear whether the last antecedent would be "actions," as the lower court desired, or "rights and actions." *See* B. Garner, *The Redbook: A Manual on Legal Style* §1.3 (3d ed. 2014). In this context, if the lower courts had applied the "in Portugal" modifier to the last antecedent "rights and actions," Decedent's real property in Nevada should have been excluded from the Will's terms; ownership of real property more appropriately falls under the category of "rights" rather than "goods." *See, e.g.*, Black's Law Dictionary 714 (8th ed.1999) (defining goods as tangible or movable personal property).

Interestingly, the Piotrowski Translation chose to interpret "bens" as "goods," while the Santos Translation interprets "bens" as "assets." This word choice can be understood to indicate that Ms. Piotrowski intended to ensure the distinction between Decedent's personal property (i.e. "goods") and any ownership interest Decedent may have had in real property (i.e. "rights").[3] Regardless, as discussed in further

[3] Certainly, it is possible that this interpretation of "bens" is without additional meaning. However, because the lower courts did not hold a trial by contest—discussed in further detail in Section D, *infra*—Appellant was deprived of the opportunity to examine Ms. Piotrowski.

detail herein, the proper grammatical rule to apply when there is a short list of interrelated words is the series-qualifier cannon.

Finally, in the Piotrowski Translation, the Portuguese word "acções" has been translated as "actions." This interpretation is essential to the lower courts' construction because it permits the definition of "actions" to be used as justification for the lower courts' tortured interpretation of the Will. The lower courts avoided application of the "in Portugal" modifier to the entire Disposition Clause by holding that "the Will confers upon [Respondent] the right to bring or maintain a legal proceeding in Portugal that [Decedent] could have brought herself." 1 ROA 99. This construction is only possible because the lower courts chose the Piotrowski Translation, which defined acções as "the right to bring or maintain such a legal or judicial proceeding." 1 ROA 98 (citing the Merriam-Webster definition of "action").

The incorrect Piotrowski Translation was not the appropriate translation for the lower court to interpret because it was not faithful to the original syntax and punctuation of the Will. However, it was the only translation that provided the lower courts with something to latch on to in order to contort the terms of the Will and avoid partial intestacy. Regardless, even with the Piotrowski Translation, the modifier "in Portugal" should have been applied equally to all three preceding nouns: goods, rights, and actions. The lower courts' use of the Piotrowski

Translation *and* the lower courts' incorrect interpretation of that translation were errors of law, and this Court should therefore reverse the lower courts' order.

ii. The Santos Translation

The more accurate translation of the Disposition Clause was provided by Ms. Isabel Pires Cruz Santos, who is alleged to be a Portuguese attorney and one of the two subscribing witnesses to the Will. *See* 1 ROA 53, 79–80. In the Santos Translation, the Disposition Clause is interpreted as bequeathing Decedent's "assets, rights and shares in Portugal." 1 ROA 53. The Santos translation makes clear that the Will was written so that the modifier "in Portugal" would be applied to all of Decedent's assets, rights, and shares.

Unlike the Piotrowski Translation, the Santos Translation retains the original punctuation. This leaves the ambiguity surrounding what, exactly, would comprise the last antecedent. More importantly, the Santos Translation interpreted the word "acções" as meaning "shares." This differing interpretation effectively prohibits the use of the last-antecedent rule because "shares" does not have as clean a definition as "actions." Using Merriam-Webster, as the lower courts did, the definition of the noun "shares" is: "a portion belonging to, due to, or contributed by an individual or group; the part allotted or belonging to one of a number owning together property or interest." Merriam-Webster, *Merriam-Webster.com Dictionary*, Shares *available at* https://www.merriam-webster.com/dictionary/shares (last accessed Mar. 4, 2022).

If the Court were to apply the last-antecedent rule to the Santos Translation of the Will, then "shares in Portugal" would seem to refer to Decedent's portion of any property interest for property owned in Portugal. By specifying that Decedent was bequeathing her property interests in Portugal to Respondent, the legal maxim of *espressio unius est exclusio alterius* would necessarily apply and the Will would be interpreted as excluding property interests outside of Portugal. Thus, while the clause "actions in Portugal" can be sensibly read to mean "legal actions in Portugal"—which is, inarguably, something that one can devise—the clause "shares in Portugal" cannot stand on its own and allow the Court to avoid intestacy.

The Will contains three nouns that are all related to each other: assets, rights, and shares. The modifier "in Portugal," can easily be applied to all of those nouns without requiring what the U.S. Supreme Court referred to as heavy lifting. Therefore, the last-antecedent rule is not appropriately applied in this context. A more straightforward, logical, and appropriate grammatical rule is the series-qualifier cannon, which demands that the modifier "in Portugal" be applied to the entire series. This Court should, therefore, properly interpret the Will and conclude that it only devises Decedent's property—real and personal—located in Portugal.

b. The Piotrowski Translator's Interpretation of the Will

Finally, the lower courts ignored the statement provided by Ms. Piotrowski that accompanied her translation. Ms. Piotrowski—who provided the translation that

the lower courts relied upon—stated that the Will was "a certification of the will of Marilyn Weeks Sweet in which she names [Respondent] as her universal heir *for all her goods in Portugal*." 1 ROA 17 (emphasis added). Through this statement, the translator is confirming that the modifier "in Portugal" was intended to apply to all nouns, since "goods" is the first noun in the list of "goods, rights, and actions."

The lower courts' determinations are clearly based upon the desire to avoid partial intestacy. Although testacy is certainly favored, it cannot be favored to the point of rewriting a testamentary document to apply more broadly than the plain language allows. The partial intestacy created by the Will cannot serve as a valid basis for discarding the rules of grammar and common sense. Therefore, Appellant respectfully requests that this Court reverse the district court's order adopting the Report & Recommendation and obviate the need to remand for further proceedings by finding that the Will applies only to assets in Portugal.

2. The Lower Courts Improperly Construed the Term "Universal Heir" Based on Incomplete *Sua Sponte* Research

The Disposition Clause begins by stating that Decedent "establishes [Respondent] as universal heir." 1 ROA 12. At the initial hearing in probate court, the Probate Commissioner informed the parties that he had conducted brief research, *sua sponte*, into how the term "universal heir" was used in European law. *See* App. 8:3-9. The Probate Commissioner's conclusion was that the term "universal heir" was used to ensure that the heir became liable for a decedent's debts, as well as

assets. *Id.* Thereafter, Respondent's counsel added further research to the proposed Report & Recommendation, which the lower courts adopted without revision. 1 ROA 111. The lower courts concluded, without proper argument or briefing, that the term "universal heir" was a concept that indicated the Will was intended to apply to all of Decedent's assets, worldwide, regardless of the "in Portugal" modifier. *Id.* This conclusion is incorrect and should be reversed.

That interpretation ignores how the courts of Portugal have construed and applied the term "universal heir." A research project funded by the EU's Justice Programme—titled Integration, Migration, Transnational Relationships. Governing Inheritance Statutes after the Entry into Force of EU Succession Regulations (referred to as "GoInEU" or "GoInEU Plus")—provided an overview of judicial decisions from across the EU. *See* Case Studies Mar. 2020, *available at* https://eventi.nservizi.it/upload/225/altro/list%20of%20selected%20case%20studies.pdf (last accessed March 8, 2022). Two of the case studies from Portuguese courts that were included by GoInEU addressed the use of the term "universal heir." *See id.*, at 15, Case Studies 3 and 4. One such case study, Case Number 3 on the GoInEU list, is from the Portuguese Supreme Court of Justice, dated Oct. 23, 2008. The case summary provided by GoInEU reads:

> In this case, A and B, married to each other, had celebrated a will agreement in Luxembourg, where they had their residence, according to which at the one's death, the other would be **universal heir**. **This will was considered contrary to**

> **Portuguese Law, and of no effect**, because they had eleven children, mandatory heirs of 2/3 of the succession. **Mandatory succession was considered a "fundamental principle of Portuguese legal system."**

Id. (emphasis added).

Regardless of the research conducted by the lower courts, and notwithstanding how the concept of "universal heir" might be applied in other European countries like Ukraine,[4] the courts of Portugal have held that depriving children of their right to inherit was "contrary to Portuguese Law." If any European country's definition of "universal heir" should be applied to Decedent's Will, it inarguably must be Portugal's. The Portuguese courts have held that a will—which appears to be substantially similar to the one at bar—was "contrary to Portuguese Law and of no effect" *because* it would prevent the decedent's children from inheriting anything.

Here, the overly broad interpretation of the Will prevents Decedent's children from inheriting anything. This improper interpretation is based, in part, on the Probate Commissioner's *sua sponte* research, which appears to have not uncovered the GoInEU Case Study cited herein. Rather, the lower courts' research looked to a general interpretation of "universal heir" without regard to the principle of mandatory succession that is "fundamental" to Portuguese Law.

[4] The Probate Commissioner's Report & Recommendation cites to an article published by the National Academy of Legal Sciences of Ukraine, which addresses the Ukrainian civil law. 1 ROA 111, n.11.

The lower courts cannot reasonably cite to the Ukrainian application of the term "universal heir" to justify an interpretation of the Will that would be rejected by the Portuguese courts. Accordingly, the lower courts' interpretation of the Will must be rejected and the Orders below, reversed.

D. At a Minimum, Appellant Was Statutorily Entitled to a Trial of Contest

The lower courts committed reversible error by failing to hold a trial of contest to test the validity of the Will. Accordingly, the order adopting the Probate Commissioner's Report & Recommendation should be reversed and this matter should be remanded for a trial in accordance with NRS 137.020.

Chapter 137 of the NRS is titled: "Contests of Wills." NRS 137.010 states, in relevant part: "any interested person . . . may contest the will by filing written grounds of opposition to the probate thereof at any time before the hearing on the petition for probate." If such a written opposition is timely filed, then the will becomes contested and subject to the remaining provisions of chapter 137.

NRS 137.020 states, in relevant part:

> 1) In the contest, the contestant is plaintiff and the petitioner is defendant. The written grounds of opposition constitute a pleading and are subject to the same rules governing pleadings as in the case of a complaint in a civil action.
>
> 2) An issue of fact involving . . . the due execution and attestation of the will, or any other questions substantially affecting the validity of the will, must be tried by the court unless one of the parties demands a jury.

Chapter 137 thereafter sets forth specific evidentiary rules and requirements unique

to contests of wills. Specifically applicable to this appeal, NRS 137.040 states: "[i]f the will is contested, all the subscribing witnesses who are present in the county and who are of sound mind must be produced and examined, or the death, absence or incapacity of any of them must be satisfactorily shown to the court…"

Here, there clearly was no trial. *See generally* App. 1–11. Under the unambiguous terms of NRS 137.020, the Probate Commissioner should have presided over a trial to determine the validity of the Will. Indeed, NRS 137.020(2) states that "questions substantially affecting the validity of the will **must** be tried by the court." The Legislature's use of the word "must" in this circumstance plainly "expresses a requirement." NRS 0.025. The lower courts failed to fulfil that requirement, which constitutes reversible error.

Here, Appellant asked the district court judge if they could "go back and ask the Portuguese attorney what the [Decedent's] intention was?" App. 34. The court's response was "that's certainly an option . . . I wouldn't say no." *Id.* However, that sentiment embodies the lower courts' failure to follow the requirements of NRS 137.020 and .040. Asking the Portuguese attorney was not merely an ***option*** for the court; it was a requirement. The court had a statutory obligation to order that the subscribing witnesses be produced and examined, or else require that Respondent show that the subscribing witnesses were unavailable to testify. It would appear that the Portuguese attorney—who was one of the subscribing witnesses—was readily

available, as Respondent obtained three signed statements, two from the attorney, Ms. Santos, and one from the witness, Ms. Barradas. 1 ROA 74, 80, 86. Appellant was, therefore, deprived of her statutory right to examine these witnesses to test the validity of the Will and to question them about Decedent's intent. This deprivation requires that the Court remand this matter to the district court for further proceedings.

Rather than hold a trial of contest, the lower courts chose to accept unsworn declarations that conformed to the requirements of NRS 53.045. However, Respondent never disclosed how these declarations were obtained or where the signatories were when they were executed. Based on the circumstances, it is plausible (if not probable) that these declarations were executed in Portugal, the home country of these witnesses. If that is the case, then the proffered unsworn declarations should not have been considered by the court because they facially failed to comply with the "Unsworn Foreign Declarations (Uniform Act)" codified at NRS 53.250 to 53.390, inclusive. This Uniform Unsworn Foreign Declarations Act requires that unsworn statements signed outside of the United States and its territories contain specific language acknowledging that the declarant is beyond the geographic boundaries of the U.S. and providing specific information as to where and when the declaration was executed. *See* NRS 53.370

Nevada law sets out a clear and unambiguous procedure for how the courts must deal with contests of wills. Here, the lower courts unequivocally failed to follow that procedure and thus denied Appellant of her right to examine witnesses at trial. Therefore, if the Court is not inclined to interpret the Will as applicable only to assets located in Portugal, Appellant respectfully requests that this Court reverse the district court's order adopting the Report & Recommendation and remand this matter for further proceedings in accordance with the trial procedure in NRS 137.

VIII. CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse the district court's erroneous decision to admit the Will into Nevada Probate. The Will should not have been admitted to probate under NRS 133A or 133 because the Will facially failed to comply with the statutory requirements found in those chapters. Moreover, even if the Will were admitted to probate in Nevada, the lower courts failed to interpret the Will correctly and in accordance with its plain language. The lower courts' decision to apply of the last-antecedent rule rather than the series-qualifying cannon was contrary to the rules of grammar and the rules of law. This Court, therefore, should exercise its authority to interpret a will *de novo* and hold that the Will only applies to assets located in Portugal as a matter of law. Finally, if the Court, given the paucity of the record before it, is disinclined to make any final determinations regarding the validity of the Will or the scope of its proper

application, then the Court must remand the matter for a trial of contest in accordance with NRS 137.080.

Respectfully submitted this 11th day of March, 2022.

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IX. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)–(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, font size 14-point, Times New Roman, and contains 7,558 words, excluding those parts exempted by NRAP 32(a)(7).

Finally, I hereby certify that I have read this appellate 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, including NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 11th day of March, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of March, 2022, I submitted the foregoing **APPELLANT'S OPENING BRIEF** for filing via the Court's eFlex electronic filing system.

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