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 REPLY BRIEF

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I. INTRODUCTION

Respondent Christopher Hisgen's ("Respondent") Answering Brief exposes just how tenuous the rulings at issue on appeal are. In a desperate attempt to try and salvage the Probate Commissioner's Report &Recommendation ("R&R") and the District Court's subsequent Order adopting it in full (collectively with the R&R, the "Orders"), Respondent starts by misstating the applicable standard of review. *See* Ans. Brf. 22–24 (claiming that the Orders were based on factual findings despite the record clearly stating otherwise). Thereafter, Respondent sets forth arguments and authorities that only highlight how **undeveloped** the record below was when the Orders issued.

Respondent's Brief presents smoke, mirrors, and semantic games in a valiant effort to change history and reframe the issues presently before this Court. However, the Respondent cannot change the facts at bar: the Orders below ignore the plain language of NRS 133A, 133, and the Decedent's Will. The Probate Commissioner denied Appellant the opportunity to respond to his independent research which formed the cornerstone of the Orders. This Court should not let the Orders stand.

II. ARGUMENT

A. STANDARD OF REVIEW

Respondent claims, somewhat bafflingly, that this Court should apply the extremely deferential "clear error" standard of review to the majority of issues raised on appeal. Ans. Brf. at 22–23. Respondent contends that the Orders should be

reviewed for clear error because they are premised on the District Court's factual findings. *Id.* However, that assertion is entirely without merit and, in fact, directly contradicts the District Court Judge who Respondent quoted as saying: "I don't really think . . . any of this was factual. . . . this was strictly a question of law." Ans. Brf. at 17 (*citing* J.A. at 23). Respondent baselessly seeks to characterize the Orders as factual findings because Respondent is desperate to have this Court apply the stringent "clear error" standard of review.

As Judge Sturman noted, the issues raised by Appellant are purely questions of law. The validity of a will is a question of law. *In re Estate of Melton*, 128 Nev. 34, 42–43, 272 P.3d 668, 673 (2012). There was no testimony presented addressing the plain language of the Will and, therefore, neither the Probate Commissioner nor the District Court made any assessments of credibility worthy of deference. *See Matter of Estate of Meredith*, 105 Nev. 689, 691, 782 P.2d 1313, 1315 (1989).

Similarly, the meaning, scope, and interplay between NRS 133A and 133 are questions of statutory construction, which are pure questions of law. *City of Reno v. Reno Gazette–Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). The Orders improperly construed NRS 133A and 133 in order to achieve the lower courts' desired outcome; in doing so, the lower courts rendered all of NRS 133A and the first clause of NRS 133.080(1) entirely superfluous. *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (recognizing that courts

must construe statutes to ensure that no part is rendered superfluous).

Appellant has raised three issues before this Court:

1) Can a foreign will be admitted under NRS 133 if it fails to comply with the requirements of a foreign will as set forth in NRS 133A?

2) Can a court ignore the grammatical and logical structure and interpretation of a testamentary instrument in order to avoid intestacy?

3) Should the Probate Commissioner be required to hold a trial pursuant to NRS 137.020 when a written objection contesting the validity of a will is served upon the interested opposing parties?

All of these issues are questions of law which must be reviewed *de novo*.

B. THE ORDERS MISINTERPRET THE SCOPE OF NRS 133A AND 133 AND FAILS TO HARMONIZE THE TWO STATUTES

The transcript of the initial hearing shows that the Probate Commissioner approached the questions at bar with a goal in mind: find a way to admit an international will that does not require compliance with the uniform international will codified in NRS 133A. *See* J.A. 3:8–4:12 (noting that the probate court had been admitting Canadian and British wills to probate without regard to NRS 133A). The Orders must be overturned because they merely memorialize the lower courts' reverse engineering to reach a preordained outcome. The Orders do not address the conflict between NRS 133A and 133 that they create.

1. International Wills Cannot be Admitted to Probate Under NRS 133

Respondent's Answering Brief, as well as the Orders being appealed, argue that an international will need not meet the requirements of the "Uniform Law" governing international wills in order to dispose of property internationally. Respondent argues that an international will can be admitted to probate under either NRS 133A or 133 because the "invalidity of the will as an international will does not affect its formal validity as a will of any other kind." Ans. Brf. 27. However, Respondent does not explain how this interpretation does anything *other* than render the entirety of NRS 133A superfluous. If a will made anywhere in the world, disposing of property located anywhere in the world, can be admitted to Nevada probate under NRS 133, what is the purpose of NRS 133A?

Moreover, Respondent asserts that NRS 133A merely "provides a mechanism to admit an international will to probate regardless of whether it would otherwise qualify as a will under the standard provisions of NRS Chapter 133." Ans. Brf. 25. There are two problems with this assertion that remain unaddressed: First, if the requirements of an international will are more stringent than the requirements of NRS 133, how could there be a situation where the requirements of 133A are met but 133 are not? Second, if the provisions of NRS 133 were meant to apply to international wills *regardless* of compliance with NRS 133A, why did the Legislature write the first clause of NRS 133.080 to read: "Except as otherwise

provided in chapter 133A of NRS…"?

The District Court attempted to address these questions by dismissing the first portion of NRS 133.080 as simply being inartfully drafted. J.A. 24. As to the concern that 133A would be essentially meaningless, the District Court reasoned that NRS 133A was "simply a way of hopefully having your intent recognized in [a] foreign country.[1]" J.A. 32. It was an error of law for the District Court to summarily disregard the first clause of NRS 133.080. Therefore, it is necessary for this Court to interpret the meaning of NRS 133.080's introductory clause "Except as otherwise provided in chapter 133A of NRS."

Upon review, it is clear that the phrase "Except as otherwise provided in" is a carve-out provision. In the case of NRS 133.080, this clause informs the reader that the requirements that follow apply to all wills *except* those that fall under the purview of NRS 133A. Ignoring this exempting language was an error of law. Accordingly, the Orders must be reversed and the lower courts should be provided with guidance as to how to apply NRS 133.080 and NRS 133A to Decedent's Portuguese Will.

2. The Will Must Comply with NRS 133A to Apply to Nevada Assets

In addition to arguing that the Will was correctly admitted to probate under NRS 133, Respondent argues that the Will was correctly admitted to probate in

[1] Ironically, in the case at bar, the "foreign country" is the United States because the Will was written in Portugal.

Nevada as an International Will despite its procedural and technical shortcomings. That argument must be rejected.

Respondent claims that an International Will need not comply with the requirements of NRS 133A.070–.090 (inclusive) "so long as it complies with NRS 133A.060." Ans. Brf. 21. However, much like Respondent's reading of NRS 133.080, this assertion completely ignores the language of the statute. Moreover, Respondent summarily claims, without any support, that the Will at bar complies with NRS 133A.060, which it facially does not. Thus, admission to probate under NRS 133A is improper.

The heart of the issue here is whether the Will complies with NRS 133A.060(2), which requires that an International Will be made "in the presence of two witnesses and of a person authorized to act in connection with international wills…." Respondent claims that this requirement was met because the Will was signed by a notary or, alternatively, Respondent provided a declaration from a Portuguese attorney during the proceeding below. Neither of those circumstances comply with NRS 133A.060(2) much less show that the Will was signed by an "authorized person."

NRS 133A.030 defines an "authorized person" as someone "empowered to supervise the execution of international wills." NRS 133.060(2) requires that an International Will be declared and executed in the presence of the "authorized

person" who then attests to the will in front of the testator. That did not occur here and the post-mortem affidavit from Isabel Santos cannot, as a matter of law, serve as a substitute for having an authorized person present at the time of the Will's creation as required by NRS 133A.060. *Compare* Ans. Brf. 29 *with* NRS 133A.060.

Similarly, NRS 133A does not explicitly state that a notary public in a foreign country qualifies as an "authorized person" empowered to supervise the execution of International Wills. Although it is certainly possible that a Portuguese Notary Public may be authorized under Portuguese law to supervise the execution of an International Will, the record contains no information regarding that topic. The lower courts merely presumed that the signatures of two lay witnesses and a notary public were sufficient to meet the requirements of NRS 133A.060(2). That is not a proper presumption to make and, therefore, the Orders should be reversed and the matter remanded for further proceedings.

C. THE JUDICIAL PREFERENCE TO AVOID INTESTACY CANNOT OVERRIDE THE INTENT OF A TESTATOR

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. Although Respondent, and the lower courts, clearly hope to avoid intestacy, they cannot ignore the language of the Will to do so. The cases Respondent cites all agree upon this point. *See, e.g.*, Ans. Brf. at 37 (citing cases which note that the rule is "that a will **must be construed according to the intention of the testator**" (emphasis added)). Respondent also

makes the meritless claim that Appellant's Opening Brief "invoke[ed] for the first time arguments against the Rule of the Last Antecedent." *Id.*

1. Rule of the Last Antecedent

Appellant vociferously argued in the proceedings below that the modifier "in Portugal" applied to the entire disposition clause of the Will. *See, e.g.*, 1 ROA 122. The fact that the specific grammatical rules were not mentioned by name does not mean that the grammatical arguments were waived. To the contrary, the record is replete with arguments regarding application of the modifier "in Portugal."[2]

Indeed, Respondent misstates—and likely misunderstands—Appellant's argument and cited authority. Appellant has never argued that the Rule of the Last Antecedent applies only to statutes. *Cf.* Ans. Brf. 38. Rather, Appellant argument is that the Rule of the Last Antecedent is inappropriately applied to situations where the modifier at the end of a list can easily apply to the entire series of nouns within that list. A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012). This is because the rules of grammar—and Supreme Court precedent—dictate that when the modifier at the end of a list "is applicable as much to the first and other words as to the last. . . the natural construction of the language demands

[2] If anything, this is merely another indicator that the record below was not sufficiently developed prior to the issuance of the Orders. 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.

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).

Here, the modifier "in Portugal" is applicable as much to the first word ("goods" or "assets," depending on the translation) and the second word ("rights") in the list as to the last ("actions" or "shares," depending on the translation). Thus, the lower courts improperly chose to apply the "in Portugal" modifier to *only* the last word; natural construction of language demanded that the "in Portugal" modifier be read as applicable to all.

Accordingly, Appellant respectfully requests that this Court reverse the Orders and find that the Will applies only to assets in Portugal.

2. Interpreting the Will as it was Written is Not Absurd

Respondent claims that it would be "absurd" to apply the "in Portugal" modifier to the entire disposition clause because it would limit what Respondent could take while placing no such restriction on the limit of the residuary estate. Ans. Brf. 40–41. That is, quite frankly, an illogical and absurd argument. The residuary clause in the Will states that Appellant and her sister "will be [Decedent's] heirs" if Respondent predeceased Decedent. 1 ROA 10. Contrary to Respondent's tortured interpretation of this phrase, the clear meaning is that if Respondent dies first, then Decedent's daughters will receive whatever Respondent would have taken under the Will. There is, quite simply, no basis for the lower courts' interpretation that because

the residuary clause disposed of all of Decedent's property worldwide, the disposition clause must apply to all of Decedent's property worldwide too.

The plain language of the Will clearly shows that Decedent intended to devise her property *in Portugal* to Respondent.[3] If, however, Respondent had already passed at the time of Decedent's death, then all of her property *in Portugal* would go to her daughters. There is nothing illogical or absurd about that since the Will was only intended to apply to Decedent's property *in Portugal*.

By contrast, the Orders interpretation of the Will is absurd. The Orders assert that because Decedent used the term "universal heir," the Will must be read to bequeath **everything** to Respondent **except** the right to bring or maintain legal actions outside of Portugal. Respondent and the lower courts contend that Decedent included in her Will the modifier "in Portugal" for the sole purpose of limiting which legal actions her so-called universal heir would be permitted to bring after her death. Interpreting the "in Portugal" modifier in this irrationally narrow way is contrary to

[3] It is worth noting that the Record—as well as Respondent's Answering Brief—only address what property was owned by the Decedent's Estate at the time of her death. There is a conspicuous absence of any information regarding Decedent's property holdings at the time the Will was made. Appellant believes that property records will show that Decedent and Respondent jointly purchased a condominium unit in Portugal before executing the Will, which would lend additional support to the argument that the Will was intended to only apply to property located in Portugal. The Record's silence as to this issue is yet another reason why this Court should direct the lower courts to hold a will contest.

logic and the generally-accepted rules of grammar.

Although courts can certainly prefer to interpret testamentary instruments in a way that avoids intestacy, they cannot do so when such an interpretation would contradict the plain language of the will and, thus, create an absurd result. That is because a desire to avoid intestacy cannot override a testator's intent.

Here, when the plain language of the Will is read naturally, it is clear that Decedent's intent was to ensure that any Portuguese property that she acquired with Respondent would go to him upon her death. The Orders ignore that intent and, therefore, they must be reversed.

D. THE ORDERS CANNOT RELY ON EXTRAJUDICIAL RESEARCH

The Probate Commissioner announced that he conducted his own research to determine the meaning of the term "universal heir," which appears in the Will. J.A. 8:3–9. This arguably violates Rule 2.9(C) of the Code of Judicial Conduct, which prohibits a judge from "investigat[ing] facts in a matter independently." The prohibition on independent judicial research and investigation ensures that litigants are afforded a meaningful opportunity to be heard, as required by due process.

Here, Appellant was gravely prejudiced by the Probate Commissioner's independent research because she was not given the opportunity to review this research or present the bench with any of her own arguments on the issue. In an attempt to avoid the clear prejudice caused to Appellant by the Probate

Commissioner's *sua sponte* research—and the additional information which Respondent included in the Commissioner's R&R—Appellant improperly argues that Appellant has waived the right to challenge this research by failing to challenge it below. Respondent's argument ironically embodies the problem: Appellant was deprived of the opportunity and due process right to challenge the Probate Commissioner's independent research below because the Probate Commissioner, as well as the district court, deprived Appellant of any opportunity to respond to it.

Accordingly, if this Court is disinclined to consider the arguments and evidence that Appellant has raised regarding the use and applicability of the term "universal heir" in Portuguese law, then, at a minimum, the Court should remand this matter for further proceedings so that Appellant is not denied due process. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (requiring notice and opportunity to be heard to satisfy constitutional due process requirements).

E. APPELLANT WAS ENTITLED TO A WILL CONTEST BECAUSE SHE SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS OF NRS 137

Respondent claims that Appellant was not entitled to a will contest because she did not issue citations as required by NRS 137.010(1). Ans. Brf. 44. That is misleading and immaterial. The purpose of issuing citations is to ensure that the persons affected by the will contest are aware that the will is being contested. Here, there is no dispute that Respondent was aware of Appellant's contest.

As the record demonstrates, Appellant provided the lower court with a written objection to the validity of the Will. 1 ROA 41–45. This written objection was served upon Respondent, the only other interested party,[4] and Respondent was given the chance to respond. 1 ROA 65–78. Thus, even if Appellant may not have technically complied with the entirety of NRS 137.010, she substantially complied with the requirements therein. From there, it is undisputed fact that Appellant was denied the opportunity to call and examine witnesses at trial. The denial of this opportunity greatly prejudiced Appellant because it allowed Respondent to belatedly provide multiple, improperly-subscribed declarations[5] from persons conveniently residing outside of the jurisdiction of the court.

Accordingly, if this Court is not inclined to interpret the Will as applicable only to assets located in Portugal for the reasons argued above and in Appellant's Opening Brief, then Appellant respectfully requests that this Court reverse the

[4] The only other potential heir was/is Decedent's other daughter who provided a written waiver of notice. 1 ROA 19.

[5] Appellant's Opening Brief addressed this point in greater detail, noting that the declarations provided were of unknown origin. Respondent's Answering Brief still does not state where these declarations were signed, however, he does admit that none of the subscribing witnesses are in Clark County. *Compare* Opening Brf. at 30 *with* Ans. Brf. at 46. Appellant, therefore, renews her challenge to the admissibility of unsworn declarations taken from an undisclosed location in violation of the Unsworn Foreign Declarations (Uniform Act). NRS 53.250–.390.

Orders and remand this matter for further proceedings in accordance with the trial procedure in NRS 137.

III. CONCLUSION

As set forth above and in Appellant's Opening Brief, the lower courts' Orders should be revered for three reasons. First, as the record demonstrates, 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 set forth therein. The lower courts' application of NRS 133 and 133A render the entirety of NRS Chapter 133A superfluous and of no effect. Thus, the Orders should be reversed and this Court should hold that an international will must comply with the provisions of NRS Chapter 133A in order to be probated in Nevada.

Second, even if the Will could be admitted to probate in Nevada, the Orders interpret the Will in a manner that contradicts the Decedent's clear intent. The Will clearly states that it only applies to assets located in Portugal. This Court must reverse the lower courts' improper interpretation of the Will's plain language because a judicial preference for testacy cannot override a testator's intent or the plain language of a testamentary instrument.

Finally, to the extent this Court is not inclined to make either of the above referenced final determinations regarding the Will, given the paucity of the record before it, then the Court should remand the matter for a trial in accordance with NRS

137.080. The Record clearly shows that Appellant provided a written objection questioning the validity of the Will and notified Respondent of this objection. There are multiple questions of fact that remain, as shown by the stunning absence of admissible evidence in the Record. Thus, if the Court declines to interpret the Will under these circumstances, a will contest trial is appropriate and warranted.

Therefore, based on the foregoing, Appellant respectfully requests that this Court reverse the Orders erroneously admitting the Will into Nevada Probate.

Respectfully submitted this 8th day of June 2022.

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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 3,571 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 8th day of June, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of June, 2022, I submitted the foregoing **APPELLANT'S OPENING BRIEF** for filing via the Court's eFlex electronic filing system.

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