IN THE NEVADA SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF MARILYN WEEKS SWEET, DECEASED. CHRISTY KAY SWEET, Appellant, v. CHRIS HISGEN, Respondent.	**Supreme Court No. 83342** District Court No. P-20-103540-E

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 PETITION FOR REVIEW BY THE SUPREME COURT

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I. QUESTIONS PRESENTED

1. Whether the October 20, 2022, Court of Appeals ("COA") order of affirmance (hereafter, the "COA Decision") conflicts with the well-settled principle of party presentation, discussed in *Greenlaw v. U.S.*, 554 U.S. 234, 243 (2008), by affirming lower court orders that decided an issue of law which the parties expressly stated was not being placed before the court.

2. Whether the COA Decision erred concerning a fundamental issue of great statewide public importance by admitting to probate a facially incorrect translation of a foreign-language will, which included punctuation not present in the original testamentary instrument.

3. Whether the COA Decision erred concerning a fundamental issue of great statewide public importance by failing to consider Portuguese law when construing the terms of a Portuguese will, which was written in Portuguese and executed in Portugal.

II. INTRODUCTION

In 2006, Marilyn Weeks Sweet ("Decedent") was dating, but not married to, Respondent Christopher Hisgen ("Hisgen"). While apparently on an extended holiday in Portugal, Decedent decided to execute a Portuguese Public Will (the "Will"), written entirely in Portuguese, witnessed by two Portuguese citizens, and notarized by a Portuguese notary. Decedent's daughter, Appellant Christy Kay

Sweet ("Ms. Sweet"), believes that Decedent and Hisgen jointly purchased a piece of real property in Portugal shortly before executing this Will. That Portuguese property apparently was sold prior to Decedent's death.

Many years after executing the Will, Decedent and Hisgen were married. Decedent did not execute any other will or leave any other testamentary instrument. Decedent passed away on February 4, 2020. A little over five (5) months later, Hisgen filed the underlying petition to admit the Will to probate in Nevada District Court. Hisgen attached a translation of the Will by Ms. Lori Piotrowski to the Petition which read, in relevant part, that Decedent "establishes as universal heir of all her goods, rights, and actions ***in Portugal***, Christopher William Hisgen."[1] 1 ROA 12, Opening Brf. 5 (emphasis added). The Petition also included a signed statement from Ms. Piotrowski certifying that she translated the Will "in which [Decedent] names [Hisgen] as her universal heir for all her goods ***in Portugal***." 1 ROA 17, Opening Brf. 25 (emphasis added). Hisgen failed to provide any explanation why a will disposing of "all [Decedent's] goods ***in Portugal***" should apply to real property in Nevada. *See generally* 1 ROA 1–6.

Ms. Sweet timely filed an objection thereto on August 11, 2020. In the proceedings below, Ms. Sweet argued three main points, two of which are

[1] For convenience, this part of the Will hereafter is referred to as the "Disposition Clause."

important to this Petition for Rehearing: (1) that the Will was not a valid international will because it fails to comport with the requirements of NRS 133A; and (2) that the plain language of the Disposition Clause provides that the Will *only* disposed of Decedent's "goods, rights, and actions ***in Portugal***," and thus did not apply to any property located in Nevada. *See* 1 ROA 41–43 (emphasis added).

Three months later, on the eve of the probate hearing, Hisgen filed a reply in support of his Petition where he argued, *for the first time*, that the Will should be interpreted as leaving all of Decedent's property to Hisgen because: "Merriam-Webster defines 'universal' as . . . '**without limit or exception**.'" 1 ROA 70 (emphasis in original). Based on this, Hisgen argued, without providing any evidentiary support, that "it appears Decedent desired for the Will to establish [Hisgen] as the universal heir of all her property, which would necessarily be without limit or exception." 1 ROA 70.

The following day, at the hearing, the Probate Commissioner announced that he had briefly conducted his own research *sua sponte* into the use of the legal phrase "universal heir" in European law. J.A. 8:3–9, Op. Brf. 25. Based on this research conducted in the preceding 24-hours since Hisgen had not raised the definition of "universal" earlier, the Probate Commissioner determined that the Will clearly meant to bequeath to Hisgen all of Decedent's real and personal property, regardless of its location, and any legal actions Decedent may have been

able to maintain in Portugal.[2] After filing an objection, 1 ROA 130, the Probate Commissioner's determination was affirmed by the district court. 1 ROA 178–179.

On October 20, 2022, the COA Decision was issued, affirming the district court's Order adopting the Probate Commissioner's Report & Recommendation ("R&R") in full. The COA Decision concluded, in relevant part, that: (1) the requirements of NRS 133A were met because Portuguese law designates notary publics as "persons authorized to act in connection with international wills," as required under NRS 133A.060(2); and (2) the Disposition Clause is ambiguous and, therefore, the presumption in favor of testacy can be used to apply the modifier "in Portugal" to only the word "actions." In support of this interpretation of the Disposition Clause, the COA incorporated its own *sua sponte* research and referenced the concept of "universal succession," noting that Roman or civil law use that concept to "refer[] to the totality of one's estate." COA Decision at 19.

On November 7, 2022, Ms. Sweet timely petitioned the COA for rehearing. That petition was summarily denied by the COA in an order dated November 23, 2022. Now, Ms. Sweet timely seeks Supreme Court review.

Review is warranted under NRAP 40B(a) because the questions presented herein are of first impression and great statewide public importance. Specifically,

[2] It is worth noting that neither the Probate Commissioner nor the district court believed that the Disposition Clause was ambiguous, despite the Probate Commissioner's R&R deciding to construe it to avoid intestacy.

when reviewing a foreign will, written in a language other than English, is it acceptable for the court to admit a translation of that will to probate when the translation contains clear errors in punctuation? Although it seems obvious that a facially incorrect translation should not be admitted to probate, neither the lower courts nor the COA Decision acknowledge the impact that adding an Oxford comma can have on how a legal document is read.

More importantly, COA Decision conflicts with itself and prior decisions of this Court and the United States Supreme Court. The COA Decision simultaneously invokes the "principle of party presentation" and ignores it by affirming the R&R and district court order deciding an issue that the parties themselves said was not being litigated.[3] That cannot stand. Therefore, Ms. Sweet requests that this Court grant review.

III. STANDARD FOR REVIEW

NRAP 40B governs review of decisions of the COA, and provides that the Supreme Court will consider the following when determining whether to review such a decision: (1) whether the question presented is one of first impression and general statewide significance; (2) whether the decision of the COA conflicts with

[3] COA Decision at n.4, *citing Greenlaw v. U.S.*, 554 U.S. 234, 243 (2008) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the rule of neutral arbiter of matters the parties present"). *See also* COA Decision at n.13 (same).

a prior decision of the COA, the Supreme Court, or the United States Supreme Court; and (3) whether the case involves fundamental issues of statewide importance. NRAP 40B(a).

IV. LEGAL ARGUMENT

Throughout the proceedings below and on appeal, Ms. Sweet has pointed to the disturbing lack of information in the record. *See, e.g.*, J.A. 34:17–24 (colloquy between Ms. Sweet's counsel and Judge Sturman regarding Hisgen's ability to access the Portuguese attorney who witnessed the Will's execution to inquire about Decedent's intent); Op. Brf. 4–7, 15–16, 30 (discussing the invalidity of the unsworn declarations provided by Hisgen under NRS 53.250, *et seq.*). However, rather than remand this matter for further proceedings to develop an adequate record capable of review, the COA Decision ignores factual gaps and supplants the COA's own *sua sponte* research for that presented by Hisgen and the courts below. This is in contradiction to the case law upholding the well-settled "principle of party presentation," which was cited, but not adhered to, in the COA Decision. Therefore, review pursuant to NRAP 40B(a) should be granted.

Furthermore, review is warranted because the lower courts' decisions have substantial statewide significance. The COA Decision affirms the lower courts' admission of and reliance on a facially incorrect translation of a foreign-language legal document. Additionally, the COA Decision does not apply Portuguese law

consistently and further fails to explain why an inconsistent application of Portuguese law is legally sound. Thus, it is imperative for the Supreme Court to review this matter and set forth a framework that lower courts must use to address and interpret foreign legal documents written in a language other than English.

A. The Lower Courts Relied on a Facially Incorrect Translation

1. The Will Translations

Both the Piotrowski Translation and the Santos Translation were presented to the COA for review. Op. Brf. 19–21. Both translations were provided to the lower courts for review as well. 1 ROA 12, 53. Importantly, Hisgen admitted at oral argument that he believes the person providing the Santos Translation was, in fact, one of the subscribing witnesses to the Will. Thus, her translation of the Will is likely more accurate and therefore should have been more appropriately considered. Moreover, it is facially evident that the Piotrowski Translation improperly added a comma that does not exist in the Will, which altered the interpretation.

Despite these facts, the COA Decision does not address the Santos Translation other than to note that it exists. The COA Decision notes that "Sweet argues that the modifier 'in Portugal' in the will applies to the entire preceding clause, not just 'actions' in the Piotrowski translation or 'rights and shares' in the Santos translation." COA Decision at 16. Thereafter, the COA Decision simply

reviews and interprets the Piotrowski Translation as if the Santos translation did not exist. More concerningly, the COA Decision does not address the comma that Piotrowski manifested into existence in the Will.

Overlooking the Piotrowski Translation's undeniable addition of the comma is erroneous and leads to an unjust result. By doing so, the COA Decision misconstrues Ms. Sweet's argument since she did not argue solely that the modifier "in Portugal" should apply to the entire Disposition Clause, but rather, also argued that Piotrowski's addition of the comma changed the last antecedent from "rights and actions" to simply "actions," and that this alteration is fundamental to construing the Will as Hisgen desired. *See* Op. Brf. 21.

The COA Decision does not address why it is not clear error to rely upon the interpretation of a translated document that undeniably changes the original punctuation, which, in turn, undeniably changes the meaning of the Will. Thus, the COA overlooked or misapprehended the fact that Disposition Clause of the Piotrowski Translation makes a material change by adding a comma. Excluding that comma, the Disposition Clause *must* be read as establishing Hisgen "as universal heir of all [Decedent's] goods, rights and actions ***in Portugal***." (emphasis added). Simply put, without the improper comma, it is clearly evident that the modifier 'in Portugal' applied to the entire Disposition Clause.

Although these facts were unequivocally placed on the record, they were

overlooked by the COA in rendering the COA Decision. *See, e.g.*, Op. Brf. 19–21. Thus, Ms. Sweet respectfully requests that this petition for review be granted.

2. The Piotrowski Certification

Hisgen's initial petition seeking to admit the Will to probate contained very little information. However, it did contain the Piotrowski Translation and a certification from Ms. Piotrowski stating that the Will "names [Hisgen] as [Decedent's] universal heir for all her goods in Portugal." 1 ROA 17, Op. Brf. 25.

The COA Decision does not address this statement, thus it appears that this fact was overlooked. Ms. Sweet contends that Ms. Piotrowski's own understanding of the Will is a material fact that must be considered because it shows that the Will is not ambiguous. Rather, the Will unambiguously provides that Hisgen is, in Ms. Piotrowski's own words, the "universal heir for all [Decedent's] goods ***in Portugal***." (emphasis added).

Thus, the plain language of the Will—as understood by a person who is fluent in Portuguese and capable of reading and understanding the actual testamentary instrument—is limited to assets in Portugal and does not address any assets outside of Portugal. In other words, it is unequivocal that the Will leaves all of Decedent's assets *in Portugal*, *without limit or exception*, to Hisgen, and nothing more. This plain language interpretation is unambiguous and, moreover, gives effect to both the phrases "universal heir" and "in Portugal."

By finding an ambiguity where none exists, the COA overlooked these material facts. Therefore, this petition for rehearing should be granted and the Piotrowski certification fully considered.

B. The Lower Courts Relied on Their Own *Sua Sponte* Research on a Matter that the Parties Expressly Stated was <u>not</u> Before the Court

Rehearing is also warranted because the COA overlooked or misapprehended a material question of law. Throughout this case, the judicial interpretation of this Will has hinged on the application of the phrase "universal heir." *See, e.g.*, J.A. 7 – 9, 33–35; 1 ROA 120; COA Decision at 19. However, Hisgen's original petition did not mention this phrase but, instead, only claimed that he had been named Decedent's personal representative. 1 ROA 1–5. It was only after Ms. Sweet challenged the ability to probate the Will in Nevada (in part on the basis that it only disposed of assets located exclusively in Portugal) that Hisgen argued for the first time in his reply brief that the term "universal" meant he was intended to be Decedent's only heir for all assets, regardless of location. **Importantly, in that same Reply**—which was filed roughly 24-hours before the scheduled hearing—**Hisgen expressly stated that "disposition of the assets is not at issue under the current Petition." 1 ROA 71.**

Rather than ruling in favor of Ms. Sweet or, at a minimum, requesting further briefing or proceedings concerning the Will, the Probate Commissioner

sua sponte (and improperly) decided to research how the term "universal heir" is used in European law. *See, e.g.*, 1 ROA 111, n.11 (R&R, citing to the use of "universal heir" in Ukrainian law as evidence of Decedent's intent). After announcing this independent research at the hearing, Ms. Sweet's counsel was not given an opportunity to respond either to this new research or the new arguments raised in Hisgen's repy brief. J.A. 8–9. As the record demonstrates, based on this *sua sponte* research, the Probate Commissioner decided an issue that had not been fully developed and framed by the parties in the record—and which had, in fact, been expressly disclaimed by Hisgen. *Compare* 1 ROA 71 ("disposition of the assets is not at issue") *with* J.A. 9 – 10 ("[B]ecause of time situations here . . . I'm able to rule on the pleadings basically through and what I've read and researched through . . . it is my finding at this point . . . Hisgen [is] the heir of everything.") *and* 1 ROA 185 (R&R concluding the Will "disposes of all assets, wherever located, to Chris Hisgen").

On appeal, Ms. Sweet argued that the record below lacked sufficient evidence and legal argument to determine the meaning of Decedent's Will. *See* Op. Brf. 31–32 (arguing that even if the Will is deemed properly admitted to probate, the record below was insufficient to decide the disposition of assets and Ms. Sweet should be permitted to "a trial of contest in accordance with NRS 137.080"); Reply Brf. 12 (arguing that further proceedings were warranted regarding the use and

applicability of "universal heir" under Portuguese law).

However, the COA Decision misapprehended the material question of law and Ms. Sweet's arguments concerning the term "universal heir," resulting in the COA improperly (a) affirming the Probate Commissioner's decision regarding the *disposition* of Decedent's assets and (b) concluding that Ms. Sweet waived her argument regarding the invalidity of such a disposition under Portuguese law. COA Decision at 20 ("the district court did not err in ruling that the will devised property outside of Portugal"), n.12 (finding waiver of "argument challenging the validity of the will under Portuguese law").

Ms. Sweet raised a material question of law regarding her due process right to a full and fair hearing prior to being deprived of any property rights she may have in her deceased mother's estate. Op. Brf. 31–32, Reply Brf. 12. The Probate Commissioner did not merely adjudicate a question of law that had not been presented by the parties, which by itself is sufficient cause for review by this Court. Rather, even more egregiously, **the Probate Commissioner adjudicated a question of law that the parties expressly stated was not being brought before the court at that time.** The district court's subsequent adoption of the Probate Commissioner's R&R, and the COA Decision affirming the same, have compounded this grave error: although the *disposition* of Decedent's assets was not before the court, the Probate Commissioner conducted *sua sponte* research (based

on an argument raised by Hisgen for the first time in a reply brief) to adjudicate the disposition of Decedent's assets.

Tellingly, before wholesale adopting the Probate Commissioner's R&R, the district court even expressed an opinion that it would be helpful to hear from the attorney involved in creating the Will in order to appropriately determine Decedent's intent regarding *distribution*. J.A. 34. Despite the acknowledgement that the record was incomplete regarding Decedent's testamentary intent, the district court affirmed the Probate Commissioner's R&R without amendment. Thus, although the distribution of assets under the Will was admittedly not presented to the court by the parties, the Probate Commissioner's unilateral decision to determine that issue has now led to a series of decisions that have caused immeasurable prejudice to Ms. Sweet.

Because Hisgen himself had claimed that disposition of Decedent's assets was not at issue in his petition, the only issue properly before the lower courts was whether the Will should be admitted to probate in Nevada. However, the Probate Commissioner's *sua sponte* research and written R&R addressed the ultimate disposition of Decedent's assets, which was improperly affirmed by the district court. Unfortunately, the COA Decision similarly addressed the disposition of Decedent's assets under the Will, and overlooked Ms. Sweet's request to permit her to proceed with a post-probate will contest under NRS 137.**080**, which would

allow her the opportunity to cure any prejudice caused by the Probate Commissioner's *sua sponte* research. The COA Decision, and the lower court opinions that it affirms, all run afoul of the well-settled principle of party presentation. Thus, review is warranted.[4]

C. The Court of Appeals Ignored Dispositive Portuguese Law

Finally, review is warranted because the COA erred by applying **Roman** civil law regarding "universal succession" to construe the Disposition Clause rather than **Portuguese** civil law that enshrines the principle of "mandatory succession." *Compare* COA Decision 19 *with* Op. Brf. 27. The COA applied Portuguese law to determine whether the Decedent's Will was signed in the presence of an "authorized person," as required for a foreign will to be valid under NRS 113A. COA Decision 9–12. However, the COA failed to look at or consider Portuguese law regarding how Decedent's assets should be distributed under the Will.

The application of Portuguese law should be consistent. As an international will made under the laws of Portugal, it is erroneous to apply Portuguese law *only* for the limited purpose of deciding whether to admit the Will to probate in Nevada.

[4] In fact, the lower courts' orders and the COA Decision may operate as a definitive adjudication of how assets under the Will are to be distributed thereby effectively precluding a post-probate will contest under NRS 137.080.

Rather, the laws of Portugal must also be applied when interpreting the Will, and the COA Decision has failed to do that. The COA Decision fails to take into account the dispositive fact that Portuguese courts have determined that depriving children of their right to inherit is "contrary to Portuguese Law, and of no effect" because "[m]andatory succession [is] considered a 'fundamental principle of Portuguese legal system.'"[5] Portuguese courts have consistently determined that wills that expressly or impliedly exclude children from inheritance are "against Portuguese public order" and, therefore, void. *See id.* at 15 (Case No. 4).

Thus, a consistent application of Portuguese law would drastically change the result reached by the lower courts and the COA because it would require Nevada courts to construe the Will in such a way to ensure that the Decedent's children are mandatory heirs. Accordingly, Ms. Sweet requests that the Supreme Court review this matter.[6]

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[5] EU Justice Programme – GoInEUplus, *Case Studies March 2020*, pp. 14-15, Case No. 3, *available at* https://eventi.nservizi.it/upload/225/altro/list%20of%20selected%20case%20studies.pdf (last accessed Dec. 8, 2022).

[6] Ms. Sweet argued that the failure of the record below to address this matter should be resolved by reversing the lower courts' Orders and remanding for further proceedings. Reply Brf. 7. Thus, Ms. Sweet renews her request that this matter be remanded for further proceedings under NRS 137.080 to determine the appropriate interpretation of the Will under Portuguese law.

V. Conclusion

For the reasons set forth more fully herein, Ms. Sweet respectfully requests that this Petition for Review be granted.

DATED this 12th day of December 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Review 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:

[x] This Petition for Review has been prepared in a proportionally spaced typeface using Microsoft Word version 14.0.6129.5000 (2010) in 14 point Times New Roman font;

2. I further certify that this Petition for Review complies with the page– or type–volume limitations of NRAP 40B(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is:

[x] Proportionately spaced, has a typeface of 14 points or more and contains 3,796 words.

3. Finally, I hereby certify that I have read this 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of December, 2022.

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on the 12th day of December, 2022, I served a copy of the foregoing **APPELLANT'S PETITION FOR REVIEW BY THE SUPREME COURT** via the Supreme Court of Nevada's E-filing system, in compliance with Nevada Rules of Appellate Procedure and Rule 9 of the Nevada Electronic Filing and Conversion Rules, to the following counsel of record:

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