

1 **I. ISSUES DECIDED BY COURT OF APPEALS**

2 The Court of Appeals of Nevada entered its Opinion on October 20,
3 2022 (the “COA Opinion”) addressing the following issues:

- 4 1. What are the requirements for the admission of an international will to
5 probate under NRS 133A?
- 6 2. Can a will be proved both pursuant to NRS 133A and NRS
7 133.080(1)?
- 8 3. In this case, do the dispositive provisions of the will (the “Will”) of
9 MARILYN SWEET (the “Testator”) apply to the Testator’s Nevada
10 property?
- 11 4. Is a party who fails to serve citations to plead to a will contest
12 pursuant to NRS 137.010(1) entitled to a will contest?

13 *See* COA Opinion at 5:4-12.

14 **II. QUESTIONS PRESENTED BY PETITION FOR REVIEW**

15 The APPELLANT’S PETITION FOR REVIEW BY THE SUPREME
16 COURT (the “Petition For Review”) narrowly addresses only Issue 3 above,
17 alleging the following errors as either (1) conflicting with well-settled
18 principles; or (2) concerning fundamental issues of statewide importance:

- 19 1. That the COA Opinion “conflicts with the well-settled principle of
20 party presentation.”

- 1 2. That the COURT OF APPEALS erred in considering a translation of
2 the Will, wherein the translator decided to include grammar in the
3 English translation that was not reflected in the Portuguese original
4 Will.
5 3. That the COURT OF APPEALS erred by ascertaining the Testator's
6 intent without considering the alleged legal impediments to the
7 dispositive provisions of Will if admitted in respect to property in
8 Portugal.
9 (Collectively, the "Questions Presented"). *See* Petition For Review at 2:2-
10 13.

11 III. STANDARD OF REVIEW

12 Pursuant to NRAP 40B(a), the Nevada Supreme Court has complete
13 discretion to review a decision of the Court of Appeals, but in making such
14 determination, will consider:

- 15 1. Whether the question presented is one of first impression of
16 general statewide significance;
17 2. Whether the decision of the Court of Appeals conflicts with a
18 prior decision of the Court of Appeals, the Supreme Court, or
19 the United States Supreme Court; or
20

1 3. Whether the case involves fundamental issues of statewide
2 public importance.

3 An allegation that the court “overlooked” or “misapprehended” points of law
4 or fact, while relevant on a petition for rehearing pursuant to NRAP 40, are
5 *not* enumerated considerations for a petition seeking review pursuant to
6 NRSP 40(B)(a).

7 **IV. ARGUMENT**

8 While the COA Opinion resolves and addresses a number of
9 fascinating legal issues, Appellant’s Petition For Review narrowly addresses
10 issues related to the substantive interpretation of the dispositive provisions
11 of Will itself. As set forth below, Appellants arguments fail merit review by
12 the Nevada Supreme Court as the COA Opinion correctly and appropriately
13 addresses the interpretation of the Testator’s Intent in accordance with well-
14 established law; accordingly, there is no conflict with prior decisions, and no
15 fundamental issues of statewide importance are involved. For such reasons,
16 and as further set forth below, this Court should deny the Petition For
17 Review. The Appellant’s three “Questions Presented” are addressed in turn
18 below:

19 ///

20 ///

A. The Application of the Party Presentation Principle does not Merit Review.

First, Appellant alleges that the COA Opinion conflicts with the Party Presentation Principle, and that the same thus merits review by this Court. Appellants argument fails as (1) Appellant failed to address the Party Presentation Principle before the lower court, and has thus waived the argument; (2) a Nevada Court can only admit a will if the terms thereof affect assets subject to the Nevada's jurisdiction; accordingly, a determination of the scope of the Will was *necessary* to the determination of whether its admission was proper; and (3) the Party Presentation Principle is "supple" and a court – especially when reviewing questions of law *de novo* – is required to make a correct determination, even if no party as invoked it. Accordingly, the COA Opinion did not conflict with Greenlaw v U.S., 234, 243 (2008) and does not merit review.

1. Appellant failed to Argue the Issue of the Party Presentation Principle During the Proceedings Below, thus has Waived the Argument.

This Court should not consider Appellant's argument regarding the Party Presentation Principle as it was not raised in the proceedings below. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."

1 Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

2 As Appellant failed to argue this issue previously, Appellant has waived the
3 same. Accordingly, this Court should not review the COA Opinion on the
4 basis of Appellant's arguments regarding the Party Presentation Principle.

5 **2. A Determination of the scope of the Will was**
6 **Necessary to Determine Whether the Will could be**
7 **Admitted to Probate in Nevada.**

8 Appellant asserts that the Will could have been admitted without
9 consideration as to whether the Will governed the assets subject to the
10 jurisdiction of Nevada's probate court. *See* Petition For Review at 15 FN 4.
11 Appellant's argument fails as the Court of Appeals properly ascertained the
12 scope and applicability of the Will to the Testator's Nevada Estate, as
13 otherwise, the Will could not be admitted to probate.

14 "[P]robate in Nevada is in the nature of an 'in rem' proceeding. In an
15 action in rem, the court acquires jurisdiction over the estate and all persons
16 for the purpose of determining their rights to any portion of the estate. NRS
17 136.010(1) limits the jurisdiction of a court to the settling of the "**estate** of a
18 decedent." (emphasis added). NRS 132.120 defines "Estate" as "[...] the
19 **property** of the decedent or trust whose affairs are subject to this title as it is
20 originally constituted and as it exists from time to time during
administration." (emphasis added). The Court has long held that if a
decedent has no assets subject to probate in Nevada, a court is without

1 jurisdiction to admit such decedent's will. *See Fialkoff v. Nevil*, 80 Nev.
2 232, 391 P.2d 740 (1964). A contrary position would result in Probate
3 Courts rendering "advisory opinions" as opposed to resolving "actual
4 controversies. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572,
5 574 (2010).

6 In this case, a determination that the Will governed the Testator's
7 assets in Nevada was a condition precedent to the Will's admission to
8 probate. Appellant's suggestion that the interpretation of the Will should
9 have been bifurcated or otherwise heard separately from the issue of the
10 Will's legal sufficiency has no legal merit. While (as set forth below) the
11 process of determining the validity of a will is different from determining
12 the Testator's intent in making the will, a Court must determine that the will
13 governs assets subject to its jurisdiction before admitting the same to
14 probate. Accordingly, the COA Opinion did not violate or conflict with the
15 Party Presentation Principle, but actually complied with the requisite process
16 for proving a will and admitting the same to probate.

17 **3. The COA Opinion does not Conflict with the Party**
18 **Presentation Principle in Conducting *de novo* Review**
of Legal Issues.

19 Notwithstanding the legal necessity of the COA Opinion's analysis
20 regarding the scope of the Will, Appellant asserts that the COA Opinion

1 reflects a departure from the Party Presentation Principle as articulated in
2 Greenlaw v U.S., 234,243 (2008), and on such basis, review by the Nevada
3 Supreme Court is appropriate. Appellant's position fails as the COA
4 Decision complies with governing law regarding the applicability of the
5 Party Presentation Principle in cases where *de novo* review and legal issues
6 are being determined.

7 The United States Supreme Court, while acknowledging the Party
8 Presentation Principle, held more recently that "[t]he party presentation
9 principle is supple, not ironclad. There are no doubt circumstances in which
10 a modest initiating role for a court is appropriate. *United States v. Sineneng-*
11 *Smith*, 140 S. Ct. 1575, 1579 (2020) (citing, *e.g.*, *Day v. McDonough*, 517
12 U.S. 198, 202 (2006))."

13 Notably, the Nevada Supreme Court recently addressed the Party
14 Presentation Principle. Addressing exceptions thereto, this Court held:

15 One such circumstance arises when a party presents an
16 interpretive question that requires the court to apply a
17 statute or interpret contract provisions—both questions of
18 law reviewed *de novo*—but neither party presents
19 arguments necessary to resolve the interpretive
20 question. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 576
U.S. 1, 41 n.2 (2015) (Thomas, 3., concurring in the
judgment in part and dissenting in part) ("Parties cannot
waive the correct interpretation of the law simply by
failing to invoke it."); *Certain Underwriters at Lloyd's of*
London v. KG Admin. Serv., 855 Fed.Appx. 260, 268 n.7
(6th Cir. 2021) (applying the court's interpretation of an

insurance contract term over parties' competing interpretations as necessary to uphold principles of contract interpretation).

Lee v. Patin, No. 83213 Nev Supreme Court (2023) (Unpublished Opinion filed March 9, 2023)

In this case, the Probate Commissioner, District Court, and Court of Appeals were each charged with reviewing *de novo* the legal issue of the Will's admission to probate. In so doing, each took the charge to determine the Testator's intent in stating the scope of the applicability of the Will – even if the parties had not provided the correct interpretation thereof themselves. Accordingly, the issue of the COA Opinion's harmony with the Party Presentation Principle does not merit review by this Court.

B. The Court of Appeals properly considered both Translations of the Will.

Second, Appellant asserts error by the Court of Appeals for considering a “facially incorrect” translation of the Testator's Will. Appellant's argument fails as the translation simply demonstrates a disagreement among experts, and not a “facially incorrect translation.”

1. A Translator's Difference of Professional Opinion Does Not Equate to a Facially Incorrect Translation.

Appellant asserts that the Court of Appeals erred in considering both translations of the Will – neither of which were presented by Appellant – on

1 the basis that one of the translations included punctuation not present in the
2 Portuguese original Will. Appellant's argument fails as the Court of
3 Appeals properly considered both translations at face value – as the work of
4 professional translators.

5 Addressing translators for a defendant in criminal proceedings, the
6 Nevada Supreme Court held that:

7 Translation is **an art more than a science**, and **there is**
8 **no such thing as a perfect translation** of a defendant's
9 testimony. Indeed, in every case there will be room for
disagreement among expert translators over some aspects
of the translation.

10 Baltazar-Monterrosa v. State, 122 Nev. 606, 137 P.3d 1137 (2006).

11 In Nevada, translators, like interpreters:

12 are subject to qualification as experts, and an expert may
13 testify to matters within the scope of his or her special
14 knowledge. The district court has discretion to determine
15 the admissibility of expert testimony, and we review this
16 decision for a clear abuse of discretion. The question of
an interpreter's competence is a factual one for the trial
court. In making this determination, the trial court is
given considerable latitude, and absent a manifest abuse
of discretion, its ruling will not be disturbed on appeal.

17 Id. (Internal citations, quotations, and footnotes omitted).

18 In the instant case, the two translations differ in several ways,
19 including the inclusion of a comma. The inconsistency between the
20 translations is simply a disagreement between the two translators. With no

1 evidence, Appellant summarily asserts that the translator’s expert opinion is
2 simply “clear error[] in punctuation[.]” *See* Petition For Review at 6:3.

3 The decision to consider both translations is neither a fundamental
4 issue nor of great statewide public importance. Rather, the decision is a
5 discretionary decision reviewed for a “clear abuse of discretion.” *Id.*
6 Accordingly, Appellants argument fails to merit review by the Nevada
7 Supreme Court.

8 **C. Portuguese Law Does Not Govern Nevada’s ascertaining of**
9 **the Testator’s Intent.**

10 Finally, Appellant asserts that because the Will was executed in
11 Portugal, the Testator’s intent must be ascertained in consideration of the
12 restrictions of Portuguese law. Further, Appellant asserts that the Court
13 could not look to Portuguese law for purposes of determining the Will’s
14 validity without also considering Portuguese law when determining the
15 Testator’s intent. Appellant’s argument fails as (1) this issue was not argued
16 below, and thus Appellant has waived the same; and (2) while governing law
17 defers to each nation to determine an “authorized person” under the UIWA,
18 no such governing law requires that a Testator’s intent be ascertained in
19 accordance with the law where such will was executed, or as asserted by
20

1 Appellant, the legal restraints on the dispositive provisions of wills of the
2 jurisdiction where executed.

3 **1. Appellant failed to argue the issue below, and thus is**
4 **deemed waived.**

5 This Court should not consider Appellant's argument as it was not
6 raised in the proceedings below. "A point not urged in the trial court, unless
7 it goes to the jurisdiction of that court, is deemed to have been waived and
8 will not be considered on appeal." Old Aztec Mine, Inc. v. Brown, 97 Nev.
9 49, 52, 623 P.2d 981, 983 (1981). In this case, Appellants failed to argue
10 this issue below. See COA Decision Page 15 FN 12. Accordingly, this
11 Court should not consider this argument as the basis for review of the COA
12 Decision by this Court.

13 **2. Appellant's Assertion that Legal Restrictions upon**
14 **Wills in Portugal Should be Considered in**
Determining the Testator's Intent Lacks Support.

15 Appellant asserts that because the Court of Appeals considered
16 Portuguese Law in determining the meaning of an "authorized person" and
17 the meaning of "universal heir," that the Court of Appeals should be
18 constrained to review Portuguese Law to determine what legal prohibitions
19 existed on the disinheriting of children in favor of a spouse. In support of
20 such position, Appellant summarily argues that "the application of

1 Portuguese law should be consistent” and “it is erroneous to apply
2 Portuguese law *only* for the limited purpose of deciding whether to admit
3 the will to probate in Nevada. *See* Petition For Review at 15:15-17.
4 Appellant’s argument fails as lacking any legal support.

5 As set forth in the COA Opinion,

6 Portugal signed the Convention Providing a Uniform
7 Law on the Form of an International Will and consented
8 to be bound to the document. [...] Additionally, an
9 "authorized person" as defined by Portugal will be
10 recognized in Nevada, since the United States has also
11 signed the convention and Nevada has adopted the
12 Annex to the UIWA derived from the Convention.

13 *See* COA Opinion at 9:21-10:5. Accordingly, the UIWA and governing law
14 **requires** that Nevada Courts defer to Portuguese law in determining the
15 meaning of an “authorized person” and the Court of Appeals properly made
16 such determination.

17 The interpretation of a will is different than ascertaining a will’s
18 validity. Under Nevada law, the guideline for interpreting a will is the
19 intention of the testatrix, determined by the meaning of her words. In re
20 Foster's Estate, 82 Nev. 97, 411 P.2d at 484 (1966). In accordance with such
guidance, the Court of Appeals investigated the Testator’s use of the word
“universal,” determining the same as a term of art with significance in
determining the Testator’s intent. Nevada Law further prescribes that “[t]he

1 primary presumption when interpreting or construing a will is that against total or
2 partial intestacy.” Id. the Court of Appeals properly applied the presumption
3 against intestacy, and reviewed the absence of the modifier “in Portugal”
4 when referring to Testator’s daughters in the residuary clause of the Will.
5 Upon weighing all these factors, the Court of Appeals concluded –
6 consistent with the lower court’s determinations – that the Will in fact did
7 govern the disposition of the Decedent’s assets in Nevada.

8 Appellant’s arguments have no similar governing law or authority
9 which would require a court to consider the legal possibilities in Portugal.
10 In fact, such a consideration is a bootstrapping argument, as if the Testator
11 intended for the Will to govern all of her estate, then she would not have
12 restricted herself to the application of the Will to her estate in Portugal, but
13 rather to her entire estate. Further, even if Appellant’s argument had merit,
14 Appellant’s authority appears to suggest that the provisions of Testator’s
15 Will, even if probated in Portugal, violate Portuguese law. Thus, the terms
16 of Testator’s Will naming Testator’s children as contingent residuary heirs
17 actually *supports* the Court of Appeals conclusion if this Court accepted
18 Appellant’s authority.

1 Accordingly, Appellant's assertion that Portuguese law be considered
2 in determining the Testator's intent fails to merit review by the Nevada
3 Supreme Court.

4 **V. CONCLUSION**

5 Appellants acknowledge that this case contemplates many fascinating
6 legal issues. However, Appellant's Questions Presented narrowly argue that
7 the Nevada Supreme Court should grant review as to issues Appellants
8 failed to argue below, which are otherwise discretionary, or which were
9 adjudicated in accordance with governing law. Accordingly, Respondents
10 assert that the Petition for Review lacks merit and should be denied.

11 DATED this 10th day of May, 2023. _____

12
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CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this RESPONDENTS' ANSWER TO
3 APPELLANTS' PETITION FOR REVIEW BY THE SUPREME COURT
4 complies with the formatting requirements of NRAP 32(a)(4), the typeface
5 requirements of NRAP 32(a)(5) and the type-style requirements of NRAP
6 32(a)(6) because:

7 [x] This Petition for Review has been prepared in a proportionally
8 spaced typeface using Microsoft® Word for Microsoft 365 MSO
9 (Version 2304 Build 16.0.16327.20200) 64-bit in 14-point Times
10 New Roman font.

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

14 [x] Proportionately spaced, has a typeface of 14 points or more and
15 contains 3,284 words.

16 3. Finally, I hereby certify that I have read this RESPONDENTS'
17 ANSWER TO APPELLANTS' PETITION FOR REVIEW BY THE
18 SUPREME COURT, and to the best of my knowledge, information, and
19 belief, it is not frivolous or interposed for any improper purpose. I further
20 certify that this brief complies with all applicable Nevada Rules of Appellate

1 Procedure, in particular NRAP 28(e)(1), which requires every assertion in
2 the brief regarding matters in the record to be supported by a reference to the
3 page and volume number, if any, of the transcript or appendix where the
4 matter relied on is to be found. I understand that I may be subject to
5 sanctions in the event that the accompanying brief is not in conformity with
6 the requirements of the Nevada Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10TH day of May, 2023, I served a copy of the foregoing RESPONDENTS' ANSWER TO APPELLANTS 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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