

138 Nev., Advance Opinion 89
IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE TRUST
AGREEMENT OF THE LIVING TRUST
OF DAVID FRANCIS DAVIES III,
DATED MAY 12, 2020.

MICHAEL C. DAVIES; AND DAVID J.
DAVIES,
Appellants,
vs.

CATHY CODNEY; AND THE TRUST
AGREEMENT OF THE LIVING TRUST
OF DAVID FRANCIS DAVIES III,
DATED MAY 12, 2020,
Respondents.

No. 83581

FILED

DEC 29 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Appeal from a district court order adopting the Clark County Probate Commissioner's report and recommendation to confirm title to decedent's real property in his trust. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

Affirmed.

Grant Morris Dodds PLLC and Robert L. Morris, Henderson,
for Appellants.

Bowler Dixon & Twitchell and Travis K. Twitchell and Christopher D.
Harris, Las Vegas,
for Respondents.

BEFORE THE SUPREME COURT, CADISH AND PICKERING, JJ., AND
GIBBONS, Sr. J.¹

OPINION

By the Court, PICKERING, J.:

Six months before his death, David F. Davies III executed a revocable living trust agreement, which he and the named trustee both signed. The agreement states that “Grantor has transferred, assigned, conveyed and delivered to the Trustee the property described in Schedule A attached”; under the heading “Real Property,” Schedule A lists as a trust asset Davies’ “House,” valued at \$245,000. Davies did not prepare or record a formal deed conveying the House to the trust. Nonetheless, over the objections of Davies’ intestate heirs, the district court held that the agreement was effective to establish the House—Davies’ only real property—as an asset of the trust under Nevada law and to the satisfaction of the relevant statute of frauds. Because NRS 163.002 and NRS 163.008, the Restatement (Third) of Trusts, and persuasive California authorities support the district court’s decision that the trust agreement sufficiently established Davies’ House as trust property, we affirm.

I.

On May 12, 2020, David Francis Davies III created a living trust agreement between himself as “Grantor” and Robert Ray Gonzales as “Trustee.” Article III of the agreement, entitled “Funding of Trust,” states that “Grantor has transferred, assigned, conveyed and delivered to the Trustee the property described in Schedule A, attached and made a part

¹The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

hereof" and that "said property . . . is intended to constitute the trust estate and to be held by the Trustee IN TRUST for the uses and purposes and subject to the terms and conditions hereinafter set forth." Schedule A lists the trust assets as follows:

Name: Real Property
Value: \$245,000
Description: House

Name: Home Furniture
Value: \$10,000
Description: Home furniture

Davies died intestate on September 22, 2020. It is undisputed that the only real property Davies owned both when he created the trust and when he died was his residence at 9300 Mount Cherie Avenue in Las Vegas (the House), last valued at \$180,163 by the county assessor.

The trust agreement named Davies' sister as the sole survivor beneficiary. In the agreement, Davies acknowledged his two children and stated, "The failure of this Trust to provide for any distribution to the Grantor's children[,] David J. Davies and Michael C. Davies[,] is intentional." Both Davies and the original named trustee, Gonzales, signed the trust agreement and had their signatures notarized. Respondent Cathy Codney later assumed the role of trustee.

After Davies died intestate, Codney petitioned the district court to assume jurisdiction of the trust and to confirm Codney as trustee and the House as trust property. See NRS 164.010 (providing for the court to assume jurisdiction over an express trust on petition of the trustee); NRS 164.015 (providing for proceedings on petition "for a ruling that property not formally titled in the name of a trust or its trustee constitutes trust property pursuant to NRS 163.002"). Davies' sons, appellants David and

Michael Davies (the heirs), objected, arguing that a trust could not be created as to real property except by deed and that Schedule A's vague description of Davies' real property violated the statute of frauds. The probate commissioner disagreed, recommending that title to the House be formally conveyed to the trust by order incorporating the description of the property from the county assessor's records. The district court adopted the commissioner's recommendation and entered an order confirming the House as trust property. The heirs appealed, raising two questions regarding trusts and real property: Can a written instrument fund a trust with real property absent a separate deed under NRS 163.002 (defining acceptable methods of trust creation) and NRS 163.008 (defining the applicable statute of frauds for trusts funded by real property)? And if so, how specifically must the instrument describe the property to comport with the statute of frauds?

II.

NRS 163.002 and NRS 163.008 govern the methods of creating, and evidentiary requirements for, trusts funded by real property, including the Davies trust. The heirs' appeal turns on the proper interpretation of those statutes; specifically, the heirs argue that to create a trust in relation to real property, the settlor must execute and record a formal deed conveying the property to the trust. They also argue in the alternative that if another type of written instrument can fund a trust with real property, the agreement must include a legal description of the property to comport with the statute of frauds. While we defer to the district court's findings of fact in probate matters, *de novo* review applies to the questions of statutory interpretation and law that this case presents. *Waldman v. Maini*, 124 Nev. 1121, 1129-30, 195 P.3d 850, 856 (2008).

A.

A valid express trust in Nevada requires a settlor, trust intent, trust property, and a beneficiary. NRS 163.003 (requiring that the settlor properly manifest an intention to create a trust, and trust property); NRS 163.006 (requiring a beneficiary). If these requirements are met, NRS 163.002(1) provides in relevant part that “a trust may be created by . . . (a) “[a] declaration by the owner of the property that he or she or another person holds the property as trustee [or] (b) [a] transfer of property by the owner during his or her lifetime to another person as trustee.” A trust created in relation to real property must arise by operation of law or be evidenced by “[a] written instrument signed by the trustee” or “[a] written instrument . . . conveying the trust property and signed by the settlor.” NRS 163.008(1)(a), (b). Nothing in the text of these statutes requires a formal deed to create a trust as to real property—and California cases construing the California statutes from which NRS 163.002 and NRS 163.008 derive have so held. *See Carne v. Worthington*, 200 Cal. Rptr. 3d 920, 927 (Ct. App. 2016) (holding that the California Probate Code permits the transfer of real property to a trust by the trust instrument, given the lack of “any statutory provisions requiring additional formalities in order to convey real property” or affirmatively requiring conveyance by deed); *Estate of Heggstad*, 20 Cal. Rptr. 2d 433, 436 (Ct. App. 1993) (concluding that “a written declaration of trust by the owner of real property, in which he names himself trustee, is sufficient to create a trust in that property, and that the law does not require a separate deed transferring the property to the trust”).

We have spoken on this issue only once and in passing. In determining the viability of a handwritten note as a holographic will, we stated in dicta, “[A]t no time was the condominium ever deeded to

respondent [trustee], and it therefore did not become a part of the trust estate," implying that real property must be conveyed to a trust by deed. *Dahlgren v. First Nat'l Bank of Nev.*, 94 Nev. 387, 390, 580 P.2d 478, 479 (1978). However, the issue was not squarely presented, and nothing in the opinion suggests that the *Dahlgren* trust agreement even attempted to convey the condominium to the trust, as the agreement did in this case. See *Carne*, 200 Cal. Rptr. 3d at 930 (distinguishing *Dahlgren* on this basis). Moreover, *Dahlgren* was decided before the 1991 passage of NRS 163.002 and NRS 163.008. *Dahlgren* therefore does not advance the heirs' position, but neither are we guided by any other relevant Nevada precedent.

We are, however, helped by cases interpreting California Probate Code Sections 15200(a)-(b) (governing trust creation) and 15206 (governing the applicable statute of frauds for trusts funded by real property), from which NRS 163.002(1)(a)-(b) and NRS 163.008(1) were drawn. In *Carne*, the California Court of Appeals analyzed a trust instrument that stated in relevant part, "I transfer to my Trustee the property listed in Schedule A, attached to this agreement." 200 Cal. Rptr. 3d at 927. Schedule A listed the legal address of real property, so the parties did not dispute the sufficiency of the description. *Id.* But similar to this case, the appellant in *Carne* contended that the disputed trust was not valid because the settlor "had not properly transferred title to the only asset" in the trust, the parcel of real property. *Id.* at 922.

In analyzing sections 15200 and 15206 of the California Probate Code, the *Carne* court relied on section 16, comment b, of the Restatement (Third) of Trusts and the attendant illustration. *Id.* at 926. Section 16, comment b advises that:

Good practice certainly calls for the use of additional formalities . . . [such as] the execution

and recordation of deeds to land. Nevertheless, a writing signed by the settlor, or a trust agreement signed by the settlor and trustee, manifesting the settlor's present intention thereby to transfer specified property (such as all property listed on an attached schedule) is sufficient to create a trust.

Restatement (Third) of Trusts § 16 cmt. b (Am. Law Inst. 2003). The comment further directs attention to Illustration 5:

The owner of certain property executes and signs a writing stating that he thereby transfers that property to T in trust for B for life, with remainder thereafter to B's issue, and delivers the writing to T. In the absence of applicable statutory provisions requiring additional formalities, a trust is created.

Id. cmt. b, illus. 5.

Guided by these common law principles, *Carne* concluded that the trust agreement effectively transferred the property from the settlor to the third-party trustees, without requiring the settlor to execute a separate deed. *Carne*, 200 Cal. Rptr. 3d at 927-28. As a matter of common law, the grant clause effectively manifested the settlor's present intention to transfer the property into trust. *Id.* at 927.² And the trust instrument was

²The *Carne* trust differs from the Davies trust in that it uses the present tense—"I transfer to my Trustee the property listed in Schedule A," *Carne*, 200 Cal. Rptr. 3d at 927, whereas the Davies trust reads, "Grantor has transferred, assigned, conveyed and delivered to the Trustee the property listed in Schedule A." But words of grant "may be in either the past or the present tense" without compromising their operative effect. 2 Joyce Palomar & Haskell A. Holloman, *Patton & Palomar on Land Titles* § 343 (3d ed. 2003); 26A C.J.S. *Deeds*, § 33, at 64-65 (2020) (noting that a conveyance must contain "operative words of grant, which may be in either the past or the present tense" (footnote omitted)). The distinction between present and past tense might make a difference if an oral transfer predated

signed by both the settlor and the trustees and appropriately listed the disputed property in Schedule A. The instrument therefore met the statutory requirements for trust creation by transfer, Cal. Prob. Code § 15200(b) (providing that “a trust may be created by . . . [a] transfer of property by the owner during the owner’s lifetime to another person as trustee”), and the applicable statute of frauds, Cal. Prob. Code § 15206 (providing that “[a] trust in relation to real property is not valid unless evidenced by . . . a written instrument signed by the trustee [or] a written instrument conveying the trust property signed by the settlor”).

Nevada’s statutes governing real property transfers into trust are almost identical to California’s. *See* NRS 163.002(1)(b) (providing that “a trust may be created by . . . [a] transfer of property by the owner during his or her lifetime to another person as trustee”); NRS 163.008(1) (providing that “[a] trust created in relation to real property is not valid unless . . . evidenced by . . . a written instrument signed by the trustee [or] a written instrument . . . conveying the trust property and signed by the settlor”). *Carne* is therefore on all fours with this case insofar as it holds that a settlor can create a valid trust in respect to the real property by transfer without need of separate deed. However, *Carne* also analyzed whether the at-issue trust agreement created a trust by *declaration* and concluded it did not. *Carne*, 200 Cal. Rptr. 3d at 928. We do not adopt *Carne*’s holding as to declarations, because the Nevada statute governing

Davies’ and his trustee’s execution of the trust agreement and an event affecting equitable title occurred in the interim, *see* Restatement (Third) of Trusts § 23 (entitled “Signing Requirement: When and By Whom?”), but there is no such evidence or argument in this case.

creation of trusts by declaration differs materially from its California counterpart.

Under common and California law, a settlor can create a trust by declaration only when the settlor and the trustee are the same person; if the trustee is a third party, the settlor must proceed by transfer. Cal. Prob. Code § 15200(a) (providing that a trust may be created by “[a] declaration by the owner of property that the owner holds the property as trustee”); see *Heggstad*, 20 Cal. Rptr. 2d at 435-36 (interpreting Cal. Prob. Code § 15200(a) and holding the settlor can create a trust by declaration if the settlor is also the trustee); Restatement (Third) of Trusts § 10(c) & cmt. e (defining “declaration of trust” as an instrument wherein the “owner of [the] property declares himself or herself trustee”); Helene S. Shapo, George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, *The Law of Trusts and Trustees* § 141 (3d rev. ed. 2022) (explaining that a transfer is unnecessary when the settlor and trustee are the same because the settlor, by declaration, can simply transmute his property interest as an owner into a “bare legal interest” as a trustee). Because the settlor in *Carne* was not also the trustee, he could not proceed by declaration under California Probate Code section 15200(a). *Carne*, 200 Cal. Rptr. 3d at 928.

Nevada law, by contrast, allows a settlor to create a real property trust by declaration whether the trustee is the settlor or a third party. This expansion of the common law derives from NRS 163.002(1)(a), which adds the phrase “or another person” in stating that a settlor can create a trust by declaration: “[A] trust may be created by . . . [a] declaration by the owner of property that he or she *or another person* holds the property as trustee.” (emphasis added). The 2017 Legislature added “or another person” to NRS 163.002(1)(a) in response to efforts by the state bar’s probate

law section to “clarify ambiguities” faced by probate practitioners by allowing “a declaration by a property owner that someone else [holds] the property as trustee” and “codif[ying] common law to clarify the types of declarations acceptable for the transfer of property into a trust.” Hearing on A.B. 314 Before the S. Comm. on Judiciary, 79th Leg., at 2 (Nev., May 2, 2017) (statement of Julia S. Gold, Co-Chair, Probate and Trust Law Section, State Bar of Nevada) (second quote); Leg. Comm. of the Probate & Trust Section of the State Bar of Nev., A.B. 314 Executive Summary E5 (2017) (third and fourth quotes). This amendment allows a Nevada settlor like Davies to create a trust by declaration whether the settlor is also the trustee, as in *Heggstad*, or has named a third party as trustee, as Davies did here. See also Edmund J. Gorman, *Where There’s a (Pour-Over) Will, There’s a Way: Nevada’s New Approach to Avoiding Probate With Revocable Trusts*, Nevada Lawyer, Nov. 2022, at 15 (discussing Nevada’s codification of *Heggstad*).

Permitting the creation of a trust in relation to real property by declaration or transfer without requiring a separate deed serves “the long-standing objective of this court to give effect to a testator’s intentions to the greatest extent possible.” *In re Estate of Melton*, 128 Nev. 34, 51, 272 P.3d 668, 679 (2012). “Good practice certainly calls for the use of additional formalities,” Restatement (Third) of Trusts § 16, cmt. b, and self-represented settlors would benefit from specificity in the trust instrument, including the legal address and assessor’s parcel number, and the execution and recording of formal deeds conveying property into trust to give notice of the conveyance to outsiders. But revocable trusts make up an increasingly significant percentage of estate planning tools used by unrepresented individuals, and formalities should not raise an unnecessary barrier to their

desired estate disposition. See Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. Davis L. Rev. 2511, 2545-46 (2020) (finding that trusts are self-prepared at a higher rate than wills, and that over 50% of trusts are self-drafted or prepared with the help of a fill-in form, mobile app, or nonlawyer).

In the circumstances of this case, the statement in the Davies trust agreement that he “has transferred, assigned, conveyed and delivered to the Trustee the property described in Schedule A,” which is “to be held by the Trustee IN TRUST,” qualifies as both a “declaration” of trust under NRS 163.002(1)(a), see NRS 163.002(2) (providing that a “declaration pursuant to subparagraph (a) of subsection 1 may . . . include a schedule or list of assets . . . that is incorporated by reference into a document that is signed by the owner of the property”), and a “transfer of property by the owner during his or her lifetime to another person as trustee” under NRS 163.002(1)(b). The trust agreement is a “written instrument signed by the trustee,” NRS 163.008(1)(a), and a “written instrument . . . conveying the trust property and signed by the settlor,” NRS 163.008(1)(b).

As in *Heggstad* and *Carne*, we find no additional authority that would require a separate conveyance by deed to effectively convey the property or to comport with the statute of frauds. NRS 111.105 (governing conveyances by deed) provides only that a conveyance of land *may* be by deed. NRS 111.205(1)³ (governing interests in real property) requires only

³NRS 111.210(1) governs the statute of frauds for land sale contracts and leases but has never been applied by this court to an express trust. See 4 Caroline N. Brown, *Corbin on Contracts* § 17.6 (Joseph M. Perillo, ed., rev. ed. 1997) (“When an owner transfers land to another in trust for the grantor . . . such a transaction may not be regarded as a ‘contract or sale’ of an interest in land.”).

that the interest be transferred “by act or operation of law, or by deed or conveyance, in writing” and signed by the grantor. NRS 163.002(1)(a)-(b) (governing trust creation) requires only a “declaration” or “transfer.” And NRS 163.008(1) (governing the statute of frauds for trusts created in relation to real property) requires only a written instrument conveying the trust property signed by the settlor or a written instrument signed by the trustee.

In the absence of any additional statutory requirements, the disposition of Davies’ House follows easily from our analysis of NRS 163.002(1)(b) and NRS 163.008(1). The trust agreement can properly be characterized either as a declaration that the House is held in trust or as a transfer of that property to the trust, and it is in writing and signed by the grantor and trustee. It therefore effectively funds the real property listed in Schedule A to the Davies trust.

B.

The heirs argue in the alternative that even if a trust instrument can fund a trust with real property, the references to “real property” and the “House” in Schedule A of the agreement fail to meet the requirements of the common law statute of frauds, *see* NRS 111.205 (codifying the common law statute of frauds for interests in land), and NRS 163.008, the statute of frauds specific to trusts funded by real property. We review *de novo* a district court’s application of the statute of frauds. *Khan v. Bakhsh*, 129 Nev. 554, 557, 306 P.3d 411, 413 (2013).

1.

NRS 163.008(3) reads:

This section *must not be construed* to require a declaration by an owner of property pursuant to NRS 163.002 that specifically identified real

property is held in trust to be in writing. As used in this subsection, “specifically identified real property” includes property that is identified by legal description, street address or the applicable assessor’s parcel number.

(emphasis added). The heirs read this subsection to *require* that trusts conveying real property specifically identify the property using the legal description, street address, or assessor’s parcel number. But the phrase “must not be construed” *relieves* the property owner from any obligation to the requirement of stating “that specifically identified real property is held in trust.” There is no need to look beyond this exceedingly plain language to see the flaw in the heirs’ position. *See In re Estate of Black*, 132 Nev. 73, 75, 367 P.3d 416, 417 (2016) (“Language in a statute must be given its plain meaning if it is clear and unambiguous.”). Therefore, as matter of statutory interpretation, Schedule A of the Davies trust does not violate the relevant statute of frauds laid out in NRS 163.008 by failing to provide any of the categories of information listed in NRS 163.008(3).

2.

The common law regarding the adequacy of property descriptions in relation to the statute of frauds further undercuts the heirs’ position. *Compare Ray Motor Lodge, Inc. v. Shatz*, 80 Nev. 114, 118, 390 P.2d 42, 44 (1964) (considering the adequacy of the property description under NRS 111.210(1), which codifies the common law statute of frauds for land sales contracts), *with Ukkestad v. RBS Asset Fin., Inc.*, 185 Cal. Rptr. 3d 145, 148-51 (Ct. App. 2015) (applying contractual statute of frauds jurisprudence to trusts). Foremost, Nevada has long maintained a generous approach to compliance with the statute of frauds in the context of other transfers of real property, specifically, land sale contracts. *See Wiley v. Cook*, 94 Nev. 558, 563, 583 P.2d 1076, 1079 (1978) (“A trial court

may . . . construe an ambiguity in the writing by receiving parol evidence.”); *Roberts v. Hummel*, 69 Nev. 154, 159, 243 P.2d 248, 250 (1952) (“[I]f it is possible to make a description certain by using the guideposts given in the writing, the court will construe the written instrument and the extrinsic evidence to be one instrument so as to effectuate the intention of the parties.”); see, e.g., *Roy Motor Lodge*, 80 Nev. at 118, 390 P.2d at 44 (1964) (looking to letters between the contracting parties for the property’s legal address); *Roberts*, 69 Nev. at 159-60, 243 P.2d at 250 (looking to parol evidence of the parties’ mutual understanding of the property’s boundaries).

Our approach accords with the “clear trend . . . towards a more realistic interpretation” of the statute of frauds, rather than one which “make[s] a fetish of requiring a perfect written contract.” 10 Richard A. Lord, *Williston on Contracts* § 29.20 (4th ed. 2011) (quoting, in second passage, *Doyle v. Wohlrabe*, 66 N.W.2d 757, 761 (Minn. 1954)). The statute of frauds is meant to “guard against the perils of perjury and error,” not to act “as a bar to a contract fairly, and admittedly, made.” *Sterling v. Taylor*, 152 P.3d 420, 428 (2007) (internal quotation marks omitted); see *Wainwright v. Dunseath*, 46 Nev. 361, 366-68, 211 P. 1104, 1106-07 (1923). More specific to this case, modern state courts have frequently held that a description akin to Davies’ (e.g., “my land” or “my property”) satisfies the statute of frauds, particularly “when it is shown by extrinsic evidence that . . . only one tract of land satisfies the description.” 10 *Williston on Contracts* § 29.20, n.20 (quoting *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983)).

Because California shares Nevada’s generous approach to the common law statute of frauds regarding interests in land, and because Nevada statute of frauds jurisprudence has long reflected the pragmatism

of common law treatises, we are persuaded that the description of real property held in trust satisfies the statute of frauds when it provides sufficient means to identify the property using extrinsic or parol evidence. *Ukkestad v. RBS Asset Finance, Inc.*, 185 Cal. Rptr. 3d 145, 148-51 (Ct. App. 2015), is instructive. There, a trust instrument conveyed all the settlor's "right, title and interest" to "all of his real and personal property to the trustee," without any further identification of the real property. *Ukkestad*, 185 Cal. Rptr. 3d at 146-47. The court held that, as a matter of common law, the statute of frauds required only that the language of the trust instrument provide "a sufficient means or key by which extrinsic or parol evidence could be used to define the property." *Id.* at 149-50 (quoting *Alameda Belt Line v. City of Alameda*, 5 Cal. Rptr. 3d 879, 883 (Ct. App. 2003)). Given that publicly available records showed that the two disputed parcels constituted "all of" the settlor's real property, the court concluded that the trust instrument comported with the statute of frauds. *Id.* at 151.

Here, Davies lived in his Mount Cherie Avenue house, his only real property, until his death. A detailed description of the parcel is easily available through the county assessor, and neither the probate commissioner nor the district court had any trouble ascertaining that description. Therefore, Schedule A provided sufficient means to identify the "House" through extrinsic evidence, and the agreement satisfies the common law statute of frauds as codified in NRS 111.205(1).

III.

NRS 163.002 and NRS 163.008 permit a settlor to create a trust as to real property via trust instrument, and a description of real property held in trust satisfies the statute of frauds if it can be identified through extrinsic or parol evidence. Given these conclusions, Davies' living trust

