IN THE COURT OF APPEALS 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-COA** 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 REHEARING

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MEMORANDUM OF POINTS AND AUTHORITIES

I. 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

[1] For convenience, this will hereafter be referred to as the "Disposition Clause."

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 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]

On October 20, 2022, this Court affirmed the District Court's Order adopting the Probate Commissioner's Report & Recommendation in full. The Court's Opinion 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 Court references the concept of "universal succession," noting that Roman or

[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 Report & Recommendation deciding to construe it to avoid intestacy.

civil law use that concept to "refer[] to the totality of one's estate." Opinion at 19.

Rehearing is warranted under NRAP 40(c) for three main reasons. First, rehearing is appropriate because the Court overlooked or misapprehended material facts in the record including the certification from Ms. Piotrowski stating that the Will "names [Hisgen] as [Decedent's] universal heir for all her goods ***in Portugal***," the competing translations of the Will, and the paucity of the record on appeal, which is devoid of evidentiary support for Hisgen's proposed Will construction.

Next, the Court overlooked a material question of law in the case because the Court did not address the legal validity of the Probate Commissioner's *sua sponte* research into non-Portuguese European law, based on an issue raised for the first time in Hisgen's Reply, and to which Ms. Sweet had no opportunity to respond. Then to compound this error, this Court concluded that Ms. Sweet waived of any argument regarding the validity of the Will under Portuguese law even though the record clearly demonstrates she was not provided a fair opportunity to respond to Hisgen's belated argument and the court's *sua sponte* research in relation thereto.

Finally, the Court both overlooked a material question of law in the case *and* failed to consider dispositive rule, regulation, or decision by failing apply Portuguese law consistently in its Opinion, including the fact that Portuguese law

expressly forbids the Court's interpretation of the Will.

II. Standard for Reconsideration

"The court may consider rehearings . . . [w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case or [w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2).

III. 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 Court's Opinion ignores factual gaps and supplants *sua sponte* research for that presented by Hisgen and the courts below. NRAP 40(c) permits rehearing so that the Court can more fully and accurately consider these issues, thus, rehearing should be granted.

Furthermore, rehearing is warranted because the Court overlooked a material legal question and misapprehended Ms. Sweet's related request for legal relief. As the record reflects, the Probate Commissioner conducted *sua sponte* legal research into an issue raised by Hisgen for the first time in his reply brief and rendered an opinion determining how Decedent's assets must be *distributed* based on that *sua sponte* research, despite Hisgen's own assertion that distribution of the assets was ***not*** one of the issues at bar. The Court's Opinion does not address the impropriety of the lower courts' *sua sponte* actions and, in fact, ratifies them. As a consequence, , Ms. Sweet has been severely prejudiced since she will be precluded from ever exercising her right under NRS 137.080 to contest the validity of the Will's purported distribution *after* admission to probate in violation of her due process rights. Thus, rehearing should be granted and Ms. Sweet should be given a full and fair opportunity to challenge the scope of the Disposition Clause in accordance with NRS 137.080.

A. The Court Overlooked Material Facts in the Record

1. The Will Translations

Both the Piotrowski Translation and the Santos Translation were presented to the Court 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, it would stand to reason that her translation of the Will is likely more accurate and therefore would have been more appropriately considered. Moreover, it is facially evident that the Piotrowski Translation added a comma that does not exist in the Will.

Despite these facts, the Court's Opinion does not address the Santos Translation other than to note that it exists. The Opinion 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." Opinion at 16. Thereafter, the Opinion simply reviews and interprets the Piotrowski Translation as if the Santos translation did not exist. More concerningly, the Opinion 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 Opinion 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 Court's Opinion 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 Court 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 *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 Court in rendering the Opinion. *See, e.g.*, Op. Brf. 19–21. Thus, Ms. Sweet respectfully requests that this petition for rehearing be granted.

2. <u>The Piotrowski Certification</u>

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 Court's Opinion 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 by the Court 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."

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 Court overlooked these material facts. Therefore, this petition for rehearing should be granted and the Piotrowski certification fully considered.

B. The Court Overlooked a Material Question of Law

Rehearing is also warranted because the Court 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; Opinion 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 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 (Report & Recommendation, 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 raisedin Hisgen's repy brief. J.A. 8–9. As the record demonstrates, based on his own nebulous *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 (Report & Recommendation 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 Court's Opinion overlooked these arguments and misapprehended the material question of law concerning the term "universal heir," resulting in this Court 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. Opinion 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 adjudicated a question of law that was not raised by Hisgen—to wit: the *disposition* of Decedent's assets—based on *sua sponte* research conducted in response to an argument raised by Hisgen for the first time in a reply brief. Even the District Court 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 Report & Recommendation without amendment.

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 Report & Recommendation addressed the ultimate disposition of Decedent's assets. This Court's Opinion similarly addresses the disposition of Decedent's assets under the Will, and overlooks 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.[3]

Ms. Sweet is concerned that the lower courts' orders and the Court's current Opinion—including the footnote stating that arguments regarding the Disposition Clause is invalid under Portuguese law if applied to assets outside of Portugal—will operate as a definitive adjudication of how assets under the Will will be distributed and effectively preclude a will contest under NRS 137.080.[4]

Based on the foregoing, Ms. Sweet respectfully requests that the Court grant rehearing to address the material legal question of whether it was proper for the Probate Commissioner, and in turn the District Court, to rule on the *disposition* of Decedent's assets under the Will rather than simply the ability to admit the Will to probate in Nevada.

C. The Court Failed to Consider Dispositive Portuguese Law

In line with the foregoing argument, rehearing is warranted because the the Court erred by applying Roman civil law regarding "universal succession" to

[3] The undersigned recognizes that there may have been a more articulate way to request this relief, and regrets any confusion that may have resulted from an unpolished presentation.

[4] Ms. Sweet does not contest the Court's application of *In re Estate of Black* and the accompanying conclusion that she was not entitled to a pre-probate will contest under NRS 137.020. Rather, Ms. Sweet is asserting that the Court overlooked Ms. Sweet's request that the Court reverse the Probate Commissioner's interpretation of how assets were to be distributed under the Will and direct the lower court to permit Ms. Sweet to follow the contest procedures outlined in NRS 137.080.

construe the Disposition Clause rather than Portuguese civil law that enshrines the principle of "mandatory succession." *Compare* Opinion 19 *with* Op. Brf. 27. Thus, to the extent the Court intended to affirm those portions of the lower courts' orders purporting to decide the appropriate *disposition* of Decedent's assets under the Will's terms,[5] such a ruling does not consider dispositive Portuguese law.

This error warrants rehearing because the Court appropriately looked to Portuguese law when determining that the notary who subscribed to the Will was a proper "authorized person" under the UIWA. Opinion 9–12.[6] However, the Court 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. Rather, the laws of Portugal must also be applied when interpreting the Will, and the Court's Opinion has failed to do that. Accordingly, rehearing is warranted

[5] Ms. Sweet notes for the record that the Court's Opinion and the lower court Orders all fail to address that the Will, by its terms, will always result in at least partial intestacy. Even under Hisgen's preferred interpretation, the Will would fail to address Decedent's legal actions *outside* of Portugal. Reply Brf. 10–11.

[6] Ms. Sweet does not challenge the Court's interpretation of the UIWA or conclusion that the Will could properly be admitted to probate in Nevada if Portuguese law designates a notary public as a "person authorized to act in connection with an international will."

because the partial application of Portuguese law misapprehends and overlooks the material question of law previously discussed in Part III(B), *supra*.[7]

IV. Conclusion

For the reasons set forth more fully herein, Ms. Sweet respectfully requests that rehearing be granted.

DATED this 7th day of November 2022.

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[7] 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.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Rehearing 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 Rehearing 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 Rehearing complies with the page– or type–volume limitations of NRAP 40(b)(3) 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 3,729 words.

3. Finally, I hereby certify that I have read this Petition for Rehearing, 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 7th day of November, 2022.

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on the 7th day of November, 2022, I served a copy of the foregoing **APPELLANT'S PETITION FOR REHEARING** 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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