

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLARK J. FEELEY, AN INDIVIDUAL,
Appellant,

vs.

WANDA G. FEELEY, INDIVIDUALLY,
AND AS A BENEFICIARY AND
SUCCESSOR TRUSTEE OF THE
MARTHA E. FEELEY 1992 TRUST
DATED OCTOBER 16, 1992, AS
AMENDED SEPTEMBER 23, 2008,
AND AS A BENEFICIARY AND
SUCCESSOR TRUSTEE OF THE
MARTHA E. FEELEY REAL ESTATE
TRUST DATED OCTOBER 16, 1992, AS
AMENDED SEPTEMBER 23, 2008;
SHANNON A. FEELEY, AN
INDIVIDUAL NAMED AS A
BENEFICIARY IN (1) THE FIRST
AMENDMENT TO THE MARTHA E.
FEELEY REAL ESTATE TRUST
DATED SEPTEMBER 23, 2008, AND (2)
THE FIRST AMENDMENT TO THE
MARTHA E. FEELEY 1992 TRUST
DATED SEPTEMBER 23, 2008; AARON
S. FEELEY, DEANNA L. FEELEY, AND
SHAWN C. FEELEY, INDIVIDUALS
NAMED AS BENEFICIARIES IN (1)
THE MARTHA E. FEELEY 1992 TRUST
DATED OCTOBER 16, 1992; (2) THE
MARTHA E. FEELEY REAL ESTATE
TRUST DATED OCTOBER 16, 1992; (3)
THE FIRST AMENDMENT TO THE
MARTHA E. FEELEY REAL ESTATE
TRUST DATED OCTOBER 16, 1992;
AND (4) THE FIRST AMENDMENT TO
THE MARTHA E. FEELEY 1992 TRUST
DATED SEPTEMBER 23, 2008; AND
BRUCE KETCHEN, AN INDIVIDUAL
AND NAMED SUCCESSOR TRUSTEE

No. 64896

FILED

JAN 20 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

OF THE SECOND AMENDMENT TO
THE MARTHA E. FEELEY 1992
TRUST,
Respondents.

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment entered after a bench trial in a trust matter.¹ Eighth Judicial District Court, Clark County; Allan R. Earl, Judge.

Martha Feeley died in February 2009. On her death, her daughter, respondent Wanda Feeley, became the trustee of two trusts created by Martha² while she was living in New Hampshire. One of the trusts contained monetary assets (the Money Trust) and the other contained a piece of real property located in New Hampshire (the Real Estate Trust). The most recent trust documents, which were executed by Martha in late 2008, provided that Wanda would be the sole successor

¹Although the notice of appeal designates the order being appealed as the January 7, 2014, order resolving all pending motions, it appears that the district court's April 29, 2013, findings of fact, conclusions of law and judgment was the final, appealable order in this matter. See NRAP 3A(b)(1) (providing for an appeal from a final judgment); *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (explaining that "a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs"). Regardless, appellant filed a timely motion to alter or amend the judgment, which tolled the time for filing the notice of appeal until its resolution on January 7, 2014. See NRAP 4(a)(4)(C). Thus, appellant's January 21, 2014, notice of appeal was effective to appeal the April 29, 2013, final judgment. See *id.*

²Because most of the parties in this appeal share the same last name, these parties are generally referred to herein by their first names.

trustee of these trusts. They further provided that one-half of the trust assets would go to Wanda and her daughter, respondent Shannon Feeley, with the other half going to Martha's son, appellant Clark Feeley, and his children, respondents Shawn, Deanna, and Aaron Feeley. Each half was to be divided equally among the beneficiaries receiving that half.

Six months after Martha's death, Clark filed the underlying lawsuit against Wanda, alleging that earlier versions of the trust documents had provided for Clark and Wanda to be co-successor trustees of the trusts. He further asserted that the trusts had provided that he and Wanda would each get half of the trust assets, leaving them to decide the extent to which their respective children would share in these assets. In the complaint, Clark contended that Martha lacked the mental capacity to understand the changes she was making to the trusts and that Wanda had unduly influenced Martha to amend the trust documents to reduce Clark's interest and to make Wanda the sole successor trustee.

Clark asserted that Wanda's actions constituted fraud and intentional infliction of emotional distress. Clark later amended the complaint to add his and Wanda's children as defendants, as their interests in the trusts could have been affected by the outcome of the proceeding. In the amended complaint, Clark also added claims for unjust enrichment, conversion, elder abuse, and breach of fiduciary duties. In addition to damages, Clark sought relief in the form of declaratory relief, a constructive trust, an accounting, and an injunction.

Wanda, Shannon, and Shawn filed an answer to the amended complaint and a counterclaim alleging trespass and trespass to chattel, false imprisonment and elder abuse, negligence, conversion, defamation,

and fiduciary abuse.³ After a bench trial, the district court entered judgment on all of the parties' claims. Because the trust documents provided that they were to be governed by New Hampshire law, the district court applied New Hampshire law, concluding that Martha had both testamentary and contractual capacity when she executed the 2008 trust documents. The district court further found that the 2008 trust documents were not a product of undue influence.

Although the court found that the 2008 trust documents were not invalid based on undue influence or lack of capacity, the court nevertheless found that the 2008 trust document amending the Money Trust was invalid for another reason not challenged in this appeal.⁴ Thus, the court concluded that a 2005 amendment to the Money Trust was the enforceable document with regard to that trust. Under the 2005 amendment, two family friends were designated as the successor trustees for the Money Trust. As a result, the court directed that those parties be contacted to determine whether either was willing to serve as trustee of

³The counterclaim was initially filed on behalf of Wanda, Shannon, Shawn, Deanna, and Aaron, but counsel for Wanda, Shannon, and Shawn later filed a motion to withdraw from representation of Deanna and Aaron, who apparently did not wish to join in the counterclaim. Deanna and Aaron are both proceeding in this appeal pro se and did not join the answering brief filed by Wanda, Shannon, and Shawn. Aaron filed a separate answer, but Deanna did not. Aaron also signed the reply to respondents' response, along with Clark.

⁴Specifically, the 2008 amendment purported to amend the original 1992 trust. But the court concluded that the 1992 trust document and a 2003 amendment to that document had been eliminated in 2005, when Martha had executed an amendment and restatement of the 1992 trust. Thus, the court found that the 2008 amendment failed.

the Money Trust.⁵ Those individuals declined, and, ultimately, a third party was appointed as trustee.

As for the Real Estate Trust, the court found that the 2008 amendment to that trust was valid and enforceable. Under that amendment, Wanda was designated as the successor trustee. Due to the fact that the assets in the Money Trust had been depleted while it was under Wanda's control, the court concluded that she had not competently managed that trust. Although the court did not expressly find that Wanda had breached her fiduciary duties as trustee, the court did conclude that her handling of the Money Trust demonstrated that she was not capable of administering the Real Estate Trust. Thus, the court ordered that Wanda be removed as trustee of the Real Estate Trust and that Clark be appointed as trustee in her place.

Turning to attorney fees, the court concluded that Wanda had a claim for attorney fees against the assets of the Real Estate Trust, once that trust had been liquidated. Additionally, because Clark had convinced the court that Wanda was not competent to manage the trust, the court found that Clark had a right to have some of his attorney fees paid out of the trust assets. In order to satisfy the attorney fees due out of the trust assets, the court ordered that the real property that was the primary asset of the Real Estate Trust be put on the market for a cash sale. Finally, the court summarily dismissed all of the remaining claims in the complaint and counterclaim.

⁵Respondent Bruce Ketchen was one of the individuals named as a trustee of the Money Trust. He declined to be appointed trustee and has not otherwise participated in the district court action or this appeal.

Thereafter, Clark filed a motion to alter or amend the judgment, arguing that the evidence showed that Wanda had wrongfully misappropriated funds from the trusts and asking the court to conclude that Wanda had breached her fiduciary duties and order her to provide an accounting of the trust assets. Wanda also filed a motion for amendment of the judgment, asking that Clark be removed as trustee of the Real Estate Trust. The district court summarily denied both motions. This appeal followed.

Jurisdictional arguments

Clark first argues that the district court lacked subject matter jurisdiction to enter its order. His arguments in this regard are somewhat unclear. Initially, it appears that he may be arguing that the court lacked jurisdiction because the trust documents provided that they would be governed by New Hampshire law. Here, the trust documents included choice-of-law clauses providing that the documents would be governed by New Hampshire law. *See Fog Motorsports No. 3, Inc. v. Arctic Cat Sales, Inc.*, 982 A.2d 963, 964 (N.H. 2009) (describing a contractual clause requiring the agreement at issue to be governed by and construed under the laws of Minnesota as a choice-of-law clause); *Choice-of-law clause*, *Black's Law Dictionary*, (10th ed. 2014) ("A contractual provision by which the parties designate the jurisdiction whose law will govern any disputes that may arise between the parties."). And the district court recognized the choice-of-law clauses and applied New Hampshire law in its order, including the New Hampshire burden of proof. *See In re Estate of Washburn*, 690 A.2d 1024, 1026-27 (N.H. 1997) (explaining that a person is presumed to have capacity, but when any evidence is produced to rebut

that presumption, the proponent of the will or trust has the burden of proving capacity by a preponderance of the evidence).

The trust documents did not, on the other hand, include any forum-selection clauses requiring issues regarding the trusts to be litigated in New Hampshire. See *Strafford Tech., Inc. v. Camcar Div. of Textron, Inc.*, 784 A.2d 1198, 1201 (N.H. 2001) (explaining that New Hampshire permits parties to contractually agree to a forum selection clause requiring an action to be brought in a different state); *Forum-selection clause*, *Black's Law Dictionary* ("A contractual provision in which the parties establish the place (such as the country, state, or type of court) for specified litigation between them."). Thus, to the extent Clark argues that issues regarding the trusts could not be litigated in Nevada based on the trust documents, this argument lacks merit.

Clark also relies on *Hanson v. Denckla*, 357 U.S. 235 (1958), for the proposition that, because the trusts were New Hampshire property, the Nevada court could not exercise jurisdiction as to the trusts. But his argument in this regard is misplaced, as *Hanson* addressed whether a Florida court could exercise personal jurisdiction over out-of-state parties based on the presence of certain property in Florida. See 357 U.S. at 250-51. Because the *Hanson* court concluded that the property was not actually located in Florida, the court further held that personal jurisdiction could not be exercised on that basis. *Id.* Here, no one has challenged the district court's personal jurisdiction over any of the parties, and thus, *Hanson* does not support Clark's claim that the district court lacked jurisdiction over this matter.

Clark also appears to argue that the court exceeded its jurisdiction by ruling on trust issues, rather than limiting its

consideration to the claims leveled against Wanda individually. In this regard, Clark asserts that the district court improperly required him to amend his complaint to name the trust and the trust beneficiaries as defendants. But Clark's contention that the district court required him to amend his complaint against his wishes is not supported by the record.

In the district court, Clark filed two motions seeking leave to amend his complaint. Insofar as Clark contends that the district court compelled him to file these motions, there are no written orders or transcripts in the record demonstrating that the district court directed him to seek leave to amend his complaint. Nor is there any indication in the record that Clark challenged any instruction of the court directing him to amend his complaint.⁶ In the absence of any indication in the record that he was compelled, over his objection, to amend his complaint, we conclude that Clark waived any argument that he was improperly required to amend his complaint. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court,

⁶In his reply brief, Clark points to the minutes of a January 3, 2011, hearing to support his contention that the court required him to amend his complaint. Court minutes do not provide a complete account of what transpired at a hearing, and it is an appellant's responsibility to provide this court with any relevant transcripts needed to resolve a case. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("[A]ppellants are responsible for making an adequate appellate record."). Regardless, the minutes noted by Clark reflect that, although the court directed an amended complaint to be filed, Clark first represented to the court that he intended to file a motion to amend the complaint to add the beneficiaries. And nothing in these minutes indicates that Clark raised any issue as to the propriety of amending his complaint. Thus, the minutes do not demonstrate that Clark was ordered, against his will, to file an amended complaint.

unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”).⁷ Thus, this argument does not provide grounds for reversal.

Additionally, to the extent Clark argues that the district court lacked jurisdiction to order attorney fees be paid out of the trust assets because the trust documents included spendthrift provisions, we conclude that this is not a jurisdictional issue. *See Hemenway v. Hemenway*, 992 A.2d 575, 578 (N.H. 2010) (explaining that subject matter jurisdiction refers to “a tribunal’s authority to adjudicate the type of controversy involved in the action”); *see also* N.H. Rev. Stat. Ann. § 564-B:10-1004 (2015) (providing that, “[i]n a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party, to be paid by another party or from the trust that is the subject of the controversy”). And because Clark did not raise this argument in the district court, we conclude he waived the argument and we decline to consider it on appeal. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. We likewise conclude that Clark failed to raise, and thus waived, his arguments that the court could not force the sale of the property, that the efforts made to use money from the trust property were potentially

⁷While New Hampshire law governs the substantive issues relating to the trust documents, Nevada’s procedural law still controls in this proceeding. *Cf. Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F. Supp. 2d 1177, 1187 (S.D. Cal. 2002) (recognizing that, in the federal courts, a choice-of-law clause generally incorporates a state’s substantive laws, but not its procedural laws); *see also Restatement (Second) of Conflict of Laws* § 122 (Am. Law. Inst. 1971) (“A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.”).

criminal, that the court improperly ordered a bank to stop payment on a cashier's check, and that the court improperly approved a stipulation to indemnify the bank. *See id.*

Testamentary capacity

With regard to Clark's argument that the district court wrongly found that Martha had testamentary capacity, we conclude that the district court's resolution of this issue was proper. Initially, to the extent that the district court's decision rested on testimony presented at trial, Clark has not provided this court with any transcripts of the trial testimony, and thus, we presume that the evidence in the transcripts supports the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, [the appellate court] necessarily presume[s] that the missing portion supports the district court's decision.").

Moreover, the record on appeal supports the district court's conclusion that, although Martha experienced some cognitive difficulties beginning in 2005, she nonetheless had testamentary capacity when she executed trust documents in September 2008. In particular, the medical records show that Martha was seen by doctors in Las Vegas before and after September 2008, and that these doctors consistently reported that Martha was oriented to time, place, and person; that her memory was good; and that her mood and affect were appropriate. Moreover, an affidavit from Martha's attorney further supported the conclusion that Martha understood her actions when she amended the trust documents. On this record, we conclude that the district court properly found Martha to have testamentary capacity. *See In re Estate of Washburn*, 690 A.2d at

1026, 1027-28 (explaining that the Supreme Court of New Hampshire will uphold findings regarding testamentary capacity “unless unsupported by the evidence or clearly erroneous as a matter of law,” and that to have had testamentary capacity, a person must have had the ability to understand the nature of his or her act, to understand the property and the nature of the property to be disposed of, to identify his or her nearest relatives, and to choose upon whom and how the property would be distributed); *see also* N.H. Rev. Stat. Ann. § 564-B:6-601 (2015) (“The capacity required to create, amend, revoke, or add property to a revocable trust . . . is the same as that required to make a will.”).

Breach of fiduciary duty

Finally, as to Clark’s assertion that the district court’s ruling that Wanda was not competent to act as a trustee should have resulted in a finding that she had breached her fiduciary duty, we note that the district court’s order is somewhat vague in this regard. In particular, the court found that Wanda did not act competently, but summarily denied Clark’s breach-of-fiduciary-duty claim, “other than as set forth” elsewhere in the court’s order. Moreover, in a post-judgment order, the district court ordered that \$26,783.41 be deducted from Wanda’s share of the trust property. It seems that this may have been aimed at off-setting amounts the court found to have been improperly removed from the trust by Wanda, which arguably indicates that the court may have concluded that her incompetence amounted to a breach of fiduciary duty. *See* N.H. Rev. Stat. Ann. § 564-B:10-1002(a)(1) (2015). Nevertheless, it does not appear that an express finding of a breach of fiduciary duty would have changed the outcome of the underlying case.


To the extent that Clark contends any finding of a breach of fiduciary duty would have precluded an award of attorney fees out of trust property, neither N.H. Rev. Stat. Ann. § 564-B:10-1002, regarding damages for a breach of trust, nor N.H. Rev. Stat. Ann. § 564-B:10-1004 (2015), regarding attorney fees and costs, appears to preclude an award of attorney fees in the instant action. To the contrary, N.H. Rev. Stat. Ann. § 564-B:10-1004 appears to be rather broad, providing the court with discretion to award fees, either directly from a party or from the trust, “as justice and equity may require.”


Here, although the district court’s findings arguably could equate to a breach of fiduciary duty, Wanda also successfully defended against Clark’s claims regarding undue influence and testamentary capacity, among other things. Moreover, as noted above, Clark failed to provide this court with the transcripts of any of the district court proceedings, and thus, we presume that those transcripts support the district court’s decisions with regard to breach of fiduciary duty and attorney fees. *See Cuzze*, 123 Nev. at 603, 172 P.3d at 135. And as Clark has failed to develop any more specific argument that the court erred by failing to specifically find a breach of fiduciary duty, we decline to consider this issue further. *See Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that an appellate

court need not consider issues not cogently argued).

In light of the above, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. David Barker, Chief Judge
Eighth Judicial District Court, Department Nineteen
Clark J. Feeley
Aaron S. Feeley
Sterling Law, LLC
Bruce Ketchen
Deanna L. Feeley
Eighth District Court Clerk