IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF THEODORE ERNEST SCHEIDE, JR.

ST. JUDE CHILDREN'S RESEARCH HOSPITAL,
Appellant,
vs.
THEODORE E. SCHEIDE, III,
Respondent.

No. 76924-COA

ORDER OF AFFIRMANCE

St. Jude Children's Research Hospital, appeals from a district court order denying its petition to admit a lost will in a probate action.[1] Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Theodore E. Scheide, Jr. executed a will in June 2012.[2] Theodore's will left his entire estate, in excess of two million dollars, to his longtime girlfriend, Velma Shay, and then to St. Jude, if Shay were to predecease Theodore. During his lifetime, Theodore regularly donated to St. Jude. The will also included a provision that expressly disinherited Theodore's estranged son, respondent Theodore E. Scheide, III (Chip).

In October 2012, Theodore executed a second will. The October will contained the same beneficiaries and provisions as the June will, but changed the named executor. Theodore asked his attorney, Kristin Tyler, to keep the original of the June will in her possession, while he retained the

[1]The Honorable Jerome T. Tao, Judge, voluntarily recused himself from participation in the decision of this matter.

[2]We do not recount the facts except as necessary to our disposition.

original of the October will. Tyler, along with her assistant Diane DeWalt, witnessed both wills.

In 2013, Shay passed away, predeceasing Theodore. Theodore's stepdaughter from a previous marriage, Kathy Longo, began to assist him with weekly errands. However, Longo eventually withdrew from this informal position, and Theodore moved into a group home. In February 2014, due to Theodore's declining health, the district court appointed Susan Hoy from Nevada Guardian Services (NGS) to serve as Theodore's guardian. Six months later, Theodore died.

After Theodore's death, the district court appointed Hoy to be special administrator of Theodore's estate and ordered her to enter Theodore's safe deposit box to find Theodore's last will. Hoy filed a Petition for Instructions reporting that only a photocopy of Theodore's October will could be found, not the original. Hoy also stated she believed "decedent destroyed any original estate planning documents he may have executed prior to his death." The district court subsequently gave Hoy official Letters of Administration for Theodore's apparent intestate estate.

Hoy filed a First Account and Report of Administration on May 18, 2016. The document requested that Theodore's total estate be distributed to Chip by intestate succession. After learning of the proceedings, St. Jude appeared for the first time, objecting to Hoy's report and asking the district court not to distribute Theodore's estate until its petition to admit the lost will was heard. On May 25, 2016, Hoy withdrew her first report and filed an amended report stating Theodore died testate and requesting distribution to St. Jude. St. Jude filed its Petition for Probate of Lost Will in September 2016. Chip objected, claiming St. Jude could not overcome the presumption under NRS 136.240 that Theodore

revoked the October will. The district court then set the matter for an evidentiary hearing. The district court also concluded that Theodore lacked capacity to revoke his will after February 2014 because he was under guardianship of his person and estate.

At the hearing, St. Jude relied on the testimony of Tyler, DeWalt, Longo, and Hoy to prove the contents and legal existence of Theodore's October will at the time of Theodore's death. The district court denied St. Jude's petition, concluding that St. Jude failed to meet its burden of proof because only one witness provided "clear and distinct" testimony of the will's provisions, and St. Jude did not prove that Theodore lost instead of destroyed the will. St. Jude appealed the court's order denying its petition.

On appeal, St. Jude contends that the district court erred in denying its petition to probate the lost will for three reasons: (1) the court improperly interpreted NRS 136.240; (2) substantial evidence proved the lost will's contents and its legal existence; and (3) the court conflated the elements required to prove legal existence. We will address each argument in turn.

Standard of review

In probate proceedings, we will not disturb a district court's findings of fact if they are supported by substantial evidence, and we review a district court's legal determinations, including issues of statutory interpretation, de novo. *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013); *Waldman v. Maini*, 124 Nev. 1121, 1129, 195 P.3d 850, 856 (2008). "When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words." *In re Estate of Melton*, 128 Nev. 34, 43, 272 P.3d 668, 674 (2012). Moreover, "[s]tatutes governing the

revocation of wills are strictly construed." *In re Estate of Prestie*, 122 Nev. 807, 812, 138 P.3d 520, 524 (2006).

The court's interpretation of NRS 136.240

Under common law, "when an executed will could not be found after the death of a testator, there was a strong presumption that it was revoked by destruction by the testator." *Estate of Irvine v. Doyle*, 101 Nev. 698, 703, 710 P.2d 1366, 1370 (1985). Now, NRS 136.240 governs petitions for the probate of lost or destroyed wills, codifying the presumption and detailing how it may be overcome.[3] NRS 136.240 states in pertinent part:

> (1) The petition for the probate of a lost or destroyed will must include a copy of the will. . . .
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> . . . .
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> (3) In addition, no will may be proved as a lost or destroyed will unless its *provisions* are *clearly* and *distinctly* proved by *two or more credible witnesses* and it is:
>
> (a) Proved to have been in *legal existence* at the death of the person whose will it is claimed to be and has not otherwise been revoked or destroyed without the knowledge, consent, or ratification of such person; or

[3]After the evidentiary hearing, but before the district court issued its decision, NRS 136.240 was amended effective October 1, 2017. Thereafter, the Legislature further amended NRS 136.240 effective October 1, 2019. We note here that the district court's order incorrectly recites the language from the 2017 amendment—which was in effect at the time the district court entered its order—instead of the prior 2009 amendment, which applied. Nevertheless, as the updates contained in the 2017 amendment do not affect the disposition of this appeal, and our review of the probate code indicates that the district court reached the correct conclusion, we cite to the language from the 2017 version in order to maintain consistency with the district court's order and to avoid further confusion.

(b) Shown to have been fraudulently destroyed in the lifetime of the person.

NRS 136.240 (2017) (emphasis added).

Strict compliance with NRS 136.240 is required. *See Howard Hughes Med. Inst. v. Gavin*, 96 Nev. 905, 907-09, 621 P.2d 489, 490-91 (1980) (holding that "because of the requirement of strict compliance with NRS 136.240" the existence of a draft will without the supporting witnesses required by the statute does not preclude summary judgment). Accordingly, the conjunctive test set forth in NRS 136.240 provides that St. Jude may only overcome the presumption that the October will was destroyed by (1) providing two or more credible witnesses who can clearly and distinctly testify about the will's provisions and (2) providing proof the will was in legal existence at the testator's death or providing proof of fraudulent destruction. NRS 136.240(3). We agree with the district court and conclude that St. Jude fails on both accounts.

The two-witness requirement was not satisfied

On appeal, St. Jude argues the district court improperly interpreted the phrase "clearly and distinctly" in NRS 136.240(3). St. Jude contends that the standard is satisfied when a witness authenticates a copy of the will as well as by the collective testimony of all witnesses, even if some lack personal knowledge of the will's contents. We do not agree.

NRS 136.240 requires a petitioner to "clearly and distinctly" prove the provisions of a lost will through the testimony of two or more credible witnesses. The Supreme Court of Nevada has clarified that this provision requires that the two witnesses must be able to testify from their personal knowledge, not from the testimony or declarations of others. *See Hughes*, 96 Nev. at 907-09, 621 P.2d at 490-91. Indeed, the supreme court in *In re Duffill's Estate*, 57 Nev. 224, 61 P.2d 985 (1936), expressly rejected

one witness' testimony because his only knowledge of the contents of the will was based on the statements of the decedent, and not on his personal knowledge of the provisions of the will. The supreme court then stated "[c]learly, his testimony does not pretend to show the provisions of the will." *Id.* at 228, 61 P.2d at 986.

Consequently, it does not follow that a proponent of a lost will can "clearly and distinctly" prove a will's provisions merely by a providing a witness who can authenticate a copy of the lost will. Neither can a proponent of a lost will "clearly and distinctly" prove a will's provisions by the collective testimony of its witnesses when each individual witness does not have personal knowledge of the contents of the will.

St. Jude directs this court to other jurisdictions that permit a copy of the will to substitute the witness testimony requirement.[4] However, those statutes expressly provide for this exception, while Nevada's statute specifically excludes such a substitution by requiring both a copy of the lost will and two witnesses to testify to its provisions. We decline to adopt St. Jude's interpretation because it is within the purview of the Legislature as to whether to expand our lost will statute. Thus, we conclude that the district court did not err when it found that collective testimony and authentication of a will copy were insufficient methods to prove the contents of a lost will under NRS 136.240. Having determined that the district court did not err in its interpretation of NRS 136.240, we next turn to the testimony of the four witnesses called by St. Jude.

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[4]*See, e.g.*, RCWA § 11.20.070 (permitting provisions of a lost will to be proven by a witness's personal knowledge or authenticity of a copy); Ark.Code Ann. § 28-40-302 (Repl. 2004) (an authenticated will copy satisfies one of the two witness requirements for proving the contents of a lost will).

Out of the four witnesses, the district court determined that "only one witness, the drafting attorney [Tyler], provided testimony sufficient to satisfy [NRS 136.240]." As the attorney who drafted both the June and October wills, there is no question that Tyler's personal knowledge of the will is sufficient to qualify her as one of the witnesses required by NRS 136.240(3). However, the next witness, Tyler's legal assistant DeWalt, could not provide any testimony relevant to the will's provisions besides verifying her signature as a witness on the October will. Because DeWalt had no personal knowledge of the lost will's provisions, and because mere authentication of a copy of a lost will cannot act as a substitute for clear and distinct testimony proving the lost will's provisions, DeWalt cannot be a witness under NRS 136.240.

The third witness, Theodore's stepdaughter, Longo, was able to recite the dispositive provisions of the October will. However, Longo testified that she had never read the will and only knew of its existence because she saw it on a shelf in Theodore's home. Longo further testified that she knew the contents of the October will solely because Theodore told her his estate was going to St. Jude. The supreme court expressly stated in *Hughes* that witnesses could not prove lost will contents in this manner, noting, "[w]hile a testator's declarations may be useful in interpreting ambiguous terms of an established will or in corroborating other competent evidence, it cannot be substituted for one of the witnesses required by statute." *Hughes*, 96 Nev. at 909, 621 P.2d at 490-91; *see also Duffill*, 57 Nev. 224, 61 P.2d 985 (concluding that a witness who had not read the purportedly lost will, but learned of its provisions through conversations with the testator, did not satisfy NRS 136.240). Consequently, Longo's testimony is inadequate under NRS 136.240 as she has no personal

knowledge of the will's provisions outside of what she learned from her conversations with Theodore.

Finally, Hoy's testimony relates to her time as Theodore's guardian, and as she had no personal knowledge of the provisions of the will, she is likewise unable to be the second witness under NRS 136.240.

The district court ultimately determined that each of the witnesses were credible, however, the court further determined that only one of those four witnesses met the requirements of NRS 136.240. In light of our discussion above, we conclude that substantial evidence supports the district court's decision. Moreover, because St. Jude failed to clearly and distinctly prove the will's provisions by two or more credible witnesses, it cannot meet its burden under NRS 136.240. Nevertheless, we discuss the second prong of NRS 136.240 below.

Whether the will was in legal existence at the time of Theodore's death

Although we need not reach the second prong of the test, we take this opportunity to consider whether substantial evidence supported the district court's decision that St. Jude failed to prove the October will remained in legal existence at the time of Theodore's death. St. Jude argues that (1) NRS 136.240 required it to prove legal existence by a preponderance of the evidence and (2) it met this standard by providing evidence of Theodore's desire to leave his estate to St. Jude, failure to ask his attorney to change his will, refusal to reconnect with Chip, and decision to keep a copy of the October will. However, because St. Jude failed to satisfy the first prong of NRS 136.240(3), it cannot meet its burden as a matter of law.

NRS 136.240(3)(a)-(b) requires that the proponent of a lost will prove the will was in "*legal existence* at the death of the person whose will it is claimed to be and has not otherwise been revoked or destroyed without the knowledge, consent or ratification of such person." *Id.* "A will is said to

be in legal existence if it has been validly executed and has not been revoked by the testator." *Estate of Irvine*, 101 Nev. at 702, 710 P.2d at 1368. "Thus, a will lost or destroyed without the testator's knowledge could be probated because it was in legal existence at the testator's death." *Id.* (internal citations omitted). Proof of actual physical existence is not required. *Id.* at 703, 710 P.3d at 1369. Because NRS 136.240 does not specify the degree of proof required, and no authority dictates one, we apply a preponderance of evidence standard. *See Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165, 232 P.3d 433, 435 (2010) ("[A]bsent a clear legislative intent to the contrary . . . the standard of proof in [a] civil matter must be a preponderance of the evidence." (internal quotation marks omitted)); *see also* 80 Am. Jur. 2d Wills § 852 (2nd ed. 2020) ("A proponent in probate court must prove his or her case by a preponderance of the evidence.").

Here, the district court correctly determined that, at one point, Theodore had validly executed the October will. However, the valid execution of a will is not the only requirement under NRS 136.240(3). NRS 136.240(3)(a) requires the proponent of a lost will to prove that the testator had not revoked the lost or destroyed will by a preponderance of the evidence. It is under this requirement that St. Jude falls short.

At the evidentiary hearing, it became clear that no witness had seen the original of the October will since it left Tyler's office in 2012. By the time the court appointed Hoy as Theodore's legal guardian, only a signed *copy* of the will was found among Theodore's possessions.[5] Although

[5]We note that Theodore's testamentary capacity may have been limited during his guardianship, thus impacting his ability to revoke the October will at that time. However, because the original October will could not be located after Theodore entered into the guardianship, and we have

Tyler and Longo testified that Theodore desired to leave his estate to St. Jude, Hoy testified that Theodore was thinking about reconciling with Chip. St. Jude presented no evidence that Theodore did not revoke his prior will, or that the original will was lost or otherwise destroyed without Theodore's consent. While one can speculate what may have happened to the original October will, St. Jude has failed to meet its burden under a preponderance of the evidence. Thus, we conclude that substantial evidence supports the decision of the district court that the October will was not proved to be in legal existence at the time of Theodore's death.

Next, St. Jude argues the district court erred by concluding the October will was not in legal existence based solely on its finding that the will's contents could not be proven. We conclude the district court did not conflate or misapply NRS 136.240's legal existence requirement. The district court recognized Theodore's knowledge of his estate plans and the repercussions of revoking his will. But it ultimately concluded that "[a]lthough [Theodore] did not make a formal change to his estate planning documents, he could have simply changed his mind and destroyed the original will in his possession." Because the district court's decision rested on a reason apart from St. Jude's failure to prove the will's contents, we conclude it did not conflate NRS 136.240's legal existence requirement.

Accordingly, we conclude that the district court did not err in denying St. Jude's petition to admit the lost will to probate because St. Jude failed to satisfy the requirements of NRS 136.240.[6]

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no testimony showing that the will was not revoked prior to the guardianship, we will not speculate as to this issue.

[6]Chip filed a motion to dismiss this appeal on July 22, 2019. Having considered the arguments contained therein, we deny the motion, as

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

cc: Hon. Gloria Sturman, District Judge
Hutchison & Steffen, LLC/Las Vegas
Cary Colt Payne
Eighth District Court Clerk

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capacity to sue is not a jurisdictional issue and was not raised below. *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, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *see also Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 50-52, 38 P.3d 872, 874-77 (2002); *Las Vegas Land Partners, LLC v. Nype*, Docket Nos. 68819 & 70520 (Order Affirming in Docket No. 68819, and Reversing in Part and Remanding in Docket No. 70520, Nov. 14, 2017). Further, we hold that St. Jude timely and properly brought this appeal under NRS 155.190.