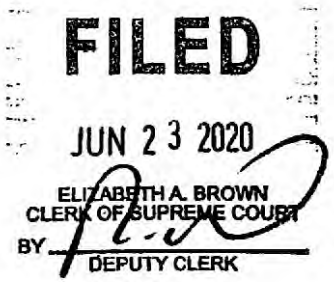
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF DOROTHY E. WRIGHT, DECEASED.

DAVID GALEY,
Appellant,
vs.
BETH ELAINE STRUDLEY,
Respondent.

No. 78408-COA



ORDER OF AFFIRMANCE

David Galey appeals from a district court order granting summary judgment in a probate matter. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

In September 2011, Dorothy E. Wright executed a formal will where she bequeathed to Galey her Colorado property, which was a fourplex rental property. Galey was not related to, married to, or a creditor of Wright's, although he rented and managed Wright's Colorado property on and off for several years.

After Wright's death on July 2, 2018, her only surviving child, respondent Beth Elaine Strudley, submitted three potential testamentary documents to the district court and requested probate of her mother's estate. The three documents executed by Wright included (1) a formal will executed in September 2011 with provisions crossed out and additions made in handwriting (the September 2011 will), (2) a handwritten document initially signed and dated in December 2017 but re-signed and re-dated in March 2018 (the handwritten 2017/2018 document), and (3) another handwritten document signed and dated in March 2018 (the handwritten March 2018 document). Although Galey received the Colorado property

under the terms of the original will, the additional handwritten notations to the September 2011 will as well as the handwritten documents from 2017/2018 and 2018 left the Colorado property to Strudley and a monetary sum to Galey.

Strudley initially asked the district court to find that the handwritten March 2018 document was a holographic will that revoked both the September 2011 will, including the 2011 will with the handwritten additions, and the handwritten 2017/2018 document. However, Strudley later argued that the handwritten 2017/2018 document combined with the 2018 document created a holographic will that revoked all prior versions of the September 2011 will.

Galey objected to Strudley's petition, arguing that the handwritten documents created a living trust, not a holographic will. Galey also argued that the handwritten additions to the September 2011 will and the two handwritten documents signed in March 2018 were the products of undue influence. Therefore, Galey argued, the original September 2011 will should control the distribution of Wright's assets.

The parties both filed motions for summary judgment. The district court granted summary judgment to Strudley, finding that the 2017/2018 and 2018 handwritten documents together constituted a holographic will that revoked the 2011 will, finding that the holographic will was created without undue influence, and denying Galey's motion for summary judgment and his motion to extend discovery.

Galey appeals, arguing that the district court erred by finding that (1) the two handwritten documents were a holographic will, (2) that the holographic will revoked the September 2011 will, (3) that the

holographic will was created without undue influence,[1] and (4) that the district court abused its discretion by denying his motion to extend discovery.

Whether the handwritten 2017/2018 document and handwritten March 2018 document constituted a holographic will

We first address Galey's arguments regarding the district court's finding that the handwritten 2017/2018 document and the handwritten March 2018 document constituted a holographic will as a matter of law. "This court reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (alteration in original) (quoting NRCP 56(c)). In reviewing an order granting summary judgment, "the evidence and any reasonable inferences drawn from it, must be reviewed in a light most favorable to the nonmoving party." *Id.*

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[1]Galey provides no authority on appeal to support his arguments regarding undue influence. Therefore, we decline to address them. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing this court need not consider arguments that are not supported by relevant authority and cogently argued). Nonetheless, we note that the district court's findings that Wright's holographic will was not created under undue influence are supported by substantial evidence. *In re Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013). Therefore, no genuine issue of material fact remained because no evidence of undue influence was presented, and the district court's grant of summary judgment on this issue was appropriate. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Galey argues that the district court erred by finding the two handwritten documents created a holographic will because the documents' plain language demonstrates that the decedent intended to create a living trust. Strudley responds that the district court properly found that the two handwritten documents formed a holographic will under NRS 133.090. Strudley argues that our analysis should focus on the decedent's intent rather than on the specific words she used.

"Whether a handwritten document is a valid will is a question of law reviewed de novo." *In re Estate of Melton*, 128 Nev. 34, 42, 272 P.3d 668, 673 (2012). "[T]he interpretation of a will is typically subject to [this court's] plenary review." *Id.* at 43, 272 P.3d at 673. "A holographic will is a will in which the signature, date and material provisions are written by the hand of the testator, whether or not it is witnessed or notarized." NRS 133.090(1). Holographic wills are "subject to no other form," and "[s]uch wills are valid and have the same force and effect as if formally executed." NRS 133.090(1), (3). Additionally, "[t]he intention of the grantor need not have been expressed by specific words, but may be derived from the entire instrument as a whole, from its general scheme, or from informal language used, by necessary implication . . . ." *In re Estate of Walters*, 75 Nev. 355, 360, 343 P.2d 572, 574 (1959) (internal quotation marks omitted).

As a preliminary matter, it appears that both the handwritten 2017/2018 document and the handwritten March 2018 document, both of which Wright signed in March 2018, comport with the formalities of NRS 133.090, as the material provisions, date, and signature on both documents

were in the testator's handwriting.[2] Accordingly, we next turn to whether the language contained within the two handwritten documents demonstrated Wright's testamentary intent, which is defined as "[a] testator's intent that a particular instrument function as his or her last will and testament." *Intent–testamentary intent*, *Black's Law Dictionary* (11th ed. 2019).

Galey urges this court to rely on *Dahlgren v. First National Bank of Nevada*, 94 Nev. 387, 580 P.2d 478 (1978), for the proposition that because Wright used the words "living trust," in the handwritten documents, they cannot be a will. *Dahlgren* states that "[t]he standard for the interpretation of a will is the intention of the testator, determined by the meaning of the words used." 94 Nev. at 390, 580 P.2d at 479 (citations omitted). We conclude that Galey's application of *Dahlgren* is inapposite, as the *Dahlgren* court's focus remained on the instrument's demonstration of testamentary intent, *id.* at 390-91, 580 P.2d at 479-80, as does ours here.

This principle also aligns with the court's holding in *In re Estate of Melton*, where the court determined that the language in a holographic will evinced the testator's intent to transfer property after death. 128 Nev. at 43-44, 272 P.3d at 674. There, the document at issue was a letter from the testator to the devisee. *Id.* at 39-40, 272 P.3d at 671-72. The court concluded that the testator's "references to his mother's funeral, her untimely death, and his statement that he 'had better leave something in

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[2]Strudley submitted two handwriting affidavits to the district court affirming that the two handwritten documents and the handwritten additions to the September 2011 will were in Wright's handwriting. Galey did not present any evidence that the handwriting contained within any of the documents at issue here was not authentic.

writing'" demonstrated the testator's testamentary intent. *Id.* at 44, 272 P.3d at 674.

Here, we conclude there are multiple phrases in the handwritten documents from 2017/2018 and March 2018 that point to Wright's testamentary intent to create a holographic will under both *Dahlgren* and *Melton*. As pertinent here, the handwritten 2017/2018 document includes provisions such as: "I leave all my property," and that Galey should receive a monetary sum "within a year after my death." Similarly, the handwritten March 2018 document includes provisions such as: "Beth is to inherit all my assets," "she is to have me cremated and my ashes with my son at White Hill Cemetery," and that Beth should pay Galey a monetary sum, "his share of my estate."

Within the handwritten 2017/2018 document, Wright also uses the phrase "I leave" when distributing her property. This is a phrase commonly used in a will for distributing property after death. In contrast, Wright did not say "I give" or "I gift," which might indicate a present transfer. Wright also references her death when discussing her devise to Galey. Taking the document as a whole, Wright's reference to her death indicates that the transfers were to take place after her death.

In the handwritten March 2018 document, Wright states that Strudley is to "inherit" all of her assets. To inherit something means "to receive (property) as a bequest or devise." *Inherit, Black's Law Dictionary* (11th ed. 2019). Wright also directs Strudley on what to do with her remains after her death and delineates Galey's share of her "estate." These words show that Wright is contemplating her death and leaving instructions for what to do with her property *after* she died.

Galey urges that the handwritten documents form a trust instead of a holographic will, and although both the handwritten 2017/2018 document and March 2018 document reference a "living trust," merely using the word "trust" within a document is not sufficient to create a trust. *See* Restatement (Third) of Trusts § 13 (2019) ("[T]he fact that a transferor uses the word 'trust' or 'trustee' does not necessarily indicate the intention to create a relationship that constitutes a trust . . . ."); *see also Petherbridge v. Prudential Sav. & Loan Assn.*, 145 Cal. Rptr. 87, 95 (Ct. App. 1978).

The key distinction between a will and a trust is that, to create a trust, the transferor must intend to impose enforceable duties upon the transferee as to the disposition of the property. *See* NRS 132.350 ("'Trust' means an interest in property held by one person for the benefit of another . . . ."); Restatement (Second) of Trusts § 125 cmt. a (1959) ("No trust is created if the transferor does not manifest an intention to impose enforceable duties upon the transferee."). Consequently, to create a trust in Nevada, "[i]t is essential to the validity of a trust, whether express or precatory, that the language employed definitely indicate an intention to create a trust, that the subject matter thereof be certain, and that the beneficiaries be certain." *In re Estate of Foster*, 82 Nev. 97, 102, 411 P.2d 482, 484 (1966); *see also* NRS 163.003 (intent and trust property required to create a trust); NRS 163.006 (beneficiaries to a trust required). Additionally, a property owner must either declare that he or she holds the property as a trustee, transfer property to another person as trustee, exercise a power of appointment in trust, or enter into an enforceable promise to create a trust. NRS 163.002(1).

Here, the two handwritten documents distribute all of Wright's assets to Strudley and instruct Strudley to distribute a monetary sum to

Galey. The two handwritten documents state that Wright wants Strudley and Wright's grandsons to be provided for, but the documents do not provide any further instruction. This precatory language[3] does not impose the enforceable duties necessary to create a trust. *Hunt v. Hunt*, 11 Nev. 442, 448 (1876) ("[W]here [the transferor's] expressions of desire are intended as mere moral suggestions to excite and aid [the transferee's] discretion, but not absolutely to control or govern it, there the language cannot, and ought not to be held to create a trust." (internal quotation marks omitted)). Therefore, because the handwritten documents do not impose a duty for the benefit of a third party, we conclude that the documents do not create a trust.

After review of the record, we conclude that it was Wright's intent to transfer her property after her death, which demonstrates her testamentary intent. Accordingly, we conclude that the handwritten 2017/2018 document and handwritten March 2018 document satisfy all the requirements of a holographic will. The documents' material provisions, date, and signature were in the testator's handwriting, NRS 133.090, and, as we explained above, Wright's testamentary intent is evident from the language contained within both handwritten documents. Thus, we conclude the district court did not err by finding that the two handwritten documents created a holographic will instead of a trust.[4]

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[3]"Precatory expressions are words of entreaty, request, wish, or recommendation" and courts generally hold "the person using such words [does] not intend to create a trust or other obligation." George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 48 *Precatory Expressions* (2d rev. ed. 1984).

[4]We have carefully reviewed Galey's remaining arguments on this point and find them to be without merit.

Whether the holographic will impliedly revoked the 2011 will

We next consider whether the holographic will impliedly revoked the September 2011 will. Strudley argues that because the district court properly found that the documents were a holographic will, the later will was capable of impliedly revoking a prior will. Galey's only argument in opposition is that the documents do not constitute a will, which we have already considered and have concluded otherwise. Thus, we now consider whether the holographic will revokes the September 2011 will.

This court reviews whether a will has been revoked de novo. *In re Estate of Melton*, 128 Nev. 34, 43, 272 P.3d 668, 673 (2012). A written will may be revoked by "[a]nother will or codicil in writing." NRS 133.120(1)(b). Thus, "a will may be impliedly revoked by a subsequent will." *Melton*, 128 Nev. at 49, 272 P.3d at 677. While "revocation of a will by implication is not favored," the court must find implied revocation where "there is such a plain inconsistency as makes it impossible for the wills to stand together." 95 C.J.S. *Wills* § 422 (2020); *see also Melton*, 128 Nev. at 49, 272 P.3d at 677. "Thus, 'a later will which affects the same property as an earlier will or disposes of the entire estate, leaving nothing on which the former will can operate, is generally regarded as a revocation thereof, even in the absence of express words of revocation.'" *Melton*, 128 Nev. at 49, 272 P.3d at 677-78 (quoting 95 C.J.S. *Wills* § 422 (2011)).

We concluded above that the handwritten documents formed a holographic will. The holographic will bequeathed all of Wright's assets to Strudley and instructed Strudley to distribute a monetary sum to Galey, making it impossible to stand together with the September 2011 will. Therefore, we conclude that the district court properly found that the holographic will impliedly revoked the earlier September 2011 will.

Thus, we conclude there was no genuine issue of material fact and the district court properly found the two handwritten documents formed a holographic will that revoked the prior September 2011 will as a matter of law. As such, we affirm the district court's grant of summary judgment.

Whether the district court abused its discretion by denying Galey's motion to extend discovery and continue trial

Finally, we consider Galey's argument that the district court abused its discretion by denying his motion to extend discovery. On the last day of the discovery period, Galey filed a motion to extend discovery and continue trial, citing to EDCR 2.35 and NRCP 6. At the hearing on the motions for summary judgment, the district court denied the motion to extend without prejudice, stating that the court may choose to reopen discovery on different issues at a later date.

On appeal, Galey argues that he demonstrated good cause and/or excusable neglect for a discovery extension. Strudley responds that Galey did not demonstrate good cause or excusable neglect because he failed to conduct any discovery despite having notice of the applicable documents and witnesses in this case. Strudley further argues that although Galey filed his motion prior to the time the parties filed their motions for summary judgment, Galey's motion to extend discovery was essentially an NRCP 56(f) motion, as the district court heard the motion at the same time it heard the summary judgment motions. *See* NRCP 56(f) (2017).[5] This court reviews a

[5]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). All orders in this case were entered

district court's decision on discovery matters for an abuse of discretion. *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012).

To begin, we agree with Strudley that Galey's motion to extend discovery is best viewed as a motion for 56(f) relief. Although Galey did not expressly request NRCP 56(f) relief in his motion, it appears that the district court treated Strudley's motion to extend discovery as a NRCP 56(f) request. Additionally, Galey, in his reply to his motion to extend discovery, asks the district court to reopen discovery if "summary judgment is not granted in his favor," so he could "explore the issues of fact that could bear on the validity of the documents presented to [the district court]." This indicates that NRCP 56(f) is the proper avenue for relief.

Further, we note that EDCR 2.35 does not apply in this circumstance. EDCR 2.35 mandates that motions "to extend any date set by the discovery scheduling order must be in writing and supported by a showing of good cause for the extension . . . within 20 days before the discovery cut-off date or any extension thereof." EDCR 2.35. Here, where the district court did not issue a scheduling order,[6] we decline to impose the

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before March 1, 2019. Accordingly, we cite the prior version of the Nevada Rules of Civil Procedure herein.

[6]The order setting the civil non-jury trial simply sets a deadline for the close of discovery as mandated by EDCR 4.17, and details no additional discovery deadlines. In this instance, we do not consider the order setting civil non-jury trial to be a scheduling order for the purposes of EDCR 2.35.

requirements of EDCR 2.35 in resolving the timeliness of Galey's request to extend discovery, and review this motion as a request for NRCP 56(f) relief.[7]

"[A] district court's refusal of an NRCP 56(f) continuance is reviewed for an abuse of discretion." *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 669, 262 P.3d 705, 713 (2011). "[A] motion for a continuance under NRCP 56(f) is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact." *Id.* at 669, 262 P.3d at 714 (alteration in original) (internal quotation marks omitted). Finally, if the movant requesting NRCP 56(f) relief has "failed diligently to pursue discovery, it is not an abuse of discretion for the district court to deny the motion." *Id.* (internal quotation marks omitted).

We initially note that Galey failed to produce any affidavits or other admissible evidence that will lead to the creation of a genuine issue of material fact in this case. Indeed, in his motion for summary judgment, Galey argues that the status of the September 2011 will and the handwritten 2017/2018 document and handwritten March 2018 document as Wright's last will and testament are ripe for adjudication as a matter of law. Additionally, at his deposition, Galey testified that he believed that Wright was of sound mind and body, and capable of handling her own affairs in 2017 and 2018. He further testified that he did not have proof that the handwritten documents were forgeries, or that someone unduly influenced Wright to change her will. Accordingly, we find that the district court's denial of Galey's motion to extend was appropriate on these grounds.

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[7]Nevertheless, even if EDCR 2.35 applied, Galey would have been required to demonstrate excusable neglect for his untimely request for additional time to complete discovery, and, for the reasons detailed below, we conclude that he did not do so here. Likewise, Galey would also have to show good cause or excusable neglect under NRCP 6(b).

Next, we turn to Galey's argument that the district court abused its discretion by denying his request to extend the discovery deadline because he was unable to conduct discovery until Strudley served her initial disclosures under NRCP 16.1, and Strudley did not serve her initial disclosures until 15 days before the close of discovery. We disagree.

"Except as otherwise specially provided in [Title 12], all the provisions of law and the Nevada Rules of Civil Procedure regulating proceedings in civil cases apply in matters of probate." NRS 155.180. However, cases filed under Title 12 of the NRS are not automatically required to comply with the initial disclosure rules. Indeed, NRS 155.170 states:

> Unless otherwise ordered by the court, upon the filing of a proceeding pursuant to [Title 12] . . . an interested person who has appeared in the proceeding . . . [i]s not required to satisfy any rule requiring the initial disclosure of experts, attendance at an early case conference or the filing of a report on an early case conference as a prerequisite to commencing [discovery].[8]

Additionally, under the local rules of the Eighth Judicial District Court, "[a]ll cases which were not commenced by the filing of a complaint are exempt from the mandatory pre-trial discovery requirements of N.R.C.P. 16.1." EDCR 2.31. In contested probate matters, such as the present case, the probate judge may set the discovery schedule, limiting the time to complete discovery obligations, and may, where appropriate, set "any additional deadlines provided for under NRCP 16 and 16.1 as deemed

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[8]"'Interested person' means a person whose right or interest under an estate or trust may be materially affected by a decision of a fiduciary or a decision of the court." NRS 132.185. Here, Galey is an interested person under this statute.

necessary or appropriate based on the nature and scope of the contested issues to be determined at the evidentiary hearing." EDCR 4.17.

In this case, the district court set a deadline for discovery, but did not set any other deadlines pursuant to NRCP 16 and 16.1 or issue a scheduling order in this case. Accordingly, we conclude that the parties were not obligated to comply with NRCP 16.1 deadlines or hold an early case conference in this matter.[9] Further, we also note that Galey, as an interested person, could have immediately started the discovery process upon making his appearance in this matter. NRS 155.170(1).

Here, Galey had ample opportunity to pursue discovery in this matter, but failed to do so. We first observe that following the filing of the petition and with over two months of discovery available to him,[10] Galey failed to conduct discovery as to any of the known witnesses—including most significantly—Strudley, the opposing party. As a party, she could have been deposed without a subpoena at the inception of the litigation and specifically questioned about the origins of the holographic will.

Next, Strudley listed several potential witnesses in her July petition, who were also included in her initial disclosures. Therefore, Galey had notice of these potential witnesses, long before the district court set the

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[9]Although Strudley's initial disclosures identify that they were issued pursuant to NRCP 16.1, this is of little consequence in light of the fact that the district court did not apply the requirements of NRCP 16.1 to this case, and in light of our conclusion that the parties were not required to comply with NRCP 16.1 deadlines in this matter.

[10]The discovery period in this case ran from September 17, 2018, through November 30, 2018. However, Galey filed his notice of appearance on August 16, 2018, and as noted above, would have been able to begin discovery on that date under NRS 155.170.

discovery deadline. Further, under NRS 155.170(1) Galey could have propounded discovery upon these witnesses when he made an appearance in this case, prior to the district court's issuance of the order setting civil non-jury trial. However, even with this advanced notice, Galey failed to conduct discovery as to any of these witnesses.

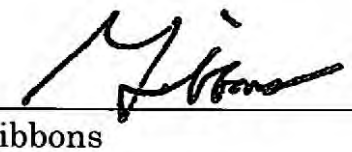
Galey also argues that he was unable to issue subpoenas to the out-of-state witnesses in order to conduct their depositions. We again point out that Strudley identified several out-of-state witnesses in her July petition. Notably, Galey previously had sufficient notice of the Colorado attorney who drafted the September 2011 will because he references him by name in his supplemental objection to Strudley's petition filed in September, nearly two months before the close of discovery. Accordingly, Galey was on notice of these potential out-of-state witnesses well before the close of discovery and took no measures to either subpoena these witnesses, timely file a motion to compel, or otherwise bring to the attention of the court his need for additional time to complete discovery in order to address his alleged out-of-state discovery issues before the close of discovery.

Thus, Galey's own conduct undermines his argument that the discovery period was too short for him to obtain information from out-of-state witnesses or to investigate the holographic will's allegedly suspicious origins. Accordingly, we conclude that Galey has not "diligently pursued discovery." *See Francis*, 127 Nev. at 670, 262 P.3d at 714 (concluding that where the movant failed to diligently pursue discovery, the district court did not abuse its discretion by denying NRCP 56(f) relief, although only "about one year had passed between the filing of [appellant's] complaint and the district court's entry of summary judgment").

Thus, we conclude that the district court did not abuse its discretion by denying NRCP 56(f) relief and denying without prejudice Galey's motion to extend discovery.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons

_____, J.
Tao

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Bulla

cc: Hon. Gloria Sturman, District Judge
Carolyn Worrell, Settlement Judge
Law Offices of P. Sterling Kerr
Dawson & Lordahl, PLLC
Eighth District Court Clerk