IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: THE ESTATE OF JOHN O. MELOT, DECEASED

IN RE: THE JOHN MELOT LIVING TRUST, DECEASED

TROY MELOT,
Appellant,
vs.
WILLIAM MELOT AND KELLY MEISTER,
Respondents

No. 45106

FILED

JUL 18 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order admitting a will to probate. Eighth Judicial District Court, Clark County; Valarie Adair, Judge.

Appellant is the son of John O. Melot, the decedent. Respondent Kelly Meister is decedent's daughter. Respondent William Melot is decedent's brother. Prior to his death, decedent executed two documents, a pour-over will and a living trust. Under the terms of the living trust, appellant was to receive one dollar while his sister was to receive approximately seventy-six percent of decedent's property. Respondent William, who is named as the executor of the will, was to receive a sizeable portion of the remainder of the trust assets.

After John Melot passed away, William filed the pour-over will with the district court and asked that it be admitted to probate. Appellant filed an objection to the admission of the will to probate and a will contest

ensued. Respondent Meister filed a separate action to ask the court to take control of the trust, confirm William as the trustee and for instructions. That action was consolidated into the probate action and all matters were subsequently heard by the district court.

The record demonstrates protracted and vigorously contested litigation in which the district court was called upon to decide numerous contested pre-trial motions and which culminated in trial to the bench. On appeal, appellant complains that the district court erred in determining that the will was validly executed. Our review of the record reveals substantial evidence supporting the district court's finding[1] that John was mentally alert and competent when he executed the will

> in the presence of Kehaulani Cassler, who notarized it and made a notation in her notary book that John understood what he was signing and reviewing. The will was witnessed by Ruth Cunningham and Edward Wood who both signed in the presence of John. John also executed a self-proving affidavit.[2]

Appellant objects to the district court's conclusion that he failed to overcome the presumption that the self-proving affidavit is valid. He claims that the court erred in determining that a presumption existed.

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[1]See NOLM, LLC v. County of Clark, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004) (stating that we give deference to the district court's factual findings so long as they are not clearly wrong and are supported by substantial evidence); First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990) (noting that substantial evidence has been defined as evidence that "a reasonable mind might accept as adequate to support a conclusion" (internal quotations omitted)).

[2]District Court Decision and Order, p. 4.

NRS 133.050 allows for attesting witnesses to sign self-proving affidavits that are to be attached to the will. While the statute does not speak the word "presumption", it does state the following:

> Any attesting witness to a will may sign a declaration under penalty of perjury or an affidavit before any person authorized to administer oaths in or out of the State, stating such facts as the witness would be required to testify to in court to prove the will. The declaration or affidavit must be written on the will or, if that is impracticable, on some paper attached thereto. The sworn statement of any witness so taken must be accepted by the court as if it had been taken before the court.[3] (emphasis added.)

The final sentence compels the trial court to accept the oath of the witness as set out in the self-proving affidavit. It is therefore incumbent upon appellant to convince the court that the affidavits were falsely sworn. This is the essence of a presumption.[4] In this action the district court had significant evidence before it upon which to rest its factual determination that the will had been validly executed. It is for the trial court to determine the credibility of witnesses and the weight to be given their

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[3]NRS 133.050(1).

[4]A presumption has been defined as "[a]n inference in favor of a particular fact," a "rule of law . . . by which finding of a basic fact gives rise to existence of a presumed fact until presumption is rebutted," or a "legal device which operates in the absence of other proof to require that certain inferences be drawn from the available evidence." See Black's Law Dictionary 1185 (7th ed. 1990).

testimony.[5] We therefore conclude that the district court did not err in its conclusion that the will had been validly executed. Nor do we conclude that the district court erred in suggesting that appellant had failed to persuade the court that the self-proving affidavits had been falsely sworn.

Appellant also claims the district court erred in considering the terms of an earlier will executed by the decedent as expressions of the testator's intent when he executed the pour-over will in question. The district court did refer to the contents of the earlier will as well as to the testimony of a friend of the decedent's who testified to statements made by the decedent concerning how he wished to dispose of his property upon his death in its findings of fact. It is clear from the district court's written conclusions that the described evidence was considered by the court on the issue of whether or not respondent William had exercised undue influence over decedent. The relevant terms of the earlier will and the statements made by decedent to a friend concerning his desire to leave nothing to appellant were consistent with the trust provision awarding appellant the sum of one dollar. Accordingly, we conclude that the district court did not err and did not abuse its discretion in considering this evidence in concluding that decedent's dispositions were not the product of undue influence by respondent William.[6] Additionally, we note that the evidence

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[5]In the Matter of T.R., a Minor, 119 Nev. 646, 649-50, 80 P.3d 1276, 1278 (2003).

[6]Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999) (noting that district courts have wide discretion in deciding whether to permit or exclude evidence and that such decisions will not be disturbed unless they are manifestly wrong).

at trial was largely undisputed that appellant and decedent had been estranged for at least the twelve years preceding his death.

Appellant seems to claim that the earlier handwritten will needed to be found to have been validly executed and qualified as a holographic will before the court could consider it. We disagree. We note that the district court did hear evidence regarding the document's authenticity. The district court, however, did not make a legal conclusion concerning its validity as a valid holographic will before considering its contents. This is not error.[7]

Appellant also complains that his handwriting expert was not permitted to testify. Appellant's handwriting expert was indeed stricken as a witness when disclosed on the final day for disclosure of witnesses and after the close of discovery. The witness was not properly disclosed as an expert as required by then effective NRCP 26(b)(5)(D)[8] which required the witness list to include a "brief narrative statement of the qualifications of such witnesses and the general substance of the testimony which the witness is expected to give." Additionally, the disclosure was made after appellant had repeatedly represented to the court and opposing parties that he did not intend to challenge the authenticity of the handwriting. We conclude the district court did not

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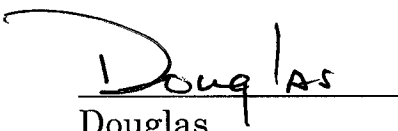
[7]Id.

[8]NRCP 26(b)(5)(D) was eliminated by amendment effective January 1, 2005. The required disclosure of expert witnesses is now governed by NRCP 16.1(2), which requires disclosure to other parties of the identities of any person who may be used at trial to present evidence and the inclusion of a report summarizing the opinions to be expressed by the expert and the basis for those opinions.

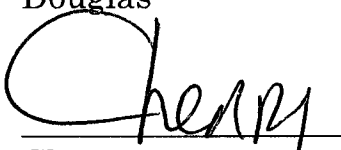
abuse its discretion in excluding appellant's witness. The district court is vested with wide discretion in deciding whether to permit or exclude evidence.[9] Its decision will not be disturbed unless manifestly wrong.[10] Here, it would have been unfair to the respondents to permit the witness to testify when the discovery deadline has passed and respondents are unable to meet the evidence. This is especially true since appellant had represented that he would not be producing a handwriting expert at trial because he did not intend to contest handwriting authenticity.

Since our review of the record reveals neither error nor abuse of discretion which would require reversal, we affirm the order of the district court.

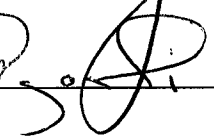
It is so ORDERED.[11]



_____, J.
Douglas



_____, J.
Cherry



_____, Sr. J.
Agosti

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[9]Libby, 115 Nev. at 52, 975 P.2d at 837.

[10]Id.

[11]The Honorable Deborah A. Agosti, Senior Justice, participated in the decision of this matter under a general order of assignment entered on July 6, 2007.

cc: Hon. Valarie Adair, District Judge
Troy Melot
Kyle & Kyle
William Melot
Eighth District Court Clerk