

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF
ROSE MILLER, DECEASED.

No. 48805

MARILYN BERKSON, AN
INDIVIDUAL, AND GERTRUDE
MALACKY, AN INDIVIDUAL,
Appellants,

vs.

HOWARD BLOOM AND BARBARA
LEPOME,
Respondents.

IN THE MATTERS OF THE ESTATE
AND LIVING TRUST OF ROSE
MILLER, DECEASED.

MARILYN BERKSON, AN
INDIVIDUAL, AND GERTRUDE
MALACKY, AN INDIVIDUAL,
Appellants/Cross-Respondents,

vs.

BARBARA LEPOME,
Respondent,
and
HOWARD BLOOM,
Respondent/Cross-Appellant.

FILED

JUN 18 2008

TRACIE LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

No. 48995

ORDER OF AFFIRMANCE

These are consolidated appeals from district court orders (1) granting respondent Barbara LePome's petition to take possession of funds that had been blocked during a probate proceeding (Docket No. 48805), and (2) reinstating respondent Howard Bloom to the positions of successor trustee of the Rose Miller Trust and personal representative to

the Rose Miller Estate (Docket No. 48995).¹ Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

These appeals arise from a probate and trust proceeding concerning Rose Miller's estate, in which appellants Marilyn Berkson and Gertrude Malacky challenged Miller's amended estate plan on lack of testamentary capacity and undue influence grounds, and from a separate civil action appellants filed against LePome, alleging interference with inheritance, breach of fiduciary duty, unjust enrichment, and elder abuse. The district court consolidated the probate and civil matters and later granted LePome's motion for partial summary judgment on the issue of Miller's testamentary capacity, concluding that Miller had the requisite capacity to amend her estate plan on the date in question. The issue of undue influence was allowed to proceed to trial, and appellants' remaining civil claims against LePome were dismissed.² Subsequently, the jury

¹Although Docket No. 48995 also involved an appeal and cross-appeal from district court orders concerning attorney fees and costs, this court entered an order on February 25, 2008, that, among other things, granted a motion for limited remand of the attorney fees and costs matter. Our February 25 order explained that any aggrieved party seeking to appeal from the district court's written order following the limited remand, must file a timely amended notice of appeal from that district court order. The district court entered its order resolving the attorney fees matter on March 26, 2008, and notice of that order's entry was served on March 31, 2008. Accordingly, since no party has filed an amended notice of appeal from the district court's post-remand March 26 order, the attorney fees and costs matter is finally resolved and, thus, is no longer before us for appellate review.

²The district court concluded that dismissal was proper because Nevada does not recognize the causes of action listed in appellants' *continued on next page . . .*

returned a verdict, finding that Miller's amended estate plan resulted from undue influence, and the district court entered judgment on that verdict, which favored appellants, who were beneficiaries under Miller's earlier estate plan. On appeal, this court reversed, concluding that the jury's verdict was not supported by substantial evidence.³

Thereafter, Bloom petitioned the district court to be reinstated as successor trustee and personal representative of Miller's trust and estate, in accordance with Miller's amended estate plan. LePome petitioned the district court to release funds in an account that she held in joint tenancy with Miller, since the funds had been blocked during the probate proceeding. The district court granted both petitions. These appeals followed.

On February 25, 2008, this court entered an order that, among other things, directed appellants to show cause why these appeals should not be summarily affirmed without briefing, based on the law of the case doctrine. Appellants have timely filed a response to our show cause order, arguing that the law of the case doctrine does not preclude this court from

... continued

complaint, or because the claims asserted in appellants' civil action duplicated the issues that were being litigated in the probate proceeding.

³See In the Matter of the Estate of Rose Miller, Docket No. 44920 (Order of Reversal, July 12, 2006 (explaining that "[a] reasonable mind could not accept the evidence presented to the jury as adequate to support its conclusion that Miller was unduly influenced in executing the [amended estate] plan[,] which favored LePome and Bloom); Order Denying Rehearing, September 26, 2006; and Order Denying En Banc Reconsideration, November 1, 2006).

considering the merits of their appeals because they have claims pending in the district court⁴ relating to Miller's trust and estate, and this court never determined any issue related to the bank account or Bloom's status as trustee and personal representative. Thus, appellants contend, the matters were left open and the district court was not bound to release the funds or reinstate Bloom to the positions in question.

LePome and Bloom filed replies, essentially arguing that appellants have no remaining claims pending in the district court that are related to the two orders that are the subjects of these appeals. In particular, LePome and Bloom assert that the only challenge appellants made to Bloom's status as personal representative and trustee below was Miller's alleged lack of testamentary capacity to appoint him to those positions and their claims that Miller had been unduly influenced in amending her estate plan, which named Bloom as trustee and personal representative. With regard to the bank account funds, LePome asserts that appellants' civil action was directed at Miller's amended estate plan, and at no time did they allege any wrongdoing with regard to LePome's joint tenancy with Miller on the bank account in question. LePome and Bloom both point out that, after the district court dismissed appellants' civil claims, appellants did not challenge that dismissal order on appeal but instead proceeded with the probate matter, which was grounded on

⁴Appellants point out that, following this court's order reversing the judgment on the jury verdict, they filed a new district court action, apparently asserting many of the same claims that they alleged during the first action, including elder abuse and undue influence. After the district court dismissed the second action, appellants appealed, and that appeal is pending in this court. See Berkson v. LePome, Docket No. 49261.

lack of testamentary capacity and undue influence. Thus, LePome and Bloom maintain, appellants cannot now challenge the orders reinstating Bloom and releasing funds to LePome, since the issues of undue influence and testamentary capacity have been fully litigated.

Appellate courts generally will not review issues that already have been decided in a previous appeal in the same case, as the principle or rule of law stated in and applied to the decision in the first appeal is considered the law of the case.⁵ Under the law of the case doctrine, the principle or rule of law necessary to the decision in the first appeal “must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal.”⁶ Thus, when a judgment is reversed on appeal, any subsequent lower court proceedings in that case must conform to the appellate court’s decision.⁷

Here, this court’s order reversing the judgment on the jury verdict necessarily reviewed the validity of Rose Miller’s amended estate plan, as challenged during the probate proceedings and on appeal. In that order, this court concluded that the evidence was inadequate to support the jury’s conclusion that Miller was unduly influenced in executing the amended estate plan. Thus, the amended estate plan stands as valid and the district court’s orders granting the petition to release funds and the petition to reinstate Bloom under that amended plan logically followed

⁵Hsu v. County of Clark, 123 Nev. __, __, 173 P.3d 724, 728 (2007).

⁶Id. (quoting Wickliffe v. Sunrise Hospital, 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988)).

⁷LoBue v. State ex rel. Dep’t Hwys., 92 Nev. 529, 532, 554 P.2d 258, 260 (1976).

from this court's conclusion that substantial evidence did not support the jury's verdict that the amended estate plan resulted from undue influence.

Although appellants argue that because the prior appeal examined only the issue of undue influence, their undecided civil claims make the law of the case doctrine inapplicable to the present appeals, we disagree. Because appellants failed to challenge the district court's dismissal of those claims or the district court's summary judgment as to the testamentary capacity on cross-appeal, in the context of LePome's and Bloom's appeal from the judgment on the jury verdict, the district court's orders are final and also stand as law of the case.⁸ Thus, the only bases on which appellants could challenge the orders at issue in these appeals were already resolved during the underlying district court proceeding and by this court's prior decision.

Therefore, having considered the parties' arguments and supporting documents, we conclude that because this court's prior order reversing the judgment on the jury verdict stated a principle of law, namely that substantial evidence did not support the jury's undue influence conclusion, the law of the case doctrine precludes these appeals.⁹ Accordingly, we summarily affirm the district court's orders releasing the funds in the blocked account to LePome and reinstating Bloom as successor trustee and personal representative of Rose Miller's amended estate plan.

⁸See State ex rel. Dep't Hwys v. LoBue, 96 Nev. 505, 508, 611 P.2d 1077, 1079 (1980) (noting that when a judgment is entered, it is conclusive upon the parties and not subject to relitigation).

⁹See LoBue, 92 Nev. at 532, 554 P.2d at 260.

It is so ORDERED.¹⁰

Maupin, J.
Maupin

Cherry, J.
Cherry

Saitta, J.
Saitta

cc: Hon. Mark R. Denton, District Judge
Bruce L. Gale
Cary Colt Payne
Richard E. Donaldson
Marquis & Aurbach
Trent, Tyrell & Associates
Eighth District Court Clerk

¹⁰As for appellants' other contentions in their response to our order to show cause, including that (1) the district court lacked jurisdiction to reinstate Bloom; (2) Bloom has a conflict of interest, preventing him from serving as trustee and personal representative; and (3) the amended estate plan never was confirmed, and is thus subject to continued litigation, we conclude that those arguments lack merit, and therefore, we decline to further address them.

Although LePome has asked this court to enter an order directing appellants to show cause why they should not be sanctioned under NRAP 38 for filing frivolous appeals, we decline to do so.