

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: ESTATE OF ALBENY HANSEN,
A/K/A ALBENY SMILANICH.

No. 49734

SCOTT HANSEN,
Appellant,
vs.
JOHN CAHILL, CLARK COUNTY
PUBLIC ADMINISTRATOR,
Respondent.

FILED

NOV 19 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Ingerson*
DEPUTY CLERK

ORDER AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

This is an appeal from a district court order setting aside a probate commissioner's report and recommendations. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

This case arises out of an objection to a final accounting in a probate matter. Appellant objected to the final accounting based on a claim that the public administrator negligently allowed a property of the estate to be foreclosed. A trial was held before the probate commissioner, who then submitted a report and recommendation to the district court. Respondent objected to the report and recommendation. The district court sustained the objection and set aside several of the probate commissioner's recommendations and made other rulings regarding attorney fees. This appeal followed.

Appellant first argues that the district court lacked jurisdiction to consider the objection to the report and recommendation because the parties had orally agreed to be bound by the decision of the probate commissioner. Respondent argues that he properly filed his objection. Having reviewed the record, there is no evidence that the parties agreed to be bound by the probate commissioner's findings.

Nothing in the court minutes suggests such an agreement. Most importantly, appellant did not raise this issue in his district court response to the objection to the report and recommendation.¹ As a result, this issue is not properly before this court on appeal, and regardless, there is no evidence to support the claim that such an agreement existed.

Appellant next challenges the district court's order setting aside several of the probate commissioner's recommendations. In ruling upon a report and recommendation, the district court should "accept the . . . findings of fact unless clearly erroneous."² We have previously stated that the court should adopt a report unless "the findings are based upon material errors in the proceedings or a mistake in law; or are unsupported by any substantial evidence; or are against the clear weight of the evidence."³

After reviewing the briefs and appendices on appeal, we conclude that substantial evidence in the record supports the recommendation of the probate commissioner that the public administrator was negligent in allowing the property to be foreclosed. This finding was not clearly erroneous and the district court improperly rejected it.

Additionally, we reverse the district court's ruling that the evidence did not support using the \$535,000 appraisal value as the basis

¹See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that this court will not consider an issue raised for the first time on appeal).

²NRCP 53(e)(2).

³Russell v. Thompson, 96 Nev. 830, 834 n.2, 619 P.2d 537, 539-40 n.2 (1980).

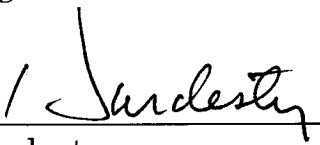
for determining damages. The public administrator did not provide any evidence to establish a different value of the home during the relevant time frame. Therefore, it was not clearly erroneous for the probate commissioner to use this appraisal to determine the value of the property.

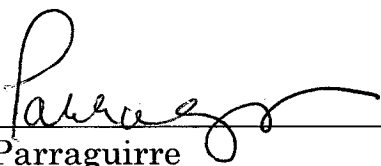
We affirm, however, the district court's order rejecting the amount of damages recommended by the probate commissioner, as substantial evidence does not support the percentage of realtors' commission the probate commissioner used in calculating damages. As a result, we remand this matter back to the district court to determine the proper amount of damages to be awarded based on a deduction for the proper amount of realtors' commission.

We also affirm the district court's conclusion that the probate commissioner failed to provide a legal basis for the award of attorney fees to appellant. This issue should be addressed on remand by the district court. Finally, we affirm the remaining allocations of attorney fees and distribution as ordered by the district court. Specifically, the district court is allowed to modify a report and recommendation under NRCP 53(e)(2), and thus, the district court did not err in reaching its conclusions. As a result, we affirm the remainder of the district court's order.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Kathy A. Hardcastle, District Judge
Ara H. Shirinian, Settlement Judge
Potter Law Offices
Goldsmith & Guymon, P.C.
Eighth District Court Clerk