IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF: ESTATE OF WILLIAM R. COVENTRY

PADGETT COVENTRY PRICE,
Appellant,
vs.
MARIS UCHIKURA; AND DOUGLAS UCHIKURA,
Respondents.

No. 57622

FILED

DEC 20 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order admitting a will to probate. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Testator William Coventry died in 2007, leaving two virtually identical wills from the years 2000 and 2002. Both wills expressly disinherited Coventry's daughter from a prior marriage, appellant Padgett Price, and disposed of Coventry's entire estate to the nieces and nephews of his deceased second wife, who are represented by respondents Maris and Douglas Uchikura.[1] After respondents sought to probate the 2002 will, the district court determined that questions of material fact existed as to its validity. Respondents then filed for summary judgment to declare the 2000 will valid, and in doing so, conceded that the 2002 will was

[1]As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition

invalid.[2] The district court granted summary judgment in respondents' favor and admitted the 2000 will to probate.

Price now appeals, arguing that (1) the district court erred by admitting the 2000 will to probate without first resolving issues regarding the 2002 will's validity, (2) genuine issues of material fact exist regarding the validity of the 2000 will, and (3) the doctrine of judicial estoppel should preclude respondent's concession of the 2002 will as invalid. As explained below, we affirm the district court's order.

Standard of review

"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. (quoting NRCP 56(c)). In reviewing an order granting summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Id.

The district court did not err in admitting the 2000 will to probate

Price argues that the district court erred in granting summary judgment because the validity of the 2002 will had not been determined.

---

[2]Notably, both the 2000 and the 2002 wills provide that Coventry expressly intended to disinherit Price and for his estate to pass to respondents. Our holding is therefore limited to the circumstances of the wills having the same distribution.

NRS 133.120(1)(b) provides that a written will may be revoked by "[a]nother will or codicil in writing, executed as prescribed in this chapter." Thus, "a will may be impliedly revoked by a subsequent will." In re Estate of Melton, 128 Nev. ___, ___, 272 P.3d 668, 677 (2012). Because respondents conceded to Price's initial argument that the 2002 will could not be proved and was invalid for failure to satisfy statutory execution requirements, it became undisputed that the 2002 will could not serve to revoke the 2000 will. See In re Estate of Laura, 690 A.2d 1011, 1014-15 (N.H. 1997); Estate of Shelly, 399 A.2d 98, 101-02 (Pa. 1979). Therefore, the district court did not err in admitting the 2000 will to probate. In re Estate of Klages, 209 N.W.2d 110, 113 (Iowa 1973).

Validity of the 2000 will

Price argues that the district court erred in granting summary judgment as to the validity of the 2000 will because genuine issues of material fact exist regarding its compliance with NRS 133.040.

Because Price did not challenge the 2000 will's validity in her opposition to respondents' summary judgment motion, the district court properly concluded that no genuine factual disputes existed before ruling in respondents' favor.[3] Wood, 121 Nev. at 729, 121 P.3d at 1029. Nor are Price's challenges to the 2000 will properly preserved for appeal. See Schuck v. Signature Flight Support, 126 Nev. ___, ___, 245 P.3d 542, 544 (2010) (concluding that on appeal from a district court's grant of summary judgment, "a de novo standard of review does not trump the general rule

[3]Although the district court granted Price leave to file a motion for rehearing pursuant to EDCR 2.24, the record supports that Price failed to present any new evidence as a basis to support rehearing. Thus, the district court properly denied her motion.

that '[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'" (quoting Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981))).

The district court properly declined to invoke judicial estoppel

Price contends that respondents should have been judicially estopped from bringing a motion for summary judgment to probate the 2000 will, as they had previously argued that there were genuine issues of material fact with regard to the 2002 will's validity.

Judicial estoppel is a discretionary doctrine intended to protect the integrity of the judiciary rather than the litigants. Mainor v. Nault, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004). Generally, it applies when:

> (1) the same party has taken two positions; (2) the positions were taken in judicial . . . proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

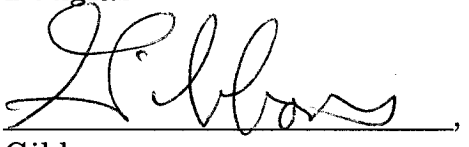
Id. (quoting Furia v. Helm, 4 Cal. Rptr. 3d 357, 368 (Ct. App. 2003)).

We have held that judicial estoppel is an "extraordinary remedy" and that it "does not preclude changes in position not intended to sabotage the judicial process." Id. (internal quotation omitted). Here, respondents' amended petition sets forth two alternative approaches for probate: (1) the 2002 will, or (2) if the 2002 will is invalid, the 2000 will. Thus, respondents have not taken two "totally inconsistent" positions. Id. (internal quotation omitted). Respondents have not attempted to obtain an unfair advantage since Price would be disinherited and the estate

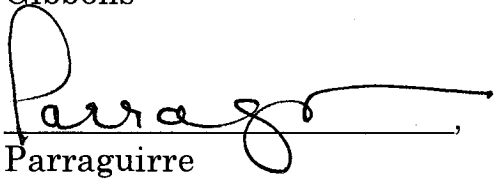
would be equally divided among the same group of takers under the provisions of either will. Therefore, the district court properly concluded that the doctrine of judicial estoppel did not apply. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Douglas



_____, J.
Gibbons



_____, J.
Parraguirre

cc: Hon. Elissa F. Cadish, District Judge
Howard Roitman, Settlement Judge
Goodsell & Olsen
Kyle & Kyle
Eighth District Court Clerk