

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF
GRACE E. KENNEDY, DECEASED.

No. 72435

ELLEN MUTTITT, F/K/A ELLEN
CHILDERS, AS COURT APPOINTED
PERSONAL REPRESENTATIVE OF THE
ESTATE OF GRACE E. KENNEDY,
Appellant,
vs.
JOSEPH ROSA,
Respondent.

FILED

FEB 08 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Ellen Muttitt, F/K/A Ellen Childers as court-appointed personal representative of the Estate of Grace E. Kennedy appeals the district court's Order Concerning Counterpetition to Declare Assets and for Approval of Funeral Expenses and Order Denying Motion Pursuant to EDCR 2.24, NRCP 52, and 59 Regarding Order Concerning Counterpetition to Declare Assets and for Approval of Funeral Expenses. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Grace E. Kennedy and Respondent Joseph Rosa started dating in 1975.¹ They never married. In 1994, Rosa bought a home in Las Vegas with his own money. He put title to the home in his and Kennedy's names as joint tenants with the right of survivorship. Rosa thought Kennedy would outlive him and he wanted to make sure she had a place to stay. In 2012, he was worried that if Kennedy outlived him, Kennedy's nieces and nephews would inherit his home. With the belief he was protecting his estate, Rosa executed a deed conveying his one-half interest in the home to his living trust. In 2013,

¹We do not recount the facts except as necessary to our disposition.

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Kennedy passed away. Rosa filed an Affidavit of Death of Joint Tenant to claim his right of survivorship. The Clark County Assessor's Office rejected the claim because it said the 2012 deed severed the joint tenancy and created a tenancy in common. Rosa petitioned to be the administrator of what he thought was Kennedy's intestate estate. One of her nephews came forward with a will² and Kennedy's niece filed an action in court on behalf of Kennedy's estate to account for the estate's half of the Las Vegas home. Rosa opposed the motion arguing, in part, that he never intended to give up his right of survivorship. He also requested that the estate reimburse him for Kennedy's funeral and wake expenses.

In response to the estate's claim for half the home, the district court held an evidentiary hearing and subsequently ordered the 2012 deed rescinded based on Rosa's unilateral mistake when he executed it. The court also ordered the estate to reimburse Rosa for Kennedy's funeral and wake expenses. Appellant filed a Motion Pursuant to EDCR 2.24; NRCP 52, and 59 Regarding the Order Concerning Counterpetition to Declare Assets and for Approval of Funeral Expenses. The district court held a motion hearing on the second motion and then summarily denied it.

The evidence supports the district court's finding that Rosa did not intend to give up his right of survivorship

"A district court's findings [of fact] will not be disturbed unless they are clearly erroneous and are not based on substantial evidence." *Hannam v. Brown*, 114 Nev. 350, 357, 956 P.2d 794, 799 (1998). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130

²Kennedy's will names her niece, who is the appellant, and the two nephews at issue here as her beneficiaries. She left nothing to Rosa in her will. One of the nephews at issue here was named administrator of the will.

Nev. ___, ___, 335 P.3d 211, 214 (2014) (internal citation and quotation marks omitted). The *Hannam* court applied an abuse of discretion standard of review to the district court's conclusions of law based on its findings of fact. *Hannam*, 114 Nev. at 358, 956 P.2d at 799.

At issue is whether the district court properly concluded that Rosa made a unilateral mistake based on the district court's findings of fact. "[A] donor's unilateral mistake in executing a donative transfer may allow a donor to obtain relief from that transfer if the mistake and the donor's intent are proven by clear and convincing evidence." *Monzo v. Eighth Judicial Dist. Court (In re Irrevocable Trust Agreement of 1979)*, 130 Nev. 597, 607, 331 P.3d 881, 888 (2014).³ The emphasis is on determining the donor's intent and whether a mistake was made at the time of the donative transfer, which is a job for the fact-finder. *Id.* at 607-608, 331 P.3d at 888.

The district court made findings of fact that Rosa intended to provide a place for Kennedy given her "failing health and mental capacity," and when he transferred his interest into his trust, he thought his interest in the home would be held for Kennedy's benefit if she survived Rosa, but Rosa did not intend "to give up his right of survivorship to the [r]esidence in the event that Decedent did not survive him." Rosa was the sole witness to testify at the evidentiary hearing and was 100 years old at the time. He testified consistently that he did not want his home to go to Kennedy's niece and nephews. He changed his deed because he was afraid that if Kennedy survived him, that her heirs would inherit his home. He also testified that he

³Appellant contends that *Monzo* "does not apply as interpreted" by the district court, in part, because there was no gift from Rosa to Kennedy. Appellant's interpretation of *Monzo* is inapposite. *Monzo* provides an analysis for courts to determine the donor's intent at the time of transfer, and "[w]hether a donee knew of or caused a mistake is likely irrelevant." *Monzo*, 130 Nev. at 603, 331 P.3d at 885.

did not know what a joint tenancy with the right of survivorship meant and if his attorney explained it, he did not remember. Rosa's testimony is evidence that he intended to maintain control of his estate because he wanted to ensure he could exclude Kennedy's heirs from inheriting the home. His testimony that he did not understand a joint tenancy and right of survivorship or remember if he was explained their legal effect adds further support that he did not intend to give up a right that gave him control of the home. The focus of the *Monzo* analysis is on the donor's intent at the time of the transfer, which is a job for the fact-finder. *Monzo*, 130 Nev. at 607-608, 331 P.3d at 888. Under the applicable law and standard of review, we conclude that there was substantial evidence to support the district court's finding that Rosa did not intend to give up his right of survivorship. Based on the evidence supporting this finding, the district court did not err in concluding that Rosa made a unilateral mistake when he executed the 2012 deed.

The district court did not err by ordering the estate to reimburse Rosa for Kennedy's funeral and wake expenses

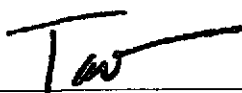
The district court's conclusions of law, including statutory interpretation, are reviewed de novo. *In re Guardianship of Hailu*, 131 Nev. ___, ___, 361 P.3d 524, 528 (2015). NRS 147.195(2) provides: "The debts and charges of the estate must be paid in the following order: . . . 2. Funeral expenses." "It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act." *In re Estate of Thomas*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000) (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986)). The term "funeral expenses" is defined as a "necessar[y] and reasonabl[e]" expense for burial, "including the funeral . . . and a visitation (or wake)." *Funeral Expense*, Black's Law Dictionary (10th ed. 2014). When reviewing funeral expenses, the Nevada Supreme Court has analyzed whether it was necessary

or reasonable. See *In re Taylor's Estate*, 61 Nev. 68, 76-77, 114 P.2d 1086, 1090 (1941) (reviewing the totality of the circumstances to conclude that the executor did not act in bad faith and instead acted as a reasonable person under similar circumstances); *In re Millenovich's Estate*, 5 Nev. 161, 182 (1869) ("With respect to funeral expenses, the Courts generally take into consideration all the circumstances of each case, and when executors have acted with ordinary prudence, they are not held personally liable.").

Accordingly, the focus is on whether Rosa acted reasonably and in good faith based on the circumstances. The evidence supports the district court's finding that Rosa held a wake to honor Kennedy's wishes that he throw a party in celebration of her life. Additionally, Rosa testified that he never initially asked Kennedy's niece or nephews for money for the funeral or wake because he thought it was his duty as Kennedy's significant other and he did not know that the family was supposed to pay for those expenses. Thus, the evidence supports that the funeral expenses, including those for the wake, were reasonable and in good faith based on the circumstances and the district court did not err by ordering the estate to reimburse Rosa. Accordingly, we

AFFIRM the judgment of the district court.⁴


_____, C.J.
Silver


_____, J.
Tao

⁴We have considered appellant's remaining arguments and conclude they are unpersuasive.

GIBBONS, J., concurring:


I agree with the outcome reached by the majority as this court is constrained by the factual findings announced by the district court. If the appellant had effectively challenged Rosa's evidence regarding his claim of unilateral mistake below, the outcome of this case may have been different.

Rosa was the sole witness to testify at the evidentiary hearing. While he testified consistently that he did not want his home to go to Kennedy's niece and nephews, this testimony primarily evidences his intent to prevent Kennedy's heirs from inheriting the home, and not a unilateral mistake. Viewed with the benefit of hindsight, it appears that the real mistake was made in 1994 when Rosa put the title to the home in his and Kennedy's names as joint tenants with right of survivorship, instead of creating a life estate tenancy for Kennedy. Rosa's actions in 2012 to convey his 50 percent interest in the home as a tenant in common to his trust may have been an attempt to partially undo the 1994 mistake.

Rosa apparently made the 2012 change with the assistance of legal counsel, which could cast doubt on the conclusion that he made a unilateral mistake. *See* RPC 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); *cf. Monzo*, 130 Nev. at 608-09, 331 P.3d at 889 (concluding there were genuine issues of material fact to preclude partial summary judgment when the attorney *testified* as to his review with client of the condo transfer to trust and his belief as to what client understood and intended when the transfer was made into trust for another).

Rosa's counsel, however, did not testify. Rosa argues on appeal that he did not have to call his counsel as a witness to meet his evidentiary burden. I agree. The appellant should have countered Rosa's testimony with evidence.

We review the record as it is. We are required to grant deference to the district court's findings of fact that Rosa did not intend to abandon his right of survivorship. This is a fact-based conclusion that Rosa did not intend to give up his joint tenancy rights, and, as a result, made a unilateral mistake. Therefore, the district court's order must be affirmed.


_____, J.
Gibbons

cc: Hon. Gloria Sturman, District Judge
John Walter Boyer, Settlement Judge
Kehoe & Associates
Goodsell & Olsen
Eighth District Court Clerk