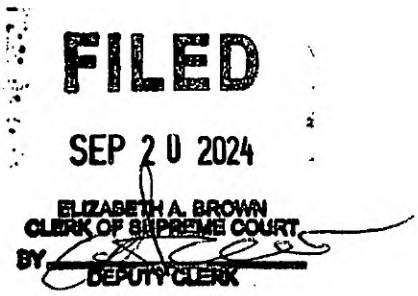
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF THOMAS JOSEPH HARRIS, DECEASED.

No. 86096-COA

TODD ROBBEN,
Appellant,
vs.
THE ESTATE OF THOMAS JOSEPH HARRIS; AND THOMAS J. HARRIS TRUST,
Respondents.



AMENDED ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING[1]

Todd Robben appeals from a district court order granting a motion to dismiss and a motion for summary judgment in a trust matter. Ninth Judicial District Court, Douglas County; Robert E. Estes, Senior Judge.

Robben is the stepson of decedent Thomas J. Harris (Harris), the settlor of the Thomas J. Harris Trust. As part of his estate plan, Harris executed the Last Will and Testament of Thomas Joseph Harris on June 12, 2019, which, as relevant here, gave the entirety of his estate, along with any lapsed gifts or residue, to the Thomas J. Harris Trust (Trust), executed on the same date. Both documents expressly disinherited Robben.

[1]Having considered Robben's petition for rehearing, we conclude that the petition should be granted. We therefore vacate our July 3, 2024, order affirming in part, reversing in part and remanding, and issue this amended order in its place.

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Harris passed away in December 2019, and subsequently, his will was entered into probate. During the administration of Harris's will, Robben filed an unsuccessful will contest, asserting that, for various reasons, Harris's will was invalid. The district court determined that Robben did not have standing to pursue the will contest as he produced no admissible evidence to show that he was either a current beneficiary of the will, prior beneficiary of a former will or trust, or an intestate heir of Harris's estate.

Robben thereafter initiated the underlying action by filing a document entitled "Verified Petition to Invalidate the Thomas J. Harris Will and Trust, Petitioner's Request for Appointment of Counsel Pursuant to NRS § 136.200, Emergency Request for Stay of Final Distribution, and Preemptory Challenge of Judge Nathan Tod Young." In this filing, Robben argued that he could collaterally challenge the decision in the earlier will case through the trust, and that both documents were void due to undue influence. In response, the estate filed a motion to dismiss Robben's petition to invalidate the will, and a motion for summary judgment, arguing that, similar to the earlier action, Robben cannot prove that he is an interested person in the trust, and therefore lacks standing to challenge its validity.

After full briefing on the motion, Robben filed a document entitled "Notice and Affidavits in Support of the Pre-Existing Olga and Thomas J. Harris Living Trust with Petitioner Named Beneficiary." Thereafter, the Trust filed a supplemental brief "addressing the fugitive affidavits" which argued that Robben's submitted affidavits were invalid as a matter of law, untimely, and improperly filed without first requesting leave of court, as the affidavits were filed after Robben filed his opposition to the Trust's motion for summary judgment. The Trust's filing further

argued that, even if the court were to consider them, the affidavits do not support Robben's position that he was an interested person in Harris's estate and summary judgment should still be granted in its favor.

At the hearing on the motion, the district court announced that it would be granting both the motion to dismiss and the motion for summary judgment on the basis that Robben is not an interested person under NRS 132.185 (defining interested person in probate matters) and because he failed to demonstrate that undue influence existed that would void the trust under NRS 155.097. Following the court's oral pronouncement, Robben expressed his displeasure with the court's ruling, and, at some point, disconnected from the remote conference room where the hearing was held. Around the same time, the estate's counsel orally moved (for the first time) to declare Robben a vexatious litigant under NRS 155.165. Without additional discussion, the court stated "[w]ell, it appears Mr. Robben [ ] has left, so the [motion] is granted." Accordingly, the district court's order granting the motion to dismiss and the motion for summary judgment also declares Robben a vexatious litigant. Robben now appeals.

On appeal, Robben challenges the district court's order granting the motion to dismiss and the motion for summary judgment, arguing—among other things—that the court erred as a matter of law when it determined that he was not an interested person under NRS 132.185. Further, Robben argues that the district court abused its discretion when it declined to appoint him counsel under NRS 136.200, and that the district court abused its discretion by declaring him a vexatious litigant without notice and an opportunity to oppose the sanction. In its answering brief, the estate contends that the district court's order should be affirmed on the basis that Robben lacked standing to bring either of his petitions under NRS

132.185 and that the district court's order declaring Robben a vexatious litigant was necessary to protect the rights of the estate.

This court reviews a district court's order granting summary judgment de novo.[2] *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine [dispute] of material fact [remains], and the moving party is entitled to judgment as a matter of law." *Id.* at 731, 121 P.3d at 1031. If the nonmoving party bears the burden of persuasion, the moving party "may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) 'pointing out . . . that there is an absence of evidence to support the nonmoving party's case.'" *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (citations omitted). "In such instances, in order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine [dispute] of material fact." *Id.* at 603, 172 P.3d at 134.

Having reviewed the briefs and the record on appeal, we affirm the district court's order granting summary judgment and dismissing Robben's petition to invalidate the will and trust on the grounds that Robben lacked standing to bring this challenge. Because the decisions resolving both motions relied on the same statute, and because—as noted

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[2]Because the district court considered matters outside of the pleadings, we construe the order granting the motion to dismiss Robben's petition concerning the will and estate as granting summary judgment regarding the same. NRCP 12(d); *Schneider v. Cont'l Assurance Co.*, 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994).

above—the decision to grant the motion to dismiss is properly treated as one granting summary judgment—we consider the district court's decisions as to both motions together.

NRS 132.185 defines an interested person as "a person whose right or interest under an estate or trust may be materially affected by a decision of a fiduciary or a decision of the court." And, as relevant here, only interested persons have standing to contest a will under NRS 137.080 ("After a will has been admitted to probate, *any interested person* . . . may, at any time within 3 months after the order is entered admitting the will to probate, contest the admission or the validity of the will." (emphasis added)), or a trust under NRS 164.015(1) ("The court has exclusive jurisdiction of proceedings initiated by the petition of *an interested person* concerning the internal affairs of a nontestamentary trust . . . ." (emphasis added)).

In response to the estate's motions, Robben argued that because he was allegedly a beneficiary of his mother's joint trust with Harris, he is now an interested person in Harris's estate. However, Robben's only evidence that the joint trust existed is a letter addressed to his stepbrother from Harris's former counsel, informing Robben's stepbrother that the previous "Thomas Joseph and Olga Harris Living Trust," created in 1998, had been "terminated" by Harris upon Olga's death, and replaced with the current iteration of the Harris trust.

Even if we were to presume that this document is admissible, the letter does not contain any reference to Robben's beneficiary status under the 1998 trust. And Robben's affidavits—which were untimely filed

under the local rules[3]—similarly failed to demonstrate his beneficiary status under the 1998 trust or that the 1998 trust even existed. Instead, these affidavits merely assert that "Olga Harris loved her son Todd Robben and continued to put money on his books in prison until she passed away in 2019" and that Robben "would have inherited a sum equal to his brother Jeff Robben, but for the undue influence perpetuated on Thomas J. Harris by Jeff D. Robben."

As a result, Robben failed to produce any competent evidence, by affidavit or otherwise, to demonstrate that he was, in fact, a beneficiary under the 1998 trust instrument, including failing to produce a copy of the 1998 trust instrument. Instead, Robben simply asserted in his opposition to the motions that "Todd C. Robben [himself] and Stephen J. Robben could have attested under oath that Olga Harris spoke of the will/trust several times" and that Robben was a beneficiary under that estate plan. We conclude Robben's bare assertion on this point, without more, is insufficient to create a genuine dispute of material fact as to whether Robben was a beneficiary under the trust. *See Wood*, 121 Nev. at 731, 121 P.3d at 1031. And because Robben failed to demonstrate that he was a beneficiary under the prior trust instrument and did not otherwise demonstrate that he could be considered an interested person, we conclude that Robben is not an interested person in Harris's trust or estate and affirm the portion of the

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[3]Robben filed his opposition to the motion for summary judgment on October 21, 2022, and the affidavits were signed and e-filed on November 2, 2022. Filing the affidavits in a separate document without requesting leave of court violates NJDCR 7, which provides that "[f]actual contentions involved in any [ ] motion must be initially presented and heard upon affidavits" and that "[e]ach affidavit . . . must be served and filed with the motion, opposition, or reply to which it relates." NJDCR 7(a), (b).

district court's order granting summary judgment on his requests regarding the estate and the trust.[4]

Finally, Robben contends that the district court improperly declared him a vexatious litigant under NRS 155.165 without providing him with the opportunity to oppose the sanction. This court reviews an order declaring someone a vexatious litigant and setting restrictions on their ability to access the courts for an abuse of discretion. *Jordan v. State, Dep't of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 62, 110 P.3d 30, 44 (2005), *abrogated on other grounds by Buzz Stew v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008). Under NRS 155.165(1), "[t]he court may find that a person . . . is a vexatious litigant if the person files a petition, objection, motion or other pleading which is without merit, [or] intended to harass or annoy" a trustee.

Because vexatious litigant orders limit a litigant's right to access the courts, the orders must meet the four factors enumerated in *Jordan*. Here, however, we need only address the first factor: that in order for the district court to enter a prefiling restriction, the litigant must first receive notice and an opportunity to oppose such a sanction in order to protect the litigant's due process rights. *Jordan*, 121 Nev. at 60-62, 110 P.3d at 42-44. Based on our review of the record, there is nothing to indicate that Robben received notice and an opportunity to oppose the proposed

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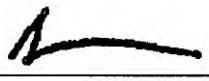
[4]Because Harris lacks standing to contest the will and the trust under NRS 137.080 and NRS 164.015(1), we conclude that the district court did not abuse its discretion when it declined to appoint counsel for Harris under NRS 136.200 ("If a will is offered for probate and it appears there are . . . interested persons who reside out of the county and are unrepresented, the court *may*, whether there is a contest or not, appoint an attorney for them." (emphasis added)).

sanction, as the district court considered and granted the motion after recognizing that Robben had left the hearing. Indeed, the documents provided in the record indicate that the estate's counsel raised this request for the first time at the hearing, and therefore Robben had no prior opportunity to respond to any requests for a prefiling restriction. Accordingly, we conclude that the district court abused its discretion when it declared him a vexatious litigant and reverse that portion of the district court's order and remand for further proceedings.

It is so ORDERED.[5]

_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

cc: Ninth Judicial District Court, Dept. II
Hon. Robert E. Estes, Senior Judge
Todd Robben
Wallace & Millsap LLC
Douglas County Clerk

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[5]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief. In light of our disposition, we also deny Robben's May 17, 2024 "Request to File a Sur-Reply and take Judicial Notice of Case 88604" as moot.