IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF THE VERA RICHMOND TRUST R-501, DATED DECEMBER 20, 1984.

SHRINERS HOSPITAL FOR CHILDREN,
Appellant,
vs.
BEN RICHMOND AS TRUSTEE FOR THE VERA RICHMOND TRUST R-501, DATED DECEMBER 20, 1984.
Respondent.

No. 38673

FILED

MAR 17 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order for instructions to distribute assets of an inter vivos trust. Appellant Shriners Hospital for Children (Shriners) argues that the respondent should have been precluded from bringing the petition for instructions based on res judicata, laches and lack of standing. Shriners further argues the district court failed to properly construe the trust. We disagree.

"[T]he doctrine of res judicata precludes parties . . . from relitigating a cause of action or an issue which has been finally determined by a court . . . ."[1] There are two sub-categories of res judicata, issue preclusion and claim preclusion.[2] Both issue preclusion and claim

[1]Executive Mgmt. v. Ticor Title Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (quoting University of Nevada v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)).

[2]See id.

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preclusion apply only if there has been a prior valid and final judgment on the merits.[3]

In October 2000, respondent filed a petition to confirm himself as sole trustee of the trust and for instructions regarding distribution of the trust assets. There was a hearing before the probate commissioner. The probate court minutes indicate that the commissioner recommended: "trustee CONFIRMED and petition for instructions DENIED." The district court never issued an order adopting the probate commissioner's recommendations. Subsequently, respondent filed a second petition for instructions in July 2001.

Shriners claims that both issue preclusion and claim preclusion should have barred respondent's second petition. We disagree.

We have previously stated that "only a written judgment has any effect, and only a written judgment may be appealed."[4] Where, as here, the district court did not issue a written judgment, there is no prior valid and final judgment on the merits. In addition, there is no indication that the commissioner even addressed the merits of respondent's petition. The commissioner merely declined to give instructions at that time. Therefore, because there was no valid and final judgment by the court regarding respondent's first petition for instructions, res judicata does not apply.

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[3]See id.

[4]Rust v. Clark Cty. School District, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987).

We construe trusts to give effect to the apparent intent of the settlor.[5] This intent can be ascertained by looking to the terms of the trust.[6] Where the language of the trust is free from ambiguity, the court may not look to parol evidence, but must limit its review to the terms of the trust.[7]

The trust, in this case, provides for the distribution of income and principal after the death of the settlor. Article IV, Paragraph 4.1(a)(1) of the trust states, "[t]he entire net income and the entire principal shall be distributed to the Settlor's spouse, BEN RICHMOND . . . or remain in the Trust at his sole discretion." The trust further provides instructions for distribution to the Arthritis Foundation of America, the Jewish Home for the Aged, and Shriners Hospital "upon the death of spouse, BEN RICHMOND."

Shriners contends that by providing for distribution to the charities, the settlor expressed an intent to provide benefits to the charities. This argument is unpersuasive. The language of the trust, giving respondent "sole discretion" is clear and unambiguous. The district court found that "what Mrs. Richmond intended to do was to leave everything to her husband and basically allow him, if he so desired during his lifetime, to use all the income and principal. Then if he elected not to do that, they probably felt that the charities would get basically the remainder interest here after Mr. Richmond passed away . . . ."

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[5]See Hannam v. Brown, 114 Nev. 350, 362, 956 P.2d 794, 802 (1998).

[6]See, e.g., Hannam v. Brown, 114 Nev. 350, 956 P.2d 794 (1998); Nicosia v. Turzyn, 97 Nev. 93, 624 P.2d 499 (1981).

[7]Corr v. Corr, 21 P.3d 642, 644 (Okla. Ct. App. 2000).

Shriners points to the trust's spendthrift provision in support of the argument that the intent of the settlor was to limit respondent's access to trust assets. We disagree.

The spendthrift provision makes reference to the other terms of the trust regarding distribution of income and principal. Thus, this provision expresses an intent to follow the distribution plan, which gives respondent sole discretion to distribute the income and principal.

Interpreting the trust document as a whole, we conclude that the distribution provision of Article IV, Paragraph 4.1(a)(1) is controlling. It unambiguously gives respondent discretion over both the trust income and principal. Further, the gift to the charities appears to have been intended to be a contingent remainder. This gift would vest if, and only if, assets remained in the trust at respondent's death.

The district court concluded that the trust gives respondent a general power of appointment. Shriners asserts the language of the trust provides no such power.

A person with a general power of appointment can distribute any amount of trust property to any person, including himself.[8] Because a general power of appointment is such an extraordinary power, "the law requires that the grantor must (1) intend to create a power, (2) indicate by whom the power is held, and (3) specify the property over which the power is to be exercised."[9] In addition, the language used must "plainly express

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[8]62 Am. Jur. 2d Powers § 11 (1990).

[9]Matter of Estate of Krokowsky, 896 P.2d 247, 250 (Ariz. 1995) (citing Matter of Estate of Lewis, 738 P.2d 617, 619 (Utah 1987)).

or clearly imply" the grantor's intent to create the general power of appointment.[10]

While the language of the trust gives respondent broad power to distribute to himself, it does not allow distribution to anyone else. This language does not "plainly express or clearly imply" an intent to provide a general power of appointment. It merely shows the settlor's intent to provide for respondent, at his discretion. Anything remaining in the trust upon his death would then go to the charities.

We conclude that the district court erred in concluding that the trust gave respondent a general power of appointment. However, this error is harmless. The broad discretion given to respondent to distribute trust principal and interest to himself, in this case, has the same effect as a general power of appointment. The trust merely limits who can receive distributions, not what respondent can do with the assets once he has distributed them to himself.

Shriners next argues that laches should have barred respondent from bringing a petition for instructions. Respondent waited sixteen years after the trust was created and thirteen years after the death of the settlor before bringing a petition for instructions. Shriners claims it suffered as a result of respondent's delay because if respondent would not have waited, both the settlor and the drafter of the trust document could have testified regarding the settlor's intent.[11]

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[10]Id. (citing Matter of Estate of Lewis, at 620).

[11]Both the settlor and the drafter of the trust document are deceased.

"Laches, an equitable doctrine, may be invoked when delay by one party prejudices the other party such that granting relief to the delaying party would be inequitable."[12] Laches involves more than a mere passage of time.[13] "[I]t requires some actual or presumable change of circumstances rendering it inequitable to grant relief."[14]

Shriners' argument fails for two reasons. First, because the language of the trust is clear regarding the distribution of trust income and principal upon the death of the settlor, we cannot look to parol evidence, but must limit review to the terms of the trust.[15] Thus, even if the settlor and the drafter were still available to testify, such testimony would be extrinsic evidence and would not be allowed.

Second, the trust provides a contingent remainder interest to the charities. The gift to the charities vests if, and only if, respondent, "at his sole discretion," chooses to leave any assets in the trust upon his death. Thus, Shriners cannot have suffered a prejudicial change in circumstances because it did not yet have a vested interest. Therefore, the doctrine of laches does not apply.

Finally, Shriners asserts that because there was no order confirming respondent's appointment as trustee, respondent lacked

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[12]Besnilian v. Wilkinson, 117 Nev. 519, 522, 25 P.3d 187, 189 (2001) (citing Building & Constr. Trades v. Public Works, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992)).

[13]See Miller v. Walser, 42 Nev. 497, 517, 181 P. 437, 443 (1919) (citation omitted).

[14]Id.

[15]See Corr, 21 P.3d at 644.

standing to bring the second petition for instructions, under NRS 164.010. NRS 164.010 provides, in part:

> 1. Upon petition of any person appointed as trustee of an express trust by any written instrument other than a will, or upon petition of a settlor or beneficiary of the trust, the district court of the county in which the trustee resides or conducts business, or in which the trust has been domiciled, shall consider the application to confirm the appointment of the trustee and specify the manner in which the trustee must qualify. Thereafter the court has jurisdiction of the trust as a proceeding in rem.
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> 2. If the court grants the petition, it may consider at the same time any petition for instructions filed with the petition for confirmation.[16]

Respondent initially filed a petition to confirm himself as sole trustee and for instructions. This petition gave the district court jurisdiction, regardless of whether there was an order filed. However, NRS 164.030 further provides,

> Any trustee whose appointment has been confirmed, as provided in NRS 164.010, at any time thereafter may petition the court for instructions in the administration of the trust or for a construction of the trust instrument, or upon or after the filing of a final account, for the settlement and allowance thereof.[17]

In this case, although the probate commissioner recommended that respondent be confirmed as sole trustee, the court never formally

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[16]NRS 164.010(1) and (2).

[17]NRS 164.030(1).

adopted the recommendation through an order. Therefore, respondent lacked standing to bring the second petition for instructions under NRS 164.030 because his appointment as trustee had not been confirmed.[18] However, there is another statute that gives respondent standing to petition the district court. NRS 164.015 provides, in part:

> 1. The court has exclusive jurisdiction of proceedings initiated by the petition of an interested person concerning the internal affairs of a nontestamentary trust. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts, including petitions with respect to a nontestamentary trust for any appropriate relief provided with respect to a testamentary trust in NRS 153.031.
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> 2. A petition under this section may be filed in conjunction with a petition under NRS 164.010 or at any time after the court has assumed jurisdiction under that section.[19]

Respondent is an "interested person." He is both trustee and beneficiary under the trust. Therefore, although respondent did not have standing under NRS 164.030, he did have standing under NRS 164.015.

Based on the foregoing, we conclude that the district court correctly interpreted the trust document, which allows respondent to distribute both the trust income and principal at his discretion. Neither the doctrine of res judicata nor laches barred respondent from bringing the second petition for instructions. In addition, respondent had standing to

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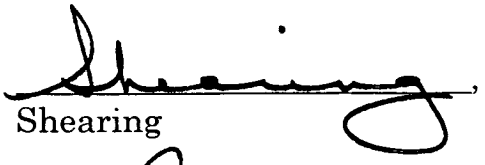
[18]See id.

[19]NRS 164.015(1) and (2).

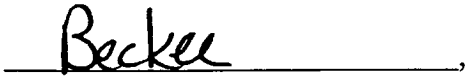
petition the district court. Accordingly, we vacate our previous orders granting both a temporary stay and an injunction, and we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing

_____, J.
Leavitt



_____, J.
Becker

cc: Hon. Stewart L. Bell, District Judge
Marquis & Aurbach
Moran & Associates
Clark County Clerk