IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF: RAY HUNTER NYGREN.

ANN NYGREN, BRUCE NYGREN, AND LYNN NYGREN ("RESIDUAL HEIRS"), Appellants,
vs.
SCOTT NYGREN, AND THE ESTATE OF RAY HUNTER NYGREN, BY AND THROUGH THE ADMINISTRATOR, DAVID WIDMER, CPA, Respondents.

No. 40258

FILED

DEC 20 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order interpreting a will, distributing property, and directing payment of estate costs. Third Judicial District Court, Churchill County; David A. Huff, Judge.

As an initial matter, we note that respondent Scott Nygren[1] challenges this court's jurisdiction to hear the portion of this appeal dealing with the distribution of real property. The district court's final order distributing property and apportioning costs was entered five months before the notice of appeal, and normally, under NRAP 4(a)(1) such a notice would be untimely. However, under NRAP 4(a)(2)(iii), the time for appeal was tolled by Scott's NRCP 52 and 59 motion to alter or amend the judgment, even though Scott sought to alter or amend only the portion of the judgment that dealt with the apportionment of costs.

[1]Since nearly all the parties to this appeal share the last name Nygren, respondent Scott Nygren will hereinafter be referred to in this order by first name.

In support of his jurisdictional challenge, Scott cites In re Estate of Miller, wherein this court held that time for an appeal from interlocutory orders in a probate matter was established by NRS 155.190, and could not be tolled by a motion made under NRCP 59.[2] NRS 155.190 enumerates fifteen probate orders, including an order that distributes property, which may be appealed to this court within 30 days of notice of entry of such an order. In Miller, this court reasoned that permitting an appellant to use the tolling motions of NRAP 4(a)(2) to enlarge the time for an appeal beyond the period provided in NRS 155.190 "would wholly undermine the clear legislative intent underlying NRS 155.190[.]"[3] However, since that decision was published, NRS 155.180 has been amended to read in pertinent part as follows: "The Nevada Rules of Appellate Procedure regulating appeals in civil cases apply to appeals taken pursuant to NRS 155.190."

Therefore, we conclude that Scott's motion tolled the time period for an appeal of the final order of the district court. Appellants having filed their notice of appeal within the time period mandated in NRAP 4(b)(1) after notice of entry of the order granting Scott's motion, this court has jurisdiction to hear the entire appeal.

Distribution of property in the will

In construing the terms of a will, "an appellate court is not bound by the interpretation accorded the instrument by the trial court.

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[2]111 Nev. 1, 9, 888 P.2d 433, 438 (1995).

[3]Miller, 111 Nev. at 8, 888 P.2d at 437.

Rather, we are free to undertake an independent appraisal of and construe for ourselves the terms of the will."[4]

"[I]t is the long-accepted position of this court that the 'primary aim in construing the terms of a testamentary document must be to give effect, to the extent consistent with law and policy, to the intentions of the testator.'"[5] However, "[a]bsent strong extrinsic evidence indicating a contrary meaning, the surest way for courts to carry out a testator's intent is to construe a will according to the plain meaning of terms used in the will."[6] "The question before [the court] is not what the testator actually intended or what she meant to write. Rather it is confined to a determination of the meaning of the words used by her."[7]

This court has expressed "a preference for construing ambiguity in favor of finding a gift to be absolute, rather than conditional."[8] Finally, "[s]ince a will speaks as of the death of the testator, and since '[a] will takes effect at the death of the testator; not before and

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[4]Concannon v. Winship, 94 Nev. 432, 434, 581 P.2d 11, 13 (1978) (citations omitted); but see Matter of Estate of Chong, 111 Nev. 1404, 1408, 906 P.2d 710, 713 (1995) (acknowledging the standard as in Concannon, but also holding "that the district court's finding [as to a clause in the will] was clearly erroneous").

[5]Zirovcic v. Kordic, 101 Nev. 740, 741-42, 709 P.2d 1022, 1023 (1985) (quoting Concannon, 94 Nev. at 434, 581 P.2d at 13).

[6]Matter of Estate of Meredith, 105 Nev. 689, 691, 782 P.2d 1313, 1315 (1989).

[7]Id. (citing Jones v. First Nat. Bank, 72 Nev. 121, 123, 296 P.2d 295, 296 (1956).

[8]School of Theology v. Faith Communications, 98 Nev. 117, 119, 642 P.2d 590, 591 (1982).

not after,' the status of the parties is to be determined as at that particular time."[9]

NRS 111.070(2) states as follows: "Every conveyance of any real property hereafter executed shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant."

As to a devise of real property, NRS 133.210 states as follows: "Every devise of real property in any will conveys all the estate of the testator therein which could lawfully be devised, unless it clearly appears by the will that the testator intended to convey a lesser estate."

The passage at issue in Ray Nygren's will reads as follows:

> I give to my son SCOTT LEWIS NYGREN all of my real property together with all farm machinery used in connection therewith upon the condition that he continues the act of farming thereof; should my son SCOTT LEWIS NYGREN not desire to continue the farming operation, then in that event all of my real property shall be divided equally among my (4) children.

Appellants Ann, Bruce, and Lynn Nygren, siblings of Scott, contend the language is unambiguous as to the defeasible nature of the grant, and that the will plainly calls for the property to revert to all four children if, at any time in the future, Scott ceases active farming on the property.

Scott counters that a plain reading of the will provision makes it clear that he is to have the property in fee simple so long as he desires to continue the farming operation at the time of the devise. Scott argues that

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[9]Bank v. Wolff, 66 Nev. 51, 59, 202 P.2d 878, 882 (1949) (quoting Page on Wills, § 938).

to produce a reasonable interpretation, the "desire" in the will provision must be determined at the time of the devise. According to Scott, appellants' interpretation would create an absurd result - if Scott was to become ill or unable physically to farm, even though he still desired to continue farming, the property would revert to the siblings, which would defeat the intent of the testator. Finally, citing NRS 111.070, Scott claims the estate passes in fee simple since there is no clear contrary intention.

Both parties agree that the district court did not find ambiguity in the will nor resort to extrinsic evidence. It is also undisputed that at the time of Ray's demise, Scott desired to continue the farming operations.

We conclude that the clause basing the devise on the condition of continuing farming is modified by the clause that bases the devise on Scott's desire to continue farming. Both portions must be read together to determine the intent of the testator.

Therefore, the nature of the devise here turns on the timing of when the special limitation, based on Scott's intention to farm, is to be determined. If the determination is to be made at the time of the devise, Scott gets the land in fee simple. If the limitation is on-going, it can be characterized as an estate in fee simple determinable, giving Scott a life estate subject to an executory limitation, and his siblings each an executory interest. In fact Scott, too, would retain an executory interest, since he gets one-quarter of the land should he "not desire to continue" farming.

Given the statutory and case law preferences for conveying land in fee simple absolute whenever possible, along with the obvious intent of the testator that the issue turn on Scott's desire to farm rather

than his ability to farm, we conclude that the only logical and realistic construction of the will provision is that Scott's desire is to be determined at the time of conveyance. Therefore, we conclude Scott is entitled to the real property of the estate in fee simple absolute.

Amendment of order on fees

Appellants' also appeal the district court's order granting Scott's motion to alter or amend the portion of the order dealing with payment of the costs of administrating the estate. Appellants urge a de novo standard of review, framing the issue as simply questions of law as to whether a court can modify an express settlement agreement between the parties, and if so, whether a party is precluded from raising the issue so long after it was decided.

Scott, however, disputes the framing of the issue as a question of law, contending the law is well-settled that a court can alter or amend its own order, as well as set aside or modify a stipulation of the parties. Scott argues for an abuse of discretion standard, citing a very old Nevada case, Nelson v. Reinhart.[10]

In Nelson, this court considered an appeal of the district court's refusal to vacate an allegedly fraudulent arbitration award, where the parties had previously stipulated to entry of judgment based on the arbitrator's award. This court framed the issue as "the right and duty of th[e lower] court to entertain a motion to relieve one of the parties of the

[10]41 Nev. 69, 167 P. 690 (1917).

effect of a stipulation duly entered into."[11] This court concluded the lower court had such a right, holding that

> such agreements are not to be regarded as contracts; and may be dealt with by the court upon a proper showing made within seasonable time; and where the showing is sufficient, the court, in the exercise of sound discretion, may relieve the parties of the effect.[12]

This court further held that a court of review, "recognizing that the matter is one involving the discretionary powers of the lower court, would rarely disturb such an order or decision except when abuse of discretion is manifest."[13] This court also made it clear, however, that such relief should be limited to situations where the stipulation was "unjustly, improperly, or fraudulently entered,"[14] and emphasized that an important consideration was the possibility of prejudice to the other party.[15]

In Seyden v. Frade, a case challenging a district court's denial of a party's motion to amend a judgment, this court noted:

> The general rule of this court is that when the evidence is conflicting and there is substantial evidence to sustain the judgment it will not be

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[11]Nelson, 41 Nev. at 78, 167 P. at 692.

[12]Id. at 82-83, 167 P. at 694 (but noting that appropriate grounds for such relief was "a judgment unjustly, improperly, or fraudulently entered;" and suggesting an important consideration was whether such relief would prejudice the other party).

[13]Id. at 84, 167 P. at 695.

[14]Id. at 83, 167 P. at 694 (citing Black on Judgments, §§ 297, 303, 321, 322).

[15]Id. at 81, 167 P. at 693-94.

> disturbed. But there is an exception to the general rule to the effect that where, upon all the evidence, it is clear that a wrong conclusion has been reached, the judgment will be reversed.[16]

The applicable standard of review here depends on how the order that Scott sought to amend or alter is characterized. If it was an order or judgment of the court, under Seyden, the standard should be whether the district court had substantial evidence on which to base its ruling. If, instead, the order that Scott sought to amend or alter is characterized as a stipulation, then the abuse of discretion standard from Nelson applies.

We conclude that although the original order here was based in large part on an agreement by the parties, it was a final order by the court at the time of Scott's motion, and the substantial evidence standard of review from Seyden applies.

Appellants contend that the original order was based on an express settlement agreement that cannot be altered without their consent. Appellants argue that they gave up valuable rights and interests, and that Scott's original agreement to pay the costs of the estate constituted consideration for the agreement to give up those rights. The appellants further claim that Scott was precluded and/or estopped from relitigating the issue so long after the original order was entered. Finally, the siblings contend their due process rights were violated by the granting of the motion without a full and fair opportunity to be heard and present evidence.

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[16]88 Nev. 174, 177, 494 P.2d 1281, 1283 (1972) (quoting Consolazio v. Summerfield, 54 Nev. 176, 179, 10 P.2d 629, 630 (1932)).

Scott argues the court had the discretion to modify the order under NRCP 52 and 59. Scott disputes his siblings' contentions that he was somehow precluded from moving to have the order amended, since it was the final order he sought amendment of, and he brought it up at the hearing on the final order settling accounting and distribution of the estate before bringing his motion under NRCP 52 and 59. Scott further contends that fairness dictated that the order be amended, citing a long list of "frivolous and vexatious challenges" by his siblings after the original agreement was made, serving to dramatically increase the costs of administration.

NRCP 52(b) states as follows:

> Upon a party's motion filed not later than 10 days after service of written notice of entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may later be questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

NRCP 59(a) states, in pertinent part, that "[o]n a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Two of the enumerated grounds for such a motion are NRCP 59(a)(3), "[a]ccident or surprise which ordinary prudence could not have guarded against," and NRCP 59(a)(4), "[n]ewly discovered evidence material for the party

making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial."

Finally, this court has held that "[a] district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous."[17]

We note that the original order, based on the agreement between the parties, was entered several years before the final order. However, it was that final order that was the subject of Scott's motion, and we conclude that Scott brought a valid, timely motion to amend or alter that order. Therefore, the appellants' claims of issue and claim preclusion, as well as estoppel, are not applicable here. We further conclude that the appellants' due process argument fails here, where both sides had a full opportunity to brief the issue for the district court.

There were substantial and significant increases in the costs of administration of the estate after the original agreement was signed, much of it brought about by the actions and legal machinations of the appellants. At the time the agreement was entered into it seemed clear that the intentions of both Scott and the estate were to wrap the estate up quickly; Scott relied upon the representations by counsel for the appellants that both sides would work towards a quick resolution of all remaining issues. We also note that at the time of the original agreement, Scott was not represented by counsel. Finally, Scott's legal expenses to that point were very low; the same could not be said at the time of the final order. Thus, by the time Scott brought his motion to alter or amend

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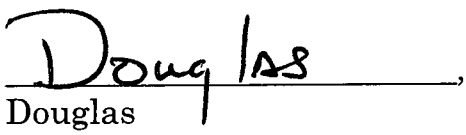
[17]Masonry and Tile v. Jolley, Urga & Wirth, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

the order, circumstances had changed substantially due to events that Scott was not in a position to reasonably anticipate at the time of the original order.

Although some amount of prejudice was visited upon the appellants by the district court's amended order, we conclude that there was substantial evidence to support the district court's decision to amend that order.

Accordingly, we ORDER the judgment of the district court AFFIRMED.



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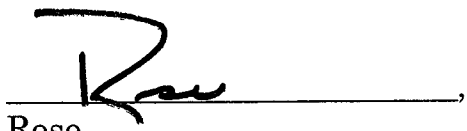
Douglas



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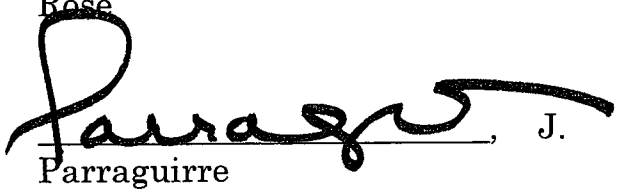
Rose



_____, J.
Parraguirre

cc: Hon. David A. Huff, District Judge
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