PROBATE
APPEALS FROM THE PROBATE COMMISSIONER AND DISTRICT COURT

BY BRADLEY J. RICHARDSON, ESQ.

The number of probate cases filed in Nevada has increased over the years and likely will continue to do so. At the same time, the scope of matters now under the jurisdiction of probate court has expanded, along with the types of decisions that are immediately appealable.

According to the Nevada Judiciary Annual Reports, Nevada has had a statewide increase in probate filings of approximately 28 percent during the last 10 years. As Nevada has marketed itself as a desirable retirement environment, it is natural that probates will increase. The latest U.S. Census Bureau estimates that the percentage of people aged 65 and older in Nevada grew by 9 percent between 2010 and 2012. Even though there has been an increase in the use of probate avoidance devices (such as living trusts) there is still plenty of litigation over trust formation and administration.

After passage of NRS 148.410 in 1999, probate court has greater jurisdiction.[1] In 2009, NRS 30.040 et seq. (Uniform Declaratory Judgments Act) was amended to apply to Title 12 and 13 actions. A close examination of these amendments reveals extensive issues in probate, trust and guardianship proceedings that may now be subject matter of declaratory relief. Further, there may be the possibility of jury trials for probate issues not previously tried with a jury.

There are occasions when a probate court may have to decide issues involving divorce matters where one of the spouses or ex-spouses is deceased, with property division or support issues still pending. In addition, a probate court may be a de facto business court when deciding matters involving large corporations, contracts, and creditor and shareholder disputes involving assets for which the court has assumed in rem jurisdiction.

District court judges decide all of the forgoing listed matters whether or not they were brought in a domestic, business or probate proceeding. However, in the second and eighth districts, these matters go to the probate judges and commissioners (sitting as masters).

The increasing number of contested probate cases (with their attendant discovery disputes) has put a strain on the dedicated probate judges, commissioners and their staffs. It is time to consider mandatory Alternative Dispute Resolution (ADR) and screening of contested probate matters in an attempt to reduce this burden.

The danger of assuming probate court is a court of limited jurisdiction

The types of matters decided in probate court, including trust matters, are extensive. Be aware that NRS 164.040 states that NRS 164.010 and 164.015 do not limit or abridge the power or jurisdiction of the district court over trusts and trustees. Caution is advised, otherwise issue preclusion may prevent litigating a matter in district court.[2]

Making a record

To improve your chances on appeal, a complete record is critical. Therefore, in a contested matter, consider requesting an evidentiary hearing with standard discovery, including depositions. If you are content to have a matter decided on the probate law and motion calendar, be certain to include declarations and affidavits that cover every detail of each element of the cause of action upon which you are seeking relief. Many appeals fail because the required elements of a cause of action were never established in the court below.

Before an evidentiary hearing is held on a contested matter, consider ADR or mediation, which will help narrow the issues, facilitate settlement, save families money and clear the probate calendars. Unfortunately, there are no mandatory prehearing settlement requirements in probate court. While local rules such as Eighth Judicial District Court Rule 2.51 authorize district courts to mandate parties to participate in settlement conferences, similar authority is, as yet, lacking for matters pending before probate commissioners. Such a mechanism would likely alleviate some of the additional burden on the probate courts.

Are the rules of civil and appellate procedure applicable to probate court?

NRS 155.180 states (1) that except as otherwise provided in Chapter 155, all the provisions of law and the Nevada Rules of Civil Procedure (NRCP) regulating proceedings in civil cases apply in matters of probate, when appropriate, or may be applied as auxiliary to the provisions of this title and (2) NRAP regulate appeals taken pursuant to NRS 155.180.

What statutes govern the time to appeal?

NRS 155.190 states the time for appeal for an appealable order is 30 days after notice of entry of an order.

NRS 137.140 states an appeal from a final order determining the contest of a will is governed by NRAP, and the notice of appeal must be filed with the clerk of the district court not later than 30 days after the date of service of written notice of entry of a final order. A party may make any motion after the determination that is provided by the NRCP.

What matters may be immediately appealed in a probate proceeding?

It is generally understood in civil proceedings that an appeal will not be required until there is a final judgment on specified matters. In probate, administration of trusts or estates may take months or years to complete. At various points in the probate process, certain decisions must be appealed or waived. *See* NRS 155.190, in particular subparagraph (n) which allows for an appeal of any decision when the amount in controversy exceeds (exclusive of costs) $10,000.[3]

In general civil practice, appeals from final judgments and orders of a district court are governed by NRAP 3A which permits appeals from: orders granting or denying a motion for a new trial; granting, or refusing to grant an injunction or dissolving, or refusing to dissolve an injunction; appointing, or refusing to appoint a receiver or vacating, or refusing to vacate an order appointing a receiver; dissolving, or refusing to dissolve an attachment; changing, or refusing to change the place of trial.[4]

Petitions for Writs

Just as in any civil proceeding, the grounds for issuance of writs of prohibition or mandamus are limited in probate proceedings.[5]

Appeal of a probate commissioner's decision

Unless the parties agree to the entry of an Order by the Probate Commissioner, a report and recommendation will be prepared. A review of this report and recommendation is governed by Rule 57 of the Second Judicial District Court rules and NRCP 53 for the eighth district. If an objection is timely filed, the matter will *automatically* be set by the second judicial court for a hearing before the probate judge. In the Eighth Judicial District Court, if an objection is timely filed, it will still be necessary for the objector to file a separate motion for hearing on the objection. Otherwise, the matter may sit in limbo, with no order entered, because no hearing took place on the objection.

To improve your chances on appeal, a complete record is critical.

In the second and eighth districts, it appears that an appeal to the Supreme Court from a probate judge's order of affirmance of a report and recommendation (or any portion of it) is waived if one has not initially filed their objection to the report.[6]

continued on page 8

PROBATE APPEALS FROM THE PROBATE COMMISSIONER AND DISTRICT COURT

continued from page 7

What is the standard of review of a probate commissioner's decision and the standard of review of the probate judge, or of a jury's decision in a probate proceeding?

Decisions of district judges, including the designated probate judges, will not be overturned if they are supported by substantial evidence. A probate judge's ruling to overturn a probate commissioner's decision requires a determination that it was clearly erroneous based on substantial evidence.[7]

For probate commissioners, see NRCP 53 and SJDC Rule 57.3 where, except as to matters of law (which are reviewed de novo), the findings of fact and recommendation of the commissioner, will not be disturbed, unless they are clearly erroneous.

The review of statutes by the Nevada Supreme Court

The Nevada Supreme Court will often be called on to review statutes which can ameliorate decisions concerning apparently strict statutory language. Some decisions may surprise the contesting parties, but that is to be expected when statutes are reviewed.[8]

Rose Miller trust litigation

Certainly, the Rose Miller trust litigation is not typical of contested probate matters, but it does remind us of the complexity of our task. In that case, a challenge was made to a trust amendment executed by Rose Miller shortly before her death. The amendment was prepared by an attorney and executed in his office. The jurors concluded the circumstances were sufficient to invalidate the trust amendment. The Nevada Supreme Court, in an unpublished opinion, reviewed the trial evidence and reversed the decision of the jury. Subsequently, in *In re Estate and Living Trust of Rose Miller* 125 Nev. 550 (2009), the Supreme Court held that the primary beneficiary of decedent's estate plan, was entitled to reasonable attorney fees and costs incurred at trial court and appellate levels from their opponent, under NRS 17.115 and NRCP. 68(f).

Then in *Berkson v. Lepome* 245 P.3d 560 (2010), the Supreme Court said the statute providing a plaintiff (whose judgment was subsequently reversed on appeal) with a right to file a new action within one year after reversal, violated the separation of powers doctrine.

Acknowledgments

Thanks to Mark A. Solomon, Esq. and Alan D. Freer, Esq. of Solomon, Dwiggins & Freer, Ltd. for reviewing with this author the evolution of the probate and trust statutes. Mark is chair of the Probate and Trust Section of the State Bar of Nevada and past co-chair of the Legislative Committee of the Probate and Trust Section. Alan is chair of the State Bar of Nevada Standing Committee on Ethics and Professional Responsibility and secretary of the Legislative Committee of the Probate and Trust Section of the Nevada state bar.

Decisions of district judges, including the designated probate judges, will not be overturned if they are supported by substantial evidence.

Although Nevada has not yet formally adopted the Uniform Probate Code or the Uniform Trust Code, many of their provisions have been enacted. ■

1 The Nevada Supreme Court in *Ward v. Daniels*, 51 Nev. 125, 269 P. 913 (1928), ruled that the Nevada Legislature had not given jurisdiction to the probate court to try title to property. However, in 1999, the Nevada Legislature enacted NRS 148.410, which confirmed jurisdiction on the probate court to try title to property. This legislation seems to have greatly increased the number of contested matters.

2 *Moriarty v. Moriarty* 2013 WL 621922 is instructive. The Supreme Court stated that, while the appellant correctly pointed out that he was permitted to file an action outside of probate, NRS 143.060 (pertaining to the personal representative's right to sue or be sued) and NRS 143.070 (actions by a personal representative for conversion or trespass) all of the issues raised by appellant in the district court action had already been raised in the probate matter and, therefore, probate court was the proper proceeding for initially resolving these issues citing *Bergeron v. Loeb*, 100 Nev. 54, 58, 675 P.2d 397, 400 (1984).

3 In NRS 155.190 there is an extensive list of matters that must be immediately appealed after notice of entry of order.

4 See *Estate of Moriarty v. Barney* 2012 WL 4051842 – in an unpublished decision which held that the underlying probate matter was still open and that the attorney's lien judgment against the appellant was not a final judgment adjudicating all rights as to all parties in the probate matter citing NRAP 3A(b)(l). As an interlocutory judgment, it could not be independently appealed but could be challenged as part of an appeal from a final judgment entered in the probate matter. Also see *Hackbarth v. Estate of Davis* 2011 WL 1815519.

5 *Dickerson v. Eighth Judicial District* 82 Nev. 234 (1966). Since NRS 155.190(1) expressly authorizes an appeal from an order appointing an administrator of an estate, review of that order by extraordinary writ, in normal circumstances, would be precluded. See also *Wheble P.A. v. Eighth Judicial District Court* 2012 WL 3086258 (Unpublished Disposition).

6 *Estate of Hansen v. CCPA* 2008 WL 6113446 (Unpublished Disposition). Appellant failed to raise an issue in his district court response to the objection to the probate commissioner report and recommendation. The court held the issue was not properly brought before the court on appeal and that the district court could modify

continued on page 10

PROBATE APPEALS FROM THE PROBATE COMMISSIONER AND DISTRICT COURT continued from page 8

a report and recommendation under NRCP 53(e)(2). The court also held that, in ruling upon a report and recommendation, the district court should, "accept the findings of fact unless clearly erroneous." Citing NRCP 53(3)(2) and noting that the court had previously stated that the court should adopt a report unless "the findings are based upon material errors in the proceedings or a mistake in law; or are unsupported by any substantial evidence; or are against the clear weight of the evidence." Citing *Russell v. Thompson,* 96 Nev. 830, 834 n. 2, 619 P.2d 537, 539-40 n. 2 (1980).

7 *Hannam v. Brown* 114 Nev. 350 (1998). The Supreme Court stated that it has historically construed trusts in a manner effecting the apparent intent of the settlor and that the district court's determination of the settlor's intent was a finding of fact and would not be disturbed unless clearly erroneous (and not based on substantial evidence), citing *Gibellini*, 110 Nev. 1201, 885 P.2d 540. See also *Estate of Chong v. Chong* 111 Nev. 1404 (1995); *Beverly Enterprises v. Globe Land Corp*. 90 Nev. 363 (1974); *In re Estate of Prestie* 122 Nev. 807 (2006); *Edwards Indus. v. DTE/BTE*, *Inc.*, *In re Jane Tiffany Living Trust* 2001 124 Nev. 74 (2008); *In re Guardianship of Estate of Burrell* 2008 WL 6101969.

8 *Estate of Melton* 272 P.3d 668 (2012). Statute that includes testamentary instruments that merely limit an individual or class from inheriting in the definition of "will" abolishes the common law disinheritance rules, which otherwise would render a testator's disinheritance clause unenforceable when the testator is unsuccessful at affirmatively devising his or her estate. See also *Costello v. Casler* 254 P.3d 631 (2011); *Waldman v. Maini* 124 Nev. 1121 (2009); *In re Orpheus Trust v. Getty* 124 Nev. 170 (2008); *Estate of Thomas v. Costello* 116 Nev. 492 (2000); *Estate of Chong v. Chong* 111 Nev. 1404 (1995); *Estate of Friedman* 116 Nev. 682 (2000).

BRADLEY J. RICHARDSON is a shareholder with Gordon Silver. He chairs the firm's Estate Planning, Probate and Guardianship practice group and focuses his work on litigation related to these issues, as well as commercial litigation. He is a former prosecutor with the Clark County District Attorney's Office, past president of the Southern Nevada Estate Planning Council and is a member of the State Bar of Nevada Standing Committee on Ethics and Professional Responsibility. He can be reached at (702) 796-5555 or brichardson@gordonsilver.com.