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### In re Fraiser Family Trust, 136 Nev. Adv. Op. 56 (Aug. 27, 2020)

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## PROBATE LAW – CHALLENGING TESTAMENTARY CAPACITY

### **Summary**

NRS 164.101 requires when a beneficiary challenges a settlor's capacity to execute amendments to the trust, the district court must hold an evidentiary hearing, make factual findings, and fully resolve the issue regarding the settlor's capacity prior to approving the amendments to the trust.

### **Background**

John and Dinny Fraiser, husband and wife, and residents of California, had three children—Amy, Bradley, and Nori. John and Dinny, as co-trustees, created the Jordan Dana Frasier Family Trust (Family Trust). Upon John's death in 2014, Dinny appointed Premier Trust, Inc., a Nevada corporation, as co-trustee, and filed a petition to confirm this appointment. In March 2016, Dinny executed a second amendment to the Family Trust designating Amy as sole beneficiary and disinheriting her other children. Assuming jurisdiction under NRS 164.010, the district court ordered the parties to attend mediation.

In late 2016, Dinny retained Janie Mulrain to act as her power of attorney and personal fiduciary. At this time, Premier filed a petition for instruction on how to handle allegation from Dinny's children questioning her testamentary competency. A settlement agreement was reached at court-ordered mediation in June 2017, but required a capacity determination for Dinny by a qualified gerontologist and a Nevada Court approval in order to be effective. Dinny was examined by a gerontologist in February 2017 and was determined to have testamentary capacity limited to assisted help.

In April 2017, Dinny executed a third amendment to the Family Trust to enforce the settlement agreement. The district court subsequently ordered an evidentiary hearing where Amy expressed concern regarding her mother's mental capacity, but the Court disagreed and held the settlement agreement to be valid. In July 2017, Premier filed a supplemental petition for instruction on how to handle the allegations of Dinny's capacity in addition to expressing their own concern regarding her overall health. Amy joined their petition as well as expressing concerns that Dinny was being unduly influenced of Mulrain.

The district court ordered a capacity hearing to be held in October 2017, to fully resolve the issue of Dinny's testamentary competency, but neither Dinny nor an examining physician attended. No capacity determination was made. In October 2018, the court ordered a two-day evidentiary hearing to resolve all remaining issue regarding the trust. The court stated that they could not fully conclude that Dinny was incapacitated nor could they fully conclude that she was capacitated. The parties arranged for Dinny to be evaluated. The evaluation concluded that Dinny was not able to fully appreciate her decision and subsequent consequences. However, Dinny was determined to have testamentary capacity when assisted by trusted advisors.

Following, in November 2018, Dinny executed a fourth amendment and petitioned for both the third and fourth amendments to be confirmed. Amy objected, questioning Dinny's capacity, but the court denied the challenged and confirmed both amendments. Amy appealed

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<sup>1</sup> By Kristin Wilde.

the district court's confirmation of the third and fourth amendments as well as contested payments of fees granted to Mulrain.

### **Discussion**

The Court reviewed the district court's confirmation of the third and fourth amendments to the Family Trust de novo. NRS 164.015 sets forth the procedural requirements when the validity of a trust is being challenged. More specifically, NRS. 164.015(4) states that "the competency of the settlor . . . is a question of fact that must be tried by the court."<sup>2</sup> The Court concluded that the statutory language makes it clear that the district court must fully resolve questions of facts in court.

Here, Amy complained that the district court failed to do so throughout the proceedings, particularly when she challenged the execution of the third and fourth amendments, as there was no evidentiary hearing to resolve whether Dinny had the testamentary capacity to do so.

While the district court did acknowledge and note Amy's several objections to Dinny's lack of testamentary capacity in their court order confirming the third and fourth amendments, the question of fact was never fully resolved. The Court concluded that the NRS 164.015 procedural requirements set forth that following Amy's challenge to Dinny's testamentary capacity to execute the third and fourth amendment, the court was required to hold an evidentiary hearing, make factual finding, and fully resolve the question of fact at hand.

The Court also reviewed Amy's appeal to payment of fees granted to Mulrain. Pursuant to NRS 164.010, the district court assumed personal jurisdiction over Dinny regarding her capacity to administrate and amend her trust. The Court held that this jurisdiction did not govern authority to determine her capacity to enter into a power-of-attorney. Because Dinny, a California resident, entered into this relationship in California, no other personal jurisdiction was found. Moreover, Amy did not show that Mulrain's fees were unreasonable.

### **Conclusion**

The Court concluded that when a beneficiary challenges a settlor's capacity to execute amendments to the trust, the court must hold an evidentiary hearing, make factual findings, and fully resolve the issue regarding the settlor's capacity prior to approving the amendments to the trust pursuant to NRS 164.015. Because the district court failed to do this, the Court reversed the confirmation of the third and fourth amendments, and remanded in order for a compliance with NRS 164.015 procedural requirements to be meet.

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<sup>2</sup> NEV. REV. STAT. § 164.015(4).