

IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of the Estate of ) Case No: 63960  
LEROY G. BLACK, Deceased. )  
)  
)

APPEAL

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from the Eighth Judicial District, Clark County  
The Honorable GLORIA J. STURMAN, District Judge  
District Court Case No. P-12-074745-E

APPELLANT'S OPENING BRIEF

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## JURISDICTIONAL STATEMENT

The "*Order Granting Objection to Report and Recommendation*," (hereafter "August 2013 Order") which resolved all the claims of the parties regarding Appellant's will contest, was entered on August 1, 2013 (FINK000162-166), and written notice was served on August 2, 2013 (FINK000160-165). Appellant, William Fink (hereinafter "Appellant" or "Fink") filed his "*Contestant's Notice of Appeal*" on August 29, 2013 which was within 30 days from entry of the August 2013 Order and timely under NRAP 4(a)(1).

The basis for this Court's jurisdiction as to the August 2013 Order is set forth in several sections of NRS 155.190 as well as NRAP 3A.

Jurisdiction is proper pursuant to NRS 155.190 because the August 2013 Order, by denying the will contest: (1) makes a final determination as to "heirship or the persons to whom distribution must be made or trust property must pass" *See* NRS 155.190(1)(k); (2) makes a "decision wherein the amount in controversy equals or exceeds, exclusive of costs, \$10,000" *See* NRS 155.190(1)(n); and (3) "Refus[es] to make any order mentioned in this section" *See* NRS 155.190(1)(m) *cf.* NRS 155.190(1)(a)(An order which refuses to "Grant[] or revok[e] letters testamentary or letters of administration.") and finally NRS

1 155.190(1)(b)(An order which "Admit[s] a will to probate or revok[es]  
2 the probate thereof.").

3  
4 Jurisdiction is proper under NRAP 3A(b)(1) because, by denying  
5 Fink a will contest, the August 2013 Order makes a final determination  
6 as to the Estate (although not as to the Trust, which is an entirely  
7 separate legal entity).

8  
9 **APPELLANT'S OPENING BRIEF**

10 **ISSUES PRESENTED**

11 The principal issue presented in this appeal is whether the  
12 District Court erred in dismissing the Appellant's will contest based  
13 upon the timing of the issuance of the citations under NRS 137.090.

14  
15 More specifically, the issues presented on appeal are as follows:

- 16 1. Whether the untimely issuance of citations under NRS  
17 137.090 is a time bar to a will contest.
- 18 2. Whether, pursuant to NRS 155.180 and/or EDCR 2.25, the  
19 time to issue citations in NRS 137.090 may be enlarged (at  
20 the Court's discretion) pursuant to NRCP 6(b).
- 21 3. Whether refusing to grant a will contest for untimely  
22 citations is in contravention of this Court's longstanding  
23 policy to adjudicate disputes on their merits.  
24  
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STATEMENT OF THE CASE

This is an appeal from an Order Granting Objection to Report and Recommendation (i.e., the "August 2013 Order"), in the Eighth Judicial District Court, THE HONORABLE GLORIA J. STURMAN, District Judge. FINK000156-9.

The central question of this appeal is whether the District Court erred in denying Appellant a will contest for untimely issuing citations under NRS 137.090 even though the petition to initiate the will contest under NRS 137.080 was timely issued.

Leroy G. Black (hereinafter "Black") died on or about April 4, 2012. FINK000016. On July 18, 2012, the Respondent, Phil Markowitz (hereinafter "Respondent" or "Phil"), filed a petition for the probate of a will and for the appointment of a personal representative (the "Probate Petition"). FINK000025-33. An order granting the Probate Petition was entered on August 31, 2012. FINK000039-40.

On November 27, 2012, Appellant , through Douglas Gardner, Esq., his attorney at the time, filed his Objection to the Admission of the Last Will and Testament of LeRoy G. Black, for the Revocation of Letters Testamentary and for Appointment of Special Administrator Pending Conclusion of Will Contest FINK000046-FINK000056 (hereinafter the "Will Contest") However, Gardner was mistaken in his



1 reading of NRS 137.090, the statute governing citations, which caused  
2 him to fail to timely issue citations. FINK000074. Upon discovery of the  
3 mistake, citations were issued immediately on January 7, 2013.  
4  
5 FINK000063; FINK000074-75.

6 The Appellant then filed a "Petition to Enlarge Time Pursuant to  
7 NRCP 6(b)" (hereafter "Petition to Enlarge") seeking leave of the Court  
8 to enlarge time to issue the citations under NRCP 6(b). FINK000066-  
9  
10 75. On February 8, 2013, Probate Commissioner Wesley Yamashita  
11 recommended granting Appellant's Petition to Enlarge, finding: (1) that  
12 the Appellant "timely objected to the validity of the will"  
13 FINK000126:27-8; (2) excusable neglect, FINK000127:5; (3) that the  
14 Appellant "acted in good faith" FINK000127:11; (4) that the Appellant  
15 "exercised due diligence," FINK000127:20; (5) that the Respondent  
16 would "suffer no prejudice" from enlarging time, FINK000128:5; and  
17 (6) that enlargement was consistent with deciding matters on the  
18 merits, FINK000128:13-14.  
19  
20

21 Respondent objected to Commissioner Yamashita's Report and  
22 Recommendation. FINK000140-45. Judge Sturman granted the  
23 Respondent's objection in the form of the August 2013 Order, finding  
24 that, pursuant to NRS 137.090, "Fink is time-barred by the statute of  
25 limitations to pursue a will contest of the March 7, 2012, will..." ("Order  
26

1 Granting Objection to Report and Recommendation, August 1, 2013,"  
2  
3 hereafter "August 2013 Order," FINK000158:21-22). Appellant Fink  
4 now appeals the August 2013 Order.  
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## STATEMENT OF THE FACTS

Black died on or about April 4, 2012 of a self-inflicted gunshot wound to the head. FINK000016. Respondent) filed his Probate Petition to probate the a will dated March 7, 2012 (hereafter the "March 2012 Will", FINK000007) and for the appointment of a personal representative. FINK000025. The March 2012 Will was purportedly executed just three weeks prior to Black's suicide under extremely suspect circumstances, as described in more detail below.

FINK000149:7.

The March 2012 Will purports to give 75% of Black's estate to Phil and 25% to Rose E. Markowitz (hereafter "Rose"), Phil's mother.

FINK000007. The March 2012 Will is not notarized, and, strangely, was purportedly executed in Las Vegas, Nevada, where Black resided, but was purportedly witnessed by David Everston of Studio City, California and Maria Onofre of Woodland Hills, California.

FINK000011 To date, Phil has never explained how the March 2012 Will came into existence.

### **I. Phil is Appointed Personal Representative and the March 2012 Will is Admitted to Probate**

Phil was appointed Special Administrator of the Estate on June 29, 2012. FINK000021-2. Later, on July 18, 2012, Phil filed the Probate

1 Petition. FINK000025-34. The District Court admitted the March 2012  
2 Will to probate and appointed Phil as Personal Representative of the  
3 Estate on August 31, 2012. FINK000039-40. Letters Testamentary  
4 were issued to Phil on September 13, 2012. FINK000045.

## 6 **II. Fink timely files his Will Contest**

7 On November 27, 2012, Fink met with his attorney at the time,  
8 Douglas J. Gardner, Esq. (hereafter "Gardner") and Gardner's  
9 paralegal, Tassy Wolfe (hereafter "Wolfe"), to discuss the possibility of  
10 objecting to the admission of the March 2012 Will to probate.  
11 FINK000073:26-27. Gardner informed Fink that an objection to the  
12 admission of the March 2012 Will had to be filed by November 30, 2012.  
13 FINK000074:1-3. Later the same day, Fink contacted Gardner and  
14 instructed him to file the Will Contest. FINK000074:6-7.

15 That same day, November 27, 2012, Appellant filed the Will  
16 Contest alleging, "that the [March 2012 Will] was obtained through  
17 fraud and undue influence as will be proved at the time of the trial of  
18 this matter." FINK000046:27-28; FINK000074:8-11. A Notice of  
19 Hearing was filed and mailed to all interested parties, including Phil.  
20 FINK000049-56.

21 In his Will Contest, Fink also maintained that Black "lacked the  
22 requisite testamentary capacity at the time it is alleged that [the March  
23  
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2012 Will] was executed." FINK000047:1-2. The period of time to contest the will expired three days later on November 30, 2012.

FINK000067:8-9. Thus, Fink timely filed his Will Contest, a fact that is not in dispute in this matter.

Additionally, Fink sought to remove Phil as Personal Representative because:

Phillip I. Markowitz has filed a false and fraudulent insurance claim for personal property removed from decedent's residence at 1600 Becke Circle, Las Vegas, NV. Said property is owned by the LeRoy G. Black 1992 Living Trust of which Contestant is the beneficiary and trustee. Said property is not subject to this probate. Mr. Markowitz has no authority whatsoever to file any claim on behalf of the trust.

In his Will Contest, Fink also requested appointment of Barbara Stewart as Special Administrator of the Estate. FINK000047. The Will Contest also declared that Fink was "in the process of issuing a Citation to all heirs of the decedent pursuant to the provisions of NRS 137.090." FINK000048:1-2.

### III. Suspicious Circumstances Under Which the March 2012 Will Was Purportedly Executed

The above referenced property (1600 Becke Circle) was owned by the Leroy G. Black 1992 Living Trust (hereafter "Black Trust" or "Trust") created on August 21, 1992 by Black and restated by Black on October 27, 2009. FINK000066:23-28. As a part of the estate planning

1 associated with the Black Trust, a pour over will was executed. Fink is  
2 the beneficiary and trustee of the Black Trust. FINK000047:9-10. The  
3 March 2012 Will submitted for probate by Phil did not reference or  
4 specifically revoke his prior executed pour over will or the Black Trust.  
5 FINK000007.

6  
7 In addition to the insurance claims improperly asserted by Phil as  
8 representative of the estate (referenced above), Phil also contacted the  
9 lessees of commercial property owned by the Trust and demanded that  
10 rent payments be made and delivered directly to him. FINK000047:14-  
11 20. These facts strongly suggest that the March 2012 Will is a forgery  
12 perpetrated by someone completely unfamiliar with Black and/or his  
13 estate planning as these particular pieces of property were Trust, not  
14 Estate, assets. FINK000047:3-13.

15  
16 In support of the Petition to Enlarge, Fink provided the District  
17 Court an expert report from handwriting expert Antonia Kledkoda-  
18 Baker C.F.D.E. FINK000101-16. Upon examining the March 2012 Will  
19 and known examples of Black's signature, Ms. Kledkoda-Baker  
20 concluded that, "Leroy G. Black did not perform his own Signature on  
21 the document identified as the Last Will of Leroy G. Black."  
22 FINK000103. The expert opinion that the March 2012 Will is a forgery  
23 is consistent with the fact that the author of the March 2012 Will was  
24  
25  
26

1 completely unfamiliar with the estate planning that Black had  
2 previously put in place.

3  
4 To this day, Phil has never explained who drafted the March  
5 2012 Will or how it came into being.

#### 6 IV. Phil's Opposition to Fink's Will Contest

7  
8 On January 3, 2013, Phil filed an Opposition to Fink's Will  
9 Contest. FINK000057-62. Phil argued that because Fink had not issued  
10 Citations within three months of the admission of the March 2012 Will  
11 to probate, that Fink had not timely objected to the March 2012 Will,  
12 even though Fink filed his Objection to the March 2012 Will on  
13 November 27, 2012. "Markowitz requests that the Court dismiss Fink's  
14 Objection and the purported will contest because of Fink's failure to  
15 comply with the strict statutory requirements of NRS 137.080 and  
16 137.090." FINK000058:21-22.

#### 17 V. Fink Issues the Citations

18  
19 Phil's counsel called Fink's new counsel, Richard Koch, and  
20 informed him "of the failure to issue the Citation[s] timely."  
21 FINK000075:3-4. Wolfe, who works as an independent paralegal for  
22 both Gardner and Koch, was instructed to immediately issue the  
23 Citations, which Wolfe did the next day. FINK000075:4-8. Fink issued  
24 a "Citation to Plea to Contest" to Phil on January 7, 2013. FINK000063.  
25  
26

On November 27, 2012 when Fink's counsel filed the objection to the March 2012 Will, they believed that only the petition had to be filed within the 3 month period to initiate a will contest:

Based upon [Fink's counsel's] inexperience, they did not notice NRS 137.090 which requires the Citation to be issued at the same time as the contest is filed. Based upon their prior experience, they proceeded as in a contest before probate and did not issue the Citation before the end of the three-month contest period.

Gardner's paralegal testified that she and Gardner, "had never been involved in an after-probate will contest but had worked together on several before-probate will contests." FINK000074:13-15. "After reading NRS 137.100 where, we believed, it stated that all proceedings in an after-probate contest were to be handled in the same manner as in a before-probate contest, we anticipated issuing the Citation in the same manner involved in other actions in which we had been involved." FINK000074:13-25.

**VI. Pursuant to NRCP 6(b) Fink's Petition to Enlarge Time to Issue the Citation is Granted by the Discovery Commissioner But Later Overturned by the Probate Judge**

Fink filed a Petition to Enlarge Time Pursuant to NRCP 6(b) (hereafter "Petition to Enlarge") on January 23, 2013. NRCP 6(b) provides that the District Court, "for cause shown may at any time in its discretion...upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result



1 of excusable neglect." Commissioner Yamashita granted Fink's Petition  
2 to Enlarge time but his recommendation was later overturned by Judge  
3 Sturman. In opposition to Fink's Petition to Enlarge Time, Phil argued  
4 that, "NRCP 6(b) does not apply and cannot be applied to enlarge the  
5 statute of limitations set forth in NRS 137.080-090. The plain language  
6 of NRCP 6(b) makes clear that the ability to enlarge time under Rule 6  
7 applies only to an act required by the Nevada Rules of Civil Procedure,  
8 not to acts required by the Nevada Revised Statutes." FINK000079:17-  
9 21. The District Court was persuaded by this argument, and, as noted  
10 below, this argument is a mis-statement of the law.

11 The Petition to Enlarge time was heard before Probate  
12 Commissioner on February 8, 2013. Commissioner Yamashita found  
13 that:

14 The period of limitation described in NRS 137.120 is only  
15 applicable to the filing of the will contest, and not to the issuance  
16 of the citation. NRS 137.120 provides as follows:

17 If no person *contests the validity of a will or of the probate*  
18 *thereof* within the time specified in NRS 137.080, the probate  
19 of the will is conclusive.

20 (Emphasis added.) The issuance of citations is handled in a  
21 separate statute, i.e., NRS 137.090. The period of limitation is  
22 only in reference to the filing of the will contest which is described  
23 in NRS 137.080 as follows:

24 After a will has been admitted to probate, any interested  
25 person ... at any time within 3 months after the order is  
26

entered admitting the will to probate, contest the admission or the validity of the will. The contestant must file with the court in which the will was proved a petition containing the allegations of the contestant against the validity of the will or against the sufficiency of the proof, and requesting that the probate be revoked.

(Emphasis added.) While the issuance of citations is not subject to the period of limitation of NRS137.120, NRS 137.090 requires the issuance of citations within three months of the admission of the will to probate. However, the extension of the time for the issuance of citations under NRS 137.090 may be extended based on the Court's discretion under NRCP 6(b) and EDCR 2.25.

There is no Nevada case law on point for this issue. Nevada courts have often looked to California case law where the statutes at issue are similar to those in Nevada. *See e.g., John v. Douglas County School Dist.*, 125 Nev . 746, 756, 219 P.3d 1276, 1283 (2009) ("we consider California case law because California's ... statute is similar in purpose and language to Nevada's ...statute.") With regard to will contests and the issuance of citations, California courts have provided as follows:

The jurisdiction of the court to entertain a proceeding for the revocation of the will does not depend upon the issuance and service of a citation within a year after the probate of the will. Jurisdiction of the court attaches on the filing of the petition inaugurating the contest. The office of the citation is only that of a summons-to give the court jurisdiction of the parties who would be affected by its revocation. *It is not essential to the jurisdiction of the court that the citation be issued and served within a year.* The only penalty for failure to have it issued within that time is that the court may dismiss the contest. *And even where there has been a failure to have it issued within the year the court may nevertheless relieve a contestant for his failure to do so and thereupon order a citation issued and served.*

*In re Logan's Estate*, 171 Cal. 357, 362-63, 153 P. 388, 390 (1915) (emphasis added). *See also In re Simmons' Estate*, 168 Cal. 390, 395, 143 P. 697 (1914) ("we think it must be held that the court

has power ... to relieve a contestant, whose petition for revocation, duly filed, has not been dismissed, from the failure to have citation issued and served within the year."); *In re Withenbury's Estate*, 188 Cal. 109, 110-11, 204 P. 385, 385 (1922) ("The issuance of the citation is not jurisdictional, and the trial court had the power to relieve the petitioner from the failure to issue such citation within a year ... ") The statute at issue in these cases is substantially similar to, and in certain respects identical to NRS 137 .080 in both purpose and language. The Court finds that the California cases are persuasive of the issue of whether the three month requirement of the issuance of citations is mandatory or permissive. Accordingly, the Court finds that the three month period for issuance of the citations is not mandatory and may be extended in the Court's discretion and pursuant to NRCP 6 and EDCR 2.25.

FINK000134:16-135:26. The Commissioner went on to find "excusable neglect" within the meaning of EDCR 2.25, NRCP 6(b) and *Moseley v. Eighth Judicial Dist. Court ex rel. County of Clark*, 124 Nev. 654, 557-68, 188 P.3d 1136, 1146 (2008), finding that Fink, "acted in good faith, exercised due diligence, had a reasonable basis for not complying with the specified time, and that the non-moving party will not suffer prejudice." FINK000136:8-10. Ultimately, the Commissioner recommended "that Contestant's Petition to Enlarge Time Pursuant to NRCP 6(b) be granted." FINK000138:5-6.

Phil objected to the Commissioners Report and Recommendation, incorrectly arguing that, "despite the fact that NRS 137.090 clearly states that the action of issuing a citation 'must' be accomplished within

1 the three month period set forth in NRS 137.080, Commissioner  
2 Yamashita recommends that the mandatory language in NRS 137.090  
3 should be read as permissive language." FINK000141:4-8. Phil also  
4 incorrectly maintained that, "NRCP 6(b) is not applicable to statutes of  
5 limitation set forth in the Nevada Revised Statutes;" FINK000144:7-8.  
6

7 The District Court heard Phil's Objection on July 9, 2013.

8 FINK000156. The District Court granted the Objection, rejecting  
9 Commissioner Yamashita's recommendation, and held that,  
10

11 Because Fink failed to cause a citation to be issued within three  
12 months of August 31, 2012, Fink is time-barred by the statute of  
13 limitations to pursue a will contest of the March 7, 2012, will.  
14 Pursuant to NRS 137.120, the probate of Decedent's March 7,  
15 2012 will is conclusive.

16 FINK000158:16-20. Additionally, the District Court held, as a matter  
17 of law, that, "Rule 6 of the Nevada Rules of Civil Procedure is not  
18 applicable to enlarge the time to issue the citation required by NRS  
19 137.090." FINK000158:25-26. Furthermore, "Fink's purported will  
20 contest of the admission of Decedent's March 7, 2012 will to probate is  
21 time-barred by his failure to comply with the requirements of  
22 NRS 137.090 and is, therefore, dismissed. The probate of Decedent's  
23 March 7, 2012 will is conclusive." FINK000159:7-9. Emphasis added.  
24

25 At the hearing, in denying the Petition to Extend, and rejecting  
26 Commissioner Yamashita's recommendation, the District Court

1 incorrectly found that, "[t]he citations weren't even issued as far as I  
2 can tell." FINK000664:23. In fact, as noted above, the citation was  
3 issued January 7, 2013. FINK000063; FINK000074-75. The District  
4 Court also found that the only means by which time could be extended  
5 to issue the citations was extrinsic fraud: "... absent the kind of  
6 extrinsic fraud that we see in *Fullerton v. Rogers* [101 Nev. 306 (Nev.  
7 1985)], it's a statute of limitations. It's got to be strictly complied with.  
8 Must, is a mandatory term, not a permissive term." FINK000664:16-18.

11 Fink then timely filed his Notice of Appeal, which initiated this  
12 matter before this Court.

### 13 APPLICABLE STANDARD OF REVIEW

15 This matter involves the interpretation of several statutes, in  
16 particular, NRS 137.080, NRS 137.090, EDCR 2.25 and NRCP 6(b).  
17 "The construction of a statute is a question of law." *Moody v. Manny's*  
18 *Auto Repair*, 110 Nev. 320, 325 (Nev. 1994). "Statutory interpretation is  
19 a question of law reviewed de novo." *Constr. Indus. Workers' Comp.*  
20 *Group v. Chalue*, 119 Nev. 348, 351 (Nev. 2003)

22 The effect of cumulative error is discussed, *infra*.

ARGUMENT**VII. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE LANGUAGE IN NRS 137.090 BARS A WILL CONTEST UPON THE UNTIMELY ISSUANCE OF CITATIONS**

The District Court erred when it concluded that NRS 137.090 requires citations to be issued within three months of the will being admitted to probate as a requirement to proceed with a will contest.

- a. The plain meaning canon of statutory construction support's Fink's position that the District Court erred in concluding that NRS 137.080, NRS 137.090 and NRS 137.120 require the issuance of citations within the three month window in order to initiate a will contest.

NRS 137.080 sets forth the steps required for a party to initiate a will contest, while NRS 137.090 sets forth the procedure for issuing citations.

NRS 137.080 requires that, "within 3 months after the order is entered admitting the will to probate" the contestant must file "a petition containing the allegations of the contestant against the validity of the will or against the sufficiency of the proof, and requesting that the probate be revoked."

NRS 137.090 addresses the issuance of citations:

Upon filing the petition, and within the time allowed for filing the petition, a citation must be issued, directed to the personal representative and to all the devisees mentioned in the will, and

1 the heirs, so far as known to the petitioner, including minors and  
2 incapacitated persons, or the personal representative of any such  
3 person who is dead, directing them to plead to the contest within  
4 30 days after service of the citation.

5 Additionally, NRS 137.120 provides that, "[i]f no person contests  
6 the validity of a will or of the probate thereof, within the time specified  
7 in NRS 137.080, the probate of the will is conclusive." Thus, to timely  
8 initiate a will contest, the Contestant must comply with NRS 137.080  
9 by filing a will contest within 90 days, which there is no dispute that  
10 Fink did in this matter.

11 "If a statute is clear and unambiguous, we will apply its plain  
12 meaning." *Aspen Fin. Servs. v. Eighth Judicial Dist. Court of State*, 313  
13 P.3d 875, 878 (Nev. 2013).

14 In denying Fink's petition to initiate a will contest, the District  
15 Court relied upon NRS 137.090, interpreting that statute to require  
16 citations to issue within the three month period **as a prerequisite to**  
17 **qualifying for a will contest**. "Fink's purported will contest of the  
18 admission of Decedent's March 7, 2012, will to probate is time-barred by  
19 his failure to comply with the requirements of NRS 137.090 and is,  
20 therefore, dismissed." FINK000165:7-9. However, **the only explicit**  
21 **requirement in NRS 137.080, the statute that governs the**  
22 **requirements to initiate a will contest, is that the objector**  
23  
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1 timely file a petition within the 3 month period, which Fink did  
2  
3 in this matter. Additionally, as noted above, the actual statute of  
4 limitations, NRS 137.120, references only NRS 137.080 and not NRS  
5 137.090. NRS 137.080, and NRS 137.120, the statutes specifically  
6 governing the timing of filing a will contest do not require  
7 citations to be issued in order to preserve the statute. In fact,  
8  
9 those statutes do not even reference citations at all! To read such a  
10 requirement into NRS 137.080, and NRS 137.120 is to avoid the plain  
11 meaning of the statutes.

12 While NRS 137.090 does require the issuance of a citation "within  
13 the time allowed for filing the petition," it does not specify any  
14 particular punishment or remedy for the failure to do so, nor does that  
15 statute dictate that the failure to timely issue the citation act as an  
16 absolute bar to bringing a will contest. On the other hand NRS 137.120  
17 does prescribe a bar to a will contest explicitly requiring adherence to  
18 NRS 137.080 only.  
19  
20

- 21 b. The canon of statutory construction, *expressio unius est*  
22 *exclusio alterius*, supports Fink's position that the District  
23 Court erred in concluding that NRS 137.080, NRS 137.090  
24 and NRS 137.120 require the issuance of citations within  
25 the three month window in order to initiate a will  
26 contest.



This Court has many times affirmed the canon of statutory construction "*expressio unius est exclusio alterius*" which literally means, "the expression of one thing is the exclusion of another..." *Galloway v. Truesdell*, 83 Nev. 13, 26 (Nev. 1967). "The mention of one thing or person is in law an exclusion of all other things or persons." *Virginia & T. R.R. v. Elliott*, 5 Nev. 358, 364 (Nev. 1870). This Court has explained this canon as:

...a well-recognized rule of statutory construction and one based upon the very soundest of reasoning; for it is fair to assume that, when the legislature enumerates certain instances in which an act or thing may be done, or when certain privileges may be enjoyed, it names all that it contemplates; otherwise what is the necessity of specifying any?

*Ex parte Arascada*, 44 Nev. 30, 35 (Nev. 1920). Time and again, this Court has interpreted statutes using this canon, finding that the inclusion of one type of thing is to the exclusion of all others. *In re Bailey's Estate*, 31 Nev. 377, 381 (Nev. 1909) (using *expressio unius est exclusio alterius* to interpret a statute enumerating the requirements for Letters Testamentary, which did not include a requirement that the petitioner be a resident of Nevada); *Ex parte Arascada*, 44 Nev. 30, 34-35 (Nev. 1920) (using *expressio unius est exclusio alterius* to interpret statute listing matters which district courts have jurisdiction, which list did not include misdemeanors); *O'Callaghan v. Eighth Judicial Dist.*

1 Court, 89 Nev. 33, 35 (Nev. 1973)("By expressly designating the areas to  
2 which NRS 463.315 shall apply, the legislature, by implication,  
3 excluded other areas therefrom."); *Arrington v. Wittenberg*, 11 Nev. 285,  
4 287 (Nev. 1876) ("If the legislature had intended that mechanics' or  
5 other liens should be governed, in this respect, by the same rule as  
6 mortgages, it would have been so stated.")  
7

8  
9 Here, the Legislature designated the requirements for initiating a  
10 will contest in NRS 137.080. The only requirement to initiate a will  
11 contest is that the objector, within 3 months, "must file with the court  
12 in which the will was proved a petition containing the allegations of the  
13 contestant against the validity of the will or against the sufficiency of  
14 the proof, and requesting that the probate be revoked." If the  
15 Legislature had intended to require citations to be issued within 3  
16 months as a prerequisite to initiating a will contest, that requirement  
17 would have been included in NRS 137.080 and NRS 137.120. It was not.  
18 The Legislature made no such requirement and the District Court was  
19 in error in reading such a requirement into the statute.  
20  
21

22 NRS 137.090, which governs the issuance of citations, indicates  
23 that, "[u]pon filing the petition, and within the time allowed for filing  
24 the petition, a citation must be issued..." However, NRS 137.090 does  
25  
26

not indicate that failure to timely issue the citations is a pre-requisite to initiating a will contest.

**VIII. THE DISTRICT COURT ERRED IN RULING THAT TIME TO ISSUE CITATIONS IN NRS 137.090 CANNOT BE ENLARGED BY NRCP 6(B).**

The District Court erred in concluding that it had no discretion to enlarge time under NRS 137.090 pursuant to NRCP 6(b).

At the July 9, 2013 hearing, the District Court interpreted the "must" requirement in NRS 137.090 as follows:

It's got to be strictly complied with. Must, is a mandatory term, not a permissive term. And unlike the Rules of Civil Procedure on service of process where you can, you know, you have the cases that tell us what the factors are that you can apply and get your time extended for service of a summons and complaint.

FINK000664:17-21. As discussed below, the District Court was incorrect in its ruling that the Rules of Civil Procedure, including Rule 6(b), do not apply to probate matters, including NRS 137.090.

**a. NRS 155.180 directs that the Nevada Rules of Civil Procedure, and thus Rule 6(b), apply to all probate proceedings, including the instant matter**

The District Court erred when it concluded in the Order Granting Objection that, "Rule 6 of the Nevada Rules of Civil Procedure is not applicable to enlarge the time to issue the citation required by NRS 137.090." FINK000158:25-26. The Court made this ruling in error following Phil's argument that, "[t]he plain language of NRCP 6(b)

1 makes clear that the ability to enlarge time under Rule 6 applies only to  
2 an act required by the Nevada Rules of Civil Procedure, not to acts  
3 required by the Nevada Revised Statutes." FINK000079:19-21.  
4

5 In fact, the entirety of the Nevada Rules of Civil Procedure,  
6 including Rule 6(b), have been incorporated into probate proceedings.  
7 Fink argued as much in the hearing on Phil's Objection in front of the  
8 District Court; Fink argued that "the rules of civil procedure apply to  
9 Title 12 cases which are will contest issues. And that those same rules  
10 apply which provide the Court with discretion, to decide that a matter  
11 can be tolled or an extension can be given due to excusable neglect of a  
12 party." FINK000660:17-23.  
13  
14

15 NRS 155.180 provides that, "all the provisions of law and the  
16 Nevada Rules of Civil Procedure regulating proceedings in civil  
17 cases apply in matters of probate..." Emphasis added. Thus, Rule 6 is  
18 applicable to enlarge time under NRS 137.090. Additionally, just as  
19 Rule 6(b) allows for time to be enlarged for "excusable neglect," so too  
20 does EDCR 2.25, a local rule which also clearly does apply to probate  
21 proceedings in the Eighth Judicial District ("A request for extension  
22 made after the expiration of the specified period shall not be granted  
23 unless the moving party, attorney or other person demonstrates that  
24 the failure to act was the result of excusable neglect.")  
25  
26

Under the plain meaning of NRS 155.180, probate proceedings are to be treated the same way as any civil case. Additionally, time may be enlarged for excusable neglect under EDCR 2.25. With respect to the Probate Judge's above cited comment regarding the service of a summons (and enlarging time to do so) Fink would submit that the issuance of a citation is very similar (the intent of which is notice to all parties). Therefore, if there are circumstances in which it is proper for a court to exercise its discretion in enlarging time to serve a summons, the same should be true for a Citation. This was, in effect, the ruling of the Probate Commissioner.

**b. The District Court's ruling Regarding the Application of NRCP 6(b) is contrary to the canon of *expressio unius est exclusio alterius***

The canon of statutory interpretation *expressio unius est exclusio alterius* (the expression of one thing is to the exclusion of the other, discussed in detail above), contradicts the District Court's ruling that Rule 6(b) does not apply to NRS 137.090.

Rule 6(b) includes an enumerated list of instances<sup>1</sup> where time may **not** be enlarged. NRS 137.090 is **not** one of the enumerated exceptions where time may **not** be enlarged.

---

<sup>1</sup> Rules 50(b), 50(c)(2), 52(b), 59(b), (d) and (e) and 60(b).

1 The Legislature would have included NRS 137.090 in the  
2 enumerated list if the Legislature had intended to prohibit the District  
3 Court from enlarging time under NRS 137.090 through Rule 6(b), but it  
4 did not. Under the canon of *expressio unius est exclusio alterius*, this  
5 Court **must** presume that the Legislature intentionally excluded NRS  
6 137.090. When the District Court concluded that Rule 6(b) had no  
7 application to NRS 137.090, it engaged in an impermissible act of  
8 judicial legislation, usurping and overriding the prerogative and will of  
9 the Legislature.

10  
11 **c. The District Court should have applied "excusable neglect"**  
12 **analysis under NRCP 6(b) in determining whether or not**  
13 **to enlarge time**

14 Because the District Court erred in concluding the NRCP 6(b) did  
15 not apply to NRS 137.090, it failed to apply the appropriate analysis for  
16 circumstances under NRCP 6(b) when time may be enlarged for  
17 "excusable neglect." FINK000069.

18 In the context of setting aside a judgment for excusable neglect  
19 under NRCP 60(b), this Court has considered the following factors:  
20

- 21  
22 (1) a prompt application to remove the judgment; (2) an absence of  
23 an intent to delay the proceedings; (3) a lack of knowledge of the  
24 procedural requirements on the part of the moving party; and (4)  
25 good faith.  
26

1 *Stoecklein v. Johnson Elec.*, 109 Nev. 268, 271 (Nev. 1993). In this  
2 matter, all three factors weigh heavily in favor of a finding of excusable  
3 neglect: (1) Fink immediately sought to enlarge time when the error  
4 was discovered by his counsel; (2) Clearly, there was no intent by Fink  
5 to delay the proceedings because he timely filed his petition to initiate  
6 the will contest; (3) the failure to issue citations timely was, in fact, due  
7 to a lack of procedural knowledge (Tassy Wolfe, the paralegal who made  
8 the mistake, testified under oath that, "[a]fter reading NRS 137.100  
9 where, we believed, it stated that all proceedings in an after-probate  
10 contest were to be handled in the same manner as in a before-probate  
11 contest, we anticipated issuing the Citation in the same manner  
12 involved in other actions in which we had been involved."  
13 FINK000074:21-25); and (4) Fink has acted in good faith by quickly  
14 moving to issue the citations and correct the problem.  
15  
16  
17

18 Under Federal Rule of Civil Procedure 6(b),  
19

20 a finding of excusable neglect under Rule 6(b)(2) requires both a  
21 demonstration of good faith by the parties seeking the  
22 enlargement and also it must appear that there was a reasonable  
23 basis for not complying within the specified period.

24 *In re Four Seasons Sec. Laws Litigation*, 493 F.2d 1288, 1290 (10th Cir.  
25 Okla. 1974). Subsequent to *Stoecklein*, this Court adopted the federal  
26

standard for "excusable neglect" under Rule 6(b) in *Moseley v. Eighth Judicial Dist. Court of Nev.*, 124 Nev. 654, 665 (Nev. 2008):

Under federal Rule 6(b), a party may obtain an extension of time to act under a particular rule when the time to act has expired and the party seeking an extension demonstrates good faith, a reasonable basis for not complying within the specified period, and an absence of prejudice to the nonmoving party.

In *Moseley*, this Court considered whether time could be enlarged as to NRCP 25(a)(1)'s requirement that, "[u]nless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party." Emphasis added.

In *Moseley*, the Plaintiff in a medical malpractice suit, Richard Sinicki (hereafter "Sinicki"), died on July 11, 2005 during the pendency of the litigation. The Defendant, Dr. Moseley, filed a suggestion of death on July 18, 2005. Sinicki's family failed to substitute in a representative of the Estate within 90 days, and, consequently, Dr. Moseley moved to dismiss pursuant to NRCP 25(a)(1). Sinicki's family objected and sought to enlarge time pursuant to NRCP 6. The District Court denied Dr. Moseley's motion to dismiss and granted the Sinicki's motion to enlarge time. Dr. Moseley then filed a writ with this Court



1 challenging the District Court's order granting the Sinicki's motion to  
2 enlarge time.

3  
4 Just as the District Court in this matter found that "must" in NRS  
5 137.090 is mandatory and left no discretion, so too did Dr. Moseley  
6 argue that "shall" in NRCP 25(a)(1) left the district court with no  
7 discretion.

8  
9 Dr. Moseley contends that NRCP 25's mandatory language  
10 required the district court to dismiss Richard's loss of consortium  
11 claim because no substitution or enlargement of time to substitute  
12 was made within the rule's 90-day limitation period.

13 *Moseley v. Eighth Judicial Dist. Court of Nev.*, 124 Nev. 654, 661 (Nev.  
14 2008). The *Moseley* Court held that despite the seemingly mandatory  
15 "shall" language in NRCP 25(a)(1), that NRCP 6(a),

16 ...provides that the district court may exercise its discretion to  
17 grant an enlargement of time to take an action that is otherwise  
18 required to be done within a specified time when excusable neglect  
19 is shown. In other words, **despite NRCP 25(a)(1)'s 90-day**  
20 **limitation period, under NRCP 6(b)(2), when a party**  
21 **establishes excusable neglect, the party may be granted an**  
22 **enlargement of time after the 90-day limitation period has**  
23 **expired.** NRCP 6(b)(2) applies to most acts required by the rules  
24 of civil procedure unless they are specifically excluded.

25 *Moseley v. Eighth Judicial Dist. Court of Nev.*, 124 Nev. 654, 662 (Nev.  
26 2008). Emphasis added.

The *Moseley* Court further held that

...a party seeking relief from NRCP 25(a)(1) under NRCP 6(b)(2) is  
required to demonstrate that (1) it acted in good faith, (2) it

exercised due diligence, (3) there is a reasonable basis for not complying within the specified time, and (4) the nonmoving party will not suffer prejudice.

*Moseley v. Eighth Judicial Dist. Court of Nev.*, 124 Nev. 654, 667-668 (Nev. 2008). In fact, the District Court found that Fink did meet each of the *Moseley* factors, but declined to apply them because the District Court ruled, incorrectly, that it had no discretion to do so. "...the contestant acted in good faith, exercised due diligence, had a reasonable basis for not complying in a specified time and there's no prejudice to the non-moving party...And further, acted in good faith seeking counsel. The objection itself was filed, just wasn't served." FINK000662:21-663:1. It seems that had the District Court not erred as to whether it had discretion, it would likely have found the excusable neglect necessary to extend time. However, the District Court did not make any such ruling because, in error, it ruled that it did not have discretion to do so.

**i. *Moseley* Factor #1: "Good Faith"**

Though counsel has been unable to locate a universal definition of "good faith" adopted by this Court, in the context of determining whether parties entered into a marriage in good faith, this Court has looked to whether there was "an honest and reasonable belief that the marriage was valid at the time of the ceremony." *Williams v. Williams*,

1 120 Nev. 559, 565 (Nev. 2004). "Whether the party acted in good faith  
2 is a question of fact." *Williams v. Williams*, 120 Nev. 559, 565 (Nev.  
3 2004).  
4

5 Here, there is no question that Fink, and his counsel, had a  
6 reasonable belief at the time they attempted to initiate a will contest,  
7 that the citations did not need to be issued within the same 3 month  
8 time frame as the petition.  
9

10 Wolfe, the paralegal working with counsel, on this matter has  
11 testified as follows:

12 Mr. Gardner and I reviewed NRS 137.080 and subsequent  
13 statutes concerning after probate will contests. We had never been  
14 involved in an after-probate will contest but had worked together  
15 on several before-probate will contests. We were familiar with the  
16 requirements concerning the issuance of the Citation. In our  
17 experience, the Citation was discussed at the hearing on the  
18 contest. At that time, the Probate Commissioner instructed the  
19 contesting party to issue the Citation and serve the same upon the  
20 heirs and interested parties to the will contest.  
21

22 After reading NRS 137.100 where, we believed, it stated that all  
23 proceedings in an after-probate contest were to be handled in the  
24 same manner as in a before-probate contest, we anticipated  
25 issuing the Citation in the same manner involved in other actions  
26 in which we had been involved.

27 FINK000074:13-25. Clearly, at the time the petition was timely filed,  
28 Fink, through his counsel, had an honest and reasonable belief that  
29 they had timely initiated a will contest pursuant to NRS 137.080.

1                                    **ii. Moseley Factor #2: "Exercised Due Diligence"**

2                                    When counsel for Respondent first argued that the citations were  
3  
4 not timely issued, Fink's counsel took immediate action to address the  
5 issue. According to the sworn testimony of Wolfe, Fink's counsel,  
6 Richard Koch,

7  
8                                    ...received a telephone call from Jonathan Barlow, Esquire, who  
9 had been retained to represent Phil and Rose Markowitz, the  
10 proponents of the March 7 will. Mr. Barlow informed Mr. Koch of  
11 the failure to issue the Citation timely. Mr. Koch was leaving the  
12 country for vacation the next day. He immediately contacted me  
and instructed me to issue the Citation as soon as possible.  
Inasmuch as it was late in the day, I went to the Clark County  
Clerk's Office and had the Citation issued the next day.

13 FINK000075:1-8. As soon as Phil's counsel took the position that the  
14 citations were not timely issued, Fink, through his counsel took  
15 immediate steps to address the issue by having citations issued as soon  
16 as possible. This type of immediate response is the essence of due  
17 diligence.  
18

19                                    **iii. Moseley Factor #3: "Reasonable Basis for Non-**  
20 **Compliance**

21                                    As described in Wolfe's testimony above, Wolfe and Fink's counsel  
22 at the time, Douglas Gardner, reasonably believed, based upon their  
23 prior experience in Probate Court, that citations did not need to be  
24 issued within the same 3 month window as the petition initiating the  
25 will contest. In fact, because the only requirement to initiate a will  
26

1 contest is to file the petition, as discussed above, this basis was the  
2 essence of reasonable.  
3

4 **iv. *Moseley* Factor #4: "Nonmoving Party Will Not  
5 Suffer Prejudice"**

6 Phil suffers absolutely no prejudice by enlarging time because (1)  
7 it is a relatively insignificant, short time that does not delay the timely  
8 administration of justice; and (2) by the time that Markowitz received  
9 the citation, he already knew through the November 27, 2012 petition  
10 that Fink had initiated a will contest. The purpose of a citation is to  
11 ensure that the party to whom the contest is made is notified of the  
12 contest, similar to a summons. Here, Phil, already a party to the  
13 proceedings, became aware of the contest when Fink filed the petition  
14 initiating the will contest. Thus, from a practical standpoint, the  
15 issuance of the citation was redundant as the purpose of the citation  
16 had already been accomplished by the petition itself. This is why  
17 California courts have held that the issuance of citations is not  
18 jurisdictional. *In re Withenbury's Estate*, 188 Cal. 109, 110-11, 204 P.  
19 385, 385 (1922) ("The issuance of the citation is not jurisdictional, and  
20 the trial court had the power to relieve the petitioner from the failure to  
21 issue such citation within a year ..")  
22  
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1 IX. BY FAILING TO ENLARGE TIME, THE DISTRICT COURT ERRED BY  
2 CONTRAVENING THE PUBLIC POLICY OF ADJUDICATING DISPUTES ON THE  
3 MERITS

4 In ruling that Fink was time-barred from proceeding with the will  
5 contest because of the timing of the issuance of the citations, the  
6 District Court erred because this Court has long held that public policy  
7 favors a determination of disputes on the merits.

8 "Public policy favors a trial on the merits." *Morgan v. Las Vegas*  
9 *Sands*, 118 Nev. 315, 323 (Nev. 2002). "...as a proper guide to the  
10 exercise of discretion, the basic underlying policy to have each case  
11 decided upon its merits." *Hotel Last Frontier Corp. v. Frontier*  
12 *Properties*, 79 Nev. 150, 155 (Nev. 1963).

13 The District Court even acknowledged that, in this matter,  
14 "there's a potential that there was fraud here in the underlying will  
15 itself..." FINK000664:8-9. This, in the context of the expert report,  
16 discussed above, which concluded that the March 2012 Will is a forgery.

17 Even Markowitz, through counsel, acknowledges that it is a  
18 "harsh" result to deny Fink a will contest based upon the timing of the  
19 issuance of the citation. FINK000657:8-9. Similarly, this Court has  
20 long held that statutes "should always be construed so as to avoid  
21 absurd results." *Welfare Div. of State Dep't of Health, Welfare &*  
22 *Rehabilitation v. Washoe County Welfare Dep't*, 88 Nev. 635, 638 (Nev.

1 1972) quoting *Ex parte Siebenhauer*, 14 Nev. 365, 368 (1879). There are  
2 few outcomes as conceivably absurd as to deny a will contest where the  
3 petition was timely filed - a fact not in dispute - and served on  
4 Markowitz giving notice of the will contest, but the citation was not  
5 timely issued, where the purpose of the citation is to provide the notice  
6 that the petition had already achieved.  
7


### 8 CONCLUSION

9  
10 The District Court erred when it denied Fink the right to proceed  
11 with a will contest. More specifically, the District Court erred in  
12 finding that a will contest is time-barred if the citation is not issued  
13 within the three month period, even though the statute which  
14 enumerates the requirement for a will contest, NRS 137.080, contains  
15 no such requirement. Further, the Court erred, as a matter of law, in  
16 concluding that NRCP 6(b) may not be used to enlarge time pursuant to  
17 NRS 137.090. Finally, the Court's cumulative errors run contrary to  
18 the public policy of deciding cases on their merits. That public policy is  
19 especially compelling in this circumstance where there is substantial  
20 evidence that the March 2012 Will is a fraud, including a handwriting  
21 expert and the bizarre circumstances under which the March 2012 Will  
22 came into being. Therefore, Fink respectfully requests that this Court  
23  
24  
25  
26

1 reverse the August 2013 Order and remand to the District Court for  
2 further proceedings.  
3

4 DATED this 15 day of DECEMBER 2014.

5 GOODSELL & OLSEN, LLP

6  
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Century Schoolbook font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6,701 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

1 accompanying brief is not in conformity with the requirements of the  
2 Nevada Rules of Appellate Procedure.  
3

4 DATED this 15 day of DECEMBER 2014.  
5

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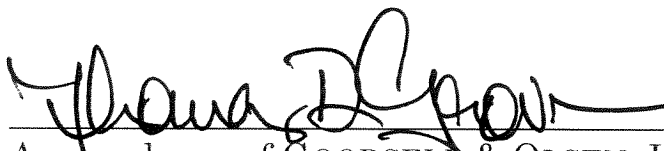
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on the 15th day of December, 2014, a copy of the foregoing APPELLANT'S OPENING BRIEF AND JOINT APPENDIX was deposited in the U.S. Mail by first class mail, postage fully prepaid, to the following:

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