

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**
2

3 MATT KLABACKA,
4 DISTRIBUTION TRUSTEE OF THE
5 ERIC L. NELSON NEVADA TRUST
6 DATED MAY 30, 2001,
 Appellant/Cross-Respondent,

7 Vs.

8 ERIC L. NELSON, INDIVIDUALLY,
9 AND IN HIS CAPACITY AS
10 INVESTMENT TRUSTEE OF THE
11 ERIC L. NELSON NEVADA TRUST
12 DATED MAY 30, 2001,
 Respondent/Cross-Appellant,

13 and

14 LYNITA SUE NELSON,
15 INDIVIDUALLY, AND IN HER
16 CAPACITY AS INVESTMENT
17 TRUSTEE OF THE LSN NEVADA
18 TRUST DATED MAY 30, 2001,
 Respondent

Supreme Court No. 66772
District Court Case No. D01507
Electronically Filed
Mar 01 2016 02:28 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Consolidated With:
Supreme Court Case No. 68292

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20 **RESPONDENT/CROSS APPELLANT ERIC L. NELSON'S**
21 **ANSWERING BRIEF AND**
22 **OPENING BRIEF ON CROSS-APPEAL**

23 RHONDA K. FORSBERG, ESQ
24 Nevada State Bar No. 009557
25 RHONDA K. FORSBERG, CHARTERED
26 64 North Pecos Road, Suite 800
27 Henderson, Nevada 89074
28 Attorney for Respondent/Cross-Appellant

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

MARK A. SOLOMON, ESQ. and JEFFREY P. LUSZECK, ESQ.

Trial and Appellate Attorneys for Appellant MATT KLABACKA
DISTRIBUTION TRUSTEE OF THE ERIC L. NELSON NEVADA
TRUST DATED MAY 30, 2001.

RHONDA K. FORSBERG, ESQ.

Trial and Appellate Attorney for Appellant ERIC L. NELSON,
INDIVIDUALLY, AND IN HIS CAPACITY AS INVESTMENT
TRUSTEE OF THE ERIC L. NELSON NEVADA TRUST DATED MAY
30, 2001.

ROBERT P. DICKERSON, ESQ., KATHERINE L. PROVOST, ESQ., and JOSEF
M. KARACSONYI, ESQ.

Trial and Appellate attorneys for Appellant LYNITA S. NELSON, INDIVIDUALLY, AND IN HER CAPACITY AS INVESTMENT TRUSTEE OF THE LSN NEVADA TRUST DATED MAY 30, 2001.

The law firms of ECKER KAINEN LAW GROUP, JIMMERSON HANSEN, STEPHENS GOURLEY & BYWATER, and the WILICK LAW GROUP previously represented ERIC L. NELSON.

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1 **RESPONDENT'S ANSWERING BRIEF/OPENING BRIEF ON CROSS**

2 **APPEAL**

3 **I.**

4 **STATEMENT OF ISSUES PRESENTED**

5 **ISSUES IN APPELLANT/CROSS RESPONDENTS' APPEAL**

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1. Whether the District Court erred by ordering the ELN Trust to pay Lynita and/or the LSN Trust ½ of the net income collected from the Arnold Property and Mississippi RV Park after it found that the case had been adjudicated and appealed.
 2. Whether the District Court erred by ordering the ELN Trust and/ Eric Nelson to pay \$75,000 to the LSN Trust for a loan that was made by Banone, LLC.

15 **ADDITIONAL ISSUES IN RESPONDENT'S CROSS-APPEAL**

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1. Whether the District Court erred in issuing an award of alimony when all of the parties' income has always been generated from managing, including buying and selling properties in ELN Trust and LSN Trust or those separate property trusts predecessors. Specifically, that since the creation of the LSN Trust, Lynita has received distributions and had her needs met from that trust which was the successor to her Separate Property Trust. In addition, the Court equalized the assets in the trusts;
 2. Whether the District Court erred in issuing the alimony award as lump sum to Lynita and that the alimony be paid from the ELN Trust;
 3. Whether the District Court erred in its interpretation of NRS 163.5557 that Eric Served as the Investment Trustee of the LSN Trust.
 4. Whether the District Court erred by finding that Mr. Nelson violated the joint preliminary injunction when the ELN Trust purchased the Bella Kathryn residence.
 5. Whether the District Court erred by entering its 6/8/15 Order, which modified its Divorce Decree by granting LSN Trust additional relief during the pendency of the First Appeal.

1 6. Whether the District Court erred in failing to recognize Tax debt and other
2 liabilities.

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4 **II.**

5 **STATEMENT OF THE CASE**

6 Respondent/Cross appellant Eric Nelson filed a Complaint for Divorce on
7 May 6, 2009. Aapp. V1:1-8. Lynita Nelson filed her Answer to Complaint for
8 Divorce and Counterclaim for Divorce and Declaratory Relief on June 22, 2009.
9 Aapp. V1:11-25.
10

11
12 After 7 days of trial in 2010, Eric and Lynita Stipulated to join the ELN Trust
13 and LSN Trust as necessary parties. Aapp. V1:1742-1746.
14

15 On June 3, 2013, almost three years after the District Court heard the first
16 witness in this case, the District Court issued a Divorce Decree, which though Eric
17 and Lynita had almost no property themselves, disposed of all the property owned
18 by the ELN Trust and the LSN Trust, with the exception of Wyoming Downs.
19 Aapp. V19:4691-4742.
20

21
22 On June 17, 2013, Lynita filed a Motion to Amend or Alter Judgment
23 seeking immediate enforcement of the Divorce Decree an to re-open the case to
24 permit discovery and requesting the District Court conduct another trial on the
25 disposition of Wyoming Downs. Aapp. V20-4755-4798. The additional trial on the
26 disposition of Wyoming Downs was heard on May 30, 2014. The Order from that
27 trial was entered on September 22, 2014, at which time the Divorce Decree became
28

1 an appealable order. Aapp V23:5553-5561. The appeal on the Divorce Decree and
2 other orders were first appealed on October 14, 2014 by the ELN Trust. Aapp.
3 V23:5576-5578.
4

5 On November 13, 2014, while the Appeal was pending, Lynita filed
6 Defendant's Motion to Enforce the June 3, 2013 Decree of Divorce, Address
7 Issues Relating to Property Awarded to Defendant in the Divorce, and for Related
8 Relief. Lynita's motion though titled as a Motion to Enforce was actually an
9 untimely motion to amend judgment. Aapp. V23:5579-5805. The District Court
10 granted Lynita's untimely motion on June 8, 2015. Aapp. V25:6226-6248. ELN
11 Trust filed a Second Appeal. Aapp. V25:6249:V26:6251.
12
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15 III.

16 STATEMENT OF FACTS

17 Eric and Lynita were married September 17, 1983, in St. George, Utah. At
18 the time of filing the Complaint for divorce the parties had two (2) minor children
19 and three adult children. All of children have now reached the age of majority.
20 Aapp. V1:1-8. Eric was born January 22, 1959 and Lynita was born October 25,
21 1961.
22
23
24

25 The parties are close in age and in good health. The parties' Financial
26 Disclosure Forms show that Eric was born on January 22, 1959 and Lynita was
27 born on October 25, 1961. There is no evidence that either party has any health
28

1 concerns. They both reside in Las Vegas, Nevada. There is no evidence on the
2 record that either party intends to move out of the Las Vegas area.

3
4 **The Parties income prior to the Separate Property Agreement.**

5 Prior to marriage Eric Nelson had obtained his real estate license. Eric
6 started a company called Eric Nelson Auctioneering to buy and sell real estate.
7 Eric's primary focus was bankrupt, repossessed and non-performing properties.
8 Eric worked along with his siblings in taking distressed projects improving them
9 and reselling them. Aapp.V1:71-74.
10
11

12 **The 1991 Revocable trust**

13
14 In 1991 Eric and Lynita retained Jeffrey L. Burr, Esq. to draft a standard
15 revocable trust and wills. Aapp. V14:3429:4-15.
16

17 **In 1993 the parties entered into a Separate Property Agreement and Separate**
18 **Property Trusts**

19 In July 1993, Eric had an opportunity to invest in some gaming ventures.
20 Lynita did not want to be involved with any activities that she had a moral concern
21 with. Aapp. V14:3433:3-16. Because Lynita was not comfortable with gaming
22 ventures she came to Jeffrey L. Burr, Esq., to see if there was some middle ground,
23 if there was some way to design a plan where she would not have to be involved in
24 that particular part of their investments. Aapp V14:3343:19-22. The parties met
25 with Mr. Burr, who explained the best way to accomplish their goals was a
26 Separate Property Agreement. Lynita felt more comfortable that she would not be
27
28

1 involved in gaming and that she could have her own assets. Aapp V14:3437:9-12.

2 The parties entered into a Separate Property Agreement dividing all of their
3 property into a fair division. Aapp V14:3440:5-17. The parties used their separate
4 pools of property and funded it into separate property trusts. When the property
5 was under each party's trusts, each party used portions of the income from their
6 separate property trusts to support the family. Neither party has ever had separate
7 jobs outside of managing their respective properties.
8
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11 **In 2001 the parties each created Self-Settled Spendthrift Trusts**

12 In or around 2000 Eric and Lynita received communications from Jeffrey L.
13 Burr's office regarding the latest in domestic asset protection allowed by a new law
14 that had been enacted. Mr. Burr met with Eric and Lynita and explained Self-
15 Settled Spendthrift Trusts. Mr. Burr explained that the parties would no longer own
16 any of the property involved and that in order to obtain distributions they would
17 have to get approval of a distribution trustee. Aapp. V14:3460:3463. Mr. Burr
18 sent both parties forms to use, which should be executed by the distribution trustee
19 prior to a distribution occurring. Aapp. V15:3504 15-21.
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24 Mr. Burr had at least two meetings with the distribution trustee of the ELN
25 Trust and LSN Trust when setting up the respective trusts, to advise her of her
26 duties as distribution trustee. Aapp. V13:3059: 3060. In following the protocol
27 Mr. Burr set up for the distribution trustees, the distribution trustee would have
28

1 annual meetings, do annual minutes and do distribution authorizations to pre-
2 approve the amount distributed to Lynita for the year from LSN Trust.
3 V13:3071:12-24. The Distribution Trustee confirmed that she followed the
4 protocol and issued the minutes. Aapp V13:3059-3062. The Distribution Trustee of
5 the LSN Trust testified that Lynita received her monthly distribution from the LSN
6 Trust along with LSN Trust paying her personal expenses pursuant to the minutes.
7 Aapp. V13:3075:19-24.

8 Since May 2001 (the creation date of the LSN Self-Settled Spendthrift
9 Trust), Lynita has received distributions from the LSN Self-Settled Spendthrift
10 Trust. LSN Self-Settled Spendthrift Trust is the successor of Lynita's separate
11 property trust. The Decree of Divorce recaps what distributions Lynita has
12 historically received from the LSN SSST. Aapp. V19:4691-4742. At trial the LSN
13 Distribution trustee confirmed many of the authorizations of distributions of
14 income made to Lynita from the LSN Trust.

15 At trial the LSN distribution trustee confirmed that starting on January 5,
16 2002 she authorized the LSN SSST to pay Lynita distributions of \$10,000 per
17 month for the next 12 months. Aapp. V13:3085:3086. That she authorized the
18 LSN SSST to pay Lynita \$15,000 distribution authorization on February 6, 2002.
19 Aapp. V13:3087:3-3. That she authorized the LSN SSST to pay Lynita \$20,000
20 distribution on April 1, 2002, and on May20, 2002. Aapp. V13:3088:3089. That

she authorized the LSN SSST to pay Lynita a distribution of \$10,000 on June 6, 2002 and December 10, 2002. Aapp. V13:3090. That she authorized the LSN SSST to pay Lynita a distribution in the amount of \$9,000 on July 8, 2003, and \$7,000 on August 2, 2003. Aapp. V13:3092:3093. That she authorized the LSN SSST to pay Lynita a distribution in the amount of \$20,000 per month for twelve months starting on February 25, 2004, and on February 25, 2005. Aapp. V13:3096:7-17 and 3101.

Upon conclusion of trial, the district court determined that Lynita initially received monthly disbursements in the amount of \$5,000, which increased to \$10,000 per month, and ultimately increased to \$20,000 per month. The district court in its ruling states that it finds that the \$20,000 per month is a fair and reasonable amount necessary to maintain the lifestyle that Mrs. Nelson has become accustomed to during the course of the marriage. However, the district court failed to recognize that all of the income distributions paid to Lynita have and continue to be paid by the very trust for which she was and continues to be the investment trustee and beneficiary. Neither Eric nor the ELN Trust have ever needed to support Lynita.

IV.

ARGUMENT

STANDARD OF REVIEW

A district court's decision concerning the award of alimony is generally reviewed for an abuse of discretion or judicial error. The court holds that before the appellate court will interfere with the trial judge's disposition of property or an alimony award, it must appear on the record that the discretion of the trial judge has been abused. *Fletcher v. Fletcher*, 89 Nev. 540, 516 P.2d 103 (1973), *Heim v. Heim*, 104 Nev. 605, 763 P.2d 678 (1988), *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918 (1996), *Schwartz v. Schwartz*, 225 P.3d 1273 (Nev. 2010). Questions of law, however, are reviewed de novo. *See Assoc. Builders and Contr. Inc. v. So. Nevada Water Auth.*, 115 Nev. 151, 156 979 P.2d 224, 227 (1999)(appellate issues involving questions of law are reviewed *de novo*).

CASE ISSUES

***Issue One:* The District Court abused its discretion and erred as a matter of law when granting alimony when all of the parties' income has always been generated from managing, including buying and selling properties in ELN Trust and LSN Trust or those separate property trusts predecessors. Specifically, that since the creation of the LSN Trust, Lynita has received distributions and had her needs met from that trust which was the successor to her Separate Property Trust. In addition, the Court equalized the assets in the trusts;**

The district court granted Lynita a lump sum alimony award of \$800,000. Aapp. V19:4691-4742. The district court stated that "\$20,000 per month is a fair and reasonable amount necessary to maintain the lifestyle that Mrs. Nelson had

1 become accustomed to during the course of the marriage.” Aapp V19:4728, line
2 16.
3

4 **NRS 125.150 Alimony and adjudication of property rights; award of**
5 **attorney’s fee; subsequent modification by court.** Except as otherwise provided
6 in NRS 125.155 and unless the action is contrary to a premarital agreement
7 between the parties which is enforceable pursuant to chapter 123A of NRS:
8
9

10 1. In granting a divorce, the court:

11 (a) May award such alimony to the wife or to the husband, in a specified
12 principal sum or as specified periodic payments, as appears just and
13 equitable;
14

14 ***

15 3. In granting a divorce, the court may also set apart such portion of the
16 husband’s separate property for the wife’s support, the wife’s separate
17 property for the husband’s support or the separate property of either spouse
18 for the support of their children as deemed just and equitable.

19 In considering any alimony award the district court must consider seven
20 factors to include (1) the career of the wife before the marriage, (2) the duration of
21 the marriage, (3) the education level of the husband before the marriage, (4) the
22 marketability of the wife, (5) the ability of the wife to support herself, (6) whether
23 the wife stayed home to care for the children, and (7) what the wife was awarded
24 besides alimony and child support. *Sprenger v. Sprenger*, 110 Nev. 855, 859, 878
25 P.2d 284, 287 (1994).
26
27
28

1 In the instant case, both parties have not held jobs, other than acting as
2 investment trustees for the ELN Self-Settled Spendthrift Trust and the LSN Self-
3 Settled Spendthrift trust, since 2001. Lynita has been the investment trustee for the
4 LSN Self-Settled Spendthrift Trust since its inception in May 2001.
5
6

7 The report prepared by the court appointed Forensic Accountant and
8 presented at trial evidences that Lynita had received \$2,020,097.41 from the LSN
9 Trust, as total distributions for 2009, 2010 and 2011 years. Aapp. V8:1806:1817.
10 That is an average of \$673,365.80 per year income from the LSN Trust to Lynita.
11 That includes the monthly distributions testified to by the Distribution Trustee
12 referenced in the district court's Decree of Divorce plus lump sum payments
13 evidenced by other minutes. Aapp. V13:3086 and Aapp. V13:3089.
14
15
16

17 The district court referenced the testimony of the LSN Distribution trustee
18 when stating that Lynita had been historically receiving \$20,000 month as
19 investment trustee of the LSN Self-Settled Spendthrift trust. Aapp V13:3085-3101.
20 There was no evidence at trial that Eric has supported Lynita during the marriage.
21 The district court based its findings of the amount Lynita needed as support on the
22 very figures that the trust for which she continues to benefit has historically paid
23 her. Aapp V13:3085-3101. Thereby negating any need of support from Mr.
24 Nelson. The district court abused its discretion by disregarding the fact that Lynita
25 through distributions from the trust for which she is the beneficiary has the ability
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1 to support herself. In fact, the evidence showed Lynita has been earning over 3
2 times the amount the district court stated was "a fair and reasonable amount
3 necessary to maintain the lifestyle that Mrs. Nelson had become accustomed to
4 during the course of the marriage." Aapp V19:4728, line 16.
5

6
7 In addition, the district court equalized the properties in each of the
8 respective trusts. V19:4739. The parties' only source of income has been
9 distributions from those trusts from rents and/or from buying and selling
10 properties. That would effectively have equalized Eric and Lynita's earning
11 potential.
12

13
14 The Nevada Supreme Court stated that "it follows from our decisions in this
15 area that two of the primary purposes of alimony, at least in marriages of
16 significant length, are to narrow any large gaps between the post-divorce earning
17 capacities of the parties. " *Shydler v. Shydler*, 114 Nev. 192, 654 P.2d 37, 41
18 (1998) citing *Gardner v. Gardner*, 110Nev. 1053, 1057, 881 .2d 645, 647 (1994);
19 *Rutar v. Rutar*, 108 Nev. 203, 206, 827 P.2d 829, 831 (1992). In the present case,
20 the district court removed any gap by equalizing the properties of the ELN Trust
21 and the LSN Trust.
22

23
24
25 "The court must award such alimony as appears 'just and equitable,' having
26 regard to the conditions in which the parties will be left by the divorce." *Sprenger*
27 *v. Sprenger*, 110 Nev. 855, 859, 878 P.2d 284, 287 (1994). Here the district court
28

1 did not do so. The district court instead decided to punish Eric by not only
2 transferring property owned by the ELN Trust to the LSN Trust, but compounded
3 the inequity by ordering alimony when the income potentials and property have
4 been equalized.
5

6
7 ***Issue Two: Whether the district court abused its discretion and erred as a***
8 ***matter of law when it awarded alimony as lump sum to Lynita***
9 ***and that the alimony be paid from the ELN Trust;***

10 In the present case, not only did the district court abuse its discretion in
11 awarding alimony at all, but it did so as a lump sum award which it ordered paid
12 from the ELN Trust. As provide by the foregoing statute, NRS 125.150(1), and
13 confirmed by the Nevada Supreme Court in *Daniel v. Baker*, 106 Nev. 412, 794
14 P.2d 345 (1990), the court was vested with the authority to grant a “principal sum”
15 of alimony or “periodic payments.”
16
17

18 In *Daniel*, the wife, who was 20 years younger than her husband sought
19 review of the amount of alimony and claimed she was entitled to alimony that
20 would extend beyond the death of her husband. The husband in *Daniel* was in
21 poor health at the time of divorce and had a much shorter life expectancy than the
22 wife. The court found an award of permanent lump sum alimony would not
23 significantly reduce the husband’s substantial wealth. The court remanded for a
24 determination of an appropriate award of permanent or lump sum alimony. *Id.* 412,
25 345. The court erred when it granted Lynita a lump sum alimony award.
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1 In the instant case, the parties are only 2 years and 9 months apart in age.
2
3 There has been no findings that Eric is in poor health or has a life expectancy that
4 is shorter than Lynita's.

5 Neither party has any separate property with which to pay such a lump sum
6
7 award. The parties disposed of all community property by Separate Property
8 Agreement (Aapp V14:3440:5-17) that was eventually transferred from separate
9
10 property trusts into Self-Settled Spendthrift trusts. Therefore neither Eric nor
11
12 Lynita have any separate ownership in the property that was transferred into the
13
14 LSN Self-Settled Spendthrift trust or the ELN Self-Settled Spendthrift trusts.
Aapp. V14:3460:3463.

15 The district court based their award of alimony as a lump sum on the idea
16
17 that the ELN Trust at the direction of Eric Nelson may deplete its property. NRS
18
19 166.20 provides that Eric has "no legal estate in the capital, principal or corpus of
20
21 the trust estate of the trust estate..." Since Eric nor Lynita can unilaterally remove
22
23 any property from the trust, and any distributions are subject to the discretionary
24
25 approval of the "distribution trustee", the district court erred as a matter of law by
26
27 treating such assets owned by the Trusts as if they were Eric and Lynita's
28
community and/or separate property.

**Issue Three: Whether the District Court erred in its interpretation of NRS
163.5557 that Eric Served as the Investment Trustee of the LSN
Trust.**

1 Despite there being no evidence of an instrument appointing Eric as an
2 investment trust adviser the district court found he was.
3

4 **NRS 163.5557 Powers of investment trust adviser and distribution**
5 **trust adviser.**

6
7 1. An instrument may provide for the appointment of a person to act as
8 an investment trust adviser or a distribution trust adviser with regard to
9 investment decisions or discretionary distributions.

10 2. An investment trust adviser may exercise the powers provided to the
11 investment trust adviser in the instrument in the best interests of the trust.
12 The powers exercised by an investment trust adviser are at the sole
13 discretion of the investment trust adviser and are binding on all other
14 persons. The powers granted to an investment trust adviser may include,
15 without limitation, the power to:

16 (a) Direct the trustee with respect to the retention, purchase, sale or
17 encumbrance of trust property and the investment and reinvestment of
18 principal and income of the trust.

19 (b) Vote proxies for securities held in trust.

20 (c) Select one or more investment advisers, managers or counselors,
21 including the trustee, and delegate to such persons any of the powers of the
22 investment trust adviser.

23 3. A distribution trust adviser may exercise the powers provided to the
24 distribution trust adviser in the instrument in the best interests of the trust.
25 The powers exercised by a distribution trust adviser are at the sole discretion
26 of the distribution trust adviser and are binding on all other persons. Except
27 as otherwise provided in the instrument, the distribution trust adviser shall
28 direct the trustee with regard to all discretionary distributions to a
beneficiary.

The district court stated in the Decree of Divorce that the fiduciary
responsibility that exists between husband and wife is "a duty to 'disclose
pertinent assets and factors relating to those assets.'" *Williams v. Waldman*, 108

1 Nev. 466, 472 (1992). Aapp V1:4700. The Decree goes on to state that Lynita was
2 presented with transfer documents to sign. Aapp V19:4700. Thereby evidencing
3 Eric's compliance with the requirement to disclose pertinent assets and factors.
4

5 In order for Lynita to have lost her authority or free agency there would have
6 needed to be authority given to Eric by the instrument. The statute is very clear that
7 all authority to act as an investment trust adviser rests solely in an instrument
8 appointing an investment trust adviser. The only trust adviser/consultant in the
9 instrument is Jeffrey L. Burr, Ltd. Aapp V26:6410-6411. There has been no
10 evidence presenting any additional instrument granting anyone authority to act as
11 an investment trustee for the LSN Trust.
12

13 The legislative history 2009 Page 788, Section 27 of chapter 215, SB 287
14 confirms that the legislature was specific as to the definition of an "investment
15 trust adviser." It states that a "Investment trust adviser" means a fiduciary given
16 authority *by the instrument* to exercise any or all of the powers and discretion set
17 forth in section 35 of this act." [Emphasis added].
18

19 Lynita chose to follow Eric's advice and to sign the documents given. The
20 Decree of Divorce states that Mr. Nelson would become upset if questioned, not
21 that Lynita lost free agency. There has been no finding that there was "undue
22 influence" by Eric. In order to establish undue influence under Nevada law, "it
23 must appear, either directly or by justifiable inference from the facts proved, that
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1 the influence ... destroy[ed] the free agency of the testator.” In re Estate of Hegarty,
2 46 Nev. 321, 326, 212 P. 1040, 1042 (1923).
3

4 **Issue Four: Whether the District Court erred by finding that Mr. Nelson**
5 **violated the joint preliminary injunction when the ELN Trust**
6 **purchased the Bella Kathryn residence.**

7 Bella Kathryn property was purchased in December 2010 by the ELN Trust
8 not Eric. The ELN trust purchased the Bella Kathryn residence in the usual course
9 of business. The JPI filed May 18, 2010 has an exception to act in the usual
10 course of business. Aapp. V1:9-10. The court did not enjoin the ELN Trust from
11 “acquir[ing] any new or additional assets, encumber[ing] existing assets, or
12 sell[ing] existing assets without specific order of the Court” until April 30, 2012.
13 Therefor the District Court erred by sanctioning the ELN Trust or Eric for the
14 purported violation of the JPI because no such violation occurred. Eric did not
15 purchase the Bella Kathryn residence in violation of the JPI. Bella Kathryn was
16 purchase by the ELN Trust in the usual course of business.
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21 **Issue Five: District Court erred by entering its 6/8/15 Order, which modified**
22 **its Divorce Decree by granting LSN Trust additional relief during**
23 **the pendency of the First Appeal.**

24 *A. The district court was divested of jurisdiction*
25

26 On October 20, 2014, the ELN Trust filed a notice of appeal. On November
27 13, 2014, and while the appeal was pending, Lynita filed Defendant’s Motion to
28 Enforce the June 3, 2013 Decree of Divorce, Address Issues Relating to Property

1 Awarded to Defendant in the Divorce, and Related Relief. "The timely filing of a
2 notice of appeal divests the district court of jurisdiction to act and vests jurisdiction
3 in the" Nevada Supreme Court. *Foster v. Dingwall*, 126 Nev. Adv. Op. 5, 228 P.3d
4 453, 454-455 (2010), citing *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d
5 525, 529 (2006). The district court erred in entering its 6/8/15 Order, which
6 modified its Divorce Decree.
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13 *B. Lynita was precluded from seeking recovery*

14 "Although whether issue preclusion applies is a mix question of law and fact,
15 legal issues predominate, and therefore, this court reviews de novo the availability
16 of issue preclusion." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215
17 P.3d 709, 717 (2009); *University & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 984,
18 103 P.3d 8, 16 (2004).
19
20

21 "A judgment is conclusive not only on the questions actually contested and
22 determined, but on all matters which might have been litigated and decided in the
23 suit." *York v. York*, 99 Nev. 491, 493, 664 P.2d 967, 968 (1983)(wife made a claim
24 to \$15,000 that could have been litigated in the first divorce action). Lynita was
25 precluded from seeking recovery of rents from Eric that were collected by the ELN
26 Trust between 2009 and 2013 from the Arnold Property and Mississippi RV after
27
28

1 entry of the final judgment on September 22 2014, because said relief was not
2 granted. Further, the rents were not collected by Eric personally. They were
3 collected by the ELN Trust. Lynita's First Amended Complaint requested a
4 constructive trust of said rents. Aapp V9:2173:5-18. In her Motion Lynita also
5 sought rents collected by the ELN Trust from the Mississippi RV Park and Arnold
6 Property. An abundance of evidence was admitted at trial evidencing that ELN
7 Trust collected 100% of rents for the Arnold Property and Mississippi RV Park.
8 Including Mr. Bertsch's report. Aapp. V11:2686, V7:1690, V8:1767 and
9 V11:2685-2709. In addition the court heard substantial amount of testimony at
10 trial, including, but not limited to, Eric, V3:506:3-507:15, V3:509:10-510:8, Lana
11 Martin, V14:3262:1-6, and Mr. Gerety, V15:3572:23-3573:7, and accountings
12 regarding the rent collected by the ELN Trust. Aapp. V27:6616.

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18 Had Lynita believed the District Court failed to address the 2009-2013 rents,
19 she should have sought the appropriate relief in her Motion to Amend, filed June
20 17, 2013. Lynita failed to do so.

21
22 **Issue Six: Whether the District Court erred in failing to recognize tax debt and**
23 **other liabilities in adjudication.**


24
25 Evidence was presented at trial that there is \$154,512.09 IRS liability against
26 Eric and Lynita. Aapp V2:306. The district court failed to adjudicate this liability.
27
28

1 Evidence at trial showed a judgment against Eric in the *Kelso-Longview*
2 *Elks Lodge No. 1482 v. Eric L. Nelson and Cleopatra's Wild Grizzly Casino LLC*
3 in the amount of \$38,309.18 plus attorney's fees. Aapp V2:295. The district court
4 did not adjudicate this debt.
5

6
7 "With property division in particular, however, we conclude that
8 community property and debt must be divided in accordance with the law. NRS
9 125.150(1)(b) requires the court to make an equal disposition of property upon
10 divorce, unless the court finds a compelling reason for an unequal disposition and
11 sets forth that reason in writing." *Blanco v. Blanco*, 129 Nev. Adv. Op.77, 311
12 P.3d 1170 (2013).
13
14

15
16 **CONCLUSION**
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18 In light of the foregoing, Eric Nelson respectfully requests that this Court
19 reverse the Decree of Divorce and other orders and reassign this matter for a new
20 trial on the merits.
21

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23 
24 RHONDA K. FORSBERG, ESQ.
25 Nevada State Bar No. 009557
26 RHONDA K. FORSBERG, CHARTERED
27 64 North Pecos Road, Suite 800
28 Henderson, Nevada 89074
Attorney for Respondent/Cross-Appellant

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3. 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 appropriate references to 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 accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

1 Dated this 1st Day of March, 2016.
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5 RHONDA K. FORSBERG, ESQ

6 Nevada State Bar No. 009557

7 RHONDA K. FORSBERG, CHARTERED

8 64 North Pecos Road, Suite 800

9 Henderson, Nevada 89074

10 Attorney for Respondent/Cross-Appellant
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