

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

2 MATT KLABACKA, Distribution Trustee
3 of the Eric L. Nelson Nevada Trust
4 dated May 30, 2001,

5 Appellant/Cross Respondent.

6 vs.

7 LYNITA SUE NELSON, Individually and
8 in her capacity as Investment
9 Trustee of the LSN NEVADA TRUST
10 dated May 30, 2001; and ERIC L.
11 NELSON, Individually and in his
12 capacity as Investment Trustee of
13 the ELN NEVADA TRUST dated May 30,
14 2001;

15 Respondents/Cross-Appellants.

16 MATT KLABACKA, as Distribution
17 Trustee of the Eric L. Nelson
18 Nevada Trust dated May 30, 2001,

19 Appellants,

20 vs.

21 ERIC L. NELSON; LYNITA SUE NELSON,
22 INDIVIDUALLY; AND LSN NEVADA TRUST
23 DATED MAY 30, 2001,

24 Respondents.

Supreme Court Case No. 66772
District Court Case No. D-
411537

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25 **APPELLANT'S ANSWER AND REPLY BRIEF**

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20 The parties and other principals involved with this matter
21 are referred to in this brief as follows: THE ERIC L. NELSON
22 NEVADA TRUST DATED MAY 30, 2001 ("ELN Trust"); THE LSN NEVADA
23 TRUST DATED MAY 30, 2001 ("LSN Trust"); Appellant MATT KLABACKA,
24 DISTRIBUTION TRUSTEE OF THE ELN TRUST ("KLABACKA"); ERIC NELSON,
25

1 Individually, and as Investment Trustee of the ELN Trust
2 ("ERIC"); and LYNITA NELSON, Individually, and as Investment
3 Trustee of the LSN Trust ("LYNITA"). Eric and Lynita shall be
4 collectively referred to as the "Nelsons."
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1 Second, with respect to the Separate Property Agreements and
2 Trusts, Jeffrey Burr, Esq. ("Burr") did not "confirm[] Eric was
3 in sole control of funding both trusts," as Burr, whose testimony
4 Lynita agreed with, V17:AAPP:4094:6-8, testified that: (1) he
5 "didn't really participate much in the funding of the trust, just
6 in advising them of - of what they should do," V7:AAPP:1538:19-
7 21; (2) the Nelsons represented to him that the division of
8 community assets at that time was "fair and equal",
9 V14:AAPP:3452:11-18; and (3) he did not believe that either party
10 was being taken advantage of. V14:AAPP:3440:11-20. Further, Lynita
11 effectuated the transfer of her newly divided separate property
12 by executing the requisite documents to fund Lynita's Separate
13 Property Trust. V27:AAPP:6513-18.

15 Third, Burr's 2010 testimony, upon which Lynita relies, was
16 clarified by his 2012 testimony. For example, Lynita's contention
17 that she did not "understand what was going to happen with the
18 new trusts," was rebutted by Burr who testified that he: (1) met
19 his professional obligation of explaining to Lynita the nature of
20 the self-settled spendthrift trusts, including the advantages of
21 said trusts, V14:AAPP:3458:6-8; (2) assured himself that Lynita
22 had a fundamental understanding of the LSN Trust before allowing
23 her to execute the same, V7:AAPP:1562:21-1563:4, V14:AAPP:3459:5-
24 12; and (3) ensured that she executed the same voluntarily.
25 V7:AAPP:1563:24-1564:2. Lynita's self-serving position is
26 further rebutted by her own actions in the execution of the LSN
27

1 Trust and correspondence dated 5/30/01 (which explained the
2 ramifications of the LSN Trust), wherein she acknowledged that
3 she "hereby understand[s] and acknowledge[s] receipt of this
4 letter. . ." V26:AAPP:6442-6444.

5 Fourth, Eric did not testify that he had "complete and
6 unfettered control of all of the property" held in the Trusts,
7 but rather confirmed on the second day of trial that "the LSN
8 Trust, which is Lynita's trust dated 2001 that she controls..."
9 V2:AAPP:270:13-14.

10 ARGUMENT

11
12 Lynita's "Argument" section fails to cite the portions of the
13 record that support her unfounded positions as required by NRAP
14 28(a)(10). Consequently, it was difficult, and in some
15 circumstances impossible, to directly respond to Lynita's
16 arguments.

17 **A. THE DISTRICT COURT LACKED JURISDICTION AND/OR SHOULD HAVE DECLINED TO HEAR** 18 **ALL CLAIMS FOR RELIEF INVOLVING THE TRUSTS.**

19 **1. THE DISTRICT COURT IN THE FAMILY DIVISION LACKED SUBJECT MATTER** 20 **JURISDICTION.**

21 Whether a court lacks subject matter jurisdiction "can be
22 raised by the parties at any time... and cannot be conferred by the
23 parties." *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224
24 (1990). If the district court lacks subject matter jurisdiction,
25 the judgment is rendered void. *State Indus. Ins. System v.*
26 *Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984).

a. IN CLARK COUNTY, THE PROBATE COURT HAS EXCLUSIVE SUBJECT MATTER JURISDICTION OVER AN ACTION FOR DECLARATORY RELIEF CONCERNING TRUSTS.

The District Court properly exercised subject matter jurisdiction over the divorce proceeding. However, after several days of trial, the District Court recognized that most of the assets that had been owned by Eric and Lynita had been transferred to Trusts and that said irrevocable Trusts must be joined as necessary parties. V7:AAPP:1744-1745. At such time, the LSN Trust filed a Third-Party Complaint against the ELN Trust, which it ultimately amended, seeking declaratory relief under NRS 30.60. V9:AAPP:2140-2192. The ELN trust then motioned to dismiss the Complaint, asserting that the probate court held exclusive subject matter jurisdiction over the proceeding under EDCR 4.16(a), NRS 30.060, and NRS 164.015. V9:AAPP:2190-2224.

NRS 30.60 confirms that the claims asserted by Lynita in the Third-Party Complaint, which sought declaratory relief regarding “any question arising in the administration of the trust,” must “**only** be made in a proceeding commenced pursuant to the provisions of title 13 of NRS.” A contested proceeding under title 13 is “initiated by the petition of an interested person concerning the internal affairs of a nontestamentary trust” and the court (*i.e.* “a district court of this State sitting in probate or otherwise adjudicating matters pursuant to this title”) has “exclusive jurisdiction” over such proceeding. NRS 164.015(1); NRS 132.116. By approving the pre-September 2, 2014 version of EDCR 4.16(a),

1 this Court directly limited which district courts in Clark County
2 shall "otherwise adjudicate[] matters pursuant to title 13."
3 Specifically, under the then existing Court Rule, the probate
4 court first decides whether it will take the case and, if not, it
5 may assign it to the probate commissioner or another district
6 court **"other than a trial judge serving in the family division."**
7 *Id.* Consequently, the LSN Trust was required to bring its trust
8 related declaratory relief claims in probate court, which is the
9 only court that had subject matter jurisdiction.

10
11 Notwithstanding, the District Court here directly violated the
12 aforementioned statutes and rules by failing to dismiss all claims
13 for declaratory relief set forth in the Amended Third-Party
14 Complaint. Indeed, the District Court should have granted the
15 Motion to Dismiss for lack of subject matter jurisdiction, divided
16 any community property that was held outside the Trusts, awarded
17 Lynita child support and alimony based on any income Eric
18 received, and then granted the divorce. Lynita could have then
19 disputed the validity of the Trusts in probate court, and if
20 successful, could have returned to the District Court to divide
21 the additional community property if any existed. In other words,
22 it was not necessary for the District Court to adjudicate the
23 trust matters that fell out of its jurisdiction in order to resolve
24 the divorce issues over which it properly exercised jurisdiction.
25 *Barelli v. Barelli*, 11 Nev. 873, 877, 944 P.2d 246, 248 (1997).
26

b. *LANDRETH* IS DISTINGUISHABLE FROM THIS CASE.

Lynita erroneously claims that, even if the District Court lacked subject matter jurisdiction, it nonetheless had the judicial power to adjudicate the matter under *Landreth v. Malik*, 127 Nev. 175, 251 P.3d 163 (2011). Lynita's cursory review of *Landreth* misconstrues the holding therein for two important reasons. First, as stated above, by approving EDCR 4.16(a), this Court, as opposed to the Nevada Legislature in *Landreth*, directly limited which courts in Clark County shall "otherwise adjudicate[]" matters pursuant to title 13," by making it clear that under no circumstances could a "trial judge serving in the family division" hear a contested matter under Title 13 of NRS.

Second, *Landreth* makes a distinction between “subject matter jurisdiction” and “judicial power.” “Subject matter jurisdiction is ‘the court’s authority to render a judgment in a particular category of case.’” *Id.* “‘Judicial Power’ is the authority to hear and determine justiciable controversies,” and also includes the power to make and enforce final decisions. *Id.* “[J]udicial power is derived directly from Article 6, Section 6(1) of the Nevada Constitution, empowering judges with the authority to act and determine justiciable controversies.” *Id.* at 168. Subject matter jurisdiction of the family court division, on the other hand, “has been reserved by legislative enactment under Section 6(2) and [is] ultimately established by NRS 3.223.” *Id.* at 169.

1 This difference, in part, led the *Landreth* court to hold that
2 because "a district court judge in the family division has the
3 same constitutional power and authority as any district court
4 judge, a family court judge has the authority to preside over a
5 case improperly filed or assigned to the family court division."
6 Further, in *Landreth*, the appellant argued, for the first time
7 on appeal, that the family court lacked subject matter
8 jurisdiction because the case concerned title and ownership of
9 property of two unmarried persons and thus did not fit within
10 those matters subject to the family court's jurisdiction under
11 NRS 3.223. Consequently, the question presented was whether the
12 family court *could* exercise judicial power where its lack of
13 subject matter jurisdiction had not been previously disputed.

15 In contrast, here, the issue is whether the District Court had
16 the judicial power to ignore the clear and unambiguous statutes
17 and rules proscribing the subject matter jurisdiction of the
18 probate court (*i.e.* EDCR 4.16(a), NRS 30.060, and NRS 164.015)
19 when the ELN Trust sought to dismiss the Third Party Complaint,
20 V8:AAPP:1885-1908, and then the Amended Third-Party Complaint for
21 lack of subject matter jurisdiction? V9:AAPP:2190-2224. The
22 answer is a resounding no, as the power of the family court to
23 ignore statutes and court rules is not contained in the Nevada
24 constitution, nor was it intended to be bestowed by *Landreth*. To
25 the contrary, *Landreth* clarifies that family courts have judicial
26

1 power to adjudicate matters improperly before it due to an
2 attorney filing or a clerk assigning a matter to the wrong court.
3 It does not give the family court, or any court, power to hear
4 matters improperly before it by ignoring the statutes which define
5 another court's subject matter jurisdiction when it is apprised
6 of said statutes in a motion to dismiss. *Sleeper*, 100 Nev. at 269,
7 679 P.2d at 1274. The latter power would allow parties to forum
8 shop and purposely file actions in the wrong court by ignoring
9 subject matter jurisdiction statutes on the belief that the court
10 will nonetheless exercise its judicial power, even if subject
11 matter jurisdiction is raised in a motion to dismiss. Indeed, it
12 would largely nullify subject matter jurisdiction statutes all
13 together since the courts would be at liberty to ignore the same.²

14
15 Therefore, the District Court erred by claiming to have a non-
16 existent authority under *Landreth* and ignoring the statutes and
17 rules proscribing the subject matter jurisdiction of the probate
18 court.³ Since the probate court, as opposed to the District Court,
19 possessed subject matter jurisdiction, the Decree is void.

21 ² *Corley v. United States*, 556 U.S. 303, 314, 129 S. Ct. 1558,
22 1566, 173 L. Ed. 2d 443 (2009) (quotations omitted).

23 ³ Applying the rules and statutes adopted by this Court and the
24 Nevada Legislature will not "overwhelm" the probate court as
25 Lynita contends. First, only trust contest proceedings under NRS
26 164.015 and declaratory relief claims brought under NRS 30.060
27 must be initiated in the probate court and the majority of divorce
28 proceedings do not involve contested trusts. Second, the
overwhelming amount of divorce cases that involve trusts involve
revocable trusts that hold community property, as opposed to

1 c. EVEN IF THE DISTRICT COURT HAD THE AUTHORITY TO IGNORE THE
2 SUBJECT MATTER JURISDICTION OF THE PROBATE COURT, IT STILL
3 ERRED BY FAILING TO ABSTAIN FROM JOINING THE DIVORCE AND TRUST
4 RELATED TORT ACTIONS.

5 Even if a family court finds that it "may have jurisdiction
6 over [a] matter pursuant to NRS 3.223," the matter may be heard
7 by the "Civil Division of the District Court" if the family court
8 decides it would be more appropriate to do so.⁴ Here, the District
9 Court erred by joining Lynita's tort actions with the divorce
10 action,⁵ which is contrary to the majority of jurisdictions that
11 have addressed this issue. Courts have uniformly found that
12 engrafting a tort action, which involves redressing a legal wrong
13 in damages, with a divorce action, which involves equitably
14 severing a marital relationship, *Heacock v. Heacock*, 402 Mass. 21,
15 520 N.E.2d 151, 153 (1988). will cause divorce actions to become
16 unduly complicated and thus unjustifiably lengthen the time before
17 a spouse may obtain a divorce.⁶ This, in turn, will adversely
18 delay child custody and support arrangements. Moreover, hearing a

19
20 irrevocable trusts that hold no community (or even separate)
21 property, as the Trusts in this case.

22 ⁴ *Kwist v. Chang*, 2011 WL 1225692 at * 2 (Nev. 3/31/11).

23 ⁵ *See Ward v. Ward*, 155 Vt. 242, 247, 583 A.2d 577, 581 (1990)
24 ("marital tort actions may not be joined into a divorce
25 action."); *Heacock v. Heacock*, 402 Mass. 21, 520 N.E.2d 151, 153
26 (1988) ("A tort action is not based on the same underlying claim
27 as an action for divorce."); *Lord v. Shaw*, 665 P.2d 1288, 1291
28 (Utah 1983) (torts between married persons should not be litigated
in a divorce proceeding).

⁶ *Stuart v. Stuart*, 143 Wis.2d 347, 421 N.W.2d 505 (1988).

1 tort action in a divorce proceeding denies a party the opportunity
2 to have a jury trial as to the tort action thereby violating a
3 party's due process. See, e.g. Nev. Const. Art. 1, Sec.3; Gittings
4 v. Hartz, 116 Nev. 386, 390, 996 P.2d 898, 900-01 (2000).

5 Here, because the divorce and trust related tort actions were
6 joined as a direct result of the District Court's denial of the
7 ELN Trust's Motion to Dismiss⁷, the underlying proceeding was
8 overly complicated, prevented Eric and Lynita from obtaining a
9 divorce for over 4 years, and denied the ELN Trust the
10 constitutional right to have a jury determine the validity of the
11 Trusts and/or the tort claims asserted by Lynita. Indeed, one
12 need only view the numerous issues on appeal in this case to see
13 that combining the trust related tort action with the divorce led
14 to an overly complicated and burdensome proceeding.

16 Moreover, Lynita has not and cannot cite any authority
17 requiring the Family Division of the District Court to hear the
18 claims arising under Title 12 and 13 of the NRS. Indeed, neither
19 *Landreth* nor *Barelli* stand for the proposition that the family
20 Court must hear said claims. United States case law is rife with
21 analogous circumstances where a court should abstain from
22 exercising its power to adjudicate matters, especially where
23

24 ⁷ Notably, the District Court did so despite being apprised of
25 the negative consequences of joining such actions in the ELN
26 Trust's Motion to Dismiss Third Party Complaint and Motion to
Dismiss the Amended Third Party Complaint. V8:AAPP:1885-1908;
V9:AAPP:2190-2224.

1 failing to do so would potentially intrude upon the powers of
2 another court.⁸ Indeed, the very premise and benefit of subject
3 matter jurisdiction, which proscribes "the court's authority to
4 render a judgment in a particular category of case," is that
5 certain courts are better trained, experienced, and equipped to
6 efficiently hear certain cases than are others. This rationale
7 is most pronounced as it relates to specialty courts such as the
8 probate court. Here, this matter involves an extremely new and
9 complex area of trust law regarding the extent of the protections
10 afforded by a self-settled spendthrift trust and when such trust
11 may be invalidated. The specialized probate court is best
12 positioned to determine these issues, as evidenced by the fact
13 that, here, the District Court completely ignored the most basic
14 tenets of trust law and relied upon statutes from other
15 jurisdictions which are directly contrary to Nevada.

17 In light of the foregoing, even if this Court finds that the
18 District Court did not lack subject matter jurisdiction, this
19 Court should nonetheless find that the District Court erred in
20 joining the tort actions with the divorce proceeding in this
21 instance. Simply put, under certain circumstances, even if a
22

24 ⁸ See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (a federal
25 court may abstain where the state courts likely have greater
26 expertise in a particularly complex area of state law); *Railroad
27 Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Younger v. Harris*,
401 U.S. 37 (1971); *Colorado River Water Conservation District v.
United States*, 424 U.S. 800 (1976).

1 court has judicial power, the court should abstain from exercise
2 it. Such a holding would soften the harsh results of the holding
3 in *Landreth*, which as the dissent therein points out, when taken
4 to the extreme, would allow a family court to “try capital murder
5 cases, construction defect cases, and business court cases.”

6 **B. THE DISTRICT COURT ERRED BY FINDING THAT IT “COULD” HAVE INVALIDATED**
7 **THE TRUSTS.**

8 The District Court erred by finding that it “could” have
9 “invalidated” the Trusts” based upon: (1) Eric’s testimony as to
10 the community nature of the assets held by each Trust; (2) the
11 breach of his fiduciary duty as a spouse; (3) the breach of his
12 fiduciary duty as an investment trustee of the LSN Trust; (4) the
13 lack of Trust formalities; (5) under the principles of
14 constructive trust; and (6) under the doctrine of unjust
15 enrichment. V19:AAPP:4736:9-17. As an initial matter, the District
16 Court erred by finding that it could have invalidated the Trusts
17 based upon Eric’s purported breaches of fiduciary duty because it
18 dismissed Lynita’s claim for breach of fiduciary duty. Cf.
19 V19:AAPP:4549:13-15 with V9:2167:25-2168:21 and V19:AAPP:4540-
20 4550. Notwithstanding, even if Lynita’s breach of fiduciary claim
21 was not dismissed, Eric’s purported breach of fiduciary duty as a
22 spouse and as the “de facto” investment trustee of the LSN Trust⁹
23

24
25 ⁹ The finding that Eric served as the “de facto” Investment
26 Trustee of the LSN Trust is contradicted by the terms of the LSN
27 Trust, V26:AAPP:6410, which appoints Lynita as Investment
28 Trustee, and Eric never executed any documents as such.

1 do not constitute grounds to invalidate the ELN Trust in any
2 jurisdiction.

3 Further, the District Court's findings regarding Eric's
4 testimony fail for the reasons below, as does the imposition of a
5 constructive trust and unjust enrichment.

6 **1. THE FORMALITIES OF THE ELN TRUST WERE FOLLOWED; MOREOVER, EVEN IF**
7 **A FEW FORMALITIES WERE NOT FOLLOWED, IT IS INSUFFICIENT TO**
8 **INVALIDATE THE ELN TRUST.**

9 Proof of non-observance of formalities must be exceptionally
10 compelling in order to rebut the presumption of validity of
11 testaments. *Succession of Kilpatrick*, 422 So. 2d 464, 475 (La.
12 Ct. App. 1982). Said authority is consistent with Burr's
13 testimony that it is unlikely that one or two mistakes with respect
14 to trust formalities would invalidate the Trusts.
15 V15:AAPP:3513:10-20. This is especially the case when the failure
16 to comply with formalities was a direct result of a third-party,
17 particularly an attorney, as opposed to the trustee.

18 a. THE TRUST FORMALITIES WERE FOLLOWED.

19 (i) *THE TRUSTS GRANT THE TRUSTEES AUTHORITY TO MAKE LOANS AND*
20 *TRANSFER PROPERTY.*

21 The Trusts grant the Trustees authority to make loans and
22 transfer assets to third-parties, including the Trusts,
23 V26:AAPP:6493-6498, and there was no evidence/findings that said
24 loans were "unauthorized."¹⁰ Lynita's contention that certain
25

26 ¹⁰ The District Court's finding that said loans were not repaid
27 ignores the tracing prepared by Daniel T. Gerety, CPA in that
28

1 loans/transfers were invalid/void because "Eric simply had her
2 name forged on the document," is false and there was no finding
3 of forgery. Lynita did not concoct her forgery theory until
4 "coached" to do so by her attorney in court. V17:AAPP4015:16-21.

5 At least one citation in her Answering Brief that Lynita
6 contends supports her forgery allegation is actually a document
7 that she testified she executed. V17:AAPP:4024:5-7. (Q: Okay.
8 You signed the second page of the deed. A. Yes, sir."). Further,
9 Lynita's other references to testimony is inapposite to her
10 position because she could not conclusively testify whether the
11 documents contained her signature. See, e.g., V17:AAPP:4022:14
12 ("it possibly may not be my signature"), V17:AAPP:4023:7,
13 V17:AAPP:4030:15. In truth Lynita testified that she in fact
14 executed the majority of documents that were presented to her.
15 V17:AAPP:4013:14-4038:23. The majority of documents that Lynita
16 contends were "forged" were notarized by seven different notaries,
17 V18:AAPP:4416:10-20, Rochelle McGowan, Jacqueline G. Hass,
18 V17:4066:6-16, Bernadette Gray, Cindy Marie Nunn, V17:4068:11-22,
19 Beverly A. Stockert, V17:4069:3-16, Sharron L. Cooper,
20 V17:4070:12-23, Virginia James, V17:4071:12-15.¹¹ V31:7490-7522.

21
22
23 they focus only on the assets transferred from the LSN Trust to
24 the ELN Trust and ignores any evidence of assets transferred from
25 the ELN Trust to the LSN Trust. V27:AAPP:6550-6558,
26 V27:AAPP:6622.

27 ¹¹ None of the documents that Lynita now contends were "forged"
28 are relevant as they were from the 80's and 90's and regard assets
not owned by the Trusts. The District Court noted that "the[eir]

1 Finally, in regards to the Deed for the Lindell Property,
2 Lynita was unable to verify whether she in fact executed said
3 document. V17:AAPP:4030:16-20. Thus, although Lynita could not
4 conclusively establish "whether she in fact she executed said
5 Deed", the District Court apparently believed it was more familiar
6 with Lynita's signature than Lynita herself by finding that said
7 signature was inconsistent. In an event, even a "forged deed"
8 for the LSN Trust would not invalidate either Trust.

9
10 (ii) *THE DISTRIBUTION TRUSTEE APPROVED ALL DISTRIBUTIONS TO ERIC.*

11 Lynita's contention that in order for the distributions to be
12 valid the Distribution Trustees should: (1) have denied some of
13 Eric's distribution requests; (2) not have allowed pre-authorized
14 distributions; and (3) personally executed all distribution
15 checks,¹² is contrary to the terms of the Trusts and unsupported
16 by Nevada law.

17 In regards to distributions, the ELN Trust provides that
18 distributions can be made to Eric if: (1) the Trustees participate
19 in a meeting "in person or by telephone or other electronic means,"
20 and the distribution is approved by the Distribution Trustee,
21

22 relevancy is marginal at best," and did not know if "there's
23 any probative value to it or not." V17:AAPP:4061:23-4062:2.

24 ¹² The Distribution Trustees testified that the individuals that
25 wrote the distribution checks to Eric knew said distributions had
26 been authorized because they had conversations regarding the same,
V13:AAPP:3150:12-21, and there were distribution authorization
forms confirming the same. V31:AAPP:7523-7526.

1 V26:AAPP:6479; or (2) "in lieu of a Trustees' meeting," the
2 Trustees may also effect a valid meeting hereunder by execution
3 of a written consent "which shall specifically state the amount
4 of the Trust estate to be distributed to Trustor." Similarly,
5 NRS 166.040(3) provides that a settlor cannot "make distribution
6 to himself or herself without the consent of another person."

7 The District Court's finding that the Distribution Trustees
8 "were no more than a "rubber stamp" for [Eric's] directions as to
9 distributions," V19:AAPP:4720:18-20, was apparently based upon
10 the fact that Eric's's distribution requests were consistently
11 granted. However, none of the distributions violated the terms
12 of the ELN Trust and Burr confirmed that distribution trustees
13 are typically persons that the settlors could trust and would
14 hopefully make distributions when requested. V14:AAPP3462:17-20;
15 V14:3472:5-3473:16. Moreover, in this instance, Burr was aware of
16 no agreement that distributions would be made upon demand. *Id.*
17 Consistent with the public policy reflected in Nevada's
18 legislation relating to spendthrift trusts, two commentators have
19 stated (referring to a self-settled spendthrift trust as an "APT"
20 or asset-protection trust):

21
22 [T]here are numerous other reasons that debunk the notion
23 that friendly relations between a trustor and trustee are, by
24 themselves, proof of a sham:

- 25 a. It is the very nature of a trust relationship that
26 trustors will pick trustees they trust, and it should
27 not be surprising that trustees will take care of a
28 trustor-beneficiary.
- b. Trustees are supposed to carry out a trustor's intent.

- 1 c. Given that trustees are fiduciaries who are supposed to
2 be solicitous of their beneficiaries' best interests,
3 they often make distributions requested by
4 beneficiaries-trustors or nontrustors.
- 5 d. The need for a trustee to honor its legal duties to a
6 trustor-beneficiary is most acute precisely when
7 creditors press claims.
- 8 e. A trustee's failure to honor its duties during the
9 pendency of a creditor's claim could expose the trustee
10 to claims for breach of duty, and a beneficiary asserting
11 such claims could seek money damages, a declaratory
12 judgment for specific performance of those duties, or
13 other remedies.
- 14 f. An APT that functions exactly as required by the terms
15 of the agreement is not a sham.
- 16 g. As discussed above, American precedent shows that proper
17 trust administration involving an independent trustee
18 and observing legal formalities will survive a sham
19 challenge.
- 20 h. A rule or argument that a sham trust exists simply
21 because a trustee engages in a pattern of trust
22 distributions or other friendly measures to or for a
23 trustor-beneficiary could actually have an undue
24 chilling effect on a trustee's independence.

25 Asset Protection: Domestic & International Law & Tactics §
26 14A:125. The uncontroverted evidence at trial confirmed that the
27 Distributions Trustees would have denied any distribution request
28 by Eric if they had disagreed with it. V13:AAPP:3143:17-3144:6.

Finally, Lynita's contention that Bertsch confirmed that "Eric
received far more money, both in direct payments and payments of
expenses, from the ELN Trust, than was ever approved by" the
Distribution Trustees is simply false. In support of her argument,
Lynita misleadingly relies upon Bertsch's Report filed 12/8/11,
V9:AAPP:2074-2075, wherein Bertsch identified expenses and
payments to Eric in the amount of \$1,324,231.16, as opposed to
Bertch's amended report filed 2/27/12, which removed \$1,050,000

1 in erroneously attributed expenses and payments and, ultimately,
2 found that only \$284,231.36 was actually distributed to Eric
3 directly or for his expenses between January 2009 to May 2011.
4 V10:AAPP:2428,2434-2436. This is far less than even the \$960,000
5 in distributions to Eric the Distribution Trustees approved from
6 only 01/09-12/10 at the Annual Meetings held on 1/6/09 and 1/6/10,
7 V3a:RAPP:0606 and V3a:RAPP:0607, and via corresponding documents
8 entitled "Distribution Authorization." See, V31:AAPP:7523-7526.

9
10 *(iii) THE ELN TRUST DID NOT MAKE DISTRIBUTIONS TO THIRD-PARTIES.*

11 Lynita's contention that Eric made "distributions" "to non-
12 beneficiary employees and family members" is contrary to the
13 finding that said payments were not "distributions," but rather
14 payment "for various services rendered and for joint-investment
15 purposes," V19:AAPP:47233-4; V10:AAPP:2428, for which 1099's were
16 provided. The District Court further found that Lynita failed to
17 establish that said payments were improper. V19:AAPP:4723:12-13.

18 *(iv) LYNITA'S COMPLAINTS REGARDING THE ABILITY OF THE*
19 *DISTRIBUTION TRUSTEES TO SERVE LACKS MERIT.*

20 Lynita's contention that the Trusts did not follow
21 formalities because the Distribution Trustees were not
22 "independent of Eric under IRC § 674" ignores NRS 163.4177 and
23 IRC § 674, which provide that if the grantor (i.e. the Nelsons)
24 retain rights over the trust income and principal, the trust is
25 not treated as a separate taxable entity and all trust income is
26 to be reported directly on the grantor's personal income tax
27
28

1 return. This is referred to as a "grantor trust." Subsection (c)
2 of IRC § 674, the only portion that references "independent
3 trustee," provides an exception that permits a trust to be a
4 separate taxable entity if none of the trustees is the grantor
5 and no more than half of them are "related or subordinate parties
6 who are subservient to the wishes of the grantor." Said exception
7 could never apply to the Trusts because each trust was expressly
8 set up as a "grantor trust," thereby making any income taxable
9 directly to the grantor regardless of who serves as the trustee
10 (i.e. income of the ELN Trust is taxable directly to Eric and the
11 income of the LSN SSST is taxable directly to Lynita). Indeed,
12 Article 3.6 of the Trusts state: "[t]rustor understands that
13 retention of such powers shall cause the Trust income to be taxable
14 to him...and agree to pay all income taxes attributable to such
15 Trust income." V19:AAPP:6480.

17 Since the ELN Trust and the LSN Trust are "grantor trusts,"
18 a fact confirmed by Burr, V15:AAPP:3535:24-3536:22, and cannot
19 qualify as "non-grantor trusts," neither the Investment Trustee
20 nor the Distribution Trustees are required to be "unrelated or
21 subordinate parties" under IRC 672. In other words, anyone can be
22 an "independent trustee" under IRC 674 when dealing with a
23 "grantor" trust because subsection (c) of IRC 674 does not apply.
24
25
26
27
28

1 The fact that Lana¹³ and Nola were allowed to serve as
2 Distribution Trustees is confirmed by Burr, the Trust Protector
3 of the Trusts, who appointed them to serve. V3:RAPP:600-610;
4 V3:RAPP:608-611. Similarly, the fact that Burr failed to comply
5 with Section 11.3 of the ELN Trust by providing "ten (10) days
6 written notice to the Trustee to remove any Trustee named herein,"
7 does not constitute grounds to invalidate the Trusts, especially
8 where such Trustees wanted to be replaced and never complained
9 about not receiving formal written notice. Irrespective of whether
10 Eric "directed" Burr to change the Distribution Trustees, Burr
11 unequivocally testified he had sole direction to effectuate said
12 change and that Eric could not and did not force him to do so.
13 V6:AAPP1485:6-1486:5.
14

15 On a final note, Lynita's contention that "she was never given
16 the opportunity pursuant to Section 3.2 of the trust to veto any
17 distributions from LSN Trust to Eric or ELN Trust despite being
18 the trustor," fails because no distributions were made. In fact,
19 if said loans/transfers from the LSN Trust to Eric/ELN Trust are
20 considered distributions, then it would further support the ELN
21 Trust's position that "equalizing" the Trusts was in error.
22

23 (v) THE ELN TRUST DID NOT CONVERT PROPERTY FROM THE LSN TRUST.
24

25 ¹³ Eric did not nominate Lana to serve as Distribution Trustee
26 of the LSN Trust as Burr testified that Lana was "acceptable to
27 both Eric and Lynita," V17:AAPP:3463:4-10, and Lynita executed
the LSN Trust appointing Lana. V26:AAPP:6410.

1 Lynita's contention that the ELN Trust "converted" property
2 is false and even the District Court never used that term in the
3 Decree as it dismissed Lynita's claim for conversion.
4 V19:AAPP:4549:13-16. The District Court's findings regarding
5 Russell Road, Lindell Property and the Brianhead Cabin fail for
6 the reasons set forth in the ELN Trust's Opening Brief and for
7 the reasons set forth herein. Further, Lynita's contention that
8 the ELN Trust "did not challenge" the District Court's findings
9 regarding Tierra Del Sol, High Country Inn, Tropicana/Albertson
10 is false as the ELN trust is specifically seeking that this Court
11 void the entire Decree and remand this matter to the Probate Court
12 for a new trial on the merits. Further, said transactions are in
13 fact challenged by testimony of Gerty, Eric, and Gerety's expert
14 report. Most importantly, even had the ELN trust converted
15 property from the LSN Trust, such actions would not invalidate
16 either Trust, but only give rise to a civil tort claim, to which
17 the ELN Trust would be entitled to a jury trial. See, e.g., Nev.
18 Const. Art. 1, Sec. 3; *Gittings v. Hartz*, 116 Nev. 386, 390, 996
19 P.2d 898, 900-01 (2000).
20

21 **2. ERIC AND THE ELN TRUST ARE SEPARATE PARTIES, AND AS SUCH, STATEMENTS**
22 **MADE BY ERIC IN HIS INDIVIDUAL CAPACITY CANNOT BIND THE ELN SSST.**

23 Lynita seeks to bind the ELN Trust with her self-serving
24 version of trial testimony elicited by Eric, in his individual
25 capacity, as opposed to Investment Trustee of the ELN Trust.
26 Lynita has already stipulated that Eric and ELN Trust are separate
27
28

1 parties, and the District Court confirmed that at no point during
2 the first 6 days of trial had Eric represented the interests of
3 the ELN Trust. V7:AAPP:1742-1746, V12:AAPP:2985:2-13. Lynita has
4 failed to identify one citation during the first 6 days of trial
5 were Eric was making an appearance on behalf of the ELN Trust.

6 Courts uniformly hold that a trust must be made a party
7 through the trustee in his/her capacity as trustee and not his/her
8 individual capacity. See, e.g., *Gladys Baker Olsen Family Trust*
9 *v. Eighth Judicial Dist. Court*, 110 Nev. 548, 874 P.2d 778 (1994)
10 (the failure of a real party in interest to join a trust as party
11 was fatal error, where the trust owned all the assets at issue
12 and was therefore a necessary party under NRCP 19(a); *Guerin v.*
13 *Guerin*, 114 Nev. 127, 953 P.2d 716 (1998) (district court
14 precluded from enforcing order against trust because trust was
15 not a named party to action at time order was entered); *In re*
16 *Ashton*, 266 S.W.3d 602, 604 (Tex. Ct. App. 2008) (although the
17 husband "was before the court in his individual capacity, he was
18 not sued in his capacity as trustee," and, consequently, the order
19 was void).¹⁴ Lynita's reliance upon NRS 163.120(1) and *Causey v.*

22 ¹⁴ See also *In re Sovereign Partners*, 179 B.R. 656, 662 (D. Nev.
23 1995) ("Party appearing in one capacity, individual or
24 representative, is not hereby bound by or entitled to benefits of
25 res' judicata in subsequent action in which he appears in another
26 capacity"); *Stiltjes v. Ridco Exterminating Co., Inc.*, 197 Ga.
27 App. 852, 853, 399 S.E.2d 708, 709 (1990) (wife in individual
28 capacity and in capacity as administratrix are legally different
persons); *Amrhein v. Amrhein*, 560 N.E.2d 157, 160 (Mass. Ct. App.
1990); *Goff v. MacDonald*, 333 Mass. 146, 129 N.E.2d 115 (1955).

1 *Carpenters So. Nevada Vacation Trust*, 95 Nev. 609, 600 P.2d 244
2 (1979), is inapposite to her position as said authority confirms
3 that a claim against a trust must be against a "trustee in the
4 capacity of representative." Consequently, Eric's statements, in
5 his individual capacity, cannot bind the ELN Trust.

6 a. ERIC DELEGATED THE AUTHORITY TO DEFEND THE ELN TRUST AGAINST
7 COMMUNITY AND SEPARATE PROPERTY CLAIMS DUE TO HIS INHERENT
8 CONFLICT OF INTEREST.

9 Eric, as Investment Trustee, had the unequivocal authority to
10 appoint/delegate the ability to defend/initiate litigation on behalf
11 of the ELN Trust,¹⁵ and properly exercised said authority to
12 institute and defend the ELN Trust against any claims that the
13 assets owned by the ELN Trust are community or separate property
14 due to his inherent conflict of interest, which arises because
15 either Eric and/or Lynita contend that some or all of the assets
16 owned by the ELN Trust are community and/or separate property,
17 and as such, are subject to division in the instant divorce
18 proceeding, when in reality, neither Eric nor Lynita possess a
19 community or separate property interest in any assets owned by
20 the ELN SSST. V26:AAPP:6477 ("NOW, THEREFORE, the Trustor hereby
21 gives, grants and delivers irrevocably, IN TRUST, until the
22 Trustees, the properties described in the Asset Inventory, TO HAVE
23 AND HOLD THE SAME IN TRUST, and to manage, invest, and reinvest
24

25 ¹⁵ See ELN Trust at Article XII, Section 12.1, 12.2 and 12.6.
26 V26:AAPP:6493-V27:AAPP:6501. Specifically, Article XII, Section
27 12.6 See also NRS 164.770(1).
28

1 the same, and any later additions thereto, subject to the terms
2 and conditions thereto."). Eric's delegation is consistent with
3 the general rule of law that "[a] trustee should do everything in
4 his power to avoid a conflict of interest."¹⁶

5 Indeed, the District Court found that Eric was required to
6 delegate the authority to defend the ELN Trust as Eric "should
7 not maintain the responsibility 'to employ and compensate, out of
8 the principal or income or both such agents, etc.' in this action
9 due to an apparent conflict such arrangement would create."

10 V12:AAPP:2759-2770. See also V10:AAPP:2264-2272.

11
12 b. EVEN IF ERIC HAD THE ABILITY TO BIND THE TRUST, THE TESTIMONY
RELIED UPON BY LYNITA IS INADMISSIBLE.

13 Although Eric utilized the term "community" during the first
14 6 days of trial; said statements are not controlling under Nevada
15 law, which specifically provides that personal opinion of either
16 spouse as to separate or community character of property is of no
17 moment whatsoever in determining legal status of that property.¹⁷

18
19 ¹⁶ *Riley v. Rockwell*, 103 Nev. 698, 701, 747 P.2d 903, 905
20 (1987). See also *Lefkovitz v. Wagner*, 395 F.3d 773, 781 (7th
21 Cir. 2005) ("trustees can consent to join forces with others in
22 a litigation and delegate control to one or more of those others,
23 who may have a larger stake or better counsel.); *Grimmway*
24 *Enterprises, Inc. v. PIC Fresh Global, Inc.*, 548 F. Supp. 2d 840
(E.D. Cal. 2008) (a trustee is bound to act in the highest good
faith toward the trust beneficiaries and must not occupy a
position where his or her interests either conflict with those of
the beneficiaries).

25
26 ¹⁷ See *Hardy v. U.S.*, 918 F. Supp. 312, 317 (D. Nev. 1996);
27 *Peters v. Peters*, 92 Nev. 687, 692, 557 P.2d 713, 716 (1976); *In*
28 *re Wilson's Estate*, 56 Nev. 353, 53 P.3d 339, 344 (1936).

1 On the effect of the opinion of a spouse as evidence of the
2 separate or community character of property, the court in *Re*
3 *Pepper's Estate*, 158 Cal. 619, 625-26, 112 P. 62 (Cal. 1910)
4 stated: "[w]hether the property was community or separate, was a
5 question of law, depending on the manner and time of its
6 acquisition. The opinion of Pepper [the husband] on this legal
7 question was entitled to no weight." Here, the District Court
8 recognized that Eric's "opinion as to whether property is
9 community or separate is not controlling" in its Order filed
10 1/31/12. V5:1167:19-21. Further, Lynita's Counsel conceded that
11 a witness cannot render a "legal opinion with respect to community
12 property law." V18:4304:10-16 (MR. DICKERSON: To which I object,
13 because he's just rendered a legal opinion with respect to
14 community property law.").

16 Nonetheless, Lynita contends that during the first 6 days of
17 trial, Eric was acting as an agent of the ELN trust in his capacity
18 as the Investment Trustee and, therefore, the ELN trust, as
19 principle, is bound by his statements. However, it is a "cardinal"
20 rule in agency law that a principle is not bound by the acts or
21 declarations of an agent who is acting in his own best interest.
22 *Edwards v. Carson Water Co.*, 21 Nev. 469, 34 P. 381, 386 (1893).
23 Eric's testimony illustrates that he, individually, and not on
24 behalf of the ELN Trust, was willing to settle this divorce by
25 splitting "every asset 50/50" because he was desperate to obtain
26 a divorce for the sake of his kids. V1:AAPP:91:2-6. Indeed, the

1 first 6 days of trial were akin to a settlement conference or
2 mediation, and as recognized by Lynita's Counsel at trial,
3 settlement proposals are inadmissible to prove the
4 validity/invalidity of Lynita's claims. V1:AAPP:110:23-24,
5 V1:AAPP:139:9-11. See also NRS 48.105.

6 In any event, the fatal flaws in Lynita's argument, is that
7 any settlement entered into would have been contingent upon the
8 approval of the Distribution Trustee pursuant to Section 3.3 of
9 the ELN Trust because a settlement would require a distribution
10 to Eric, V26:AAPP:6479, who in turn would have been required to
11 transfer said property to Lynita and/or the LSN Trust to
12 effectuate said settlement. Consequently, the fact that Eric used
13 the word "community" and may have been willing to settle by
14 agreeing to a 50/50 split, did not and cannot bind the ELN Trust.

16 **C. EVEN IF THE DISTRICT COURT'S FINDING THAT IT "COULD" HAVE INVALIDATED**
17 **THE TRUSTS IS SUPPORTED BY "SUBSTANTIAL" EVIDENCE, IT WAS APPROPRIATE**
18 **FOR THE DISTRICT COURT TO KEEP THE TRUSTS INTACT.**

19 Even if the District Court's finding that it "could" have
20 invalidated the Trusts is supported by "substantial" evidence,
21 the District Court properly upheld the validity of the Trusts.

22 / / /

23 / / /

24 1. **THE DISTRICT COURT FOUND THAT THE TRUSTS WERE VALID AND THAT THE**
25 **ELN TRUST WAS FUNDED WITH ERIC'S SEPARATE PROPERTY.**

26 The District Court specifically found that the Trusts were
27 created in accordance with NRS 166.020, and that the ELN Trust

1 was funded with Eric's separate property held in the Eric Separate
2 Property Trust.¹⁸ V19:AAPP:4696:12-15. Consequently, Lynita's
3 contention that there are no findings that "would support the
4 conclusion that the trusts were valid" and/or the Trusts were
5 somehow funded with community property fails as she was unable to
6 identify how the District Court's findings that the Trusts were
7 validly formed and funded were erroneous.

8 The creation of a spendthrift trust is governed by NRS 164.010
9 as opposed to NRS 163.002 or NRS 163.003, which Lynita relies
10 upon; however, even if said statutes apply, Eric "properly
11 manifest[ed] an intent to create a trust" when he executed the
12 ELN Trust and transferred property to said trust. V26:AAPP:6477.

14 Further, Lynita's contention that Burr purportedly said that
15 the Trusts "would not affect their rights with regards to same in
16 the event of divorce" is contrary to Burr's testimony that he
17 explained to the Nelsons that one of the "dangers of this type of
18 agreements was the fact that perhaps in a dissolution that they
19 would lose the right to claim the others party's assets that were
20 separated..." V14:3448:10-18. The fact that there was no
21 agreement that the Trusts would be ignored in the event of divorce
22 was also confirmed by Lana, V14:AAPP:3300:14-19, and Nola.
23 V13:AAPP:3135:17-3136:10.

24
25 2. LYNITA FAILED TO ESTABLISH THAT ERIC WAWS THE TRUSTS ALTER EGO BY
 CLEAR AND CONVINCING EVIDENCE.

26 ¹⁸ Burr confirmed that the Trusts were valid. V19:AAPP:3473:18-
27 21.

1 Although Lynita now conveniently contends that the District
2 Court erred by applying NRS 163.418, she omits the fact that she
3 plead her alter ego claim under NRS 163.418 in her Amended Third-
4 Party Complaint. V9:AAPP:2166:5-25. Although the ELN Trust
5 requested that said claim be dismissed, V9:2190-2224, the District
6 Court "appl[ied] NRS 163.418 [as it] comports with the
7 Legislature's intent evidenced by the fact that it drafted a
8 "specific "alter-ego" statute applicable to "trusts,"
9 V12:AAPP:2918:4-9, based upon Lynita's arguments in her Opposition
10 to Motion to Dismiss, V9:AAPP:2010:9-2011:20, and Supplement
11 thereto. V31:AAPP:7529-7563. Lynita never appealed the Order
12 stating that NRS 163.418 applies. V12:AAPP:2918:4-9.

14 It was only after the conclusion of trial when it was apparent
15 that she failed to establish that the Trusts were Eric's alter
16 ego, by clear and convincing evidence as required by NRS 163.418,
17 V19:4577:10-4579113, that Lynita concocted the argument that said
18 statute does not apply retroactively. V5:RAPP:1061-1062.
19 Specifically, the following evidence that Lynita introduced at
20 trial regarding alter ego either could not be considered and/or
21 was insufficient to establish that the Trusts were Eric's alter
22 ego: (1) Eric was serving as Investment Trustee of the ELN Trust,
23 and "delegated" Investment Trustee of the LSN Trust,
24 V19:AAPP:4703:16-4704:8; (2) Burr removed Lana, an employee of
25 the ELN Trust, as Distribution Trustee at Eric's request,
26
27

1 V19:AAPP:4719:21-25; (3) Nola, one of the Distribution Trustee's,
2 was Eric's sister, *id.*; (4) Eric requested distributions from the
3 Distribution Trustee; and (5) Eric managed entities that were
4 owned by the Trusts.

5 Lynita's reliance upon *McKellar v. McKellar*, 110 Nev. 200,
6 203, 891 P.2d 296, 298 (1994), ignores at least two cases wherein
7 this Court identified when statutes should apply retroactively:

8 unless the Legislature clearly indicates that they should
9 apply retroactively or the Legislature's intent cannot
10 otherwise be met. This general rule does not apply to
11 statutes that do not change substantive rights and instead
12 relate solely to remedies and procedure, however; in these
instances, a statute will be applied to any cases pending
when it is enacted.¹⁹

13 Unlike NRS 125B.050 in *McKellar*, NRS 163.418 was not "amended"
14 in 2009; but rather, was the first time that the Nevada Legislature
15 recognized and codified factors relating to a claim for alter ego
16 against an irrevocable trust. Consequently, the Legislature's
17 intent to recognize a claim for alter ego against an irrevocable
18 trust cannot be effectuated unless NRS 163.418 applies
19 retroactively. NRS 163.418 also does not change the substantive
20 rights as it relates solely to the remedies/procedure of an alter
21 ego claim in Nevada.

22 Notwithstanding, Lynita makes the absurd request that this
23 Court reject Nevada law, and apply California law, to the Trusts,
24

25 ¹⁹ *Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 179-80,
26 162 P.3d 148, 154 (2007). See also *Madera v. State Indus. Ins.*
27 *Sys.*, 114 Nev. 253, 258, 956 P.2d 117, 120 (1998).

1 despite the fact that California does not recognize the validity
2 of self-settled spendthrift trusts. Further, the facts in *In re*
3 *Schwarzkopf*, 626 F. 3d 1032 (9th Cir. 2010) are easily
4 distinguished from the facts in this case. Specifically, in
5 *Schwarzkopf* the court found that the trust was the husband's alter
6 ego based on husband's payment of personal expenses from said
7 trust, whereas, here, NRS Chapter 166 specifically permits the
8 settlor of a self-settled spendthrift trust to be a beneficiary
9 without limits as to the benefits received and to have any power
10 except "for the power of the settlor to make distributions to
11 himself or herself without the consent of another person." NRS
12 166.040(3). See also Bogert's Trusts And Trustees § 222 (In
13 providing a survey of all state's spendthrift statutes, it
14 explains "Nev. Rev. Stat. §§ 166.010 et seq. is a unique statement
15 of spendthrift rules."). *Schwarzkopf* is further distinguishable
16 because the finding of alter ego was premised upon facts that are
17 inadmissible under NRS 163.418.

19 / / /

20 / / /

21 / / /

22 2. LYNITA FAILED TO ESTABLISH THE NECESSARY ELEMENTS FOR JUDICIAL
23 ESTOPPEL.

1 "[J]udicial estoppel is an extraordinary remedy that should
2 be cautiously applied."²⁰ Lynita's request for judicial estoppel
3 fails because she cannot meet the necessary five elements as set
4 forth in *Marcuse v. Del Webb Communities, Inc.*, 13 Nev. 278, 287,
5 163 P.3d 462, 468-469 (2007).

6 Here, the first and fourth factors are not met because Eric
7 and the ELN trust are not the same party and Eric has not taken
8 two totally inconsistent positions for the reasons set forth
9 above. However, even if so, "judicial estoppel does not preclude
10 changes in position not intended to sabotage the judicial
11 process," *Mainor*, 120 Nev. at 765, 101 P.3d at 318, and here, both
12 Lynita and the District Court conceded that the Trusts were
13 necessary parties that had to be joined. Further, the third
14 factor is not met because the purportedly inconsistent positions
15 are required to take place, and be adopted, in separate judicial
16 pleadings (as opposed to different "phases" of trial as Lynita
17 contends), whereas here, the positions were taken in the same
18 judicial proceeding and the District Court did not adopt or accept
19 Eric's prior testimony as true but found that Eric's "opinion as
20 to whether property is community or separate is not controlling."
21 V10:AAPP:2270:25-27. Finally, Lynita's contention that Eric's
22 purported change in position resulted in Eric obtaining an "unfair
23
24

25 ²⁰ *Mainor v. Nault*, 120 Nev. 750, 765, 101 P.3d 308, 318 (Nev.
26 2004).

1 advantage" is absurd as the District Court treated the Trusts like
2 community property by equalizing the same. As such, judicial
3 estoppel cannot apply.

4 4. LYNITA FAILED TO ESTABLISH THE NECESSARY ELEMENTS FOR EQUITABLE
5 ESTOPPEL.

6 Lynita also failed to meet the burden of invoking
7 equitable estoppel because she could not establish that the ELN
8 Trust led her to believe that she possessed a community property
9 interest in its assets, or that she was "ignorant of the true
10 state of facts." Indeed, Lynita's contention that she had no
11 way of knowing that Eric would seek to uphold the validity of the
12 Trusts and other estate planning documents is absurd as it
13 disregards the Separate Property Agreement, V26:AAPP6273-6282,
14 Separate Property Trusts V26:AAPP:6283-6341, Trusts,
15 V26:AAPP:6395-V27:AAPP:6508, and the dozens (if not hundreds) of
16 deeds that she executed. V27:AAPP:6513-6549. More importantly, as
17 indicated *supra*, however, Lynita's Counterclaim filed on 6/22/09
18 confirms that she was aware of Eric's position regarding the same.
19 V1:AAPP:11-39. Consequently, Lynita's contention that she was
20 somehow blindsided by Eric's position before the ELN Trust was
21 made a party is deceitful.

23 5. EQUITY DEMANDS THAT THE TRUSTS REMAIN INTACT.

24 Because she failed to establish the requisite elements for
25 equitable and judicial estoppel, Lynita requests that this Court
26 turn a blind-eye to the law and focus only on equity. However,
27

1 equity demands that this Court uphold the validity of the Trusts
2 as it would be inequitable to allow Lynita, who has reaped the
3 benefit of having her separate property protected from creditors
4 for nearly twenty years, to seek to invalidate the ELN Trust
5 because the assets contained therein exceeded the assets owned by
6 the LSN Trust.

7 Finally, Lynita's reliance upon NRS 47.240 fails for the same
8 reasons, namely, the statute only applies if a party represents
9 something to be true and the other "believe[s] a particular thing
10 to be true" and "act[s] upon such belief." Further, direct
11 evidence was "introduced contrary" to what Lynita deems to be
12 "conclusive." See, NRS 47.190, thereby rendering NRS 47.240
13 inapplicable.
14

15 **D. IF THE DISTRICT COURT WOULD HAVE INVALIDATED THE TRUSTS THE PROPERTY**
16 **OWNED BY THE ELN TRUST WOULD HAVE REVERTED BACK TO ERIC'S SEPARATE**
17 **PROPERTY AND THE PROPERTY OWNED BY THE LSN TRUST WOULD HAVE REVERTED**
18 **BACK TO LYNITA'S SEPARATE PROPERTY.**

19 Even if the District Court erred by not invalidating the Trusts
20 as Lynita contends, said error is harmless error pursuant to NRCP
21 61 because the property owned by said Trusts would revert back to
22 Eric and Lynita's separate property as opposed to community
23 property. Indeed, as indicated in Section (C)(1) *supra*, the
24 District Court specifically found that the ELN Trust was funded
25 with Eric's separate property and the LSN Trust was funded with
26 Lynita's separate property. V19:AAPP:4696:16-4697:3.

27 **E. THE DISTRICT COURT ERRED BY "EQUALIZING" THE TRUSTS.**
28

1 Lynita justifies the District Court's "equalization" of the
2 Trusts based upon her unsubstantiated statement that the ELN Trust
3 converted over \$7,000,000²¹ from the LSN Trust, which she contends
4 is more than the value of the property awarded to Lynita in the
5 Decree. The ELN Trust acknowledges that "if" the ELN Trust had
6 converted assets from the LSN Trust, the LSN Trust may have a
7 claim against the ELN Trust; however, such a claim was required
8 to be brought in a different forum for the reasons stated in
9 Section A, which would have resulted in the ELN Trust being able
10 to request a jury trial on tort claims. See, e.g., Nev. Const.
11 Art. 1, Sec. 3; *Gittings*, 116 Nev. at 390, 996 P.2d at 900-01.
12

13 1. THERE WAS NO AGREEMENT TO KEEP THE TRUSTS LEVEL IN HOLDINGS.

14 The District Court erred by relying upon the purported
15 "intent" of the Nelsons to equalize the Trusts for the reasons
16 set forth in Section (C) (3) of the Opening Brief, namely, (1) the
17 purported testimony regarding intent cannot change the unambiguous
18 terms of the Trust; and (2) the Parties purported intent to
19 "equalize" the Trusts does not create a legally enforceable
20 agreement to do so.

21 First, the District Court erred by relying upon Lynita's self-
22 serving testimony regarding intent as opposed to the clear,
23 definite and unambiguous terms of the Trusts as this Court has
24 made it clear that "[w]hen the plaintiff pleads that the
25

26 ²¹ Lynita failed to identify the properties or provide a
27 calculation as to how this number was reached.

1 writing...does not express the intentions of the parties to it at
2 the time, he pleads something which the law will not permit him
3 to prove." *Rd. & Highway Builders v. N. Nev. Rebar*, 284 P.3d 377
4 (2012).

5 Even if Eric "opened the door" regarding intent as Lynita
6 contends, "where parole evidence has been admitted to show some
7 general or specific intent, that evidence may not be used to
8 change the meaning of whatever unambiguous terms do appear in the
9 writing." *Matthews v. Drew Chemical Corp.*, 475 F.2d 146, 150 (5th
10 Cir. 1973). Further, the parole evidence rule precludes evidence
11 of "oral promises" to contradict express terms of documents. *Green*
12 *v. Del-Camp Investment, Inc.*, 193 Cal.App.2d 479, 14 Cal.Rptr.
13 420, 422 (1961); *Sherrodd, Inc. v. Morrison-Knudsen Co.*, 249 Mont.
14 282, 815 P.2d 1135, 1137 (1991). Consequently, the District Court
15 erred by relying upon the Parties testimony as opposed to the
16 terms of the Trusts.

18 Second, the District Court's finding that "the evidence
19 adduced at trial clearly established the parties intended to
20 maintain an equitable allocation of the assets between the
21 [Trusts]," V19:AAPP4700:13-16, is erroneous because Burr merely
22 testified that any intent of Eric or Lynita to make equalizing
23 gifts, which he defined as "disinterested generosity",
24 V14:AAPP:3479:4-5, in the future was in their sole discretion as
25 they had no binding agreement to do so. V14:AAPP:3447:15-23,
26 V14:AAPP:3448:5-9, V14:AAPP:3478:21-3479:18, V14:AAPP:3484:16-

1 19.²² Burr's testimony is consistent with the District Court's
2 other findings that Burr had testified that he had merely
3 "discussed and suggested that the Nelsons periodically transfer
4 properties" to "ensure that their respective values remained
5 equal," and "the respective trusts" could be equalized.
6 V19:AAPP:4700:2-6. In other words, although Burr only testified
7 that the Parties "could" level off the Trusts, a fact which the
8 District Court concedes, it somehow arrived at the erroneous
9 conclusion that the "parties intent to maintain an equitable
10 allocation" was clearly established, and he treated said "intent"
11 as a legally enforceable agreement by "equalizing" the Trusts.
12

13 2. LYNITA VOLUNTARILY TRANSMUTATED HER COMMUNITY PROPERTY TO SEPARATE
14 PROPERTY AFTER THE LEGAL RAMIFICATIONS OF THE SAME WERE EXPLAINED
TO HER BY TWO SEPARATE ATTORNEYS.

15 As stated in the ELN Trust's Opening Brief at 24:20-27:10,
16 the District Court cannot selectively enforce the Trusts for the
17 reasons set forth in two factually similar cases: *Marriage of*
18 *Holtemann*, 166 Cal. App. 4th 1166, 83 Cal. Rptr. 3d 385 (Cal. App.
19 4th 2008) and *Marriage of Lund*, 174 Cal. App. 4th 40, 94 Cal. Rptr.
20 3d 84 (Cal. App. 4th 2009). In order to distance herself from
21 these cases, which are damning to her position, Lynita contends
22 that said cases do not establish precedent because they were
23 decided under California law by California courts. While these
24

25
26 ²² This is consistent with Eric's testimony that the Nelsons
27 "could level off" the Trusts as opposed to confirming there was
a binding agreement to do so. V1:83:21-84:16

cases are certainly not binding on this Court, they surely are precedents which should be considered, and we believe adopted, by this Court.

Lynita also contends that *Holtzman* and *Lund* are distinguishable from the facts in this matter because in those cases the parties "understood the full legal effects of the agreements and were not misled and misinformed," and here, Lynita erroneously claims that both Burr and Richard Koch, Esq. ("Koch"), two well respected attorneys, did not advise her of the full legal effects of the creation of the estate plan.

Burr testified that the purpose of the Separate Property Agreement was to divide the Nelson's assets "in equal shares to separate property," V7:AAPP:1530:1-14, and that he advised both Eric and Lynita that a separate property agreement possessed certain benefits and risks, one of which was divorce, V14:AAPP:3448:10-18, and that each party bore the risk that they would not have a further interest in the other spouse's separate property.V14:AAPP:3448:10-18. It was Burr's "opinion and belief that you can't have a separate property agreement for the purpose of making this asset protection work versus creditors, but have some side agreement that it's not going to apply in other circumstances." V14:AAPP:3439:16-20. In that regard, Burr testified that Eric and Lynita had no side agreement, oral or written, that the Separate Property Agreement would not control in the event that the parties were divorced, V14:AAPP:3464:21-

1 3464:11, V14:AAPP:3477:1-17, and that said document created
2 separate property for all purposes by its own terms and would have
3 been enforceable as such if they had gotten a divorce the day
4 after they executed the Separate Property Trusts.
5 V14:AAPP:3480:18-24. It was based upon Koch's testimony, which
6 Lynita tries to discount,²³ that the District Court found that
7 Lynita was "advised and counseled as its legal affects" by Koch.
8 V19:AAPP:4695. See also V14:AAPP:3420:1-15, V14:AAPP:3422:9-22.

9
10 No evidence was introduced that there was an agreement that
11 the Trusts would be respected only as to third-party creditors
12 and not in the event of divorce between Eric and Lynita. Indeed,
13 Lynita testified that "she was led to believe" or that she believed
14 for that matter, that the Separate Property Agreement, Separate
15 Property Trusts and/or Self-Settled Spendthrift Trusts would not
16 affect her property rights in the event of divorce. To the
17 contrary, all evidence showed that was not the case.
18 V13:AAPP:3081:18-22, V13:AAPP:3151:12-16.

19
20
21
22 ²³ Lynita's trial testimony on 11/17/10, that Koch did not
23 explain anything is inconsistent with the Separate Property
24 Agreement that she executed on July 13, 1993, which specifically
25 provides that she "fully understand[s] the facts and and has been
26 fully informed of all legal rights and liabilities..."
27 V26:AAPP:6273, V26:AAPP6277. (Emphasis Added). Further, Lynita
28 clarified her testimony at trial on 7/18/12, by stating that she
could not recall if Koch actually explained anything to her.
V14:AAPP:3390:18-3391:7.

1 On 2/17/09, months before the instant Divorce Proceeding was
2 initiated, Lynita instructed Burr to amend her Separate Property
3 Trust, V14:AAPP:3489:16-21, which confirmed that her separate
4 property would retain its separate character. V26:AAPP:6353-6354.
5 Lynita would not have incurred the expense of restating her
6 Separate Property Trust had she believed that the Trusts would
7 not apply in the event of divorce. Although this issue was raised
8 in the ELN Trust's Opening Brief at 14:7-16, Lynita failed to
9 respond to the same in her Answering Brief.

10
11 3. THE DISTRICT COURT FOUND THAT THE NELSONS' ALLEGED SEPERATE PROPERTY
12 WAS TRANSMUTATED TO COMMUNITY PROPERTY BUT LYNITA FAILED TO ESTABLISH
13 BY CLEAR AND CONVINCING EVIDENCE THAT THE NELSONS TRANSMUTED THEIR
14 SEPERATE PROPERTY TO COMMUNITY PROPERTY AFTER 1993.

15 As a final argument as to why she believes the District Court
16 correctly equalized the assets in the Trusts, Lynita contends that
17 the Nelsons community property was never transmuted to separate
18 property. Lynita's contention is rebutted by the Decree, which
19 specifically provides that the Separate Property Agreement, which
20 was entered into pursuant to NRS 123.080 and NRS 123.220(1) was
21 valid. V19:AAPP:4695:9-11.

22 Further, Lynita's contention that the District Court found
23 that the Trusts were "extensively commingled" is false, and the
24 word "commingled" is not used once in the Decree. Further, the
25 ELN Trust's Opening Brief, Statement of the Facts Sections C, at
26 pages 10-11 and E, at pages 13-14, set forth all of the evidence
27 confirming that the assets of the Trusts were kept separate and
28

1 not commingled. The fact that much of the original assets
2 identified in the Separate Property Agreement were ultimately sold
3 and said proceeds were utilized to purchase other property is
4 inconsequential, because all acquisitions in Eric's Separate
5 Property Trust originated from Eric's separate funds. *Id.*
6 Further, after the ELN Trust was created in 2001, and was funded
7 with Eric's separate property contained in Eric's Separate
8 Property Trust, V19:AAPP:4696:18-20, all acquisitions made by the
9 ELN Trust originated from the funds in the ELN Trust. See ELN
10 Trust's Opening Brief at Section E, at pages 13-14. For these
11 reasons, Lynita's contention that the ELN Trust could not trace
12 the original source of funds used to acquire such properties is
13 erroneous.
14

15 Lynita's Answering Brief failed to introduce any evidence to
16 rebut the above. Consequently, the cases relied upon by Lynita,
17 *Malmquist v. Malmquist*, 106 Nev. 231, 245, 792 P.2d 372, 381
18 (1990) and *Ormachea v. Ormachea*, 67 Nev. 273, 217 P.2d 355 (1950),
19 are inapposite to her position because in those cases this Court
20 found that there was extensive commingling of community assets,
21 whereas here, no such evidence was presented and/or admitted at
22 trial.
23

24 As a final argument, Lynita erroneously contends that the
25 Nelsons transmuted their separate property to community property
26 after they executed the Separate Property Agreement. "[T]he right
27 of the spouses in their separate property is as sacred as is the
28

1 right in their community property, and when it is once made to
2 appear that property was once of a separate character, it will be
3 presumed that it maintains that character until some direct
4 evidence to the contrary is made to appear." *Barrett v. Franke*,
5 46 Nev. 170, 208 P. 435, 437 (Nev. 1922). "Transmutation from
6 separate to community property must be shown by clear and
7 convincing evidence." *Sprenger v. Sprenger*, 110 Nev. 855, 858,
8 878 P.2d 284, 287 (Nev. 1994).²⁴ Lynita's failure to cite portions
9 of the record to support her theory that a transmutation occurred
10 is insufficient to meet the clear and convincing standard.

11
12 **F. THE PURPORTED "EQUALIZATION" FAVORED LYNITA AND/OR THE LSN TRUST.**

13 Lynita's contention that the "Court's division of property
14 was equal based on the property that remained at the time of
15 trial," or that the purported "equalization" actually benefitted
16 the ELN trust, is just plain wrong and ignores the facts raised
17 by the ELN Trust in its Opening Brief at 30:1-34:16. Lynita flip-
18 flops on this issue in her Answering Brief by referring to the
19 "equalization" as an "approximately equal division," Answering
20 Brief at 26:15, and later states the assets were "correctly
21 equalized," *id.* at 41:22.

22 Although Lynita self-servingly contends that the District
23

24 ²⁴ Lynita's reliance in *Sprenger* is inapposite to her position
25 because in that case the wife did not meet the clear and convincing
26 evidence standard. Lynita's reliance upon *Schreiber v. Schreiber*,
27 99 Nev. 453, 663 P.2d 1189 (1983) is similarly unpersuasive as,
28 due to it being remanded, there was no analysis as to whether the
clear and convincing standard required for transmutation was met.

1 Court findings were supported by "substantial evidence," she fails
2 to identify the "substantial" evidence that supports the District
3 Court's findings regarding the "equalization." Irrespective of
4 her ability to do so, Lynita's arguments fail for the following
5 reasons.

6 First, although the District Court ordered the ELN Trust to
7 transfer over \$5,000,000 of property to the LSN Trust to
8 effectuate its stated intent to "equalize" the Trusts (i.e. the
9 ELN Trust would possess \$8,783,487.50 in assets and the LSN Trust
10 would possess \$8,785,988.50 in assets), V19:AAPP:4739, it was
11 never a true equalization because the Bella Kathryn Property was
12 overvalued at "costs in the amount of \$1,839,495 instead of its
13 appraised value of \$925,000." V19:AAPP:4717:13-4718:6,
14 V19:AAPP:4723:15-20. As such, the practical effect of the Decree
15 is that it awarded the ELN Trust assets valued at \$7,858,487.50
16 as opposed to \$8,783,487.50.

18 Lynita's contention that it was proper for the District Court
19 to value the Bella Kathryn Property at costs as opposed to the
20 appraised value as a "sanction" for Eric's purported personal
21 violation of the JPI, to which the ELN Trust was never bound,
22 ignores the arguments raised in the Opening Brief at 30:17-31:11.
23 Further, Lynita does not even attempt to respond to the fact that
24 the District Court failed to sanction the LSN Trust and/or even
25 credit the ELN Trust for the \$200,000.00 in improvements and
26 expenses Lynita made on her residence during the divorce
27

1 proceeding. V8:AAPP:1810, V10:AAPP:2458. An unbiased and true
2 "equalization" would have taken that into consideration.

3 Second, after the Trusts were purportedly "equalized" on Page
4 47 of the Decree by awarding each Trust approximately \$8,700,000,
5 which was not a true "equalization" because it overvalued property
6 owned by the ELN Trust, on Page 48 of the Decree the ELN Trust is
7 ordered to pay: (1) \$800,000 in alimony: (2) \$87,775 in child
8 support; (3) \$35,258 to Bertsch;²⁵ and \$144,967 to Dickerson.
9 V19:AAPP:4740. The practical effect of this finding, decreased
10 the assets awarded to the ELN Trust from \$7,858,487.50 to
11 \$6,790,487.50, and increased the assets awarded to Lynita/LSN
12 Trust from \$8,785,988.50 to \$9,673,738.50. Cf. V19:AAPP:4739 with
13 V19:AAPP:4740.

15 Third, after the entry of the Decree the District Court
16 continues to order the ELN Trust to pay the LSN Trust additional
17 money for rent that was collected by the ELN Trust from 05/09-
18 07/13. Specifically, the ELN Trust has already paid and/or was
19 ordered the LSN Trust an additional \$66,680.39 for the rents
20 collected on the Lindell Property from 05/09-07/13, and \$75,000
21 for a loan that Banone, LLC ("Banone") made to Dynasty Development
22

23
24 ²⁵ As stated in the Opening Brief at 33:11-23, the \$35,259 the
25 ELN Trust was ordered to pay to Bertsch in the Decree was in
26 addition to the \$104,410 previously paid to Bertsch by the ELN
27 Trust or Eric, a fact which Lynita failed to respond to in her
28 Answering Brief. Notwithstanding, the District Court erred by
not even crediting the ELN Trust for the paid amounts.

1 Management, LLC ("Dynasty") in 11/11, see Opening Brief at 34:1-
2 11, which further decreases the assets awarded to the ELN to
3 \$6,648,807.11, and increases the assets awarded to the LSN Trust
4 to \$9,815,418.89. Cf. V19:AAPP:4739 with V23:AAPP:5704 and
5 V25:AAPP:6236:16-20. Further, the District Court has ordered the
6 ELN Trust to account and pay Lynita the rents collected from the
7 Arnold Property, and Mississippi RV Park from 05/09-07/13, which
8 could be substantial.²⁶ The practical effect of the award would
9 decrease the assets awarded to the ELN Trust to \$6,523,807.11,
10 and increase the assets awarded to the LSN Trust to \$9,940,418.89.
11 Lynita has completely failed to address, explain or justify how
12 this disparity in assets was not in error.
13

14 To make matters worse, the District Court ignored all of the
15 liabilities (except for Wyoming Downs) identified by Bertsch and
16 Gerety because "it did not find any documented evidence to support
17 such claims," despite the fact that Lynita stipulated during trial
18 to "share equally" in the liabilities. V5:1056:23-1057:6.

19 In lieu of directly responding to the plethora of documents
20 admitted at trial and identified in the Opening Brief at 31:20-
21 33:10, even promissory notes, V30:7488-7489, confirming the
22

23 ²⁶ Although this Court stayed the Order compelling the ELN Trust
24 to account and pay the rents collected by the Arnold and Lindell
25 Properties as ordered by the District Court, the District Court
26 found that ELN Trust may have received \$4,000 a month from the
27 Mississippi RV Park, and as such, may be ordered to pay the same
28 to the LSN Trust. V25:6241:17-6242:10. See also
V25:6239:18:6240:12.

1 liabilities, Lynita generally falsely contends that Bertsch
2 somehow found that the liabilities identified by the ELN Trust
3 were not "supported." Bertsch, who is not an attorney, testified
4 that his purpose of special master was to "report what [he] found"
5 as opposed to "making an evaluation." V18:AAPP:4289:5-13.
6 Notwithstanding, Bertsch testified he did not believe a contingent
7 liability was a "real" liability, V18:4322:22-24, although he
8 conceded that under at least one transaction a \$623,000
9 contingent liability existed, V:19:4342:3-6, and that a contingent
10 liability in the amount of \$1,000,000 could be worth \$0,
11 \$1,000,000 or somewhere in between. V19:4342:15-20. This faulty
12 logic, which is contrary to law, was followed by the District
13 Court. *See, e.g., Nicewonder v. Nicewonder*, 602 So. 2d 1354 (Fla.
14 Dist. Ct. App. 1992) (in effecting equitable distribution, court
15 should have considered contingent tax liabilities). Consequently,
16 if said liabilities ever become realized it appears that the ELN
17 Trust may be 100% liable for the same, which is contrary to law.

18
19 As a final argument, Lynita contends in her Answering Brief
20 at 49:20-25 that the "equalization" was unfair to her because it
21 was she, as opposed to the ELN Trust, that received less than one-
22 half (1/2 of the property) because Eric paid \$697,476 in personal
23 expenses, \$3,900,115 was paid to Eric's family members and
24 \$407,392 to the Parties children. As indicated *supra*, the
25 payments to family members was compensation for various services
26 rendered. V19:AAPP:4723:1-14.
27

1 In contrast, Lynita spent spent \$1,915,090.63 of the
2 \$2,020,097.41 held in accounts titled in the name of the LSN Trust
3 from 2009-2011. V8:AAPP:1810-1811. Specifically, Lynita
4 withdrew \$581,838.66 in cash, spent \$190,539.72 on housing
5 expenses and \$411,597.42 in other "personal expenses." See *id.*
6 Consequently, Lynita's personal expenses from 2009-2011 were
7 nearly twice as much as the personal expenses of Eric between
8 2009-2012. Cf. V11:AAPP:2678-2709 with V8:AAPP:1810-1811.

9
10 **G. THE DISTRICT COURT'S DISREGARD FOR NEVADA LAW DOES NOT CONSTITUTE HARMLESS**
11 **ERROR.**

12 The District Court's blatant disregard of the terms of the
13 Trusts, NRS 166.120 and NRS Chapter 21, which prohibits the
14 District Court from ordering the ELN Trust to distribute assets
15 to pay Eric's personal obligations to Lynita, her Counsel, and
16 the Special Master, is so egregious, Lynita does not even try to
17 defend the District Court's action.

18 Notwithstanding, Lynita contends that the District Court's
19 errors with respect to the same are "clearly harmless" under NRCF
20 61 because said errors do "not affect the substantial rights of
21 the parties." Here, the District Court's findings do affect the
22 ELN Trust's substantial rights because a different result would
23 have been reached (*i.e.* the ELN Trust would not be forced to make
24 said payments to Lynita, her Counsel or Bertsch) if the District
25 Court followed Nevada law. See, *Wyeth v. Rowatt*, 126 Nev. 446,
26 465, 244 P.3d 765, 778 (2010).

1 Lynita has failed to cite any authority that supports her
2 position that the District Court can ignore Nevada law in favor
3 of laws from other jurisdictions (*i.e.* Florida, South Dakota and
4 Wyoming), which are contrary to Nevada law, to obtain the results
5 that it wants. Although the District Court did find that it could
6 have invalidated the Trusts, said finding is in error for the
7 reasons identified in Section B *supra*. Notwithstanding, even if
8 there was sufficient evidence to justify said findings, the
9 District Court did not invalidate said Trusts, and as such, the
10 ELN Trust has a substantial right to have the District Court
11 follow the law, namely, NRS 166.120 and NRS Chapter 21.
12

13 **H. THE DISTRICT COURT ERRED BY IMPOSING A CONSTRUCTIVE TRUST OVER PROPERTIES**
14 **OWNED BY THE ELN TRUST.**

15 The District Court erred and exceeded its jurisdiction by
16 imposing a constructive trust over the Lindell and Russell Road
17 Properties because (1) a legal, as opposed to an equitable remedy
18 for any alleged misconduct, is available and (2) there was no
19 evidence, let alone conflicting evidence, to support the District
20 Court's imposition of a constructive trust, particularly with
21 respect to Russell Road.

22 1. **THE CONSTRUCTIVE TRUST SHOULD BE REMOVED BECAUSE THERE IS A LEGAL**
23 **REMEDY.**

24 Lynita failed to respond to the ELN Trust's argument that the
25 imposition of an equitable constructive trust remedy was in error
26 because there is a legal remedy, and as such, said argument should
27 be deemed meritorious and the constructive trust should be
28

1 removed. See NRAP 31(d); *Polk v. State*, 126 Nev. 180, 233 P.3d
2 357 (2010).

3 2. THERE WAS NO CONFLICTING EVIDENCE, LET ALONE SUBSTANTIAL EVIDENCE,
4 TO SUPPORT THE IMPOSITION OF A CONSTRUCTIVE TRUST OVER RUSSELL ROAD.

5 Lynita's contention that it was an appropriate for a
6 constructive trust to be imposed on Russell Road because "it is
7 the exclusive province of the district court to determine facts
8 on conflicting evidence" fails because no conflicting evidence
9 was introduced at trial. Notwithstanding, the District Court
10 ignored the uncontested evidence in order to obtain the result it
11 wanted: "an equalization of the Trusts."

12 **a. THE DISTRICT COURT'S FINDING THAT ERIC DIRECTED LYNITA TO**
13 **TRANSFER HER 50% INTEREST IN RUSSELL ROAD IS CONTRARY TO THE**
14 **EVIDENCE.**

15 The District Court's finding that that the LSN Trust
16 transferred its "interest in Russell Road, under the advice and
17 direction of Mr. Nelson," V19:AAPP:4709:2-3, is unsupported by
18 the record. Bertsch confirmed that it was Lynita, as opposed to
19 Eric, that "signed an assignment or forfeit of her interest in
20 the partnership to remove her from the property records,"
21 V7:AAPP:1672, and the paperwork executed by Lynita regarding said
22 assignment does not reference Eric. V29:7015-7016. Further,
23 Lynita introduced no evidence at trial, not even testimony, that
24 Eric somehow directed her to relinquish her ownership in Russell
25 Road.

26 / / /

1 The only evidence on this issue came from Eric who testified
2 that he had no conversations with Lynita regarding her ownership
3 interest because he was not involved in it. V17:AAPP:4234:19-21.
4 Not only did Eric have nothing to do with said transaction, but
5 he did not benefit from said transaction as he did not have an
6 ownership interest in Russell Road when Lynita relinquished her
7 interest in 2004 to avoid furth capital contributions.
8 V7:AAPP:1672. Consequently, the aforementioned finding is
9 contrary to the evidence admitted at trial.

10
11 **b. IT IS UNCONTESTED THAT THE DISTRICT COURT IGNORED THE**
12 **\$4,000,000 THE ELN TRUST PAID FOR ITS 66.67% INTEREST IN**
RUSSELL ROAD.

13 It is uncontested that in 2010, five years after Lynita
14 relinquished her interest in Russell Road, the ELN Trust paid
15 \$4,000,000 for its 66.67% interest in Russell Road²⁷:

16	Pay down of Bank Loan	\$300,000.00
17	Pay off of personal residence of Cal Nelson	\$400,000.00
18	Credit to Cal Nelson for prior payments	\$522,138.45
19	Amount to pay Bank Note from Sugar Daddy's	\$1,520,597.88
	Amount to pay Bank Loan from Line of Credit	\$1,257,263.67
	TOTAL	\$4,000,000.00

20 Since the ELN Trust's interest in Russell Road was paid for
21 with its own assets, the District Court erred by imposing a
22 constructive trust over such property because the 66.67% obtained
23 by the ELN Trust in 2010 cannot be traced, which is a prerequisite
24 to the imposition of a constructive trust, to the interest that
25 Lynita and/or the LSN Trust relinquished in 2004. See *Eychaner*

26
27 ²⁷ V7:AAPP:1673-1674; V19:AAPP:4708:7-8

1 *v. Gross*, 779 N.E.2d 1115, 1143 (Ill. 2002); *In re Marriage of*
2 *Harrison*, 310 S.W.3d 209 (Tex. App. 2010) ("trust fund must be
3 clearly traced into other specific property; that nothing must be
4 left to conjecture, and that no presumptions, except the usual
5 and necessary deductions from facts proven, can be indulged.");
6 *In re Hayward*, 480 S.W.3d 48 (Tex. App. 2015) ("the party seeking
7 imposition of a constructive trust—not the party opposing it—bears
8 the burden of strictly tracing the property to be placed into a
9 constructive trust to property wrongfully withheld from the party
10 seeking the trust.").

11
12 Notwithstanding, even if the 66.67% interest in Russell
13 Road that the ELN Trust obtained in 2010 could be traced to the
14 50% Lynita relinquished in 2004, it is well established that a
15 constructive trust cannot be enforced against a bona fide
16 purchaser, such as the ELN Trust. *See, e.g., Brophy Min. Co. v.*
17 *Brophy & Dale Gold & Silver Min. Co.*, 15 Nev. 101 (1880); *Pluemer*
18 *v. Pluemer*, 776 N.W.2d 261, 266-67, 2009 WI App 170 (Wis. App.
19 2009); *In re Marriage of Allen*, 724 P.2d 651, 658 (Colo. 1986).
20 ("Neither an equitable lien nor a constructive trust is available
21 against a bona fide purchaser for value.")

22
23 **c. IT IS UNCONTESTED THAT THE CONSTRUCTIVE TRUST GRANTS LYNITA A
GREATER INTEREST IN RUSSELL ROAD THAN SHE EVER POSSESSED.**

24 The District Court awarded the LSN Trust an economic windfall
25 by giving her a 50% interest of the ELN Trust's 66.67% ownership
26 interest in Russell Road, which is valued at \$2,265,113.50,
27
28

1 despite the fact that she only paid \$855,954 for a 50% interest
2 in 1999. Cf. V19:AAPP:4709:7-10, V19:AAPP:4739 with
3 V19:AAPP:4707:15-17, V7:AAPP:1672-1674, V30:AAPP:7020. The
4 increase in value is based, in large part, on the fact that the
5 Russell Road at the time the Decree was entered is approximately
6 3 times larger than it was when owned by the LSN Trust. Cf.
7 V29:AAPP:7020 with V29:AAPP:7023-7046. The District Court erred
8 by failing to take these facts, which were not contested (at trial
9 or in Lynita's Answering Brief), into consideration, in imposing
10 its constructive trust.
11

12 In light of the fact there is no conflicting evidence on the
13 ELN Trust's acquisition of Russell Road, the constructive trust
14 placed over Russell Road was improper and should be reversed.

15 3. THE EVIDENCE SUPPORTING THE IMPOSITION OF A CONSTRUCTIVE TRUST OVER
16 THE LINDELL PROPERTY WAS NOT "SUBSTANTIAL."

17 The evidence admitted at trial confirms that the LSN Trust
18 transferred 50% of its interest in the Lindell Property to the
19 ELN Trust on 3/22/07 in exchange for the transfer of millions of
20 dollars of property. See Opening Brief at 41:8-42:17.

21 Nevertheless, the District Court imposed a constructive trust
22 because it believed (1) it was unclear what Mississippi properties
23 were involved in the transaction; (2) no credible testimony as to
24 the value of the Mississippi property was presented; and (3) the
25 transfer of the Mississippi property from the ELN Trust to the
26 LSN Trust occurred in 2004 and the transfer of the Lindell Property
27
28

1 from the LSN Trust to the ELN Trust occurred in 2007.
2 V19:AAPP:4709:22-4710:5. This finding was not based on
3 "substantial" evidence, but rather, is contrary to the evidence
4 admitted at trial for the reasons set forth in the Opening Brief
5 at 41:8-42:17, namely, Bertsch and/or Gerety testified regarding
6 the properties involved in the transaction and the values of said
7 property. Indeed, if there was not credible testimony as to the
8 value of the Mississippi properties involved in the transaction,
9 then how could the District Court have attributed values to the
10 same properties when it "equalized" the Trusts? Cf.
11 V19:AAPP:4710:2-4 with V19:AAPP:4739. Lynita's contention to the
12 contrary defies logic.
13

14 **I. THE DISTRICT COURT ERRED BY ALLOWING LYNITA AND/OR THE LSN TRUST TO**
15 **LITIGATE CLAIMS THAT WERE, OR SHOULD HAVE BEEN, INCLUDED IN THE FINAL**
16 **JUDGMENT.**

17 As stated in the ELN Trust's Opening Brief at 44:19-48:15,
18 after the District Court equalized the assets owned by the Trusts,
19 V19:AAPP:4736:9-17, V19:AAPP:4738:10-4739:25, it violated Nevada
20 law by allowing Lynita to re-litigate claims for rents collected
21 by the ELN Trust from 5/09-06/13, despite the fact the District
22 Court: (1) had confirmed that it had disposed of any and all
23 claims between the Parties; (2) was divested of jurisdiction
24 because the ELN Trust had already filed an appeal; and (3) had
25 already "equalized" the Trusts thereby resulting in a double
26 recovery for Lynita.
27
28

1 Lynita's contention that she was allowed to relitigate said
2 claims because she "had no idea which properties would ultimately
3 be awarded to her, as Eric was arguing that Lynita had no interest
4 in properties held in the ELN Trust" is nonsensical as the
5 relitigated claims stem from properties titled in the name of the
6 LSN Trust prior to and during the trial (*i.e.* the Arnold Property,
7 Lindell Property and Mississippi RV Park), as opposed to
8 properties owned by the ELN Trust. In fact, Lynita requested that
9 the ELN Trust place the rents collected from the Mississippi RV
10 Park placed in a blocked account as early as 7/26/11,
11 V30:AAPP:7401:4-10; however, the District Court denied Lynita's
12 request. Lynita then sought the same relief in her Amended Third
13 Party Complaint. V9:AAPP:2137:5-18. Lynita's contention that she
14 was allowed to relitigate said claims is absurd, in bad faith,
15 and ignores, and fails to redspond to, the arguments contained in
16 the Opening Brief.

18 **J. THE ISSUE OF "UNJUST ENRICHMENT" WAS NOT TRIED BY EXPRESS/IMPLIED CONSENT.**

19 Although Lynita does not dispute the fact that her claim for
20 unjust enrichment was dismissed by the District Court 16 months
21 before entry of the Decree, she erroneously contends that judgment
22 on this issue was not proper because her unjust enrichment claim
23 was raised during the trial proceedings without objection.
24 Unsurprisingly, Lynita failed to cite any portion of the record,
25 as required by NRAP 28(e)(1), to support her position for a simple
26

1 reason: the phrase "unjust enrichment" was never used by any
2 attorney, witness, or the District Court during the trial.

3 Because unjust enrichment was never raised as an issue at
4 trial, it cannot be deemed to have been tried by either express
5 or implied consent. "Express consent may be found when a party
6 has stipulated to an issue or the issue is set forth in a pretrial
7 order." *Blinn v. Beatrice Comm. Hosp. & Health Ctr., Inc.*, 708
8 N.W.2d 235, 244 (2006). Similarly, in Nevada a court will only
9 find implied consent to trial of an issue where, e.g., "counsel
10 for the defendant had raised the issue in his opening argument,
11 [and] counsel for plaintiff had specifically referred to the
12 matter as an issue in the case," or where "appellant's counsel
13 agreed with [the] court's characterization of the matter as the
14 major issue in the case." *Schwartz v. Schwartz*, 95 Nev. 202, 205,
15 591 P.2d 1137, 1140 (1979) (citations omitted). Where, instead,
16 "there was no reference to [the disputed issue] as a defense, or
17 to the factual issues involved, during pre-trial discovery,
18 opening remarks of counsel, or at any time prior to the cross-
19 examination of appellant," this Court held that the issue was *not*
20 tried by implied consent. *Id.* at 205-06, 591 P.2d at 1140.

21
22 Federal courts, applying the federal analogue of NRCP 15(b),
23 have held similarly that "[a] finding of implied consent depends
24 on three factors: 'whether the parties recognized that the
25 unpleaded issue entered the case at trial, whether the evidence
26 that supports the unpleaded issue was introduced at trial without
27

1 objection, and whether a finding of trial by consent prejudiced
2 the opposing party's opportunity to respond.'" *Liberty Lincoln-*
3 *Mercury v. Ford Motor Co.*, 676 F.3d 318, 327 (3d Cir. 2012).

4 Here, the factors militate against a finding of trial by
5 consent. First, the Parties could not have "recognized that the
6 unpleaded issue entered the case at trial," because there: (1)
7 was no stipulation to try a claim for unjust enrichment; (2) a
8 claim for unjust enrichment was not included in any pretrial
9 order; and (3) there is no evidence that the Parties expressly
10 consented to try a claim for unjust enrichment. In fact, no one
11 ever even said the words "unjust enrichment" at trial. Second,
12 no "evidence that supports the unpleaded issue was introduced at
13 trial without objection," because the ELN Trust was never
14 "apprised that [any] evidence went to the unpleaded issue."
15 Finally, the ELN Trust would be severely prejudiced by a finding
16 of trial by consent, because the issue of unjust enrichment was
17 dismissed before trial, and was never mentioned again until the
18 decree was issued *after the trial* was over. For these reasons,
19 the District Court therefore erred when it entered judgment on
20 the issue of unjust enrichment.
21

22 **K. THE DISTRICT COURT PROPERLY CONFIRMED WYOMING AS AN ASSET OF THE ELN**
23 **TRUST.**

24 The District Court found that the ELN Trust's purchase of
25 Wyoming Downs via an entity owned 100% in its name, Dynasty
26 Development Management, LLC ("Dynasty"). V31:7527-7528, was not
27
28

1 community property, for reasons set forth in the Order Determining
2 Disposition of Wyoming Downs. V23:AAPP:5556-5561. Specifically,
3 the District Court found: (1) Wyoming Downs was financed through
4 debt, V23:AAPP5558:7-17; (2) the District Court found no facts to
5 conclude that Lynita has an interest in Wyoming Downs,
6 V23:AAPP:5558:21-22; (3) even assuming Wyoming Downs was Eric's
7 separate property, there was no transmutation from separate to
8 community property, V23:AAPP:5558:25-28; and (4) at the time
9 Wyoming Downs was purchased by Dynasty, Lynita was treating the
10 LSN as a separate and district entity. V23:AAPP:5559:2-12.

11
12 Further, Lynita adamantly opposed Dynasty's acquisition
13 of Wyoming Downs during the Divorce Proceeding by arguing that
14 the purchase of "the non-performing Wyoming Downs racetrack will
15 cause irreparable harm to Lynita." V9:AAPP:2049:4-6. Lynita also
16 conceded on multiple occasions that she did not have an interest
17 in Dynasty, V9:AAPP:2046:fn:1, nor did she contribute to the
18 \$75,000 earnest money deposit. V9:AAPP:2046:fn:2.

19 Although the District Court correctly confirmed that
20 Wyoming Downs is an asset of the ELN Trust, and Lynita/LSN Trust
21 possess no ownership interest therein, it erred by awarding Lynita
22 \$75,000 for the earnest money deposit loaned by Banone for the
23 reasons stated in the Opening Brief at 34:1-11, which Lynita
24 failed to address in her Answering Brief.

25
26 **L. THE DISTRICT COURT ERRED BY EXCLUDING LAYNE RUSHFORTH, ESQ. AS AN EXPERT.**

1 The District Court made it clear that the Parties were to
2 reach an agreement on discovery deadlines, and in furtherance of
3 said instruction Lynita proposed that the discovery deadline
4 expire one week before trial resumed on 7/16/12, which date the
5 ELN Trust never opposed and understood to be controlling.
6 V16:AAPP:3805:21-:3806:3. Despite the fact that the District
7 Court did not impose any discovery deadlines, and it conceded at
8 trial that it was at "fault" for not doing so, V12:AAPP:2981:16-
9 18, "V12:AAPP:2982:8-17, V12:AAPP:2987:2-4, the District Court
10 erroneously excluded Rushforth from testifying at trial.²⁸

11
12 The District Court additionally erred by finding that it "did
13 not see how much Rushforth could assist the Court in deciding a
14 fact at issue in this matter, and any testimony Rushforth could
15 offer is regarding the law which invades the province of the
16 Court," as the reasons were specifically set forth in the ELN
17 Trust's Opposition to Motion in Limine, V16:AAPP:3803-3821,
18 namely, Rushforth's testimony would assist the District Court as
19 he would have been able to provide specialized knowledge regarding
20 factual and legal issues raised by Lynita, including, the
21 practices, and standard of care relating to asset protection
22 trusts.

23
24
25 ²⁸ NRCP 16.2 does not apply because the trial had already
26 commenced when the Trusts were made parties. V12:2941:6-17;
27 V12:AAPP:2943:9-15.

1 Finally, Rushforth was being offered to rebut the expert
2 witness opinions that Burr provided in favor of Lynita. To make
3 matters worse, although the District Court precluded Mr. Rushforth
4 testifying because it believed he would testify regarding the law,
5 the District Court then allowed Burr to do the very same thing:
6 testify regarding the law, V14:AAPP:3512:12-21, which ultimately
7 served as a basis for certain findings in the Decree. *U.S. v.*
8 *Mitchell*, 365 F.3d 215, 247 (3d Cir. 2004) ("There is a "parity
9 principle" in admission of expert testimony: "If one side can
10 offer expert testimony, the other side may offer expert testimony
11 on the same subject to undermine it, subject, as always, to
12 offering a qualified expert with good grounds to support his
13 criticism."). Consequently, the District Court erred by precluding
14 Rushforth from testifying regarding the law and then allowing Burr
15 to do so.

17 **M. LYNITA'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.**

18 The District Court also erred, and Lynita's issues on appeal
19 fail, because her claims are barred by the statute of limitations.
20 NRS 166.170 limits the timeframe in which a creditor, which is
21 defined as a "person who has a claim," NRS 112.150(4), to either
22 two years after the transfer is made or six months after the
23 persons discovers said transfer. NRS 166.170(1). A person is
24 deemed to have discovered a transfer at the time a public record
25 is made of the transfer. NRS 166.170(2). Further, NRS 166.170(3)
26 and (6) requires a creditor to prove that the transfer of property
27

1 was fraudulent and/or violated the laws of the State of Nevada by
2 "clear and convincing evidence."

3 Lynita was advised of this two-year statute of limitation by
4 Burr in person and via correspondence dated 5/30/01, which
5 provides: "[o]nly those assets transferred to your NOST will be
6 protected from creditors' claims once the two-year statute of
7 limitations has run from the date you transfer assets into your
8 NOST." V26:AAPP:6442-6444. Lynita represented that she
9 "understand and acknowledge receipt of this letter." *Id.*
10 Additionally, a notice relating to transfers made to the Trusts
11 was published in Nevada Legal News three times commencing on
12 8/21/01. V26:AAPP:6445-6446. and conveyances of real property were
13 recorded in the county recorder's office. Consequently, the
14 statute of limitations began to run in or around 05/01, over 16
15 years ago. Any claim that Lynita may have had against the ELN
16 Trust should have been brought no later than 05/03. NRS 166.170.

18 Although NRS 166.170(8) makes it clear that it supersedes
19 the longer period that would be allowed under NRS 11, Lynita's
20 claims are similarly barred under NRS 11.070 and 11.080 (claim
21 for seizing or possessing premises must be brought within five
22 years), NRS 11.190(1)(b) (breach of written contract subject must
23 be brought within 6 years), NRS 11.190(2)(c) (breach of an oral
24 agreement must be broughtin within 4 years) and NRS 11.190(3)(a)
25 community property claim must have been brought within 3 years.
26

1 In light of the foregoing, the District court erred by even
2 allowing Lynita to pursue her claims that were time barred.

3 **N. THIS MATTER SHOULD BE REMANDED TO THE PROBATE COURT.**

4 The errors the District Court made in this case are numerous,
5 substantial, prejudicial, and, when viewed as a whole, demonstrate
6 a clear bias against Eric and the ELN Trust thereby warranting
7 remand of this matter to a different judge. Indeed, it was apparent
8 from early on that the District Court wanted to impose community
9 property equal division principles onto irrevocable self settled
10 spendthrift trusts. In order to accomplish this, the District
11 Court was forced to repeatedly make the sixteen major legal errors
12 set forth in the Opening Brief, the dozens of other errors
13 identified on the ELN Trust's Docketing Statement that it could
14 not address due to page limitations, and those identified in the
15 instant Reply. These errors go far beyond the District Court
16 simply making understandable erroneous rulings based upon
17 ambiguity in the law. Instead, the District Court systematically
18 ruled in favor of Lynita even when required to ignore express
19 Trust terms and clear Nevada law. It is these seemingly deliberate
20 legal errors, not the unfavorable ruling themselves, that
21 demonstrate the District Court's bias. Ultimately, this Court
22 should remand this matter to a different judge because the
23 District Court will have "substantial difficulty putting out of
24 his ... mind" its "previously-expressed view[]" that he will
25 invalidate the trust on remand, V21:AAPP:5178: 6-9,

1 V22:AAPP:5299:19-21, V22:5304:4-9, and other erroneous holdings
2 and because doing so will preserve the appearance of justice by
3 condemning judicial bias. In fact, the District Court is already
4 gearing up to go "round two" with this Court. V22:AAPP:5199:8-11.
5

6 Moreover, given the abundance of errors regarding the Trusts
7 it would be more fair and judicially economical to have the trust
8 matters be heard by the Probate Court as opposed to having the
9 District Court attempt to correct the record, which is riddled
10 with errors due to the District Court's actions.

11 **CONCLUSION**

12 In light of the foregoing, the ELN Trust respectfully requests
13 the relief sought in its Opening Brief.
14

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CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this brief complies with the
3 formatting requirements of NRAP 32(a)(4), the typeface
4 requirements of NRAP 32(a)(5) and the type style requirements of
5 NRAP 32(a)(6) because this brief has been prepared in a monospaced
6 typeface using Microsoft Office Word 2010 in 12 point Courier
7 type style.
8

9 2. I further certify that this brief complies with the page
10 or type-volume limitations of NRAP 32(a)(7) because, excluding
11 the parts of the brief exempted by NRAP 32(a)(7)(C), it is
12 monospaced, does not contain more than 10.5 character per square
13 inch (i.e. Courier 12 point), and contains 1,580 lines.

14 3. Finally, I hereby certify that I have read this appellate
15 brief, and to the best of my knowledge, information and belief,
16 it is not frivolous or interposed for any improper purpose. I
17 further certify that this brief complies with all applicable
18 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),
19 which requires every assertion in the brief regarding matters in
20 the record to be supported by appropriate references to page and
21 volume number, if any, of the transcript or appendix where the
22

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1 matter relied on is to be found. I understand that I may be
2 subject to sanctions in the event that the accompanying brief is
3 not in conformity with the requirements of the
4 Nevada Rules of Appellate Procedure.

5 Dated this 3rd day of May, 2016.

6
7
8 /s/ Jeffrey Luszeck
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