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Docket 66772 Document 2016-18317

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
REPLY TO FACTUAL ASSERTIONS BY ELN TRUST AND ELN TRUST'S UNSUPPORTED ARGUMENTS REGARDING FACTUAL REPRESENTATIONS	1
ARGUMENT	15
A. THE ELN TRUST'S ANSWER AND REPLY BRIEF ATTEMPTS TO IMPROPERLY RAISE NEW ISSUES FOR THE FIRST TIME, TO DEPRIVE LYNITA OF THE OPPORTUNITY TO FULLY RESPOND TO SAME	15
B. THE DISTRICT COURT ERRED IN NOT SPECIFICALLY INVALIDATING ERIC'S SHAM TRUSTS DESPITE FINDING SUFFICIENT EVIDENCE TO JUSTIFY INVALIDATING THE TRUSTS	23
1. The Trusts Did Not Have Authorized Distribution Trustees And Distributions Were Made For Years Without Authorization	23
2. ELN TRUST Was Properly Made A Party To The Case – By ERIC Himself	25
3. At The Time That ERIC Testified Before The Court During The First Six Days Of Trial, He Had The Authority To Bind – And Did, In Fact Bind, ELN TRUST	26
4. ERIC's Testimony During The First Six Days Of Trial Was Not Only Admissible, But It Also Served To Conclusively Establish Facts Regarding ERIC's Handling And Treatment Of The Trust Property	27
5. The Elements For Judicial Estoppel Were Met	27

1	6.	The Elements For Equitable Estoppel Were Met	28
2	7.	LYNITA's Attempt To Prevent ERIC From Inheriting 100% Of	
3		The Parties' Property In The Event Of Her Death Prior To	
		Divorce Does Not Validate Otherwise Invalid Trusts	29
4	8.	If The Trusts Had Been Invalidated, All Property Would Have	
5		Been Community Property	30
6	C.	THE DISTRICT COURT ERRED IN REFUSING TO DIVIDE	
		WYOMING DOWNS	32
7		CONCLUSION	33
8		CERTIFICATE OF COMPLIANCE	34
9		CERTIFICATE OF SERVICE	36

10
11
12
13
14
15
16
17
18
19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

TABLE OF AUTHORITIES

CASES

Cord v. Neuhoff, 94 Nev. 21, 573 P.2d 1170 (1978) 20

Forrest v. Forrest, 99 Nev. 602, 668 P.2d 275 (1983) 30

G & H Associates v. Ernest W. Hahn, Inc., 934 P.2d 229, 113 Nev. 265 (1997)
..... 19

In re Schwarzkopf, 626 F.3d 1032, 1036-37 (9th Cir. 2010) 18

Ivory Ranch, Inc., v. Quinn River Ranch, Inc., 705 P. 2d 673, 101 Nev. 471
(1985) 21

Malmquist v. Malmquist, 106 Nev. 231, 792 P.2d 372 (1990) 31

Moberg v. First Nat’l Bank of NV, 96 Nev. 235, 607 P.2d 112 (1980) .. 30

Oak Grove Investors v. Bell & Gossett Co., 668 P.2d 1075, 99 Nev. 616 (1983)
..... 19

Ormachea v. Ormachea, 67 Nev. 273, 217 P.2d 355 (1950) 31

Schreiber v. Schreiber, 99 Nev. 453, 663 P.2d 1189 (1983) 31

Schwartz v. Schwartz, 95 Nev. 202, 591 P.2d 1137 (1979) 21

Sprenger v. Sprenger, 110 Nev. 855, 878 P.2d 284 (1994) 31

STATUTES AND COURT RULES

EDCR 1.30 16

1	EDCR 4.02.	16
2	Internal Revenue Code, Section 672(c)	24
3	Internal Revenue Code, Section 674(c)	24
4	NRAP 28(a)	15
5	NRAP 28.1(c)(2)	1
6	NRCP 38(b)	16
7	NRS 112.150(4)	18
8	NRS 123.270	20
9	NRS 166.170	17
10	NRS 166.170(10)(b)	18
11	Spendthrift Trust Act of Nevada (NRS Chapter 166)	18

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1 **REPLY TO FACTUAL ASSERTIONS BY ELN TRUST AND ELN**
2 **TRUST'S UNSUPPORTED ARGUMENTS REGARDING FACTUAL**
3 **REPRESENTATIONS**

4 ELN TRUST outrageously alleges at page 1 of the Answer and Reply
5 Brief:

6 Lynita's Statement of The Case and Facts is intentionally
7 misleading and riddled with false and unsupported
8 representations. Further, other than "spinning" her version of the
9 facts, Lynita fails to identify any factual errors set forth in the
10 Statement of the Facts submitted by the ELN Trust. Some of
11 Lynita's most egregious misrepresentations are as follows.

12 NRAP 28.1(c)(2) provides that a respondent's answering brief on appeal and
13 opening brief on cross-appeal "must comply with Rule 28(a), except that the
14 brief need not include a statement of the case or a statement of the facts unless
15 the respondent is dissatisfied with the appellant's statement." (Emphasis
16 added). As pointed out in LYNITA's Answering Brief on Appeal and Opening
17 Brief on Cross-Appeal ("Answering and Opening Brief"), ELN TRUST's
18 "Statement of Facts" omitted critical material facts and almost all of the
19 evidence adduced during the first 6 days of trial. ELN TRUST's "Statement
20 of Facts" was so deficient that LYNITA was compelled to present her own
21 Statement of Facts. Obviously LYNITA did not agree with ELN TRUST's
22 "Statement of Facts," or believe that such "Statement of Facts" did not include

1 any errors or omissions.

2 Following the above-referenced quote, ELN TRUST proceeds to do
3 exactly what it falsely alleges LYNITA did in her Opening Brief: “spin” and
4 misrepresent the facts of the case. ELN TRUST continues to attempt to
5 relitigate the case in this Court by seeking to have this Court make new factual
6 determinations rather than review the findings of the district court for error.
7 ELN TRUST has in its briefs cited evidence without acknowledging contrary
8 evidence accepted by the district court in its detailed Decree of Divorce. In
9 many instances, the findings which contradict the factual representations made
10 by ELN TRUST were not challenged by ELN TRUST on appeal, and therefore
11 cannot now be disputed. Below are several examples of statements of facts
12 made by ELN TRUST in the Answer and Reply Brief which are based on
13 evidence which was disputed and contradicted, and not accepted by the district
14 court. ELN TRUST relies on such unsupported “facts” to support many of its
15 arguments.

16 The opening section of ELN TRUST’s brief purports to highlight for the
17 Court “[s]ome of Lynita’s most egregious misrepresentations,” none of which
18 were actually misrepresentations. First, ELN TRUST takes exception with the
19 following statement from LYNITA’s brief:

1 On June 24, 2011, ERIC filed a motion seeking to join ELN
2 TRUST as a necessary party to the divorce action. Despite days
3 of his sworn testimony to the contrary, ERIC suggested for the
4 first time that he and LYNITA had no legal interest in the
5 properties purportedly held in ELN TRUST. AAPP V8: 1606-
6 1661.

7 The fact that ERIC changed positions after the first 6 days of trial was
8 specifically outlined in many of the district court's findings which were not
9 challenged on appeal. AAPP V19:4706:27-4707:3; AAPP V19:4715:9-15;
10 AAPP V19:4734:4-4735:8.

11 To further attempt to support its unreasonable attack, ELN TRUST goes
12 on to state that ERIC "repeatedly testified that the property at issue was owned
13 by the Trusts during the first 6 days of trial," citing four portions of ERIC's
14 2010 testimony: "V1:AAPP:115:11-15, VI:139:3-6, VI:AAPP:16:20-24,
15 VI:AAPP:170:1-2." ELN TRUST's statement completely disregards, again,
16 the extensive testimony by ERIC during 2010 that although property was
17 "purchased" or "owned" in the name of ELN TRUST or LSN TRUST, such
18 assets were actually "my assets" or "Lynita's assets", held for the benefit of the
19 parties, and that ERIC transferred properties between the trusts to protect the
20 parties and to level them off. See, e.g., AAPP V1:71:21-24, AAPP V1:83:21-
21 84:16. Such testimony was quoted extensively verbatim at pages 4-11 of

1 LYNITA's Answering and Opening Brief, and described in detail in the
2 Decree. See, e.g., AAPP V:19:4698:7-4699:24. ELN TRUST finally states
3 that ERIC "testified regarding the irrevocability of the Trusts, and that the
4 assets contained therein were not 'transferable even by the courts.'
5 V4:AAPP:879:11-17." However, the record cited by ELN TRUST again does
6 not support the contention made. At V4:AAPP:879:11-24, ERIC explains that
7 \$16,000,000 in carryforward tax losses on the "books" of his trust cannot be
8 transferred, even by the Court. He does not state that the assets of ELN
9 TRUST and LSN TRUST are not transferrable. In fact, his trial presentation
10 in 2010 was about how he would like the district court to divide the properties
11 between the parties. AAPP V5:1074:11-1108:13.

12 Continuing with the unreasonable attack on LYNITA's completely
13 accurate factual recitation, ELN TRUST challenges LYNITA's statements that
14 ERIC was in control of funding the parties' trusts. Of course, that is exactly
15 what Mr. Burr testified to multiple times while being questioned by ERIC's
16 counsel. AAPP V7:1538:9-18; AAPP V7:1544:17-1545:3.

17 Continuing with the purported examples of LYNITA's "most egregious
18 misrepresentations," ELN TRUST next complains that LYNITA's recitation
19 of facts relies upon Mr. Burr's 2010 testimony as though LYNITA is not

1 entitled to cite to such testimony (which was also relied upon by the district
2 court in numerous unchallenged factual findings), and must instead cite only
3 to the “clarified” (i.e., conflicting) testimony ELN TRUST attempted to elicit
4 from Mr. Burr two (2) years later at trial. ELN TRUST then quotes (in part)
5 the following sentence from LYNITA’s Answering and Opening Brief:
6 “LYNITA did not totally understand what was going to happen with the new
7 trusts but again ‘trusted ERIC pretty much to make those kinds of decisions.’”
8 ELN TRUST then attempts to convince the Court that Mr. Burr’s testimony
9 rebutted such statement and that LYNITA completely understood the “nature
10 of self-settled spendthrift trusts” and the terms of LSN TRUST, ignoring Mr.
11 Burr’s very clear testimony to the contrary:

12 Q. Okay. So please tell us what communications happened
13 between you, Lynita and Eric Nelson regarding hey guys, there’s
14 a new law [for self-settled spendthrift trusts] on the books that
may be of some advantage to you?

15 A. Well, keep in mind that the dynamics between Lynita and
16 Eric, Eric was pretty much the business guy and so, he was the
one I would predominately communicate with.

17 AAPP V7:1536:13-19.

18 Q. Now, okay. Did you explain this legislative change [self-
19 settled spendthrift trusts] and why this could be an advantage to
Lynita Nelson to Lynita Nelson?

1 A. I've got to say again, in fairness, Lynita, because she
2 wasn't involved in the business and she struggled to understand
3 totally, you know, all the intricacies of what was going on, the
technicalities, but, you know, she trusted Eric pretty much to
make those kinds of decisions.

4 Q. Okay.

5 A. And so - - so together we - - we had a discussion but she
6 pretty well admitted look, I - - this is kind of Greek to me, you
7 know, but if you say it's a good thing to do and we'll move
forward. That's my best recollection in all honesty.

8 AAPP V7:1543:7-15.

9 Q. Well, did [LYNITA] express to you that she understood
the basic concepts of the trust?

10 A. Yes, she was willing to go forward with the planning.

11 Q. And what did you explain to her were the basic concepts of
12 the trust, the irrevocable trust of 2001, Exhibit 81?

13 A. Just that this additional statute would provide an extra
14 layer of protection for her, Eric and the family from
creditors.

15 AAPP V7:1544:7-16.

16 Finally, ELN TRUST alleges that LYNITA's factual statement that
17 ERIC "had complete and unfettered access to the properties contained within
18 [ELN TRUST and LSN TRUST]" is another example of her "egregious
19 misrepresentations." ELN TRUST again, shockingly, ignores ERIC's very

1 clear testimony about his complete control, management, and ability to transfer
2 back and forth between trusts, all properties held by the parties no matter how
3 titled, which testimony was quoted verbatim at pages 4-11 of LYNITA's
4 Answering and Opening Brief. ELN TRUST also ignores, yet again, findings
5 of the district court which support LYNITA's factual contention, which
6 findings ELN TRUST has not challenged. AAPP V19:4698:2-6; AAPP
7 V19:4701:2-17; AAPP V19:4703:9-14; AAPP V19:4721:10-13. A s
8 previously stated, ELN TRUST has, in both its briefs, done exactly what it
9 falsely alleges LYNITA has done: spun and misrepresented facts. Many of the
10 arguments made by ELN TRUST are premised on such spun, or
11 misrepresented and unsupported factual assertions.

12 First, ELN TRUST often ignores the testimony of Mr. Burr during 2010
13 which supported the findings contained in the Decree. Instead, ELN TRUST
14 attempts to paint a completely different picture referencing and quoting Mr.
15 Burr's 2012 testimony, which testimony was two (2) years further removed
16 from the events about which Mr. Burr testified and had knowledge. ELN
17 TRUST alleges that Mr. Burr's testimony supports the propositions that (1) the
18 intent of ERIC or LYNITA to make "equalizing gifts" between their trusts was
19 "disinterested generosity" and "they had no binding agreement to do so," and

1 (2) the parties understood that the separate property agreement and trusts
2 would affect their rights during divorce and there was no agreement that the
3 Trusts would be ignored in the event of divorce. ELN TRUST further
4 represents (falsely) that “no evidence was introduced that there was an
5 agreement that the Trusts would be respected only as to third-party creditors
6 and not in the event of divorce between Eric and Lynita,” and that although
7 “Lynita testified that ‘she was led to believe’ or that she believed for that
8 matter, that the Separate Property Agreement, Separate Property Trusts and/or
9 Self-Settled Spendthrift Trusts would not affect her property rights in the event
10 of divorce. To the contrary, all evidence showed that was not the case.” As
11 can be seen from a review of Mr. Burr’s actual testimony (some of which was
12 quoted above), Mr. Burr did indeed testify that the parties agreed to level off
13 the trusts, that LYNITA did not really understand the self-settled spendthrift
14 trusts that were executed but trusted ERIC and Mr. Burr, that LYNITA was led
15 to believe that the basic concept of the self-settled spendthrift trusts was to
16 “provide an extra layer of protection for her, Eric and the family from
17 creditors,” that LYNITA was further led to believe that the trusts would not
18 affect her property rights in the event of divorce, and that ERIC controlled the
19 parties’ estate planning, trust funding, and financial decisions. The following

1 are just a few more examples of such testimony by Mr. Burr during
2 questioning by ERIC's attorney:

3 Q All right. Well, one of the things that you indicated that the
4 parties agreed to specifically Lynita and Eric in 1993, was that
5 there would be, you know, a leveling off or an updating of the
6 trusts to try to keep them roughly even, do you recall your
7 testimony?

8 A. Yes.

9 Q. Okay. And what did you communicate to them in that
10 regard?

11 A. Just that it would be important to, you know, periodically
12 rebalance the trusts.

13 AAPP V7:1532:4-13.

14 Q. I'll ask you again because I think you have. What were the
15 parties agreeing to do as it relates to dividing their assets and
16 characterizing their assets as their respective separate property in
17 1993 and redone again in an irrevocable nature in 2001?

18 A. In '93, it's clear that they were dividing their estate equally
19 into two separate trust, into two separate prop - - and into
20 separate property. In 2001, you'll notice there's not that language
21 in that trust declaring it to be separate property. At that point in
22 time, you know, I don't see any - - there was not attempt really to
23 define community property rights at that time. And again, the
24 intent all along was to protect them from third-party creditors,
25 from guarantees, and (indiscernible) for them from the very
26 beginning that I thought these trusts would not - - should not be
27 relied upon for dissolution rights; I mean, because their intent all
28 along was to keep the balance of ownership.

1 AAPP V7:1553:7-23.

2 Q. 2001, (indiscernible) what were the parties' understanding
3 and intent as you understood it, as you prepared the documents,
4 relative to whether or not there still retained a community
property interest in assets they declared to be each party's
separate property, vis-a-vis themselves?

5 A. Again - -

6 Q. And not a third-party creditor?

7 A. Again, to be - - I mean, clear, vis-a-vis themselves, this
8 trust - - this planning was never meant to alter rights in the event
9 of dissolution or divorce. And that was never discussed. I mean,
the whole discussion focused on how can the family best protect
itself from potential liabilities to third parties. And so that was
basically what was discussed.

10 AAPP V7:1555:7-19.

11 Q. Okay. Specifically as it relates to Lynita Nelson and Eric
12 Nelson, did you have a conversation with Eric Nelson and Lynita
13 Nelson where you explained to them that the execution of the
irrevocable trust in 2001 was not a protection against each other
as it relates to community property rights?

14 A. I explained - - my best recollection, because I try to do this
15 in every case, I tried to tell them that these trusts should not be
relied upon in a dissolution setting.

16
17 AAPP V7:1557:19-1558:3. In addition to the foregoing, ELN TRUST's
18 contentions are contradicted by ERIC's testimony quoted at pages 4-11 of
19 LYNITA's Answering and Opening Brief, regarding the character and nature

1 of the parties' property, the purposes of the trusts, the periodic leveling off of
2 the trusts, and the way ERIC managed, controlled, and treated the parties'
3 property.

4 Perhaps the most egregious factual misrepresentation made and relied
5 upon by ELN TRUST is the assertion that the "District Court specifically
6 found that the ELN Trust was funded with Eric's separate property and the
7 LSN Trust was funded with Lynita's separate property." The district court
8 never made this finding nor could it based on the evidence presented. Instead,
9 the district court found that after the creation of ELN TRUST and LSN
10 TRUST, all of the assets and interests then held by the 1993 trusts were
11 transferred to ELN TRUST and LSN TRUST. AAPP V19:4696:18-19; AAPP
12 V19:4697:2-3. In other words, the parties stopped holding properties in the
13 1993 trusts, and instead utilized the new trusts. There were no findings that
14 the assets and interests were the exact same as those listed in the 1993 Separate
15 Property Agreement, or that such properties were the separate properties of
16 ERIC and LYNITA. Such findings would have been impossible. First, ERIC
17 admitted that he regularly transferred properties between the parties' trusts. See
18 AAPP V1:83:21-84:16; AAPP V1:204:6-16. Second, even ELN TRUST's
19 purported expert witness, Daniel Gerety, CPA (whom the district court found

1 to lack credibility), admitted during direct examination by ELN TRUST's
2 attorney that it was not possible to trace the properties from the 1993
3 agreement:

4 Q. [] what specifically were you asked to do?

5 A. Originally we were asked to try to trace the assets from the
6 separate property agreement that was in - - was it '93, if I
7 remember right, '93, I think - - from '93 all the way to September
8 of 2011 at the time and we weren't able to get all of those old
records. We were not able to do a tracing from '93. The best we
- - with the records that were available, was to go from 2001 to
2011.

9 AAPP V15:3550:17-3551:1. Despite Mr. Gerety's admission that it was
10 impossible to trace the assets from the separate property agreements to the
11 assets held in ELN TRUST and LSN TRUST at the time of trial, ELN TRUST
12 has tried to mislead this Court into believing that there was conclusive
13 evidence that after 1993 all of the parties' properties were kept separate, and
14 that all assets in the ELN TRUST at the time of trial originated from separate
15 property (see pages 39-40 of the Answer and Reply Brief). The evidence
16 relied upon to try to substitute for an actual tracing was not documentary, as
17 Mr. Gerety admitted that there were incomplete records (AAPP V15:3550:17-
18 3551:1), but instead uncorroborated oral testimony by ERIC's bookkeeper,
19 Shelley Newell, that to the best of her knowledge and information,

1 approximately 12-19 years later (depending on when the transaction occurred),
2 the acquisitions in ERIC's 1993 trust originated from his separate funds. AAPP
3 V14:3299:1-5. Ms. Newell also testified that the parties "had many, many
4 bank accounts back then," but that she only "monitored and took care of []
5 ones that related were related to the specific business entities." AAPP
6 V14:3312:7-9. Ms. Newell further testified that she only monitored the assets
7 related to the business entities (AAPP V14:3312:16-18), further evidencing
8 how incomplete and limited her "information and knowledge" truly was.

9 Finally, ELN TRUST alleges, "It is uncontested that in 2010, five years
10 after Lynita relinquished her interest in Russell Road, the ELN TRUST paid
11 \$4,000,000 for its 66.67% interest in Russell Road" (citing V7:AAPP:1673-
12 1674; V19:AAPP:4708:7-8). Based on this assertion, the ELN TRUST
13 concludes that "since the ELN Trust's interest in Russell Road was paid for
14 with its own assets . . ." the district court erred by imposing a constructive
15 trust. The only evidence that was undisputed was (1) that LYNITA's 1993
16 trust purchased the Russell Road property for \$855,945, and became a 50%
17 owner with ERIC's brother, Cal Nelson, who had paid only a \$20,000 down
18 payment; and (2) in 2004, LYNITA's interest in the property was transferred
19 to Cal Nelson for zero consideration. AAPP V7:1672; AAPP V19:4707:13-20.

1 “[T]he Declaration of Value for Tax Purposes indicates that it was exempted
2 from taxation due to being a ‘transfer without consideration for being
3 transferred to or from a trust.’” AAPP V19:4708:2-3. Thereafter, during the
4 course of the divorce proceedings, ERIC purchased a 65% interest in the
5 property from his brother, which was “said to have cost \$4,000,000.” AAPP
6 V7:1672. The amount of cash paid was \$2,777,861.55, and the remaining
7 \$1,222,138.45 was credited to Cal Nelson, in part, for obligations ERIC had
8 previously paid for his brother, including his brother’s mortgage and a bank
9 loan. AAPP V7:1673. According to tax returns, Cal Nelson’s capital account
10 included \$855,000, which was the amount of the purchase price paid by
11 LYNITA for which she never received any reimbursement. AAPP V7:1673.
12 Accordingly, ERIC was “said” to have paid his brother millions of dollars for
13 a property purchased by LYNITA. Of course, there is no way to know whether
14 that purported \$4,000,000 was paid for from ELN TRUST’s “own assets” as
15 represented by ELN TRUST, as the district court found that millions of dollars
16 worth of properties and loans were taken by ERIC from LSN TRUST without
17 compensation or repayment. AAPP V19:4710:14-4715:7.

18 As can be seen, it is the ELN TRUST, not LYNITA, who has taken great
19 liberty with, “spun,” and misrepresented the facts of the case.

1 **ARGUMENT**

2 **A. THE ELN TRUST’S ANSWER AND REPLY BRIEF ATTEMPTS**
3 **TO IMPROPERLY RAISE NEW ISSUES FOR THE FIRST TIME,**
4 **TO DEPRIVE LYNITA OF THE OPPORTUNITY TO FULLY**
5 **RESPOND TO SAME**

6 ELN TRUST raises several new issues and makes several new
7 challenges of the district court’s Decree in the Answer and Reply Brief for the
8 first time during this appeal. The Court should categorically reject such
9 challenges. NRAP 28(a) requires that an appellant’s opening brief include a
10 statement of the issues presented for review, a statement of facts relevant to the
11 issues submitted for review, a summary of the argument, and the argument,
12 “which must contain (A) appellant’s contentions and the reasons for them . .
13 . and (B) for each issue, a concise statement of the applicable standard of
14 review” ELN TRUST’s improper attempt to raise new issues in the
15 Answer and Reply Brief is highly prejudicial to LYNITA, and prevents her
16 from having the opportunity to fully respond within the constraints of a reply
17 brief instead of an answering brief. If the Court is inclined to consider such
18 new challenges, LYNITA respectfully requests that she be given the
19 opportunity to further brief same. Listed and briefly addressed below are the
new issues or challenges presented by ELN TRUST in the Answer and Reply

1 Brief which were not included in ELN TRUST's Opening Brief.

2 (1) ELN TRUST argues at pages 9-11 that even if the district court
3 had subject matter jurisdiction (which it clearly did as set forth in LYNITA's
4 Answering and Opening Brief), the district court erred in joining tort actions
5 with the divorce proceeding and in not exercising its discretion to abstain from
6 hearing the claim within its power to adjudicate. The ELN TRUST also alleges
7 that the district court's refusal to abstain "denied the ELN TRUST the
8 constitutional right to have a jury determine the validity of the Trusts and/or
9 the tort claims asserted by Lynita." ELN TRUST alleges this new issue that
10 it was wrongfully denied a jury trial despite the fact that ELN TRUST and
11 ERIC never made demand for a jury trial as required by NRCP 38(b). To the
12 contrary, ELN TRUST has maintained that the case should have been heard by
13 a different district court judge sitting in probate, which is simply the "chief
14 judge for the Eighth Judicial District Court of Nevada" unless he or she
15 appoints another district court judge "to serve as the probate judge in the chief
16 judge's stead." EDCR 4.02. This "specialized probate court" judge only serves
17 2 year terms, which can be extended for up to 2 years, at which time another
18 district court judge takes his or her place. EDCR 1.30. In 2009 and 2010,
19 Judge T. Arthur Ritchie, Jr., Eighth Judicial District Court, Family Division,

1 Department H, served as the Chief Judge and the “specialized probate court.”
2 If ELN TRUST’s arguments are correct, then the orders entered by Judge
3 Ritchie during those years would all be void, as Judge Ritchie, despite being
4 a district court judge eligible to serve as the Chief Judge of the Eighth Judicial
5 District Court, should not have heard such cases by virtue of the fact that he
6 was elected to the Family Division.

7 (2) ELN TRUST alleges for the first time at pages 12-20 that the
8 district court erred in finding that it could have invalidated the trusts. Such
9 findings were discussed in LYNITA’s Answering and Opening Brief, and are
10 discussed further below when addressing ELN TRUST’s opposition to
11 LYNITA’s argument that the district court should have specifically invalidated
12 ELN TRUST.

13 (3) ELN TRUST argues for the first time at pages 58-60, that the
14 district court also erred, and LYNITA’s issues on appeal should fail because,
15 “Any claim that Lynita may have had against the ELN Trust should have been
16 brought no later than 05/03,” and were barred by the statute of limitations.

17 The limitations period found in NRS 166.170 is inapplicable to the
18 instant matter. First, the district court found that it could have invalidated ELN
19 TRUST, and should have invalidated ELN TRUST. Certainly ELN TRUST

1 cannot receive the protections afforded to a valid spendthrift trust, including
2 the statute of limitations for creditors to bring actions concerning transfers of
3 property to such trust (there could be no actual transfer to a non-existent trust).
4 *See In re Schwarzkopf*, 626 F.3d 1032, 1036-37 (9th Cir. 2010) (holding that the
5 statute of limitations for bringing a fraudulent transfer claim was not
6 applicable where the receiving trust was found to be invalid). Moreover, the
7 claims asserted by LYNITA were not claims by a “creditor.” NRS
8 166.170(10)(b) provides that “[c]reditor has the meaning ascribed to it in
9 subsection 4 of NRS 112.150.” NRS 112.150(4) defines a creditor as a
10 “person who has a claim.” A “claim” is defined in NRS 112.150 as “a right to
11 payment, whether or not the right is reduced to judgment, liquidated,
12 unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed,
13 legal, equitable, secured or unsecured.” LYNITA’s claims against ERIC and
14 ELN TRUST were not claims for payment from the property held in the ELN
15 TRUST, but rather a legal claim of ownership in the property itself. Certainly
16 the Legislature did not enact the Spendthrift Trust Act of Nevada (NRS
17 Chapter 166) and the limitations period contained in NRS 166.170 to allow
18 individuals to convert or steal property belonging to another, or to fraudulently
19 obtain title to such property, with impunity. Any such interpretation of the

1 Spendthrift Trust Act of Nevada, and NRS 166.170, would be against public
2 policy.

3 Furthermore, it is well-settled that limitation periods do not begin to run
4 until an injured party knew, or should have known, of the facts constituting the
5 elements of his or her cause of action. *See, e.g., Oak Grove Investors v. Bell &*
6 *Gossett Co.*, 668 P.2d 1075, 1079, 99 Nev. 616, 623 (1983); *G & H Associates*
7 *v. Ernest W. Hahn, Inc.*, 934 P.2d 229, 233, 113 Nev. 265 (1997). Up until the
8 conclusion of the first 6 days of trial, ERIC steadfastly maintained “that the
9 actions he took were on behalf of the community and that the ELN Trust and
10 LSN Trust were part of the community.” AAPP V19:4715:9-12. LYNITA
11 “was not advised that she was not entitled to the benefit of the assets
12 transferred from the LSN Trust to the ELN Trust under the direction of [ERIC]
13 until the ELN Trust joined the case as a necessary party.” AAPP V19:4706:26-
14 4707:3. Accordingly, even if NRS 166.170 was applicable to the instant
15 action, which clearly it is not, LYNITA’s cause of action could not have
16 accrued until June 24, 2011 when ERIC moved to join ELN TRUST as a
17 necessary party (AAPP V7:1606): the first possible date that LYNITA could
18 have known of any potential injury resulting from ERIC’s/ELN TRUST’s
19 actions.

1 Finally, any limitation periods that could conceivably be applied to
2 LYNITA's claims must be considered tolled during the time of the parties'
3 marriage. *See Cord v. Neuhoff*, 94 Nev. 21, 24, 573 P.2d 1170, 1172 (1978)
4 ("The policy of the law is to refrain from fostering domestic discord which
5 may follow from litigation between spouses commenced for fear that the bar
6 of laches would attach by lapse of time.").

7 (4) ELN TRUST challenges for the first time the district court's
8 findings regarding breach of ERIC's fiduciary duties on the basis that such
9 claim was dismissed. A fiduciary duty exists between spouses and is inherent
10 in all of their financial dealings. *See* NRS 123.270 (providing that a husband
11 and wife can make contracts respecting property subject to "the general rules
12 which control the actions of persons occupying relations of confidence and
13 trust toward each other"). Accordingly, whether or not a breach of that duty
14 is alleged in the pleadings, the district court presiding in a divorce action must
15 analyze all of the transactions between the spouses in light of the duties owed.

16 Additionally, ELN TRUST's argument, even if allowed at this juncture,
17 ignores the fact that all claims were tried by consent despite ELN TRUST's
18 arguments to the contrary. "It is recognized that an affirmative defense can be
19 considered (if not pleaded) if fairness so dictates and prejudice will not

1 follow.” *Ivory Ranch, Inc., v. Quinn River Ranch, Inc.*, 705 P.2d 673, 675, 101
2 Nev. 471, 473 (1985). While ELN TRUST cites to this Court’s decision in
3 *Schwartz v. Schwartz*, 95 Nev. 202, 591 P.2d 1137 (1979) in its description of
4 the situations wherein implied consent will be found, it specifically omitted
5 from its quotation the following: “that the factual issue had been explored in
6 discovery, that no objection had been raised at trial to the admission of
7 evidence relevant to the issue.” *Id.*, 95 Nev. at 205, 591 P.2d at 1140.

8 In opening argument, ELN TRUST specifically indicated that it was
9 going to show that assets in the parties’ trust were kept separate. AAPP
10 V13:3009:24-3010; AAPP V13:3014:2-7. ELN TRUST further indicated that
11 it was going to introduce evidence as to the accounting of properties
12 transferred between trusts. AAPP V19:3015:18-3016:15.

13 To attempt to prove that assets transferred between ELN TRUST and
14 LSN TRUST were kept separate, and that LSN TRUST was properly
15 compensated for property transferred by ERIC from LSN TRUST to ELN
16 TRUST, ELN TRUST presented the testimony of Mr. Gerety. Now that the
17 Court disagreed and ordered an appropriate remedy to compensate LYNITA
18 for the properties wrongfully taken under theories of unjust enrichment and
19 breach of fiduciary duty, ELN TRUST attempts to convince the Court that

1 such issues could not be considered, and that the district court's hands were
2 tied to either rule in ELN TRUST's favor, or ignore the injustices in the facts
3 found based on the evidence presented at trial.

4 Finally, it should be pointed out that during opening argument, LYNITA
5 clearly stated that "ELN Trust converted" millions of dollars of [LYNITA's]
6 property, and described all of the properties for which LYNITA was not
7 properly compensated, e.g., Tierra del Sol, High Country Inn, Russell Road,
8 Tropicana Albertson's, Lindell, Brian Head cabin, Flamingo Road. AAPP
9 V13:3036:12-3040:11.

10 (5) Desperate to erase the first 6 days of trial and the evidence that
11 was presented during the first 6 days of trial, ELN TRUST makes the
12 outrageous claim for the first time on appeal at pages 25-26 that the first 6 days
13 of trial "were akin to a settlement conference or mediation" – the first ever
14 settlement negotiations conducted on the record, with opening statements,
15 direct examination, cross examination, re-direct examination, and admission
16 of exhibits and evidence.

17 ...

18 ...

1 **B. THE DISTRICT COURT ERRED IN NOT SPECIFICALLY**
2 **INVALIDATING ERIC'S SHAM TRUSTS DESPITE FINDING**
3 **SUFFICIENT EVIDENCE TO JUSTIFY INVALIDATING THE**
4 **TRUSTS**

5 The arguments in support of LYNITA's position on cross-appeal were
6 set forth in LYNITA's Answering and Opening Brief, and are not restated
7 herein. As set forth in said brief, the evidence and district court's findings
8 clearly establish that no valid trusts were ever created. Even if valid trusts
9 were created, the district court specifically found that the trusts could have
10 been invalidated.

11 1. The Trusts Did Not Have Authorized Distribution Trustees And
12 Distributions Were Made For Years Without Authorization

13 Section 11.3 of ELN TRUST Agreement expressly provides as follows:

14 11.3 Trust Consultant. JEFFREY L. BURR, LTD., a Nevada
15 Corporation (herein known as the "Consultant" to the Trust),
16 shall have the right and power by giving ten (10) days written
17 notice to the Trustee to remove any Trustee named herein (except
18 the Trust Consultant may not remove the Trustor as a Trustee
19 hereunder) and/or any Successor Trustee, **and to appoint either**
(1) an individual who is an "independent" Trustee pursuant
to Internal Revenue Code Section 674, as amended, or (2) a
Nevada bank or Trust company to serve as Trustee or as Co-
Trustees of the Trusts created hereunder. . . .

AAPP V26:6490-6491 (emphasis added).

1 Internal Revenue Code, Section 674(c), defines “independent trustees”
2 as being trustees other than the grantor of a trust who are not “*related or*
3 *subordinate parties who are subservient to the wishes of the grantor.*”
4 Section 672(c) defines “related or subordinate party” under Section 674 as
5 including the grantor’s [Eric’s] “sister” (such as Nola Harber), “an employee
6 for the grantor” (such as Lana Martin), and “a subordinate employee of a
7 corporation in which the grantor is an executive” (again such as Ms. Martin).
8 Section 672(c) further provides that “a related or subordinate party shall be
9 presumed to be subservient to the grantor in respect of the exercise or
10 nonexercise of the powers conferred on him unless such party is shown not to
11 be subservient by a preponderance of the evidence.”

12 ELN TRUST attempts to convince the Court at pages 18-20 of its
13 Answer and Reply Brief that the express terms of the trust cited above do not
14 actually apply to ELN TRUST, by arguing (without any support from the
15 express terms of the ELN TRUST) that the only portion of IRC Section 674
16 which references an “independent trustee” is not actually applicable to ELN
17 TRUST because it is a grantor trust. The language of the trust agreement,
18 however, is very clear and unambiguous.

1 The district court found that formalities were not followed in changing
2 trustees on February 22, 2007, and again in June 2011. AAPP V19:4719:21-
3 27. As a result, distributions were made for years to the parties without the
4 consent of a validly acting distribution trustee.

5
6 2. ELN TRUST Was Properly Made A Party To The Case – By
 ERIC Himself.

7 ELN TRUST first makes the assertion that a trust must be made a party
8 through the trustee in his/her capacity as trustee and not his/her individual
9 capacity, and cites to a number of cases wherein either: 1) the trust at issue was
10 never made a party to the case, or 2) final orders were entered with regard to
11 trust assets prior to the time that the trust was made a party. ELN TRUST does
12 not explain how these cases apply to the instant case, wherein not only was
13 ELN TRUST properly made a party to the case, but it was made a party well
14 before any final orders allocating trust assets were entered. None of the cases
15 cited by ELN TRUST contradict in any way LYNITA's position that the sworn
16 testimony of ERIC, as the investment trustee of ELN TRUST, as to ELN
17 TRUST's operations and the nature and source of the trust assets, even if made
18 in his individual capacity, is binding on ELN TRUST.

19 ...

1 In arguing that ERIC could not testify in his individual capacity and
2 simultaneously represent, or bind, the trust, ELN TRUST conveniently fails to
3 mention that Section 11.10 of ELN TRUST explicitly allowed for ERIC to so
4 act:

5 11.10 Trustee Actions. Any Trustee may freely act under all or
6 any of the powers of this agreement . . . without the necessity of
7 obtaining consent or permission of any person interested herein
8 [...] or the consent or approval of any court, **and notwithstanding**
9 **that the Trustee may also be acting individually**, or as Trustee
10 of other Trusts, or as agents of other persons or corporations
interested in the same matters, or may be interested in connection
with the same matters as stockholders, directors or otherwise;
provided, however, that the Trustee shall exercise such powers at
all times in a fiduciary capacity, primarily in the interest of the
beneficiaries hereunder.

11 AAPP V:26:6492 (emphasis added).

12 3. At The Time That ERIC Testified Before The Court During The
13 First Six Days Of Trial, He Had The Authority To Bind – And
Did, In Fact Bind, ELN TRUST

14 ELN TRUST does not deny that ERIC, as investment trustee, was the
15 only person able to litigate and defend any actions involving ELN TRUST.
16 Instead, ELN TRUST argues that ERIC had the authority to delegate this
17 power, and that he did delegate such power to various distribution trustees and
18 counsel. It is undisputed, however, that such delegation did not take place
19 until *after* the first 6 days of trial and *after* ERIC had testified under oath with

1 regard to the assets held in ELN TRUST. By ELN TRUST's own argument,
2 ERIC could not have delegated that which he did not possess, and throughout
3 the first 6 days of trial, ERIC maintained the power to bind ELN TRUST in
4 any and all legal proceedings.

5
6 4. ERIC's Testimony During The First Six Days Of Trial Was Not
7 Only Admissible, But It Also Served To Conclusively Establish
8 Facts Regarding ERIC's Handling And Treatment Of The Trust
9 Property

10 Desperate to avoid or somehow ignore ERIC's damning testimony
11 during the first 6 days of trial, ELN TRUST takes the position that such
12 testimony was somehow inadmissible. ELN TRUST bases this argument on
13 case law providing that a party's opinion as to the character of property as
14 community versus separate is not controlling. ERIC's testimony, at a time
15 when he was serving as investment trustee, was offered without objection.
16 Furthermore, ERIC's testimony conclusively established his representations
17 to LYNITA, the way he treated properties purportedly held in trust, and intent
18 of the parties.

19 5. The Elements For Judicial Estoppel Were Met

ELN TRUST argues that LYNITA did not meet the first and fourth
elements of judicial estoppel stating that ERIC and ELN TRUST are not the

1 same party and ERIC did not take two totally inconsistent positions. ELN
2 TRUST also argues that if ERIC changed positions, his change was not
3 intended to sabotage the judicial process because the trusts were necessary
4 parties. The district court specifically found, however, that ERIC took
5 inconsistent positions, and changed positions mid-trial in an attempt to get a
6 second bite at the apple. AAPP V19:4734:4-4735:8.

7 Finally, without citing any legal support, ELN TRUST argues that the
8 “inconsistent positions are required to take place, and be adopted, in separate
9 judicial pleadings (as opposed to different “phases” of trial as Lynita contends)
10” None of the authorities cited by the parties require separate legal actions
11 or pleadings, and instead the Court in *Sterling Builders, Inc. v. Fuhrman*, 80
12 Nev. 543, 549-50, 396 P.2d 850 (1964), stated, “[U]nder the doctrine of
13 judicial estoppel a party who has stated on oath in former litigation, as in a
14 pleading, a given fact a[s] true, will not be permitted to deny that fact in
15 subsequent litigation.” Again, there is no requirement for independent actions.

16 6. The Elements For Equitable Estoppel Were Met

17 ELN TRUST argues, “Lynita also failed to meet the burden of invoking
18 equitable estoppel because she could not establish that the ELN Trust led her
19 to believe that she possessed a community interest in its assets, or that she was

1 'ignorant of the true state of the facts.'" Again, the district court's findings
2 establish this element as it was clear from the testimony that ERIC, the
3 investment trustee through whom ELN TRUST acted, led LYNITA to believe
4 that the assets in both Trusts were community property.

5 7. LYNITA's Attempt To Prevent ERIC From Inheriting 100% Of
6 The Parties' Property In The Event Of Her Death Prior To
7 Divorce Does Not Validate Otherwise Invalid Trusts

8 Mr. Burr testified that after trying to assist LYNITA in negotiating a
9 divorce settlement with ERIC, he continued as her lawyer in estate planning
10 matters. AAPP V7:1577:3-6. Mr. Burr had a conversation with LYNITA
11 "about how in Nevada only a dissolution of divorce would terminate a
12 dispositive provision of a will or even perhaps a trust, and if she wanted to
13 change that to where Eric was no longer a beneficiary in her documents, that
14 she needed to take action and make some amendments." AAPP V7:1577:10-

15 14. After being so advised by Mr. Burr, LYNITA changed all estate planning
16 documents to disinherit ERIC. See AAPP V7:1578:19-1579:2. As Mr. Burr
17 advised LYNITA, if she did not make such changes, ERIC would be the
18 beneficiary of her interests in all of the property owned by the parties in the
19 event of LYNITA's untimely death prior to the parties' divorce. Certainly
LYNITA's actions did not constitute an admission that LYNITA believed,

1 contrary to what she was told by Mr. Burr in 2001, that the trusts would apply
2 in the event of divorce.

3
4 8. If The Trusts Had Been Invalidated, All Property Would Have
5 Been Community Property.

6 All property acquired during marriage is presumed to be community
7 property, and such presumption may only be overcome by clear and
8 convincing evidence. *Forrest v. Forrest*, 99 Nev. 602, 604-05, 668 P.2d 275,
9 277 (1983).

10 Mr. Gerety conceded that ELN TRUST could not trace property back to
11 the 1993 separate property agreement. The only evidence that can overcome
12 the presumption of community property by clear and convincing evidence is
13 a direct tracing of the source of funds used to purchase such property to
14 separate property funds. *See, e.g., Moberg v. First Nat'l Bank of NV*, 96 Nev.
15 235, 237, 607 P.2d 112, 114 (1980) (“[W]e are called upon to determine the
16 status of property acquired during marriage with funds the status of which is
17 uncertain. . . . [W]e hold those properties that cannot be traced to be
community property . . .” (emphasis added)).

18 In addition, ERIC so extensively commingled the properties held in the
19 parties’ respective trusts that it would have been impossible to determine the

1 source of funds used to purchase the assets purportedly held in ELN TRUST
2 and LSN TRUST at the time of divorce. Once an owner of separate property
3 funds commingles those funds with community funds, “the owner assumes the
4 burden of rebutting the presumption that all the funds in the account are
5 community property.” *Malmquist v. Malmquist*, 106 Nev. 231, 245, 792 P.2d
6 372, 381 (1990). “[I]ntermingled properties are considered community
7 property [where] the properties have become so mixed and intermingled that
8 it is no longer possible to determine their source.” *Ormachea v. Ormachea*, 67
9 Nev. 273, 297, 217 P.2d 355, 367 (1950).

10 To the extent any of the property purportedly held in trust was separate
11 property, such property was orally transmuted. *See Schreiber v. Schreiber*, 99
12 Nev. 453, 663 P.2d 1189 (1983) (enforcing an oral property agreement
13 between spouses where there was partial performance); *see also, Sprenger v.*
14 *Sprenger*, 110 Nev. 855, 858, 878 P.2d 284 (1994) (citing to a party’s
15 testimony regarding intent in analyzing whether a transmutation of separate
16 property occurred).

17 ...

18 ...

19 ...

1 **C. THE DISTRICT COURT ERRED IN REFUSING TO DIVIDE**
2 **WYOMING DOWNS**

3 ELN TRUST argues that LYNITA was not entitled to an interest in
4 Wyoming Downs because she opposed the purchase of Wyoming Downs. If
5 the trusts were invalid as the district court found, LYNITA certainly could not
6 waive her interest in community property by opposing a purchase by her
7 spouse in the middle of divorce litigation. Nowhere in the law does it provide
8 that a spouse forfeits his or her rights to property if he or she objects to the
9 acquisition of same.

10 Even if the trusts were valid, the ELN TRUST used property awarded
11 to LYNITA to purchase Wyoming Downs (AAPP V23:5559:13-16), and prior
12 to the Court's final judgment possessed millions of dollars of properties taken
13 from LYNITA without compensation (see AAPP V19:4710:14-4715:7). ELN
14 TRUST should not have been permitted to profit off of LYNITA's property.

15 ...

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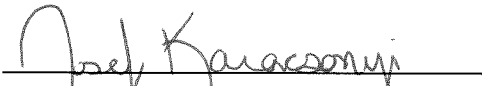
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1 **CONCLUSION**

2 For the reasons set forth in LYNITA's Opening Brief on Cross-Appeal,
3 as well as above, this Court should reverse the district court's decision to
4 uphold the validity of ELN TRUST and LSN TRUST, and the order denying
5 LYNITA her equal interest in Wyoming Downs.

6 Respectfully submitted,

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3. I further certify that this brief complies with the page and type-volume limitations of NRAP 28.1(e) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6960 words.

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