IN THE SUPREME COURT OF THE STATE OF NEVADA

MATT KLABACKA, Distribution Trustee of the Eric L. Nelson Nevada Trust dated May 30, 2001, Appellant/Cross Respondent. vs. LYNITA SUE NELSON, Individually and in her capacity as Investment Trustee of the LSN NEVADA TRUST dated May 30, 2001; and ERIC L. NELSON, Individually and in his capacity as Investment Trustee of the ELN NEVADA TRUST dated May 30, 2001; Respondents/Cross-Appellants.	**Supreme Court Case No. 66772** **District Court Case No. D-09-411537**
MATT KLABACKA, as Distribution Trustee of the Eric L. Nelson Nevada Trust dated May 30, 2001, Appellants, vs. ERIC L. NELSON; LYNITA SUE NELSON, INDIVIDUALLY; AND LSN NEVADA TRUST DATED MAY 30, 2001, Respondents.	**Consolidated With:** **Supreme Court Case No. 68292**

APPELLANT'S OPENING BRIEF

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The parties and other principals involved with this matter are referred to in this brief as follows: THE ERIC L. NELSON NEVADA TRUST DATED MAY 30, 2001 ("ELN Trust"); THE LSN NEVADA TRUST DATED MAY 30, 2001 ("LSN Trust"); Appellant MATT KLABACKA, DISTRIBUTION TRUSTEE OF THE ELN TRUST ("KLABACKA"); ERIC NELSON, Individually, and as Investment Trustee of the ELN Trust ("ERIC"); and LYNITA NELSON, Individually, and as Investment Trustee of the LSN Trust ("LYNITA").

NRAP 26.1 DISCLOSURE

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

A. MARK A. SOLOMON, ESQ. and JEFFREY P. LUSZECK, ESQ.
Trial and Appellate Attorneys for Appellant MATT KLABACKA, DISTRIBUTION TRUSTEE OF THE ERIC L. NELSON NEVADA TRUST DATED MAY 30, 2001

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

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment pursuant to NRAP 3(A)(b)(1). The orders appealed are: (1) FINDINGS OF FACT AND ORDER entered on 7/11/12, V30:7471-7479 (2) ORDER FROM 2/23/12 HEARING PARTIALLY GRANTING ELN TRUST'S MOTION TO DISMISS THIRD-PARTY COMPLAINT WITHOUT PREJUDICE entered on 8/31/12, V19:4540-4550; (3) ORDER FROM 7/16/12 HEARING entered by this Court on 10/10/12, V19:4683-4690; (4) the DECREE OF DIVORCE entered on 6/3/13, V19:4691-4742; (5) ORDER FROM 9/4/13 HEARING REGARDING PAYMENT OF LINDELL PROFESSIONAL PLAZA INCOME entered on 9/30/13, V21:5247-V22:5254; (6) ORDER DETERMINING DISPOSITION OF DYNASTY DEVELOPMENT MANAGEMENT, INC. AKA WYOMING DOWNS entered on 9/22/14, V23:5553-5561; (7) ORDER FROM 7/22/13, HEARING ON LYNITA NELSON'S MOTION TO AMEND OR ALTER JUDGMENT, FOR DECLARATION AND RELATED RELIEF entered on 9/22/14, V23:5562-5575; and (8) Findings of Fact and Order entered on 6/8/15. V25:6226-6248.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The ELN TRUST identified approximately 30 appealable issues in the Docketing Statements filed on 11/25/14 and 7/23/15. This Opening Brief will focus on the following issues, which include mixed issues of fact and law:

1. Whether the District Court lacked jurisdiction to hear the claims for relief asserted in the LSN TRUST'S Amended Third-Party Complaint arising under Titles 12 and 13 of NRS concerning the internal affairs of the ELN Trust.

2. Even if the District Court had subject matter jurisdiction to hear claims arising under Title 12 or 13 of NRS, whether the District Court erred under the Eighth Judicial District Court Rules by hearing the claims for relief asserted in the Amended Third-Party Complaint.

3. Whether the District Court erred by entertaining claims between entities (the ELN Trust and LSN Trust) in a divorce proceeding instead of requiring said claims to be raised in a civil proceeding.

4. Whether the District Court erred by ordering the ELN Trust to pay Eric's spousal support obligation and child support arrearages based upon statutes from other jurisdictions and in contravention of Nevada law.

5. Whether the District Court erred by ordering the ELN Trust to pay a portion of Lynita's attorneys' fees and costs because the ELN Trust was not added as a necessary party until 2012.

6. Whether the District Court erred by ordering the ELN Trust to pay Larry Bertsch, CPA, the court appointed special master, fees without providing a corresponding credit to the ELN Trust on the "equalization," and/or requiring the other Parties to share in the expense.

7. Whether the District Court erred by striking the expert witness report of Layne T. Rushforth, Esq., and excluding him from testifying as an expert in this matter.

8. Whether the District Court erred by enforcing the purported intent of Eric and Lynita to make future gifts to each other in order to "equalize" the assets owned by the ELN Trust and LSN Trust despite the fact that there is no legally enforceable agreement to make such gifts and neither Eric nor Lynita possess a community or separate property interest in the assets owned by such trusts.

9. Whether the District Court erred by relying on the Parties' characterization of the property owned by the spendthrift trusts as being community property in contravention of Nevada law.

10. Whether the District Court erred by imposing a constructive trust over the Russell Road property and failing to credit the ELN Trust for the millions of dollars that it paid for its interest in such property.

11. Whether the District Court erred by failing to consider the substantial property the ELN Trust transferred to the LSN Trust as "consideration" for the ELN Trust's acquisition of a 50% interest in the Lindell property and Brianhead cabin.

12. Whether the District Court erred by failing to credit the ELN Trust for liabilities and/or expenses owed by the ELN Trust.

13. In its attempt to purportedly "equalize" the ELN Trust and LSN Trust, whether the District Court erred by overvaluing the Bella Kathryn property at its "cost" not its appraised value for Eric's purported violation of the joint preliminary injunction.

14. Whether the District Court erred by ordering the ELN Trust to pay Lynita and/or the LSN Trust 1/2 of the net income collected from the Arnold Property and Mississippi RV Park after it found that the case had been adjudicated and appealed.

15. Whether the District Court erred by entering its 6/8/15 Order, which modified its Divorce Decree by granting the LSN Trust additional relief during the pendency of the First Appeal.

16. Whether the District Court erred by ordering the ELN Trust to pay $75,000 to the LSN Trust for a loan that was made by Banone, LLC.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

Eric initiated a divorce proceeding against Lynita on 5/6/09. V1:1-8.

After 7 days of trial in 2010, Eric and Lynita stipulated to join the ELN Trust and LSN Trust as necessary parties. V1:1742-1746.

On 6/3/13, nearly a year after the District Court oversaw an additional 7 days of trial, the District Court issued its Divorce Decree, which disposed of all of the property owned by the ELN Trust and the LSN Trust, except for Wyoming Downs. V19:4691-4742.

On 6/17/13, Lynita filed a Motion to Amend or Alter Judgment seeking the immediate enforcement of the Divorce Decree, requesting that discovery be re-opened and that the District Court conduct another trial on the disposition of Wyoming Downs. V20:4755-4798. Said trial was heard on 5/30/14, and the Order Determining Disposition of Dynasty Development Management, Inc. aka Wyoming Downs was entered on 9/22/14, V23:5553-5561, at which time the Divorce Decree became an appealable order. The Divorce Decree, along with other orders, were appealed on 10/20/14. V23:5576-5578. Although the First Appeal was pending, on 11/13/14, Lynita filed a Motion to Enforce the Divorce Decree, V23:5579-5805, which was a thinly disguised and untimely motion to amend judgment, that was granted on 6/8/15, V25:6226-6248, thereby necessitating the ELN Trust to file the Second Appeal. V25:6249-V26:6251.

STATEMENT OF FACTS

Lynita seeks to thwart the separate property asset protection plan that she entered into with full advice from multiple attorneys.

A. 1991 REVOCABLE TRUST.

In 1991 Eric and Lynita retained Jeffrey L. Burr, Esq. ("Burr") to draft a standard revocable trust and wills. V14:3429:4-15. Burr met with both Eric and Lynita on two occasions prior to the execution of said revocable trust, V14:3432:6-12, and believes that they both understood the probate and estate-planning process. V14:3432:18-21.

B. CREATION AND IMPLEMENTATION OF THE SEPARATE PROPERTY AGREEMENT AND SEPARATE PROPERTY TRUSTS.

1. BURR EXPLAINED THE LEGAL EFFECT OF THE SEPARATE PROPERTY AGREEMENT AND SEPARATE PROPERTY TRUSTS PRIOR TO LYNITA'S EXECUTION OF THE SAME.

In July 1993, Eric and Lynita met with Burr because Eric had an opportunity to invest in some gaming ventures, in which Lynita did not want to become involved in for moral and religious reasons. V14:3433:3-16, V13:3131:3-3132:5. Over the course of at least two meetings with Eric and Lynita, V26:6252, V14:3434:4-10, Burr explained that the best way to accomplish their goals would be to enter into a separate property agreement, V14:3438:1-7, which was a methodology that estate planners then used in order to provide asset protection for at least a portion of the marital community. V3437:31:17-21. Burr further explained that once the property was divided into separate pools and funded into separate property trusts, V14:3436:18-21, Eric and Lynita would be free to operate and dispose of their separate property as they deemed fit. V14:3435:13-22.

Burr explained to both Eric and Lynita the legal consequences of the separate property agreement, V14:3438:23-33:5, V14:3446:12-23, including the benefits, detriments and risks. Burr believes that Lynita understood what he communicated to her. V7:1518:13-16. Although Eric and Lynita were not contemplating divorce at the time, Burr explained that a separate property agreement possessed certain benefits and risks, one of which was divorce. V14:3448:10-18. Specifically, Burr explained to Eric

and Lynita that the property they currently owned was community property, and that said community property would be converted to separate property under the separate property agreement. V7:1521:23-1522:8, V7:1530:10-14, V14:3436:18-21, V14:3439, V14:3447:3-6. Burr also explained that either Eric or Lynita could stand by the terms of the Separate Property Agreement in the event of divorce, and that each party bore the risk that they would not have a further interest in the other spouse's separate property. V14:3448:10-18.

Burr further explained that if the Parties wanted to avoid the possibility of possessing unequal assets and liabilities at any point in time, they should periodically balance separate property as they deemed appropriate. V14:3447:10-14, V14:3477:18-21, V14:3484:77:23-78:17. To effectuate such balancing Eric or Lynita would need to make the decision to gift their separate property to the other party and/or their separate property trust. V14:3447:15-23, V14:3478:21-3479:6. Burr made it clear that any intent of Eric or Lynita to make equalizing gifts in the future was in their sole discretion as they had no binding agreement to do so. V14:3448:5-9. Burr also made a form for Eric and Lynita to make gifts to each other. V26:6347-6349, V14:3481:14-15.

Both Eric and Lynita knew that by dividing their community property into separate property it would become separate for all purposes and there could not be a "wink-and-a-nod" side agreement that the separate property agreement would not apply in the case of divorce, V14:3439:12-20, V14:3438:18-24, because if such a side agreement existed it would render the separate property agreement invalid or

ineffective. V14:3448:5-9. Burr confirmed that in order for this plan to be effective the Parties had to reach an agreement dividing the community assets for all purposes, *see id*., without any side agreements (*e.g*., it would be valid as to creditors but not in the event of divorce). V14:3439:12-20, V14:3450:2-11. Simply put, the Parties could not on one hand agree to treat the property as separate for creditor purposes, while on the other hand have a side agreement that it would not be treated as separate property in any other instance, including divorce. V14:3448:5-9, V14:3450:2-11.

Burr believes that Lynita understood what he told her regarding entering into a separate property agreement (hereinafter referred to as "Separate Property Agreement"), V14:3441:2-3, V14:3447:7-9, which Lynita ultimately executed on 4/28/93. V26:6273-6282. Burr testified that he is not aware of any agreement between the Parties that the Separate Property Agreement would not control in the event of divorce. V14:3465:5-11, V14:3477:2-17, V15:3501:7-17. In fact, other than Lynita's self-serving and fabricated testimony, no evidence and/or testimony was introduced evidencing that the Separate Property Agreement was to be operative with respect to creditors but would not control the disposition of property between them in the case of divorce.

Lynita failed to introduce any evidence that Eric lied, falsified any information that she received, or otherwise induced her to execute the Separate Property Agreement as a result of duress or fraud. To the contrary, Burr testified that he has no reason to believe that Eric unduly influenced Lynita to execute the Separate Property Agreement or any other document. V14:3450:12-15. Burr was provided with a list of all

community assets nearly a week before the Separate Property Agreements and Separate Property Trusts were executed. V26:6253-6261. Burr further testified that it was his belief and understanding that the division of community assets at the time the Separate Property Agreement was executed was fair and equitable, and that if it was not he would have done something about it. V14:3452:11-3453:4.

2. RICHARD KOCH, ESQ. ALSO EXPLAINED TO LYNITA THE LEGAL EFFECT OF THE SEPARATE PROPERTY AGREEMENT.

In addition to the legal advice that Burr rendered to Lynita regarding the Separate Property Agreement and the separate property trust, including, THE NELSON FAMILY TRUST dated 7/13/93 ("Lynita's Separate Property Trust"), Lynita was separately represented by Richard Koch, Esq. ("Koch") in her execution of the same. V26:6273-6282, V26:6283-6312. Burr spoke with Koch about the proposed estate plan over the telephone, V14:3444:18-23, and sent correspondence to Koch asking him to review the following with Lynita: (1) Separate Property Agreement with Schedules A and B; and (2) "the values of the respective assets, which were given to Mr. Burr." V26:6262-6273.

Although Koch remembered little of the events in 1993, he testified that his custom and practice would have been to explain to Lynita the differences in the attributes of community property and separate property, the legal effect of dividing community property into two pools of separate property, and the legal consequences of converting community property to separate property. V14:3420:1-15, V14:3422:9-22.

Koch would not have executed the following "Attorney Certification" contained within the Separate Property Agreement without fulfilling his ethical obligations and ensuring that the representations were true and correct:

> … he has advised LYNITA SUE NELSON with respect to this Agreement and has explained to her the legal effect of it; that LYNITA SUE NELSON has acknowledged her full and complete understanding of the Agreement and its legal consequences, and has freely and voluntarily executed the agreement in the undersigned's presence. (Emphasis Added). V26:6273-6282. *See also* V14:3417:14-3418:5.

Lynita confirmed that Koch asked her if she had any questions, and whether she understood the agreement, to which she said yes. V14:3389:22-3390:4. Recital 1 to the Separate Property Agreement, which she executed that states:

> The Parties declare that each has retained independent counsel and they fully understand the facts and has been fully informed of all legal rights and liabilities; that after such advice and knowledge, each believes this AGREEMENT to be fair, just and reasonable, and that each signs this AGREEMENT freely and voluntarily. V26:6273. *See also* V26:6277.

Koch has no recollection of Lynita advising him that there was a side agreement that the Separate Property Agreement would not control the character of the property being divided in the event of a divorce between the Parties. V14:3421:20-3422:8. If she had, Koch would have expressed serious concern about the purported side agreement not being contained within the Separate Property Agreement and followed-up with correspondence memorializing the concern, which did not occur in this case. *See id.*, V14:3425:5-24.

In light of the foregoing evidence, the District Court found that the Separate Property Agreement was a "valid agreement." V19:4695:9-11.

C. THE ASSETS THAT FUNDED THE SEPARATE PROPERTY TRUSTS WERE KEPT SEPARATE AND NOT COMMINGLED.

The District Court found that the assets listed in Schedule A of the Separate Property Agreement, V26:6273-6282, were used to fund Eric's separate property trust THE ERIC L. NELSON SEPARATE PROPERTY TRUST dated 7/13/93 ("Eric's Separate Property Trust"), V26:6313-6341, and the assets listed in Exhibit B, V26:6273-6282, were used to fund Lynita's Separate Property Trust. V26:6283-6311. V19:4695:12-4696:11. Lynita effectuated the transfer of her newly divided separate property by executing the requisite documents to fund Lynita's Separate Property Trust. *See e.g.*, V27:6513, V27:6514-V27:6518. Further, both Eric, V26:6342, and Lynita, V26:5312, executed a document entitled "Assignment of Assets," which transferred and assigned their separate property to their respective separate property trusts.

Shelley Newell, the bookkeeper for the Eric's Separate Property Trust and Lynita's Separate Property Trust from 1993 - 2000, V14:3287:17-23, V14:3288:15-3289:7, confirmed that from 1993 through 2000, the assets owned and liabilities owed by Eric's Separate Property Trust and Lynita's Separate Property Trust were kept separate. V14:3296:12-24. When she created the books for Eric's Separate Property Trust and LSN Separate Property Trust in 1993, Shelley ensured that said books reflected the property as divided in the Separate Property Agreement. V14:3292:2-21,

V14:3294:4-18. All acquisitions in Eric's Separate Property Trust during Shelley's bookkeeping tenure originated from Eric's separate funds, V14:3299:1-5, and she was aware of no community property going into either of trusts during said time frame. V14:3300:8-12.

Shelley testified that although there were a few gifts made from Eric's Separate Property Trust to Lynita's Separate Property Trust (*i.e*. an interest in Tierra Del Sol and Sycamore Plaza), V14:3294:9-3295:4, no loans were made between the trusts. V14:3294:1-4. Shelley also testified that to the extent that common expenses were shared between Eric's Separate Property Trust and Lynita's Separate Property Trust, said expenses were always accounted for as a "due to – due from" if the trusts did not then each pay their respective shares. V14:3297:5-19. When Shelley had questions regarding the separate nature of the Separate Property Trusts she should would seek guidance from Burr. V14:3303:5-9, V26:6344-6345, V26:6345-6346.

D. CREATION AND IMPLEMENTATION OF THE SELF-SETTLED SPENDTHRIFT TRUSTS.

In or around 2000 Eric and Lynita received communications from Burr's office regarding the opportunities associated with the domestic asset-protection trust statute that had been recently enacted in Nevada. V14:3455:2-6.

On or around January 15, 2001, Eric and Lynita met with Burr to discuss converting their Separate Property Trusts to self-settled spendthrift trusts. V26:6392, V26:6393, V14:3456:22-24. Burr met his professional obligation of explaining the

nature of the self-settled spendthrift trusts, including the advantages of said trusts. V14:3458:6-8. The implementation of self-settled spendthrift trusts were intended to "supercharge" the prior estate planning already in place, V14:3458:9-22, by providing both Eric and Lynita greater protection from liabilities because: (1) the assets owned by each of the Separate Property Trusts were still exposed to liabilities that the grantor incurred individually (*e.g*. car accidents); and (2) assets owned by a self-settled spendthrift trust would be protected from creditors after a two year waiting period. V14:3455:11-3456:10, V14:3458:23-3459:9. Said meeting was confirmed in writing by Burr on 1/30/01, V26:6393, and copies of the proposed trusts were sent to Eric and Lynita on or around 2/15/01. V26:6394.

On 5/30/01, nearly 3 months after they were provided drafts of the self-settled spendthrift trusts, Eric executed the ELN Trust, V26:6475-V27:6508, and Lynita executed the LSN Trust. V26:6395-6427. Lynita made the decision to have Burr jointly represent her and Eric for the creation of trusts and waived the potential conflict of interest. V26:6442-6444. Despite the fact that self-settled spendthrift trusts are somewhat complex, Burr assured himself that Lynita had a fundamental understanding of the LSN Trust before allowing her to execute the same, V7:1562:21-1563:4, V14:3459:5-12, and ensured that she executed the same voluntarily. V7:1563:24-1564:2. Burr explained to Eric and Lynita that the ELN Trust and the LSN Trust would be irrevocable, and they would be giving up ownership of their separate property. V14:3461:5-17. No evidence was introduced that there was an agreement that the ELN

Trust and LSN Trust would be respected only as to third-party creditors and not in the event of divorce between Eric and Lynita. To the contrary, all evidence showed that was not the case. V13:3081:18-22, V13:3151:12-16.

Upon execution of the ELN Trust and LSN Trust, Burr believed said trusts were valid and enforceable under Nevada law in accordance with their terms. V14:3473:18-21. The District Court found that said Trusts were established in accordance with NRS 166.020. V19:4696:16-25.

Based upon the evidence presented at trial, V26:6445-6446, V27:6509-6510, V6511-6512, V13:3080:17-3081:9, V14:3460:5-14, the District Court found that the ELN Trust was funded with the assets owned by the ELN Separate Property Trust, V19:4696:18-19, and the LSN Trust was funded with the assets owned by the LSN Separate Property Trust. V19:4697:2-4.

After Lynita executed the LSN Trust, Burr communicated with her directly regarding other issues pertaining to the LSN Trust. V26:6434-6437, V26:6438-6441, V26:6447, V26:6448, V26:6449, V26:6450, V26:6453-6457, V26:6458-6461.

E. THE ASSETS OWNED BY THE SELF-SETTLED SPENDTHRIFT TRUSTS WERE KEPT SEPARATE AND NOT COMMINGLED.

Just like the Separate Property Trusts, the assets and liabilities of the ELN SSST and LSN SSST were kept separate from 2001 through present, V13:3075:11-20, V13:3076:15-3077:11, and there was no commingling. V13:3078:3-13. Further, all of the acquisitions made by the ELN Trust originated from the funds in the ELN Trust.

V13:3078:22-3079:1, V13:3080:9-16. This was reconfirmed by Daniel Gerety, CPA, who was retained by the ELN Trust to trace all of the assets and liabilities of the ELN SSST since its inception on 5/30/11. V27:6550-V29:7016. Gerety did note loans between the ELN SSST and LSN SSST; however, said loans were accounted for in a "due to – due from" account and have since been satisfied. V27:6554, V27:6622.

F. LYNITA CONFIRMS THE ASSETS OWNED BY HER SEPARATE PROPERTY TRUST WAS HER SEPARATE PROPERTY BY DISINHERITING ERIC.

Months before the Divorce Proceeding was initiated, Lynita retained Burr to amend and restate her Separate Property Trust, V26:6351-6381, V26:6382, V26:6383, amend the LSN Trust, V26:6350, V26:6351-6352, V26:6462-6468, V26:6469-6474, and Last Will and Testament, V26:6384-6388, to disinherit Eric from said trust in which she represented was her separate property and/or which Eric had no legal interest.

G. ENTRY OF DIVORCE DECREE.

On 6/3/13, the District Court issued the Divorce Decree. V19:4691-4742. Although the District Court recognized that the Nevada State Legislature "approved the creation of spendthrift trusts in 1999 and it is certainly not the purpose of this Court to challenge the merits of spendthrift trusts," V19:4967:11-15, and ordered that the ELN Trust and LSN Trust would remain intact, V19:4736:9-17, the District Court ordered the ELN Trust to distribute over $1,000,000 to pay Eric's *personal obligations*. V19:4740:14-4741:3.

In so doing, the District Court ignored NRS Chapter 21, NRS 166.120 and other provisions of Nevada's self-settled spendthrift trust statutes, and erroneously supported his findings based upon statutes from South Dakota and Wyoming, which specifically allow or obligate a self-settled spendthrift trust to pay child-support or alimony obligations of a beneficiary. V19:4732:2-23.

Although the Divorce Decree purports to be a final judgment, the District Court admittedly failed to dispose of all of the assets at issue. Specifically, it failed to address whether Lynita had an interest in the ELN Trust's ownership interest in Wyoming Downs. V19:4737:23-4738:2.

H. DIVORCE DECREE BECOMES FINAL UPON DISPOSITION OF WYOMING DOWNS.

At the evidentiary hearing on Wyoming Downs the District Court found that although Wyoming Downs was purchased during the pendency of the marriage, it was not "community property as it was clearly purchased through Dynasty, an entity wholly owned by the ELN Trust and the Court maintained the ELN Trust." V23:5558:18-21.

SUMMARY OF THE ARGUMENT

The District Court, who lacked jurisdiction to hear this matter, ignored the Nevada law and the facts of this matter in arriving at its decisions, which provide an economic windfall to Lynita and the LSN Trust. To make matters worse, the District Court has threatened the ELN Trust by making it clear it clear that if the Divorce Decree is overturned it will merely invalidate the ELN Trust. For these reasons, and those set

forth below, the orders appealed herein should be overturned and the claims relating to the ELN Trust should be remained to the Probate Court for a rehearing.

ARGUMENT

A. THE DISTRICT COURT LACKED JURISDICTION AND/OR SHOULD NOT HAVE HEARD THE MAJORITY, IF NOT ALL, OF THE CLAIMS FOR RELIEF ASSERTED AGAINST ERIC'S TRUST IN THE AMENDED THIRD-PARTY COMPLAINT BROUGHT BY LYNITA'S TRUST.

This Court "reviews a district court's decision regarding subject matter jurisdiction de novo." *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). The lack of subject matter jurisdiction can be raised at any time during the proceedings and is not waivable. *Mainor v. Nault*, 120 Nev. 750, 761, 101 P.3d 308, 315 (2004).

The District Court lacked jurisdiction to hear the claims asserted in the Third-Party Complaint as said claims arose under Title 12 or 13 of NRS, thereby rendering exclusive jurisdiction in the Probate Court. *See* NRS 164.015(1) (the "court[1] has exclusive jurisdiction of proceedings initiated by the petition of an interested person concerning the internal affairs of a nontestamentary trust. . .Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. . ."); NRS 30.060 ("[a]ny action for declaratory relief under this section [which includes the determination of "any question" arising in

[1] The word "court" in NRS 164.015(1) means "a district court of this State sitting in probate or otherwise adjudicating matters pursuant to this title." *See* NRS 132.116, made applicable to trust proceedings under Title 13 by NRS 164.005.

the administration of a trust] may only be made in a proceeding commenced pursuant to the provisions of title 12 or 13 of NRS, as appropriate."); EDCR 4.16(a) ("The probate judge may hear whichever contested matters the judge shall select…all other contested matters pertaining to the probate calendar will be assigned on a random basis to a civil trial judge, other than a trial judge serving in the family division.").

Notwithstanding, even if the family court had jurisdiction to hear Lynita's claims arising under Title 13 of NRS, it would have been more appropriate for said claims to be heard by the Probate Court and/or a Civil Division.[1] First, Eric and Lynita did not own the majority of their assets in their individual capacities and even if they did, such property was separate property. Thus, as discussed more fully in Section (C)(1), there was little community or separate property of the Parties to distribute in the Divorce Proceeding. Second, as is apparent from the Divorce Decree, the vast majority of the matter involved what can only be considered a trust dispute rather than traditional family court matters. Third, the Probate Court and its corresponding Civil Division has more experience and expertise as it concerns trust litigation such that it would have been a more appropriate forum to evaluate complex trust accountings and other trust specific issues that dominated this matter.

By finding that the District Court erred by hearing the trust litigation in this matter, this Court will confirm that complex trust litigation should not be heard in the Family Court but rather the Probate Court as outlined by rule and statute. In so finding,

[1] *See Kwist v. Chang*, 2011 WL 1225692 * 2 (Nev. Mar. 31, 2011) (slip copy).

the remaining issues on appeal will become moot as said issues should have been litigated as a trust dispute in the appropriate forum - the Probate Court.

B. THE DISTRICT COURT EXCEEDED ITS JURISDICTION AND ERRED BY ORDERING THE ELN SSST TO DISTRIBUTE ASSETS TO PAY ERIC'S OBLIGATIONS TO LYNITA, HER COUNSEL, AND THE SPECIAL MASTER IN CONTRAVENTION OF THE TERMS OF THE TRUST, NRS 166.120 AND NRS CHAPTER 21.

Despite the District Court's determination not to invalidate the ELN Spendthrift Trust, it nonetheless, in contravention of Nevada law, ordered the ELN Trust to distribute assets in the approximate amount of $1,075,000.00 to pay Eric's *personal obligations* to Lynita, her counsel and the court-appointed special master. V19:4740:10-4741:3. In making such findings, the District Court ignored the plain language of Nevada's self-settled spendthrift trust statutes and NRS Chapter 21, and relied upon Florida case law and South Dakota and Wyoming statutes that each, unlike Nevada Law, expressly allow a self-settled spendthrift trust to pay child-support or alimony obligations of a beneficiary. "Statutory interpretation is a question of law which this court reviews de novo."[2]

Nevada law protects the interests of a beneficiary in a spendthrift trust from all creditors of the beneficiary. Indeed, NRS 166.130 expressly provides that "[a] beneficiary of a spendthrift trust has no legal estate in the capital, principal or corpus of the trust unless under the terms of the trust the beneficiary or one deriving title from

[2] *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998); *In re Orpheus Trust*, 124 Nev. 170, 174, 179 P.3d 562, 565 (2008).

him or her is entitled to have it conveyed or transferred to him or her immediately, . . ." Similarly, NRS 166.120 provides:

> 2. Payments by the trustee to the beneficiary. . ., must be made only to or for the benefit of the beneficiary and not by way of acceleration or anticipation, nor to any assignee of the beneficiary, nor to or upon any order, . . ., given by the beneficiary, whether such assignment or order be the voluntary contractual act of the beneficiary or be made pursuant to or by virtue of any legal process in judgment, execution, attachment, garnishment, bankruptcy or otherwise, or whether it be in connection with any contract, tort or duty. Any action to enforce the beneficiary's rights, to determine if the beneficiary's rights are subject to execution, to levy an attachment or for other remedy must be made only in a proceeding pursuant to chapter 153 of NRS, if against a testamentary trust, or NRS 163.010, if against a nontestamentary trust. A court has exclusive jurisdiction over any proceeding pursuant to this section.
>
> 3. …; nor shall the interest of the beneficiary be subject to any process of attachment issued against the beneficiary, or to be taken in execution under any form of legal process directed against the beneficiary or against the trustee, or the trust estate, or any part of the income thereof, but the whole of the trust estate and the income of the trust estate shall go to and be applied by the trustee solely for the benefit of the beneficiary, free, clear, and discharged of and from any and all obligations of the beneficiary whatsoever and of all responsibility therefor. (Emphasis added).

Pursuant to the terms of the ELN Trust the Distribution Trustee has complete discretionary authority to make "distributions of principal and/or income to the beneficiaries hereunder at times and in amounts as determined in the sole discretion of the Distribution Trustee, subject only to the veto power vested in the Trustor..." V26:6498 at Section 12.2. Section 3.1 further provides that distributions are to be made in the Trustee's "sole and absolute discretion" to or for the benefit of one or more beneficiary under the terms of the ELN Trust. V26:6478. Section VI(b)(1) of the ELN

Trust additionally authorizes the Distribution Trustee to delay distributions to the beneficiary due to the "current involvement of the beneficiary in a divorce proceeding…" V26:6488.

Consequently, Eric has no "right" to receive any distribution from the ELN Trust and neither he, his creditors nor the District Court can compel distributions therefrom to or for his benefit. *See* N.R.S. 163.417 (a "**court may not order the exercise of**: . . . (c) A trustee's discretion to: (1) **Distribute any discretionary interest**; (2) Distribute any mandatory interest which is past due directly to a creditor; or (3) Take any other authorized action in a specific way; or . . ."). (Emphasis added).[3] In any event, Section 3.4 of the ELN Trust states that if any unauthorized distribution of any of the Trust is made to the Trustor that distribution is void.

Here, although the District Court found that the ELN SSST "was established as a self-settled spendthrift trust in accordance with NRS 166.020," and it was "certainly not the purpose of this Court to challenge the merits of spendthrift trusts," V19:4697:9-17, it erred by ordering the ELN Trust to pay Eric's personal back child support, alimony and attorney's fees obligations to Lynita. In support of its erroneous result, the District Court relied upon statutes from South Dakota and Wyoming, V19:4732:2-23, case law

[3] *See also* NRS 21.080 ("[t]his chapter does not authorize the seizure of, or other interference with, any money, thing in action, lands or other property held in spendthrift trust or in a discretionary or support trust governed by chapter 163 of NRS for a judgment debtor, or held in such trust for any beneficiary, pursuant to any judgment, order or process of any bankruptcy or other court directed against any such beneficiary or trustee of the beneficiary;"); NRS. 21.090, which identifies property that is exempt under Nevada law from execution, including a beneficial interest in spendthrift trust prior to distribution.

from Florida, V19:4733:2-14, and what it deemed to be a "strong public policy." V19:4733:15-20. The District Court's reliance on such authority is demonstrably misplaced because although the statutes relied upon the District Court expressly allow self-settled spendthrift trusts to pay child-support and alimony obligations, Nevada has no such counterpart. In fact, as discussed below, the Nevada Legislature expressly declined to amend the spendthrift trust provisions to provide for such exceptions.

The fact that the District Court exceeded its jurisdiction was conceded by Robert Dickerson, Esq., Counsel for Lynita in the instant matter, when he proposed that the Nevada Legislature recognize such exceptions. Indeed, Mr. Dickerson acknowledged in a Memorandum that he prepared for the Senate Committee on Judiciary that Nevada "has no statutory language allowing for a spouse or child to be an exception creditor of the [spendthrift] trust" and that "there has never been an effort to address the effect of this type of trust on domestic support obligations." V30:7480-7487.[4] The proposed amendments to Chapter 166, however, did not pass and, as a result, the Nevada spendthrift trust statutes were not amended by the Legislature to allow for an exception for support order creditors of a beneficiary to be enforced against a spendthrift trust.

Courts of other jurisdictions, relying upon the absence of similar exceptions in their statutes, have routinely held that a beneficiary's interest in a spendthrift trust is not subject to an alimony or support order. *See In re Johnston's Estate*, 252 Cal.App.2d

[4] The Amendment proposed, namely Section 1.3 of AB378, sought to "creat[e] a credit exception for a settlor's child, spouse or domestic partner, or former spouse or domestic partner which would allow such person the ability to obtain a judgement enforceable against the trust estate. V30:7481.

923, 60 Cal. Rptr. 852 (1967); *Lippincott v. Lippincott*, 37 A.2d 741 (Pa. 1944). Consequently, the Divorce Decree directing the ELN Trust to pay almost $1,075,000.00 to Lynita, her attorney's, and the special master for a Eric's *personal* support obligations directly violates Nevada spendthrift statutes, and is thus, a clear error of the law.

What makes the District Court's misinterpretation of Nevada's spendthrift trust statutes so egregious is the fact that it struck the expert witness report of Layne T. Rushforth, Esq. and precluded him from testifying at trial because it was "not sure" what Mr. Rushforth could add, stating that "spendthrift trusts are pretty straightforward, and I've read the statutes on that in preparation." V12:2939:12-20. The decision to strike Mr. Rushforth from testifying at trial was an abuse of the District Court's discretion because Mr. Rushforth is a demonstrably qualified expert[5] and no rationale was offered for the strike beyond the District Court suggesting that it already knew enough regarding spendthrift trusts, which simply is not the case[6] as the Divorce Decree clearly violates Nevada law.

C. THE DISTRICT COURT ERRED BY "EQUALIZING" THE ASSETS OWNED BY THE ELN TRUST AND LSN TRUST.

The assets owned by the ELN Trust and LSN Trust should not have been equalized by the District Court for at least three reasons. First, neither Eric nor Lynita individually

[5] *Hallmark v. Eldridge*, 124 Nev. 492, 499, 189 P.3d 646, 650-51 (2008).

[6] *Id. at* 498, 189 P.3d at 650 (citation omitted) ("This court reviews a district court's decision to allow expert testimony for abuse of discretion.")

possess a community or separate property interest in the assets owned by such Trusts. Second, the District Court cannot enforce the Trusts for some purposes and then ignored said documents for other purposes. Third, the District Court erroneously relied on parole evidence to justify its ruling.

1. NEITHER ERIC NOR LYNITA HAVE A COMMUNITY OR SEPARATE PROPERTY INTEREST IN THE ELN SSST OR LSN SSST THAT CAN BE EQUALIZED.

Chapter 166 of the Nevada Revised Statutes codifies the Spendthrift Trust Act of Nevada. A spendthrift is defined as "a trust in which by the terms thereof a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed." NRS 166.020. "A beneficiary of a spendthrift trust has no legal estate in the capital, principal or corpus of the trust estate . . ." NRS 166.130. As such, Eric's property rights under the ELN Trust are limited to that of a beneficiary with a "discretionary interest," as defined in NRS 163.4185(1)(c), and Nevada law limits his enforceable rights.

Since neither Eric nor Lynita can unilaterally remove any property from the Trusts, and any distributions are subject to the discretionary approval of the "distribution trustee," they do not have a separate property interest in assets owned by said trusts. Further, there is no legal authority that allows a spouse to assert a community property interest in property not owned by the other spouse. Consequently, the District Court erred as a matter of law by treating said assets owned by the Trusts as if they were Eric and Lynita's community and/or separate property.

2. THE DISTRICT COURT ERRED BY ENFORCING THE TRUSTS FOR SOME PURPOSES AND REPUDIATING SUCH TRUSTS FOR OTHER PURPOSES.

In Nevada, it "is well settled that a person shall not be allowed at once to benefit by and repudiate an instrument, but, if he chooses to take the benefit which it confers, he shall likewise take the obligations or bear the onus which it imposes."[7] Here, the District Court allowed the parties to reap the benefit of the Separate Property Agreement, but failed to require them to bear the resulting onus when it erroneously found that the trusts were designed solely for creditor protection and not a property settlement. V19:4699:24-27. In other words, the District Court simultaneously found the instruments to be valid as to creditors, but invalid as it pertained to the Parties' divorce due to its unfounded belief that Eric and Lynita were required to "equalize" and "level off" the trusts. This Court should review the District Court's interpretation of the Separate Property Agreement de novo.[8] Further, whether the District Court can transmutate the Trusts' property for conditional or selective purposes is a question of law that should be reviewed de novo.[9]

As the following two factually similar cases demonstrate, the District Court cannot selectively enforce the instruments: the Separate Property Agreement and Trusts are either valid and enforceable or they are not, and here, the District Court did

[7] *Fed. Mining & Engr. Co. v. Pollak*, 59 Nev. 145, 85 P.2d 1008, 1012 (Nev. 1939).

[8] *See, e.g., Bielar v. Washoe Health Sys., Inc*., 129 Nev. Adv. Op. 49, 306 P.3d 360, 364 (2013) (citation omitted).

[9] *See, e.g., Blaich v. Blaich*, 114 Nev. 1446, 1447–48, 971 P.2d 822, 823 (1998); *Bopp v. Lino*, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994).

not invalidate them. First, in *Marriage of Holtemann*, 166 Cal. App. 4th 1166, 83 Cal. Rptr. 3d 385 (Cal. App. 4th 2008), a husband and wife entered into a transmutation agreement and a trust that established the husband's express intent to transmute his separate property to community property so as to eliminate the need for probate and minimize taxes in the event of either spouse's death. Both the transmutation agreement and trust made it clear that they were not "not made in contemplation of a separation or marital dissolution [but] solely for the purpose of interpreting how property shall be disposed of on the deaths of the parties." *See id.* at 1169-1170.

The wife thereafter filed a petition to dissolve marriage and the husband exercised his right to revoke the trust. In rejecting the husband's claim that the assets identified in the transmutation agreement and trust were his separate property, the court further found:

> … **[W]e are not aware of any authority for the proposition that a transmutation, once effected, can be limited in purpose or otherwise rendered conditional or temporary**…. As the trial judge stated: "Husband argues that the transmutation was limited to estate purposes only. **In other words, Frank wishes to have his cake and eat it too.** He argues that, in the event of either his or Barbara's death, the survivor would be able to use the Transmutation Agreement to claim the property as community property, thus obtaining a full step up in basis to the fair market value of the property at date of death, while at the same time denying the validity of the Transmutation Agreement as an instrument which created community property. **Thus, when it would benefit either Frank or his estate, Frank wishes to characterize the property as community. However, when it would be detrimental to Frank, he wishes to ignore the transmutation and call the property separate.**" *Id*. at 1173, 391-392. (Emphasis Added).

Simply put, the court would not allow the husband to transmutate his separate property for conditional or selective purposes.

Similarly, *Marriage of Lund*, 174 Cal. App. 4th 40, 94 Cal. Rptr. 3d 84 (Cal. App. 4th 2009) confirms that a transmutation agreement cannot be used selectively. A specific question addressed by the court was whether "[i]f it's his separate property, can they for estate planning purposes . . . [and] for stepped-up [tax] basis, . . . say the magic words, 'for community property,' then it's community property, but for all other purposes it's not?" *Id*. at 49, 92. Ultimately, the court relying upon *Holtemann*, rejected "the notion that parties may execute a "conditional" transmutation (or, as colorfully described by the court, cross their fingers while signing the agreement)," *id*. at 54, 96, in holding that it would not "assume the parties intended to execute the agreement for the sole purpose of providing documentary support to a future materially false representation to the IRS." *Id*.

Here, just like in *Holtemann*, "the motivations underlying the documents" in the instant proceeding is irrelevant. The pertinent question is whether "they contain the requisite express, unequivocal declarations of a present transmutation." *Holtemann*, 166 Cal. App. 4th at 1173, 83 Cal. Rptr. 3d at 385. It is undisputed that the Separate Property Agreement validly and unequivocally transmutated Eric and Lynita's community property to separate property thereby making their purported intent to equalize the Trusts periodically irrelevant. Moreover, *Holtemann* flatly rejected the notion that a husband and wife can invalidate a transmutation agreement because it was

not made in "contemplation of a separation or marital dissolution." Yet, our District Court did exactly that, it invalidated the Separate Property Agreement and resulting trust as it relates to the divorce, because according to the District Court, it was not made to be a property settlement agreement upon divorce. Further, and most importantly, *Holtemann* and *Lund* held that the transmutation from separate to community property or vice versa cannot be "conditional." Yet, this is exactly what the District Court did when it found that the ELN and LSN Trust is conditionally valid as to creditors but invalid as it pertains property distribution upon divorce.

Since the District Court found the Separate Property Agreement and resulting Trusts to be valid, they should be fully enforced as they pertain to creditors *and* the Eric and Lynita in the divorce proceeding. Consequently, the District Court erred by ordering the ELN Trust to transfer properties to the LSN Trust as a matter of the law.

3. THE DISTRICT COURT ERRED BY RELYING UPON THE PURPORTED INTENT OF ERIC AND LYNITA TO EQUALIZE THE TRUSTS VIA FUTURE GIFTS DESPITE THERE BEING NO LEGALLY ENFORCEABLE AGREEMENT TO MAKE SUCH GIFTS.

This Court, in the context of the parole evidence rule, reviews "a district court's decision to admit or exclude evidence for abuse of discretion."[10] As this Court adeptly

[10] *See Frei ex rel. Litem v. Goodsell*, 129 Nev. Adv. Op. 43, 305 P.3d 70, 73 (2013); *M.C. Multi–Family Dev. v. Crestdale Assocs.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (200). Interpreting a trust presents a legal question that is reviewed de novo unless the court's interpretation is based on the credibility of extrinsic evidence. *Waldman v. Maini*, 124 Nev. 1121, 1126, 195 P.3d 850, 855 (2008). If it is based on extrinsic evidence, as here, a court will not overrule the district court's conclusions unless they "are clearly erroneous and not based on substantial evidence." *Nevada Ins. Guaranty v. Sierra Auto Ctr.*, 108 Nev. 1123, 1126, 844 P.2d 126, 128 (1992)).

noted, "[e]xtrinsic or parole evidence is not admissible to contradict or vary the terms of an unambiguous written instrument, "'since all prior negotiations and agreements are deemed to have been merged therein.'"[11] Consequently, courts determine a settlor's intent strictly from the language contained in the trust document and not the settlor's undeclared intentions.[12]

Extrinsic evidence is only considered if the trust document is ambiguous.[13] Indeed, "[i]t is not [a] court's function to rewrite a trust in order to effectuate a more equitable distribution or to impart an intent…that is not expressed in the trust."[14] Rather, the terms of the trust agreement are conclusive of the testator's intent. *See*, *e.g.*, *Taylor v. Taylor*, 978 A.2d 538, 542-43 (Conn. Ct. App. 2009) ("The issue of intent as it relates to the interpretation of a trust instrument ... is to be determined by examination of the language of the trust instrument itself and not by extrinsic evidence of actual intent.").

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[11] *Frei ex rel. Litem v. Goodsell*, 129 Nev. Adv. Op. 43, 305 P.3d 70, 73-74 (2013) (citation omitted). *See also In re Estate of Devine*, 910 A.2d 699, 703 (Pa. Super. 2006) (explaining that courts limit their inquiry to the four corners of the trust document because "the language of the trust deed itself is the best and controlling evidence of such intent.").

[12] *See In re Estate of Zilles, 200 P.3d 1024, 1028 (Ariz. Ct. App. 2008)(* quoting *Estate of Avila*, 85 Cal. App. 2d 38, 39 (1948)) *Estate of Edwards*, 203 Cal. App.3d 1366, 1371 (1988).

[13] *See Carmody v. Betts*, 104 Ark. App. 84, 88, 289 S.W.3d 174, 178 (Ark. Ct. App. 2008).

[14] *Kimberlin v. Dull*, 218 S.W.3d 613, 616 (Mo. Ct. App. 2007) (emphasis added).

For this reason, courts regularly exclude evidence from parties and/or the settlor concerning the intention of trust terms.

Here, the terms of the ELN Trust and LSN Trust are clear, definite and unambiguous. The Trusts make no mention of making future gifts to perpetually equalize the ELN and LSN Trust and there is no other legally enforceable agreement to do so. Nonetheless, the District Court abused its discretion by enforcing the purported intent of Eric and Lynita and ignoring the plain terms of the Trusts:

> THE COURT FURTHER FINDS . . . that keeping the Trusts intact, while transferring assets between the Trusts to "level off the Trusts", **would effectuate the parties clear intentions of** "supercharging" the protection of the assets from creditors while **ensuring that the respective values of the Trusts remained equal.** V19:4736:13-17.

The District Court additionally erred by relying upon Eric's testimony regarding whether the property owned by the Trusts was either community or separate property because said testimony constitutes a legal opinion which Eric is not qualified to make. *Peters v. Peters*, 92 Nev. 687, 692, 557 P.2d 713, 716 (1976). Although the District Court recognized that Eric's "opinion as to whether property is community or separate is not controlling" in its Findings of Fact and Order filed January 31, 2012, and Lynita's Counsel conceded that a witness cannot render a "legal opinion with respect to community property law," V5:1167:19-21, the District Court still utilized said impermissible testimony in support of its Divorce Decree.

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D. EVEN IF THE DISTRICT COURT WAS ENTITLED TO "EQUALIZE" THE TRUSTS, THE PURPORTED "EQUALIZATION" FAVORED LYNITA AND/OR THE LSN TRUST.

The "equalization" provided an economic windfall to Lynita and/or the LSN Trust for numerous reasons. First, the District Court erred by over-valuing property owned by the ELN Trust. Second, when the Court "equalized" the Trusts it failed to provide a credit for any liabilities. Third, as indicated *supra*, after the District Court "equalized" the Trusts by transferring over the $5,000,000 of property from the ELN Trust to the LSN Trust, it ordered to the ELN Trust to pay support to Lynita $875,000 for spousal support, V19:4740:10-14, her counsel's fees in the amount of $144,967, V19:4740:22-25, and Mr. Bertsch's fees in the amount of $35,258. V19:4740:19-21. Finally, after the entry of the Divorce Decree the District Court has routinely ordered the ELN Trust to pay the LSN Trust additional money, thereby thwarting its stated intent to "equalize" the Trusts.

1. THE DISTRICT COURT ERRED BY OVERVALUING THE BELLA KATHRYN PROPERTY AS SANCTION.

The District Court erred by intentionally overvaluing property owned by the ELN as a "sanction" for Eric's purported violation of the Joint Preliminary Injunction ("JPI"), by valuing the Bella Kathryn Property at "costs in the amount of $1,839,495 instead of its appraised value of $925,000." V19:4717:13-4718:6, V19:4723:15-20.

The District Court's finding is fatally flawed because the Bella Kathryn Property was purchased by the ELN Trust on December 28, 2009, as opposed to Eric individually, nearly 18 months before the ELN Trust was made a party in the Divorce

Proceeding. *Cf.* V19:4717:13-18 *with* V1:9-10. As such, the JPI did not enjoin the ELN Trust from undertaking any action, V1:9-10, because it was not until 4/30/12, over 2 years after the Bella Kathryn Property was purchased, that the District Court enjoined the ELN Trust from "acquir[ing] any new or additional assets, encumber[ing] existing assets, or sell[ing] existing assets without the specific order of the Court." V19:4539:1-5. Since the ELN Trust was not enjoined from acquiring new property in December 2010 when it purchased the Bella Kathryn Property, the District Court erred by sanctioning the ELN Trust for Eric's purported violated of the JPI because no such violation occurred.

Further, the $1,839,495 assessed against the ELN Trust was the "improvement and expenses" of the Bella Kathryn. V11:2686. Ironically, despite the imposition of the JPI, Lynita and/or the LSN Trust spent nearly $200,000 on improvements and expenses on her residence; yet, the District Court did not sanction her and/or provide a credit to the ELN Trust for said improvements, thereby once again favoring Lynita. V8:1810, V10:2458.

2. THE DISTRICT COURT ERRED BY FAILING TO CREDIT THE ELN TRUST FOR THE NUMEROUS LIABILITIES IDENTIFIED BY MR. BERTSCH AND MR. GERETY.

The District Court's finding that it "did not find any documented evidence to support" the numerous liabilities identified by Eric and/or the ELN Trust, V19:4721:V20-4722:21, is contrary to the evidence and testimony elicited from Mr. Gerety or Mr. Bertsch. Indeed, Mr. Gerety's report identified a $1,110,998 line of

credit that the ELN Trust owed Mellon Bank on 9/30/11, V27:6554, V28:6798, V28:6807, identified an additional $945,745 in liabilities reflected on the ELN Trust's books and records and another $6,744,299 of contingent liabilities that have not yet been reflected on the books. V28:6815-6816.

With respect to the $945,745 in liabilities reflected on the ELN Trust's books and records, both Mr. Bertsch, V30:7397-7399, and Mr. Gerety, V28:6815, and V30:7488-7489, identified promissory notes in favor of Bob and Lana Martin against Eric and/or the ELN Trust (one in the amount of $200,000 and one in the amount of $105,000), and said promissory notes were attached as exhibits to Mr. Gerety's report and utilized by Lynita as an exhibit during the Divorce Proceeding. *Id.* Consequently, at the very least, the District Court erred by finding that said documentation was insufficient to support a liability in the amount of $350,000 and crediting the ELN Trust said amount.

The Trustees acknowledge that the majority of remaining liabilities are "contingent." However, said liabilities can become realized if a party pursues and proves liability. For example, and by no means of limitation, both Mr. Bertsch, V30:7397-7399, and Mr. Gerety, V28:6815-6816, V28:6911-6915, also identified a contingent liability in the approximate amount of $623,000 to Frank Soris if certain property owned by the ELN Trust, which the District Court transferred to the LSN Trust in its Divorce Decree, was not worth $1,368,000. Although it was unclear whether the value of said of said property is worth $1,368,000, the District Court erred by ignoring said liability as opposed to making the LSN Trust 50% liable on the contingent liability.

The same rationale applies to the remaining contingent liabilities identified by Mr. Bertsch and Mr. Gerety.

To make matters worse, Lynita's Counsel had even stipulated during the trial that to the extent there is potential liability Lynita would be willing to "share equally" in said liabilities. V5:1056:23-1057:6.

In light of the foregoing, the ELN Trust should receive a credit for the liabilities identified by Mr. Bertsch and Mr. Gerety, or alternatively, hold Lynita and/or the LSN Trust liable for 50% of said liabilities.

3. THE DISTRICT COURT ERRED BY FAILING TO CREDIT THE ELN TRUST FOR PAYMENTS MADE TO THE SPECIAL MASTER.

Mr. Bertsch was paid $139,358 in the Divorce Proceeding, none of which was paid by Lynita and/or the LSN Trust. V30:7431:5-6 ($60,000 paid by Eric/ELN Trust), V30:7477:7-12 ($44,100 paid by Eric/ELN Trust) and V19:4737:15-19 (showing an additional $35,258 paid by the ELN Trust). To make matters worse, The District Court failed to even provide the ELN Trust a credit for said payments that it made despite the fact that the District Court found that Mr. Bertsch's retention benefitted all Parties "by providing the Court with financial information necessary for the rendering of a fair and just decision in the pending divorce proceedings." V30:7476:15-24. Obviously, if Mr. Bertsch's work benefitted all Parties his fees should have been borne equally.

4. THE DISTRICT COURT'S STATED INTENT TO "EQUALIZE" HAS BEEN THWARTED BECAUSE IT CONTINUES TO ORDER THE ELN TRUST TO PAY THE LSN TRUST ADDITIONAL MONEY.

In September 2014, over a year after it equalized the Trusts, the District Court erred by ordering the ELN Trust to pay $75,000 to the LSN Trust for a loan that Banone, LLC ("Banone") made to Dynasty Development Management, LLC ("Dynasty") in November 2011. V23:5557:23-5558:3. Although the District Court ultimately transferred Banone to the LSN Trust in its Divorce Decree, V19:4712, at the time said loan was made in November 2011 Banone was owned 100% by the ELN Trust. *Id*. *See also* V23:5559:13-16. In other words, the District Court ordered the ELN Trust to compensate the LSN Trust for a loan one of its assets made nearly 18 months before the District Court transferred Banone to the LSN Trust.

As indicated *supra*, the District Court's stated intent to "equalize" the Trusts was effectuated when it transferred nearly $5,000,000 to the LSN Trust. V19:4739:2-26. Consequently, by ordering the ELN Trust to pay the LSN Trust additional money it is thwarting its stated intent and further penalizing the ELN Trust.

E. THE DISTRICT COURT ERRED BY CREATING A CONSTRUCTIVE TRUST OVER THE RUSSEL ROAD AND LINDELL PROPERTIES.

The District Court erred and exceeded its jurisdiction by imposing a constructive trust[15] because (1) a legal, as opposed to an equitable remedy for any alleged

[15] This Court "will review a district court's decision granting or denying an equitable remedy for abuse of discretion." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. Adv. Op. 41, 245 P.3d 535, 538-39 (2010) (citing *Douglas Disposal Inc. v. Wee Haul, LLC.*, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007) (reviewing a request for injunctive relief under an abuse of discretion standard)). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Nolan v. State*, 122 Nev. 363, 376, 132 P.3d 564, 572 (2006) (quoting *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). However, to the

misconduct, is available and (2) the res put into the constructive trust and transferred to the LSN Trust cannot be traced to the LSN Trust. The District Court additionally erred because it failed to credit the ELN Trust for the millions of dollars that it paid and/or debt it incurred for its interest in said property.

1. THE IMPOSITION OF AN EQUITABLE CONSTRUCTIVE TRUST REMEDY WAS IN ERROR BECAUSE THERE IS A LEGAL REMEDY.

First, since a constructive trust is an equitable remedy, a party is precluded from seeking a constructive trust if the party has an adequate remedy at law for damages. *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp*., 896 F.2d 54, 58 (3rd Cir. 1990) ("The proper remedy for breach of contract, however, is an award of damages at law, not the equitable remedy of constructive trust.").

Here, even if the Russell Road Property and Lindell Property were purchased with assets from the LSN Trust, which they were not as shown below, the District Court exceeded its jurisdiction by holding the ELN Trust liable for Eric's purported breaches of fiduciary duty in his individual capacity, as the alleged *de facto* Investment Trustee of the LSN Trust. Accordingly, Lynita is precluded from seeking a constructive trust against the ELN Trust because it has an adequate remedy at law, apart from the divorce dispute, for damages against Eric.

2. THE IMPOSITION OF THE CONSTRUCT TRUST WAS IN ERROR BECAUSE THE PROPERTY PLACED INTO THE CONSTRUCTIVE TRUST AND TRANSFERRED TO THE LSN TRUST CANNOT BE TRACED TO THE LSN TRUST, OR

extent the decision to impose the constructive trust was based on conclusions of law, the decision is reviewed de novo. *Grosjean v. Imperial Palace*, 125 Nev. 349, 356, 212 P.3d 1068, 1075(2009).

ALTERNATIVELY, THE PERCENTAGE OF EACH PROPERTY OWNED BY THE TRUST WAS IMPROPERLY COMPUTED.

A constructive trust may be imposed "when the consideration for the property is provided by one party, but title is taken by another, and the circumstances negate the possibility of the consideration being a gift." *Cummings v. Tinkle*, 91 Nev. 548, 550, 539 P.2d 1213, 1214 (1975). "The proceeds of the alleged wrongful conduct must exist as an identifiable fund *traceable* to that conduct, such that it can become the res of the proposed trust." *Eychaner v. Gross*, 779 N.E.2d 1115, 1143 (Ill. 2002) (holding that constructive claim failed because there was no evidence of an identifiable fund traceable to any wrongful conduct) (emphasis added).[16]

i. RUSSELL ROAD PROPERTY

The District Court imposed a constructive trust over 50% of the ELN Trust's 66.67% ownership interest in the Russell Road Property, located at 5220 E. Russell Road, Las Vegas, Nevada, which the ELN Trust acquired with its *own* assets in 2010, over 5 years after the LSN Trust relinquished its interest in said property.

a. *LYNITA OBTAINED AND THEREAFTER, WITHOUT THE INVOLVEMENT OF ERIC AND/OR THE ELN TRUST, RELINQUISHED AN INTEREST IN THE RUSSELL ROAD PROPERTY.*

[16] *See also Brown v. Federal Savings and Loan Insurance Corp.*, 105 Nev. 409, 777 P.2d 361 (1989) (district court imposed constructive trust over $1,300,000.00 which could be traced over improper transactions); *Estate of Cowling v. Estate of Cowling*, 847 N.E.2d 405 (Ohio 2006)(holding "before a constructive trust can be imposed, there must be adequate tracing from the time of the wrongful deprivation of the relevant assets to the specific property over which the constructive trust should be placed.").

On November 11, 1999, Lynita's Separate Property Trust (as opposed to the LSN Trust as found by the District Court) purchased the Russell Road Property, which at the time was only 3.3 acres, for $855,945. V19:4707:15-17, V7:1672-1674, V30:7020. On June 7, 2001, Lynita's Separate Property Trust transferred the Russell Road Property to a partnership named CJE&L, LLC in exchange for the LSN Trust obtaining a 50% interest in said partnership. *See id*. Shortly thereafter, CJE&L, LLC obtained a $3,100,000 loan for the purpose of constructing a building for Cal's Blue Water Marine. *See id*.

In 2004, Lynita executed a guarantee on the flooring contract for Cal's Blue Water Marine, which she subsequently withdrew, thereby resulting in the LSN Trust forfeiting its interest in CJE&L, LLC in consideration of being released as a guarantor. V19:4707:23-25. Although the District Court found that the LSN Trust transferred its interest in Russell Road "under the advice and direction of Mr. Nelson," V19:4709:2-3, no evidence was presented at trial linking Eric to this transaction. Indeed, the document Lynita executed to relinquish said interest does not reference Eric. V29:7015-7016. Notwithstanding, the District Court erred by penalizing the ELN Trust for not producing at trial evidence of the value assigned to Lynita's liability despite the fact that the ELN Trust had no such burden. V19:4708:2-6.

b. AFTER LYNITA RELINQUISHED HER INTEREST IN CJE&L, LLC SAID ENTITY PURCHASED APPROXIMATELY 6 ADDITIONAL ACRES THAT WERE ADDED TO THE RUSSELL ROAD PROPERTY.

As indicated *supra*, at the time Lynita's Separate Property Trust purchased the Russell Road Property, said property consisted of 1 parcel that was approximately 3.3 acres. V29:7020. After the LSN Trust relinquished its interest in CJE&L, LLC said entity purchased approximately 6 additional acres that were added to the Russell Road Property. CITE. When the ELN Trust purchased its 66.67% interest in said property consisted of 4 parcels that exceed 9 acres. V29:7036. Consequently, the Russell Road Property ultimately obtained by the ELN Trust in 2010 was substantially larger than when the LSN Trust relinquished its interest in 2005, a fact which the District Court failed to consider.

c. THE DISTRICT COURT ERRED BY FAILING TO CREDIT THE ELN TRUST THE $4,000,000 THAT IT PAID TO OBTAIN ITS 66.675% IN THE RUSSELL ROAD PROPERTY.

The District Court additionally erred by ignoring the fact that the ELN Trust paid nearly $4,000,000.00 for its 66.67% interest in the Russell Road Property, which Mr. Bertsch found was comprised of the following amounts:

> "1) In 2009, the ELN Trust purchased an FDIC note on a property in Phoenix commonly known as "Sugar Daddy's" for approximately $520,000. The source of these funds came from the Line of Credit. The property was sold with proceeds amounting to $1,520,597.88. Since this was designate as a 1031 exchange, the proceeds were used in 2010 to purchase Eric's interest in the Russell Road Property.
>
> 2) As indicated above, the ELN Trust had previously paid $300,000 to pay down the Bank Loan which was secured by property in Utah. In addition, the ELN Trust paid off the mortgage on Cal's house amounting to $400,000. Both amounts were paid from a Line of Credit. These two amounts aggregating $700,000 were then used as a credit towards the purchase price for ELN Trust's interest.

3) The ELN Trust gave a credit amounting to $522,138.47 which represented future agreements with Cal and the termination of any present verbal partnership agreements. This also included money on rental payments given to Cal.

4) The remaining amount to fulfill the obligation of the purchase price was to borrow $1,257,263.67 from the Line of Credit in 2010.

Therefore the purchase of ELN Trust's interest is comprised of the following:

Pay down of Bank Loan	$300,000.00
Pay off of personal residence of Cal Nelson	400,000.00
Credit to Cal Nelson for prior payments	522,138.45
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
	$4,000,000.00"[17]

Since the ELN Trust's interest in the Russell Road Property obtained in 2010 was paid for with its own assets, the District Court erred by imposing a constructive trust over such property because it cannot be traced to the interest that Lynita and/or the LSN Trust relinquished in 2005.

Even if the ELN Trust's acquisition of a 66.67% interest in Russell Road can be traced to the LSN Trust, the District Court still awarded the LSN Trust an economic windfall by giving her a 50% interest of the ELN Trust's 66.67% ownership interest, which is valued at $2,265,113.50, despite the fact that she only paid $855,954. Further, as indicated above, the Russell Road Property today is approximately 3 times larger than it was when owned by the LSN Trust. The District Court additionally failed to give

[17] V7:1673-1674.

the ELN Trust a credit for the $4,000,000 that it paid to acquire its 66.67% interest. V19:4707-4709.

In light of the foregoing, the constructive trust placed over the Russell Road Property was improper and should be reversed.

ii. LINDELL PROPERTY

The District Court similarly erred by imposing a constructive trust over the ELN Trust's 50% in the Lindell Property. Evidence admitted at trial confirms that the LSN Trust transferred 50% of its interest in the Lindell Property to the ELN Trust on 3/22/07 in exchange for the transfer of millions of dollars of property. Specifically, in exchange for a 50% interest in the Lindell Property, the ELN Trust transferred its interest 100% of the Mississippi real estate (valued at $2,000,000), V27:6556, V27:6622, V30:7411-7417, and 200 acres of Wyoming Land (valued at $405,000), V19:4739:19, to the LSN Trust. *See also* V16:3769:19-3770:10. Further, because the ELN Trust transferred over $2,000,000 of its assets to the LSN Trust, the LSN Trust was supposed to transfer 50% of the Mississippi property to a LLC, so that the ELN Trust and LST Trust would both own a 50% interest.

The District Court's basis for imposing a constructive trust over the ELN Trust's 50% interest in the Lindell Property was because of its belief that the Grant, Bargain Sale Deed that conveyed 50% of the LSN Trust's interest in the Lindell Property to the ELN Trust purportedly "clearly reflects a signature not consistent with Mrs. Nelson's signature when compared to the numerous documents signed by Mrs. Nelson and

submitted to this Court." V19:4709:16-21. Lynita never questioned the authenticity of said deed when it was first admitted as an exhibit at trial on 8/31/10. V2:456:10-11, V30:7394-7396. The District Court failed, however, to conclude that the signature was forged and/or identify the "numerous documents" that were inconsistent with the signature on the Grant, Bargain, Sale Deed, which was notarized.

The District Court imposition of a constructive trust was also based on its mistaken belief that Mr. Gerety's testimony regarding the transfer was not "credible" because: (1) it was unclear what Mississippi properties were involved in the transaction; (2) no credible testimony as to the value of the Mississippi property was presented; and (3) the transfer of the Mississippi property from the ELN Trust to the LSN Trust occurred in 2004 and the transfer of the Lindell Property from the LSN Trust to the ELN Trust occurred in 2007. V19:4709:22-4710:5.

First, substantial evidence was admitted at trial regarding what properties were involved in the transaction, as deeds of the properties that were transferred from the ELN Trust to the LSN Trust in November 2004 were admitted as exhibits at trial. *See, e.g.*, V29:7086, V29:7092, V29:7108, V29:7215-7216, V29:7230-7231, V29:7243-7244, V30:7252-7253, 31:. Further, Mr. Gerety's report, V27:6555-6556, V27:6622, and trial testimony, V15:3576:2-3578:20, V15:3692:4-22, V15:3705:18-3706:3, V16:3865:2-7, identifies the Mississippi property along with the value of said property as represented by the appraisal obtained by Mr. Bertsch.

Second, the District Court's contention that there was no credible testimony as to the value of the Mississippi property is misplaced as Mr. Bertsch obtained appraisals of the Mississippi Properties, V30:7411-7417, which were relied upon in his reports submitted to the District Court. V7:1662-1683, V9:2186-2189, V30:7397-7399. Indeed, it was these very appraisals and reports that the District Court analyzed and utilized in assigning a value to the properties owned by the Trusts in the Divorce Decree. V19:4739.

Lastly, the District Court's contention imposition of a constructive trust over the ELN Trust's 50% interest in the Lindell Property because the Mississippi Property was transferred 3 years before the Lindell Property was transferred is perplexing because the District Court imposed a constructive trust over the Russell Road Property when the LSN Trust relinquished its interest in said property 5 years before the ELN Trust obtained an interest in the same.

F. THE DISTRICT COURT ERRED BY RELYING ON AN UNJUST ENRICHMENT THEORY TO TRANSFER THE BANONE, LLC AND BRIANHEAD PROPERTY FROM THE ELN TRUST TO THE LSN TRUST BECAUSE IT PREVIOUSLY DISMISSED LYNITA'S UNJUST ENRICHMENT CLAIM OR, ALTERNATIVELY, FAILED TO CREDIT THE ELN TRUST.

The District Court erred by transferring Banone, LLC and the Brianhead Cabin because (1) it had previously dismissed Lynita's and/or the LSN Trust's unjust enrichment claim, (2) alternatively, the District Court failed to credit the ELN Trust for the liability that it assumed in conjunction with the sale of Wyoming Downs, LLC and the consideration given for the 50% interest in the Brianhead cabin.

1. THE DISTRICT COURT DISMISSED LYNITA'S UNJUST ENRICHMENT CLAIM 16 MONTHS BEFORE IT ENTERED ITS DIVORCE DECREE.

The District Court erred by awarding the LSN Trust the properties owned by Banone, LLC and ½ of the Brianhead Cabin to Lynita under the theory of unjust enrichment because the District Court dismissed Lynita and/or the LSN Trust's unjust enrichment claim 16 months before it entered the Divorce Decree so that she could bring said claim in "another tribunal." *Cf.* V9:2173 *with* V19:4549.

Here, since the District Court dismissed the unjust enrichment claim, it erred as a matter of law by awarding Banone, LLC and ½ of the Brianhead cabin to the LSN Trust on the basis of unjust enrichment.

2. THE DISTRICT COURT ERRED IN FINDING THAT THE LSN TRUST TRANSFERRED ITS INTEREST IN THE HIGH COUNTRY INN AND BRIANHEAD CABIN TO THE ELN TRUST FOR NO CONSIDERATION.

Despite the Court's erroneous findings, the ELN Trust paid valuable consideration for its interest in the High Country Inn and Brianhead Cabin. Indeed, the ELN Trust's expert witness, Dan Gerety, CPA identified all transactions between the Trusts in order to keep track of what was due to each Trust, V27:6554, including the High Country Inn and Brianhead Cabin, V27:6622, and Mr. Gerety's report showed that the LSN Trust actually owed the ELN Trust $28,731. *Id*. The District Court erred by rejecting the findings contained within Mr. Gerety's report because Mr. Gerety did not consult with Lynita's Counsel prior to completing his report. V19:4718:7-16.

Further, with respect to the interest in the High Country Inn acquired from the LSN Trust on 1/18/07, V19:4710:22-25, the ELN Trust did in fact compensate the LSN Trust for said interest. Specifically, the ELN Trust agreed to take a $1,3600,000 debt that requires the ELN Trust to guarantee a minimum monthly payment of $10,300 to Frank Soris through January 2022. V16:3772:9-3775:3, V16:3798:12-3800:23, V16:3933:2-3935:5, V16:3937:3-3938:9, V18:4475:19-4477:5, V28:6912-6915, V29:7050-7068. The ELN Trust additionally paid the taxes associated with the sale of the High County Inn. V18:4476:17-4477:5.

The District Court's finding that there was insufficient evidence to support the ELN Trust's position that the LSN Trust transferred 50% of its interest in Brianhead cabin for consideration, V19:4714:2-11, fails for the same reasons set forth in Section E(2)(ii) *supra*. Specifically, the consideration that the LSN Trust received in exchange for its interest in the Brianhead Cabin was the Mississippi Property transferred from the ELN Trust in 2007. V16:3770:16-3771:8.

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

1. THE DIVORCE DECREE CONFIRMED THAT THE DIVORCE DECREE DISPOSED OF ALL ISSUES BETWEEN THE TRUSTS EXCEPT FOR OWNERSHIP OF WYOMING DOWNS.

The Divorce Decree confirmed ownership of all assets owned by the Trusts, assigned values to said property, "equalized" the property owned by the Trusts, V19:4736:9-17, V19:4738:10-4739:25, and with the exception of Wyoming Downs,

V19:4738:2-3, confirmed that the District Court had disposed of any and all claims between the Parties. On 6/17/13, shortly after the Divorce Decree was entered, Lynita conceded that the only issue regarding division of property that the District Court left "unresolved" pertained to the "existing interest in Wyoming Downs." V20:21-22.

On 9/22/14 the District Court disposed of Wyoming Downs thereby making its judgment final. V23:5553-5561.

2. THE DISTRICT COURT VIOLATED NEVADA LAW BY ALLOWING LYNITA AND THE LSN TRUST TO RE-LITIGATE THEIR CLAIM FOR RENTS COLLECTED BY THE ELN TRUST FROM 05/09-06/13 AFTER ENTRY OF FINAL JUDGMENT AND APPEAL.

On 11/13/14, after the District Court entered its final order, Lynita and the LSN Trust filed a Motion to Enforce Decree of Divorce, which was a thinly disguised and untimely motion seeking additional relief not granted in the Divorce Decree. Notwithstanding, the District Court granted the Motion to Enforce and ordered the ELN Trust to account and pay the LSN rent it collected between 05/09-6/13 from the Arnold Property, and the Mississippi RV Park. V25:6226-6248. The District Court erred by allowing Lynita to re-litigate claims that were not granted in the Divorce Decree because the District Court was divested of jurisdiction after the ELN Trust filed the First Appeal on 10/20/14.[18]

[18] "[A] timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court." *Rust v. Clark City School Dist*., 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). Although a "party seeking to alter, vacate, or otherwise change or modify an order or judgment" has the ability to file a motion with the district court, the district court "lacks jurisdiction to enter an order granting such motion." *Foster v. Dingwall*, 126 Nev. Adv. Op. 5, 228 P.3d 453, 455 (2010).

In Nevada, "[n]o proposition of law is more thoroughly settled than that, when issues between parties to an action have once been tried and finally determined, whether such determination is erroneous or not, the same questions cannot again be litigated by such parties or their privies." *Kernan v. Kernan*, 78 Nev. 93, 94, 369 P.2d 451, 452 (1962). Indeed, "a judgment is conclusive not only on the questions actually contested and determined, but on all matters which might have been litigated and decided in the suit." *York v. York*, 99 Nev. 491, 493, 664 P.2d 967, 968 (1983) (wife made a claim to $15,000 that could have been litigated in first divorce action). "Although whether issue preclusion applies is a mixed question of law and fact, legal issues predominate, and therefore, this court reviews de novo the availability of issue preclusion. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (2009); *University & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 984, 103 P.3d 8, 16 (2004).

Lynita was precluded from seeking to recover the rent collected by the ELN Trust between 2009 and 2013 from the Arnold Property and Mississippi RV after the entry of the final judgment on 9/22/14 because said relief was not granted. Indeed, Lynita's First Amended Complaint requested a constructive trust over "the assets, income, profits, **rents** and fees received by" the ELN Trust, V9:2173:5-18, V9:2179:10-28. (Emphasis Added). Further, Lynita had additionally sought to have the rents collected by the ELN Trust from the Mississippi RV Park placed in a blocked account; however, the District Court denied such relief. V30:7401:4-10.

A plethora of evidence admitted at trial confirmed that the ELN Trust collected 100% of rents for the Arnold Property and the Mississippi RV Park. Specifically, Mr. Bertsch's reports identified that the ELN Trust and/or entities owned by the ELN Trust were collecting rent from May 2009-June 2013 for the Arnold Property, V11:2686 ($14,235.19 rent collected from 2009-3/2012) and the Mississippi RV Park. V7:1690 ($8,200 rent collected in 2011), V8:1767 ($31,362.99 rent collected in 2009), V11:2685-2709 ($42,793.09 in rent collected from 2009-3/2012). The Parties also introduced a substantial amount of testimony at trial, including, but not limited to, Eric, V3:506:3-507:15, V3:509:10-510:8, Lana Martin, V14:3262:1-6, and Mr. Gerety, V15:3572:23-3573:7, and accountings regarding the rent collected by the ELN Trust. V27:6616.

If Lynita believed the District Court failed to address the 2009-2013 rent for the Arnold Property and Mississippi RV Park, she should have sought the appropriate relief in her Motion to Amend, which she filed on 6/17/13, and/or sought a new trial pursuant to NRCP 59.[19] Notwithstanding, because Lynita failed to raise this issue "no later than 10 days after service of written notice of the entry of the judgment," *see* NRCP 59(b), she was precluded from raising said issue and the District Court erred by allowing argument on the same.

[19] However, even then, such a request would have been inappropriate as motions filed under 59€ may not be used to "relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *See Stevo Design, Inc. v. SBR Mktg. Ltd*., 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013) (citation omitted).

3. THE DISTRICT COURT HAS PENALIZED THE ELN TRUST TWICE.

What makes the 6/8/15 Order even more egregious is the fact that the District Court already admittedly "equalized" and/or "leveled off the ELN Trust ($8,783,487.50) and LSN Trust ($8,785,988.50)" in its Divorce Decree. Consequently, by forcing the ELN Trust to pay Lynita and/or the LSN Trust 50% of rental proceeds from the Arnold Property, Lindell Property and Mississippi "RV Park from January 1, 2010, through January 1, 2013, after it made it clear in the Divorce Decree of its intent to equalize the ELN Trust and LSN Trust, the District Court is providing an additional economic windfall to Lynita and the LSN Trust as it is penalizing the ELN Trust twice (once when it equalized the Trusts in 2013, and again, by forcing the ELN Trust to pay the LSN Trust hundreds of thousands of additional money that was already accounted for).

H. THIS MATTER SHOULD BE REMANDED TO THE PROBATE COURT OR, ALTERNATIVELY, A DIFFERENT FAMILY COURT JUDGE BECAUSE JUDGE SULLIVAN HAS ALREADY THREATENED TO INVALIDATE THE TRUST UPON REMAND.

"[T]he principal factors considered. . . in determining whether further proceedings should be conducted before a different judge are (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and

duplication out of proportion to any gain in preserving the appearance of fairness." *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979). Further, when "a district court judge . . . has heard the evidence that should have been excluded **and formed and expressed an opinion on the ultimate merits**, the case should be "reassigned if remanded."" *FCH1, LLC v. Rodriguez*, 130 Nev. Adv. Op. 46, 335 P.3d 183, 190 (2014). (Emphasis Added).

Further, "[t]he test for whether a judge's impartiality might reasonably be questioned is objective," and presents "a question of law [such that] this court will exercise its independent judgment of the undisputed facts." *Ybarra v. State*, 247 P.3d 269. 272 (Nev. 2011), reh'g denied (June 29, 20122), cert. denied, 132 S. Ct. 1904 (U.S. 2012). Ultimately, the court must decide "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [the judge's] impartiality." *Id.*

Finally, the District Court lacks jurisdiction to hear this matter as it relates the Trust. Accordingly, it should be remanded to the Probate Court who has proper jurisdiction over the trust.

1. THE DISTRICT COURT IS UNABLE TO PUT OUT OF ITS MIND PREVIOUSLY-EXPRESSED VIEWS ON ERRONEOUS FINDINGS AND/OR EVIDENCE.

The *Arnett* factors confirm that this matter should be remanded to the Probate Court because the District Court is unable to put out of its mind previously-expressed views or findings that are erroneous. Indeed, the District Court has *repeatedly* stated that if this Court grants the ELN Trust's appeal, it will merely invalidate the ELN Trust:

THE COURT: Yeah, we'll get there, the issue. I tell you, depending on what the Supreme Court does, you know, I thought my order of decree made it clear that I was inclined to set aside those spendthrift trust. V21:5178:6-9.

…

THE COURT: And depending on what the Supreme Court does, they may remand it back to me and I may set aside the trust and we'll go to round two in the Supreme Court. V21:5194:8-11.

THE COURT: I made it clear in my divorce decree that the Supreme Court- depending what they do on that came back to me on a question for this Court that I would invalidate the trust…" V22:5299:19-21.

THE COURT: But I think I made my divorce decree real quick- real clear. I think a made a specific finding that in the event that I felt clearly I could invalidate the trust. That- because that gave indication where I was going in case Supreme Court otherwise that I would invalidate the trust based on the formalities…" V22:5304:4-9.

Such threats clearly express the District Court's pre-determined intent to invalidate the ELN Trust if his plan to "equalize" the Trusts is thwarted.

2. REASSIGNMENT IS NECESSARY TO PRESERVE THE APPEARANCE OF JUSTICE.

Reassignment is also necessary to preserve the appearance of justice because the District Court has demonstrated an extreme bias against Eric and the ELN Trust. On multiple occasions, the District Court issued rulings on its volition. For example, and by no means of limitation, on August 1, 2013, the Parties appeared at a routine Status Check to see (1) whether Eric had paid $1,032,742 to Lynita, and (2) whether the ELN Trust had produced an accounting of rental income. At the hearing, the District Court, without briefing or a request from Lynita's Counsel, advised the Parties for the first

time that he was inclined to issue a charging order against any distributions from the ELN Trust to Eric:

> THE COURT: **And so I'm inclined to issue a charging order against any distributions that Mr. Nelson has coming. I think I can clearly do that with a charging order no matter what they rule on the trust**. I think as far as spousal support and child support, I think it's clear from the case law that I have looked at from spendthrift trusts that they can issue charging orders against any distributions that the parties get in to satisfy any family support issues. The issue on that is with their stay. Does that stay might – the spousal support order as well. And I'd be inclined to set about issue in a charging order against any distributions that the trust would pay to Mr. Nelson to satisfy his spousal support and child support obligations. . . So I would be inclined to . . . put a charging order against any proceeds and any distributions to Mr. Nelson and that that money would go to that first. . . I know I can issue a charging order. I'm very comfortable about that. . . **I can definitely do charging orders against the trust, any distributions he gets to make sure that any orders other than this Court that are enforceable would be paid before he gets any distributions under the trust. And I'm pretty comfortable I can do that**. V20:5000:2-V21:5001:19.

At the same hearing, the District Court, once again on its own volition and without a request from Lynita's Counsel, ordered the ELN Trust to provide an accounting for the Lindell Property, V21:5002:4-5, V26:5002:17-5003:8, and pay Lynita the 50% of rental proceeds from January 1, 2010, through January 1, 2013, V21:5040-5042, despite the fact that it had already "equalized" and/or leveled off the Trusts. At the same hearing, Judge Sullivan, once again on his own volition and

without request from Lynita's Counsel, stated that he would consider an injunction against the ELN Trust. V21:5011:7-20.

The fact that the District Court is willing to improperly impose remedies on its own volition, which exceeds its jurisdiction, further illustrates its bias and why this matter should be remanded to another district court. As this Court recognized in *Kirksey v. State*, 112 Nev. 980. 1007. 923 P.2d 1102, 1119 (1996), "an opinion formed by a judge on the basis of facts introduced or events occurring in the course of the proceedings, constitutes bias or partiality motion where the opinion displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible.'"

3. REASSIGNMENT IS NECESSARY IN PRESERVING THE APPEARANCE OF FAIRNESS.

Finally, any waste or duplication created by a reassignment is substantially outweighed because it is clear that the ELN Trust cannot and will not obtain a fair resolution of this matter so long as this matter is heard by the District Court as it has predetermined how it will rule upon remand and has demonstrated extreme antagonism and bias toward Eric and the ELN Trust.

Ultimately then, the factors outlined in *Arnett* all favor reassignment upon remand of this matter in the interest of justice.

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/ / /

CONCLUSION

In light of the foregoing, the ELN Trust respectfully requests that this Court reverse the 8 Orders appealed, particularly the Divorce Decree, and reassign this matter to the Probate Court for a new trial on the merits.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is not proportionately spaced, has a typeface of 14 points, and contains 13,948 words.

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

4. Nevada Rules of Appellate Procedure.

Dated this 30th day of November, 2015.

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