

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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IN THE MATTER OF THE
KENT AND JANE WHIPPLE
TRUST, DATED MARCH 17,
1969, JANE WHIPPLE, CO-
TRUSTEE AND
AMENDMENTS THERETO,
JANE WHIPPLE.

Case No.: 69945

WARNER WHIPPLE, CO-
TRUSTEE OF THE KENT AND
JANE WHIPPLE TRUST, DATED
MARCH 17, 1969, AS AMENDED,

Appellant,

Vs.

JANE WHIPPLE, CO-TRUSTEE
OF THE KENT AND JANE
WHIPPLE TRUST, DATED
MARCH 17, 1969, AS
AMENDED, AND JANE
WHIPPLE,

Respondents.

RESPONDENTS' ANSWERING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following persons are entities as described in NRAP 16.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. All law firms that have appeared for the party: JUSTICE LAW CENTER, LLC, a Nevada Corporation, comprised of attorneys BRET O. WHIPPLE, ESQ.; ALISSA ENGLER, ESQ.; JEB W. BOND, ESQ. No other parties described in Rule 26.1 are known to Appellant at this time.

Dated this 31st day of October, 2016.

/s/ Alissa Engler, Esq.

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ISSUES PRESENTED

1. Whether the district court correctly determined that Trustee Jane Whipple's Petition for Declaratory Relief, seeking a legal declaration as to the ownership status of particular water rights permits which are claimed as property of the Kent and Jane Whipple Trust and/or Kent Whipple Ranch, LLC, was not subject to co-Trustee Warner Whipple's motion to compel arbitration.

2. Whether the district court correctly determined that Trustee Jane Whipple's Petition for a legal declaration determining the scope of the authority of the Trust and Jane Whipple as Trustee to act regarding that property, was not subject to the Trust's arbitration clause.

3. Whether the district court correctly held that Warner Whipple could not compel arbitration regarding the Petition for Declaratory Relief, where the subject matter covered by the Petition involved issues and/or events which occurred solely prior to Warner Whipple becoming co-Trustee of the Trust.

4. Whether the district court correctly held that the issue of what authority a trustee has pursuant to the terms of the trust is a question of law not requiring or implicating the exercise of that authority by the co-trustees, and as a result, not subject to arbitration.

STATEMENT OF THE CASE

Kent and Jane Whipple created the Kent and Jane Whipple Trust dated March 17, 1969 (hereinafter “the Trust”) in 1969. Jane and Kent Whipple were to serve as the trustees of the trust, for which they were also the beneficiaries during their lifetimes.

Upon the death of either spouse, the trustee was to divide the assets of the Trust into two sub-trusts; Trust A and Trust B. Additionally, if Kent passed away such that Jane was the surviving spouse, a co-trustee would be appointed upon Kent’s death. The co-trustee was originally Keith Murray Whipple. The co-trustee is currently Warner Whipple.

Keith Murray Whipple and Jane Whipple had served as co-trustees for the majority of the last thirty-eight years, up until approximately October, 2015. Jane Whipple successfully managed the ranch, and the Kent Whipple Ranch Trust and LLC to be profitable and to increase the value of the assets held by the family over that time. Appellant’s Appendix (“AA”) 0212. It has been her primary purpose, following the intent and wishes of herself and her husband expressed in the Trust, to keep the Ranch together for the ongoing benefit of the entire family. *Id.*

Although the Trust was never divided into Trust A and Trust B, Jane Whipple (acting as Trustee) continued to acquire property for the Trust and Kent

Whipple Ranch, LLC. Numerous property transfers, including the water rights permits which were the subject matter of the Petition for Declaratory Relief, were acquired after Kent Whipple's death but before Warner Whipple became co-Trustee. In January, 2015, the Kent Whipple Ranch applied to the State Engineer to change the point of diversion, place of use and manner of use of a portion of one of those water permits. AA at 0228 (Factual Findings of District Court). This application was filed prior to Warner Whipple becoming co-Trustee. *Id.* Betsy Whipple, a remainder beneficiary of the trust, protested to the State Engineer. The State Engineer stayed his consideration of the application pending determination by a court of competent jurisdiction regarding who owns rightful title to the water rights permits in question. *Id.*

Jane Whipple filed a Petition seeking declaratory relief. Specifically, Jane was seeking a declaration that:

- (1) The Kent and Jane Whipple Trust dated March 17, 1969, remained in effect in 1976 after the death of Kent Whipple;
- (2) That Jane Whipple is a trustee of the Trust;
- (3) That the "A" and "B" trusts were never portioned or funded;
- (4) That water right Permit 79132 was transferred to the Trust and the transfer is valid and the permit is an asset of the Trust;

(5) That water right Permits 28599, 55918, 55919, 55920, 79132 were transferred to the Kent Whipple, Ranch, LLC, by the Kent and Jane Whipple Trust dated March 17 1969, and the transfer is valid and said permits are assets of the Kent Whipple Ranch, LLC;

(6) Confirmation of the appraisal (in 1976 dollars) of the Kent and Jane Whipple Trust dated March 17, 1969;

(7) That the A trust is the rightful owner of Kent Whipple Ranch, LLC and that Jane Whipple has an absolute right to manage or sell the assets of Kent Whipple Ranch, LLC, including the earlier-mentioned water rights; and

(8) That the Kent and Jane Whipple Trust dated March 17, 1969, as the sole owner of the Kent Whipple Ranch, LLC, has and continues to have authority to manage, sell, to otherwise convey water right Permits 28599, 55918, 55919, 55920, 79132 and Claim of Vested right V-01394. AA 0229.

Warner Whipple, as co-trustee, then filed a Motion to Dismiss/Stay Petition Pending Mandatory Arbitration. AA 0227. The district court held that “it appears that all of Warner’s disagreements or concerns relate to actions taken prior to the resignation of Warner’s predecessor Co-Trustee. [...] Neither party cited any law to support Warner’s authority to dispute actions taken before his appointment as

Co-Trustee.” AA 0232-0233. Thus the court found “that the ‘dispute’ raised by Warner is not arbitrable under Section Ten of the Trust. AA 0233.

Furthermore, the court found that “the issue of what authority a trustee has pursuant to the terms of the trust is a question of law and does not require a consideration of how a trustee should exercise that authority.” *Id.* Thus, the court reasoned that a determination of the scope of the authority of the trustees to allocate property is not subject to arbitration, whereas disputes over decisions about *how to exercise* that authority would be subject to arbitration. In sum, the court found no dispute or disagreement that falls within the scope of the arbitration language within the trust. AA 0234.

LEGAL ARGUMENT

A. Summary of the Appellant’s Argument.

The Appellant argues that the district court erred when it refused to refer the parties below to arbitration. *See* Opening Brief (“OB”) at 8. Appellant also argues that the district court improperly made factual findings going to the merits of the case which appellant claims must be reserved for arbitration. *Id.* In support of these contentions, the Appellant refers to Nevada’s policies in favor of broadly enforcing arbitration clauses, as well as to the Appellant’s view of the content of

the reasonable expectation of the Trustors. Appellant asks that this Court overturn the district court's decision below. *Id* at 9.

B. Summary of the Respondents' Argument.

The district court correctly ruled below when it held that “on the record before the court, it appears that all of Warner’s disagreements or concerns *relate to actions taken prior to the resignation of Warner’s predecessor Co-Trustee.*” *See* Order at 6, emphasis added. That is, Jane Whipple merely sought declaratory direction from the district court regarding the legal effect of actions taken by herself and/or herself and previous co-trustees prior to Warner Whipple becoming co-trustee. Because the relief sought was merely a judicial declaration regarding the legal consequences of property transfers made by the trustees prior to Warner Whipple becoming co-trustee, the relief sought does not implicate a dispute between Warner Whipple and Jane Whipple falling within the scope of the types of disputes covered by the Trust’s arbitration clause.

Furthermore, a Trustee seeking declaratory relief regarding the legal meaning (and scope) of their powers under the Trust does not involve any dispute subject to arbitration because the scope of the Trustees’ (or co-Trustees’) powers under the trust is not a matter up for decision between the co-Trustees. That is, the co-Trustees do not make any decisions whatsoever regarding the scope of their

powers, and therefore, any disagreement over that issue is not a disagreement about an “act” of the Trustee under the terms of the Trust. *See* AA 0033, wherein the Trust dictates that the two co-Trustees must unanimously vote to agree to “act hereunder” and, within that context, any disagreement regarding how to act be submitted to arbitration. The district court correctly held that “the issue of what authority a trustee has pursuant to the trust is a question of law, and does not require a consideration of how a trustee should exercise that authority.” AA 0233. Because Warner’s dispute is actually a dispute over whether Jane can seek a court’s declaration that the Trust owns particular property, and because the question of whether Jane can seek a court’s declaration that the Trust owns particular property or not is a question of law that does not implicate decisions regarding the actions of the co-trustees, the dispute does not fall within the Trust’s arbitration clause.

C. **Respondents’ Answering Argument.**

1. **Appellant mischaracterizes the law on this subject when Appellant claims that a party seeking to exempt a dispute from arbitration must show beyond a reasonable doubt that the dispute is not subject to arbitration.**

Appellant correctly identifies that Nevada favors the enforcement of arbitration clauses when it appears that the dispute raised is of the sort which the original parties to the arbitration clause intended to be subject to arbitration.

Appellant, however, makes several misstatements of law which over-emphasize or mischaracterize otherwise-relevant legal principles.

Appellant claims that “appellate review of an order denying arbitration” is guided in part by the principle that “a party seeking to exempt a dispute from arbitration must show beyond a reasonable doubt that the dispute is not subject to arbitration.” OB at 9. Appellant backs up this claim with a citation to *Phillips v. Parker* 106 Nev. 415 at 417. There is no mention of this principle on that page of *Phillips* and, indeed, that case does not contain the term “reasonable doubt.” See *Phillips v. Parker* 106 Nev. 415, 794 P.2d 716 (1990).

The absence of the term “reasonable doubt” makes sense; it would be a curious step to import a notoriously abstract criminal evidentiary standard into the interpretation of contracts and arbitration clauses. *Phillips* does, however, note that “once an arbitrable issue has been found to exist, all doubts concerning the arbitrability of the subject matter should be resolved in favor of arbitration.” *Id* at 417. This is not equivalent to Appellant’s claim that “a party seeking to exempt a dispute from arbitration must show beyond a reasonable doubt that the dispute is not subject to arbitration.” The *Phillips* language regarding the resolution of “all doubts” applies only once the “arbitrable issue has been found to exist.” Because that determination (whether or not there is an arbitrable issue) is exactly the issue

raised and disputed below and now on appeal, the Appellant's citation to *Phillips* at 417 is a mischaracterization of that law.

2. **The district court correctly held that Jane Whipple is entitled to seek declaratory relief regarding her rights or legal relations as Trustee to determine "questions of construction" of the trust, under NRS 30.060 and NRS Chapter 164.**

NRS 30.060 and NRS Chapter 164 grant the authority to petition the district courts for declaration of rights, including petitions from trustees for questions regarding the construction of the language of a trust.

Appellant spends a large portion of their brief arguing that arbitration clauses must be interpreted and applied broadly. These general principles are conceded to be true. Respondents argued below, and the district court agreed, that the arbitration clause in this case, even broadly understood, does not apply to disagreements *on purely legal questions* between the co-Trustees. The district court correctly held that Jane was appropriately seeking judicial guidance regarding the legal effect of particular past transfers made involving the Trust and Trust property prior to Warner Whipple becoming co-trustee.

Specifically, Jane was seeking a declaration that: (1) The Kent and Jane Whipple Trust dated March 17, 1969, remained in effect in 1976 after the death of Kent Whipple; (2) Jane Whipple is a trustee of the Trust; (3) The "A" and "B" trusts were never portioned or funded; (4) Water right Permit 79132 was

transferred to the Trust and the transfer is valid and the permit is an asset of the Trust; (5) Water right Permits 28599, 55918, 55919, 55920, 79132 were transferred to the Kent Whipple, Ranch, LLC, by the Kent and Jane Whipple Trust dated March 17 1969, and the transfer is valid and said permits are assets of the Kent Whipple Ranch, LLC; (6) confirmation of the appraisal (in 1976 dollars) of the Kent and Jane Whipple Trust dated March 17, 1969; (7) The A trust is the rightful owner of Kent Whipple Ranch, LLC and that Jane Whipple has an absolute right to manage or sell the assets of Kent Whipple Ranch, LLC, including the earlier-mentioned water rights; and (8) that the Kent and Jane Whipple Trust dated March 17, 1969, as the sole owner of the Kent Whipple Ranch, LLC has and continues to have authority to manage, sell, to otherwise convey water right Permits 28599, 55918, 55919, 55920, 79132 and Claim of Vested right V-01394.

The Appellant misunderstands the issue and therefore misunderstands why the district court held that these requested judicial declarations were not subject to arbitration. Appellant claims that “Jane is seeking authority from the district court to consummate a sale of the Water Rights.” OB at 14. Jane is only seeking judicial guidance as to the legal status of property she believes the Trust already owns, as well as declaratory relief as to the power of the Trustee (or co-Trustees) to transfer that property. Jane sought this relief in direct response to the Division

of Water Resources' letter indicating that they considered the ownership of the permits "questionable" and put a hold on the permits "until a court of competent jurisdiction determines the conflicting claims to ownerships of the water rights."

Thus, Jane is not seeking a court order directly approving whatever she decides to do with the water rights in question. She first seeks a declaration that the trust owns the title to those water rights, and second she seeks a declaration as to her relative power (as trustee and co-trustee) over those rights. The district court might find that the Trust owns the water rights but that disputes about what to do with the water rights must go to arbitration. It might find that the Trust owns the water rights, but only through Trust A controlled solely by Jane Whipple. It is necessary to determine this question outside of arbitration because any arbitration would necessarily presuppose both that the Trust owns the water permits and question and that the water permits are not solely within Trust A and therefore subject to Jane Whipple's unilateral control (as she can, at any time, remove the entirety of Trust A as her personal property). If either of these presuppositions is incorrect, then the matter was never arbitrable in the first place because the property was beyond the realm of actions requiring the agreement of the co-trustees.

3. **Appellant misunderstands the district court's reasoning as to the distinction between questions of law and whether they must be submitted to arbitration.**

Appellant claims that the district court erred because even “legal” disagreements must be arbitrated to the same extent as “factual” disagreements. OB at 15. Appellant correctly notes that whether or not a disagreement is submitted to arbitration hinges “on the language of the arbitration clause itself.” OB at 16.

Here, the arbitration clause indicates that both co-trustees must agree on any action taken “hereunder.” AA 0033. This means under the powers granted by the trust document. Within this context, any dispute (any failure to reach unanimous agreement on an action under the trust agreement) goes to arbitration.

Determining the scope of their powers as Trustees is simply not an act “under” the Trust. The distinction the district court found within the trust language is not a distinction between questions of law and questions of fact. The distinction is between disagreements about co-trustee “acts” under the trust and disagreements about co-trustee acts beyond the trust. Disagreements about questions of law are not excluded from arbitration because they are questions of law; they are excluded from arbitration because the co-Trustees do not have the power to resolve questions of law via “acts” under the Trust. The only entity that

can resolve questions of law regarding the construction of the Trust is the district court, and that is what the district court correctly held.

4. **The district court's order did not include factual findings going to the merits of the case.**

Appellant claims that the district court improperly made factual findings going to the merits of the case. This is false. Appellant only refers to one example that it claims constitutes an improper factual conclusion. Specifically, the Appellant cites language wherein the district court noted that “all of Warner’s disagreements or concerns relate to actions taken prior to the resignation of Warner’s predecessor.” *See* OB at 19. While Appellant claims there was no record before the district court to support this finding, a review of Appellant’s Motion below and its supporting documentation indicates that the timeline which the district court refers to (regarding when Warner became co-trustee and when the acts done by Jane occurred) was undisputed below. Likewise, Appellant does not appear to dispute this timeline now. The district court appropriately found, based on uncontested facts that the water permit transfers at issue in the Petition for Declaratory Relief occurred prior to Warner Whipple becoming co-trustee.

5. **Respondents can and did overcome the presumption in favor of arbitration by demonstrating that the arbitration clause does not apply to disputes over authority and only applies to disputes over “acts.”**

Appellant claims that the district court erroneously allowed Respondents to overcome the presumption in favor of arbitration when it agreed with Respondents’ argument as to the difference between disputes over the co-trustees authority and disputes over the co-trustees acts. This argument is redundant. If the district court is wrong regarding the “authority” and “act” distinction, then it does not matter that there is a presumption in favor of arbitration, because there would be essentially no remaining argument against arbitration. If the district court is right, then the dispute here falls entirely beyond the scope of the arbitration clause and a mere presumption in favor of arbitration is insufficient to contravene the plain meaning of the Trust agreement and the intent of the parties to limit the scope of arbitration to disputes over the “acts” by the Trustees. Because the district court’s interpretation of the Trust agreement is correct, the presumption was overcome by Jane Whipple in the court below, and the district court’s ruling must be upheld.

CONCLUSION

In sum, Respondents respectfully request that this Court affirm the judgment of the district court below. The district court correctly held that the Petition for Declaratory relief raised questions of law, and any dispute therein was not a dispute over potential acts of the co-trustees but rather a dispute over the construction of the trust agreement and the scope of trustee powers. Furthermore, the water rights permit transfers discussed in the Petition all occurred prior to Warner Whipple becoming co-trustee, and he therefore cannot raise disputes as to those transactions. For these reasons, the order should be affirmed.

Dated this 31st day of October, 2016.

/s/ Alissa Engler, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

RESPONDENTS' OPENING BRIEF

By providing a copy to the following by virtue of e-filing with the Supreme Court on October 31, 2016:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(7)(a)(ii) and the type style requirements of NRAP32(a)(6) because:

This brief has been prepared in proportionally spaced typeface using MS WORD, Font size 14, Times New Roman. I further certify that this brief complies with the page- or typevolume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP(a)(7)(C), does not exceed 7,000 words, and has a total word-count of **3,846**.

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, such as to harass or cause unnecessary delay or needlessly increase the costs of litigation.

Dated this 31st day of October, 2016.

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