

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

2
3 RICARDO P. PASCUA,

4
5 Appellant,

6 vs.

7 BAYVIEW LOAN SERVICING,
8 LLC; SEASIDE TRUSTEE, INC.;
9 AND BANK OF NEW YORK
10 MELLON,

11 Respondent.

Case No.: 71770

Electronically Filed
Mar 14 2018 10:05 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

12
13 **APPELLANT'S OPENING BRIEF**

14
15 THERESE M. SHANKS, ESQ.
16 Nevada Bar No. 12890
17 ROBISON, SHARP, SULLIVAN & BRUST
18 A Professional Corporation
19 71 Washington Street
20 Reno, Nevada 89503
21 Telephone: (775) 329-3151
22 Facsimile: (775) 329-7941
23 Email: tshanks@rssblaw.com
24 *Attorneys for Appellant*
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

Appellant Ricardo Pascua is an individual, not a corporation or other entity, and is not using a pseudonym. The undersigned counsel is expected to appear in this proceeding. Appellant represented herself *pro se* in district court.

DATED this 14th day of March, 2018.

ROBISON, SHARP, SULLIVAN & BRUST
71 Washington Street
Reno, Nevada 89503

By: Therese Shanks
THERESE M. SHANKS, ESQ. (NSB #12890)
Attorney for Appellant Ricardo Pascua

TABLE OF CONTENTS

Page

NRAP 26.1 STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
NRAP 17 ROUTING STATEMENT	vi
JURISDICTIONAL STATEMENT	vii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
FACTUAL AND PROCEDURAL BACKGROUND	2
I. PASCUA LOSES HIS WIFE.	2
II. RICARDO IS APPOINTED SPECIAL ADMINISTRATOR....	2
III. THE FORECLOSURE MEDIATION	3
IV. PETITION FOR JUDICIAL REVIEW	4
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
I. STANDARD OF REVIEW	5
II. THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING THAT PASCUA, AS SPECIAL ADMINISTRATOR, WAS NOT A PROPER PARTY TO THE FORECLOSURE MEDIATION.....	6
A. Special Administrators May Participate in Foreclosure Mediations.	6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. Special Administrators May Participate in Foreclosure
Mediations Under NRS 140.040(2)(a). 7

C. Regardless, Pascua Substantially Complied with NRS
140.040(2)(c). 9

CONCLUSION 11

CERTIFICATE OF COMPLIANCE 12

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Page

NEVADA CASE LAW

<i>Albios v. Horizon Cmtys., Inc.</i> , 122 Nev. 409, 132 P.3d 1022,1030 (2006)	7
<i>Bodine v. Stinson</i> , 85 Nev. 657, 461 P.2d 868, 871 (1969)	7
<i>Einhorn v. BAC Home Loans Servicing, LP</i> , 128 Nev. 689, 290 P.3d 249, 251 (2012)	5
<i>In re Resort at Summerlin Litig.</i> , 122 Nev. 177, 182, 127 P.3d 1076, 1079 (2006)	8
<i>O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.</i> , 133 Nev., Adv. Op. 60, 401 P.3d 218, 221 (Nev. 2017)	10
<i>Pasillas v. HSBC Bank USA</i> , 127 Nev. 462, 255 P.3d 1281 (2011)	5-6

NEVADA STATUTE

NRS 107.086	7-8
NRS 107.086(2)	8
NRS 107.086(3)	9
NRS 107.086(5)	4,7
NRS 107.086(8)	9
NRS 107.086(9)	9
NRS 132.265	5,7
NRS 140.040	1,3,5-8
NRS 140.040(2)(a)	3-9
NRS 140.040(2)(c)	5-9,11

1 NRS 140.040(2)(d) 3,10

2 NRS 140.050(1) 10

3 **NEVADA RULES**

4
5 FMR 7(1) 4,6-7

6 NRAP 3A(b)(1) vii

7
8 NRAP 17(b)(10) vi

9 NRAP 26.1(a) i

10
11 **SECONDARY SOURCES**

12 *Legal Proceeding, Black's Law Dictionary (10th ed. 2014) 8*

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

This appeal should be assigned to the Nevada Court of Appeals because it is an appeal arising from the foreclosure mediation program. NRAP 17(b)(10).

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

[illegible]

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

STATEMENT OF THE CASE

This appeal raises from an Order denying a Petition for Judicial Review of a foreclosure mediator’s recommendation that a certificate issue to Respondents Bayview Loan Servicing, LLC (“Bayview Loan”), Seaside Trustee, LLC (“Seaside”), and Bank of New York Mellon (“BNYM”) (collectively, “Bayview” unless referred to individually) for foreclosure of a home owned by the deceased wife of Appellant Ricardo Pascua (“Pascua”). The foreclosure mediator found that Pascua did not have authority to participate in the foreclosure mediation because the home was still owned by Pascua’s deceased wife. Although Pascua had been appointed as the Special Administrator of her estate, the Order did not specifically state that Pascua had authority as Special Administrator to negotiate the mortgage on the home. After the mediator recommended that a certificate issue to Bayview, Pascua filed a Petition for Judicial Review with the District Court. The District Court affirmed the mediator’s recommendation. This appeal follows.

FACTUAL AND PROCEDURAL BACKGROUND

I. PASCUA LOSES HIS WIFE.

In December 2005, Myrna Pascua (“Myrna”) purchased a home in Las Vegas, located at 560 Haunts Walk Avenue (the “Haunts Walk Home”). Record On Appeal (“ROA”) 64-67. She executed a Promissory Note in the amount of \$345,500, which was secured by a deed of trust on the home. *Id.* at 38-59. The Deed of Trust was assigned to Bank of New York Mellon. *Id.* at 61. Bayview Loan serviced the loan for Bank of New York Mellon. *Id.* at 29.

Myrna and Pascua have been married since 1994. *Id.* at 8. Myrna passed away in 2010 from breast cancer. *Id.* at 9. She was 55 years old. *Id.* She left behind Pascua and their two children. *Id.* at 79.

II. RICARDO IS APPOINTED SPECIAL ADMINISTRATOR.

After Myrna’s death, Pascua filed a Petition to be appointed Special Administrator of her estate. *Id.* at 75-76. In the Petition, he specifically noted that he was seeking special administration for “short sale of property located at 560 Haunts Walk Ave.” *Id.* at 76. The Petition did not list Myrna’s and Pascua’s children as heirs. *Id.*

Two days later, Pascua filed an “Amended Petition for Special Letters of Administration,” in which he listed the children as heirs. *Id.* at 78-80. He also amended his reason for seeking appointment to “marshal all assets.” *Id.* at 79.

1 Pascua was appointed Special Administrator of Myrna's estate on February
2 18, 2011. *Id.* at 83-84. The Order specified that he was appointed Special
3 Administrator "for the purpose of administering the estate in accordance with
4 Nevada Revised Statutes Chapter 140.040." *Id.* at 84.

6 A copy of NRS 140.040 was attached to the Order. *Id.* at 85. Under NRS
7 140.040, a Special Administrator may "commence, maintain or defend actions or
8 other legal proceedings as a personal representative;" and "[o]btain leave of court
9 to . . . mortgage real property in the same manner as an executor or
10 administrator." NRS 140.040(2)(a), (d).

13 **III. THE FORECLOSURE MEDIATION.**

15 On February 9, 2016, Bayview Loan commenced foreclosure proceedings
16 on the Haunts Walk Home. *Id.* at 30. Seaside was the foreclosure trustee. *Id.*
17 Pascua requested that the parties participate in Nevada's foreclosure mediation
18 program. *Id.*

21 At the foreclosure mediation, the mediator found that the home was not
22 eligible for the foreclosure mediation program because the Haunts Walk Home
23 was still owned by Myrna, who was not present, and the Order appointing Pascua
24 as Special Administrator of Myrna's estate did not specifically give him authority
25 to participate in the mediation. *Id.* at 101. The mediator recommended that the
26 foreclosure certificate issue to Bayview. *Id.* at 102.
28

1 **IV. PETITION FOR JUDICIAL REVIEW.**

2 Pascua filed a Petition for Judicial Review of the foreclosure mediator's
3 decision. *Id.* at 1-6. He contended that the Order appointing him as Special
4 Administrator did provide him with the authority to participate in the mediation.
5 *Id.* at 4. Specifically, Pascua argued that he had authority to participate in the
6 mediation because "a Special Administrator may: 'For all necessary purposes,
7 commence, maintain or defend actions and other legal proceedings as a personal
8 representative.' (NRS 140.040(2)(a))." *Id.*

9
10
11
12 The District Court found that Pascua "is not an owner" and "is not entitled
13 to be an owner" of the Haunts Walk Home. *Id.* at 161. It further found that the
14 "Probate Order neither subrogates [Pascua] to the rights of Myrna Pascua under
15 the Note and Trust Deed, nor authorized [Pascua] to modify the Note, nor makes
16 [Pascua] the owner of the Property." *Id.* Accordingly, the District Court ordered
17 that a mediation certificate be issued to Bayview. *Id.* This appeal follows.

18
19
20 **SUMMARY OF THE ARGUMENT**

21
22 The District Court abused its discretion when it found that Pascua was not
23 a proper party to the foreclosure mediation because he was not appointed Special
24 Administrator of Myrna's estate for that specific purpose. Although Foreclosure
25 Mediation Rule 7(1) ("FMR") is silent as to whether a representative of a
26 homeowner may participate on the homeowner's behalf, NRS 107.086(5)
27 expressly permits a representative to participate in the mediation.
28

1 Special administrators are personal representatives of deceased
2 homeowners. NRS 132.265. When a special administrator has been granted
3 powers of general special administration under NRS 140.040, he is not required
4 to obtain a court order specifically authorizing him to participate in a foreclosure
5 mediation because foreclosure mediations are “legal proceedings” which special
6 administrators have authority to commence and/or defend under NRS
7
8 140.040(2)(a).
9

10 Should this Court disagree, the District Court’s Order must still be
11 reversed because Pascua substantially complied with NRS 140.040(2)(c).
12 Pascua’s initial petition stated that he sought to be appointed Special
13 Administrator so that he could negotiate a short sale of the Haunts Walk Home,
14 even though he did not obtain a court order specifically granting him that
15 authority. Accordingly, Pascua substantially complied with NRS 140.040(2)(c),
16 and the District Court’s Order should be reversed.
17
18
19

20 ARGUMENT

21 **I. STANDARD OF REVIEW.**

22 This Court reviews a district court’s denial of a petition for judicial review
23 of a foreclosure mediation program recommendation for an abuse of discretion.
24
25 *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 468, 255 P.3d 1281, 1286 (2011);
26 *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 692, 290 P.3d 249,
27 251 (2012). However, “[t]he scope and meaning of a statute” and a foreclosure
28

1 mediation rule are both questions of law that this Court reviews de novo.

2 *Pasillas*, 127 Nev. at 467, 255 P.3d at 1285.

3 **II. THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING**
4 **THAT PASCUA, AS SPECIAL ADMINISTRATOR, WAS NOT A**
5 **PROPER PARTY TO THE FORECLOSURE MEDIATION.**

6 The issue in this appeal is whether a special administrator of a deceased
7 homeowner's estate must obtain a specific order under NRS 140.040(2)(c)
8 authorizing his participation in the foreclosure mediation, or whether the general
9 powers granted special administrators under NRS 140.040 are sufficient to vest
10 authority in a special administrator to negotiate a binding agreement at a
11 mediation. The District Court abused its discretion by implicitly holding that a
12 special order is required under NRS 140.040(2)(c), because a special
13 administrator may participate in a foreclosure mediation under NRS
14 140.040(2)(a).
15
16
17

18 **A. Special Administrators May Participate in Foreclosure**
19 **Mediations.**

20 Nevada's foreclosure mediation rules do not address who the proper party
21 to a foreclosure mediation is when the homeowner is deceased. Under Nevada's
22 foreclosure mediation rules, "[t]he program applies to any grantor or person
23 (homeowner) who holds the title of record and is the owner-occupant of a
24 residence" FMR 7(1). The rules are otherwise silent regarding deceased
25 homeowners.
26
27
28

1 FMR 7(1) must be interpreted to include “representatives” of homeowners
2 as proper parties to the mediation. NRS 107.086, the statute which created the
3 foreclosure mediation program, provides that “[t]he grantor or his or her
4 *representative*, or the person who holds title of record *or his or her*
5 *representative*, shall attend the mediation.” NRS 107.086(5) (emphasis added).
6

7
8 To construe FMR 7(1) in harmony with NRS 107.086(5), this Court must
9 interpret FMR 7(1) to allow representatives of deceased homeowners to
10 participate in the foreclosure mediation. *See Albios v. Horizon Communities,*
11 *Inc.*, 122 Nev. 409, 422, 132 P.3d 1022, 1030 (2006) (“Apparent conflicts
12 between a court rule and a statutory provision should be harmonized and both
13 should be given effect if possible.” (Internal quotations omitted)). A special
14 administrator is a “personal representative” of a decedent. NRS 132.265.
15 Accordingly, a special administrator may attend a foreclosure mediation on
16 behalf of a deceased homeowner.
17

18
19
20 **B. Special Administrators May Participate in Foreclosure**
21 **Mediations Under NRS 140.040(2)(a).**

22 A special administrator does not need to get a specific order under NRS
23 140.040(2)(c) because a foreclosure mediation is a legal proceeding which
24 special administrators have power to commence or defend under NRS
25 140.040(2)(a). Special administrators’ general powers over an estate are limited.
26 *Bodine v. Stinson*, 85 Nev. 657, 660, 461 P.2d 868, 871 (1969) (*superseded by*
27 *statute on other grounds*). These limited general powers are found in NRS
28

1 140.040. However, a special administrator may apply for an order allowing him
2 or her to represent the decedent for a specific purpose not set forth in NRS
3 140.040. NRS 140.040(2)(c).
4

5 Under the general limited authority granted all special administrators, “[a]
6 special administrator may . . . commence, maintain, or defend actions or other
7 legal proceedings as a personal representative.” NRS 140.040(2)(a). NRS
8 140.040 does not define “legal proceeding.” “If a statutory phrase is left
9 undefined, this court will construe the phrase according to its plain and ordinary
10 meaning.” *In re Resort at Summerlin Litig.*, 122 Nev. 177, 182, 127 P.3d 1076,
11 1079 (2006). The definition of “legal proceeding” is “[a]ny proceeding
12 authorized by law and instituted in a court or tribunal to acquire a right or to
13 enforce a remedy.” *Proceeding*, Black’s Law Dictionary (10th ed. 2014).
14
15
16
17

18 A foreclosure mediation is a required legal proceeding before a lender may
19 acquire the right to foreclose on a home and enforce its remedy of a trustee’s
20 sale. The foreclosure mediation is a proceeding authorized by law. *See* NRS
21 107.086. A trustee is required to notify homeowners of their right to participate
22 in the foreclosure mediation prior to a trustee’s sale of the home. NRS
23 107.086(2).
24
25

26 A foreclosure mediation is also instituted in a court. If a homeowner
27 decides to participate in the foreclosure mediation, he must file a “petition with
28 the district court to participate in the mediation . . . , and pay the clerk of the court

1 a fee of \$25” plus the petitioner’s portion of mediation fees imposed under the
2 FMR. NRS 107.086(3). The mediator is required to notify the district court of
3 the outcome of the mediation. NRS 107.086(8)-(9).
4

5 Finally, the foreclosure mediation program is a necessary requirement for a
6 trustee who hopes to acquire the right to foreclose on owner-occupied housing
7 and/or enforce their remedy of a nonjudicial foreclosure pursuant to a power of
8 sale. If the homeowner properly elects to participate in the foreclosure mediation
9 program, “no further action may be taken to exercise the power of sale until the
10 completion of the mediation.” NRS 107.086(3). Accordingly, the foreclosure
11 mediation program is a “legal proceeding” within the plain meaning of that term.
12
13
14

15 Because the foreclosure mediation program is a “legal proceeding,” a
16 special administrator has the general power to initiate, defend *and participate* in
17 a foreclosure mediation under NRS 140.040(2)(a). Pascua was granted this
18 general power in his Order appointing him Special Administrator. *See* ROA 84.
19 Therefore, the District Court abused its discretion in finding that Pascua was not
20 a proper party to negotiate the terms of the mortgage in the foreclosure
21 mediation. The District Court’s Order must be reversed.
22
23
24

25 **C. Regardless, Pascua Substantially Complied with NRS**
26 **140.040(2)(c).**

27 Should this Court disagree, the District Court’s Order must still be
28 reversed because Pascua substantially complied with NRS 140.040(2)(c). To
determine whether strict or substantial compliance with a statute is required, this

1 Court “examine[s] the statute’s provisions, as well as policy and equity
2 considerations.” *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 133 Nev.,
3 Adv. Op. 60, 401 P.3d 218, 221 (Nev. 2017). Substantial compliance is used “to
4 avoid harsh, unfair or absurd consequences.” *Id.* at 222 (internal quotations
5 omitted). It is appropriate if the purpose of the statute “can be adequately served
6 in a manner other than by technical compliance with the statutory language.” *Id.*
7 (Internal quotations and alterations omitted).
8

9
10 Although special administrators have limited authority, the Legislature
11 clearly intended special administrators to be able to negotiate mortgages on
12 property. Under NRS 140.050(1), a special administrator may ask the court for
13 leave to pay a mortgage. Under NRS 140.040(2)(d), a special administrator may
14 ask the court for permission to place a mortgage on real property of the estate.
15 Thus, the Legislature clearly contemplated that special administrators would be
16 required to negotiate mortgages on decedent’s real property.
17

18
19 Here, Pascua’s Order of appointment did not specifically vest him with
20 that authority. Regardless, Pascua obviously sought to become Special
21 Administrator for the sole purpose of negotiating the mortgage on the Haunts
22 Walk Home. In his first Petition, he specifically noted that he was seeking
23 special administration for “short sale of property located at 560 Haunts Walk
24 Ave.” ROA 76. When he amended the Petition to include the heirs, he omitted
25 this language. *Id.* at 79.
26
27
28

1 Bayview and the District Court were both aware that Pascua sought to
2 become Special Administrator to short sell the Haunts Walk Home because
3 Bayview specifically informed the District Court of this fact and provided the
4 District Court with Pascua's original and amended Petitions. *Id.* at 29, 75-80.
5 Pascua substantially complied with NRS 140.040(2)(c). The District Court's
6 decision must be reversed.
7
8

9 **CONCLUSION**

10 For the foregoing reasons, Pascua respectfully requests that this Court
11 reverse the District Court's Order and remand this matter for further proceedings.
12

13 DATED this 14th day of March, 2018.
14

15
16 BY: Therese M. Shanks
17 Therese M. Shanks, Esq.
18 Nevada Bar No. 12890
19 Robison, Sharp, Sullivan & Brust
20 71 Washington Street
21 Reno, Nevada 89503
22 *Attorney for Appellant*
23
24
25
26
27
28

CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this Appellant's Opening Brief complies with
3 the formatting requirements of NRAP 32(a)(4), the typeface requirements of
4 NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because:
5

6 This brief has been prepared in a proportionally spaced typeface using
7
8 Microsoft Word 16 in 14 font and Times New Roman type.

9 2. I further certify that this opening brief complies with the page or
10 type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the
11 brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface
12 of 14 points or more, and contains 2,408 words.
13
14

15 3. Finally, I hereby certify that I have read this appellate brief, and to the best
16 of my knowledge, information, and belief, it is not frivolous or interposed for any
17 improper purpose. I further certify that this brief complies with all applicable
18 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which
19 requires every assertion in the brief regarding matters in the record to be
20 supported by a reference to the page and volume number, if any, of the transcript
21 or appendix where the matter relied on is to be found. I understand that I may be
22 subject to sanctions in the event that the accompanying brief is not in conformity
23
24
25

26 ///

27 ///
28

1 with the requirements of the Nevada Rules of Appellate Procedure.

2 DATED this 14th day of March, 2018.

3
4
5 BY:

Therese Shanks

6 Therese M. Shanks, Esq.

7 Nevada Bar No. 12890

8 Robison, Sharp, Sullivan & Brust

9 71 Washington Street

10 Reno, Nevada 89503

11 *Attorney for Appellant*

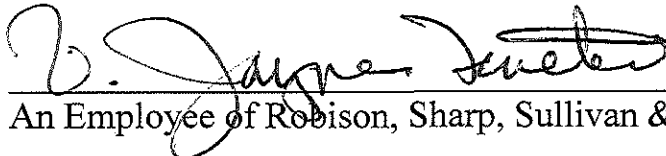
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 14th day of March, 2018, I caused service of a true and correct copy of the above and forgoing **APPELLANT'S OPENING BRIEF** pursuant to the Supreme Court Electronic Filing System, and by first class United States mail, postage prepaid, to the following:

Aaron Waite, Esq.
Charles Kennon, Esq.
Weinstein, Pinson & Riley
6785 S. Eastern Ave., #4
Las Vegas, NV 89119
Attorney for Respondent

Barbara Buckley, Esq.
LEGAL AID CENTER OF SOUTHERN NEVADA
725 E. Charleston Blvd.
Las Vegas, NV 89104


An Employee of Robison, Sharp, Sullivan & Brust