IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. HELEN NATKO, Respondent.	Electronically Filed Jan 07 2019 02:32 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 73048

PETITION FOR REVIEW

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, CHARLES W. THOMAN, and files this Petition for Review pursuant to Rule 40B of the Nevada Rules of Civil Procedure.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 7th day of January, 2019.

Respectfully submitted,

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BY */s/ Charles W. Thoman*
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MEMORANDUM
POINTS AND AUTHORITIES

On December 20, 2018, the Court of Appeals issued an Order of Affirmance in Natko v. State, Docket No. 73048. The court held that the district court abused its discretion by including Jury Instruction 18, which read: "A person's status as a joint account holder does not by itself provide lawful authority to use or transfer another['s] assets for their own benefit." Natko v. State, Docket No. 73048 at 2-3. This instruction was based on this Court's holding in Walch v. State: The "mere status as a party to … joint accounts" does not "provide [the party] with lawful authority to use [the other party's] assets for her own benefit." 112 Nev. 25, 33, 909 P.2d 1184, 1189 (1996).

Despite being a nearly verbatim statement of Walch's holding, the Court of Appeals held that it "does not accurately and completely reflect [Walch's] reasoning and conclusion." Natko, Docket No. 73048 at 2. Instead, the court held, Walch also requires "the State [to] allege and establish that the criminal intent arose prior to the funds being deposited into the joint account." Id. at 7.

The holding below is erroneous for two reasons. First, Walch imposed no such requirement on the State. Second, the holding creates a broad presumption that a general joint tenancy has been created by the mere existence of a joint account which threatens to unravel over a century of this Court's property law jurisprudence. For

these reasons, the State is aggrieved by the Order of Affirmance, and it hereby seeks the review of this Court pursuant to NRAP 40B(a)(2)-(3).

SUBSEQUENT AMENDMENTS TO NRS 100.085 DID NOT DISTURB OR OVERRULE THIS COURT'S HOLDING IN WALCH V. STATE.

This Court has previously addressed whether a person's status as a joint account holder automatically gives that person a possessory interest in the account's funds. It answered that question in the negative. Legislative changes to NRS 100.085 did not disturb this—the answer is still a resounding no. The Court of Appeals erroneously disagreed.

In Walch v. State, the defendant argued that funds deposited in two accounts became her and the victim's joint legal property and that she had lawful authority to withdraw them and use them as she wished. 112 Nev. at 31, 909 P.2d at 1187-1188. To support this argument, the defendant cited NRS 100.085(1). Id. However, this Court found defendant's argument to be without merit. Id. This Court made clear that "the effect of NRS 100.085(1) is to protect a depository, such as a bank, from liability if it pays money out to a joint tenant of an account." Id. at 31, 909 P.2d at 1188.

It is this limited understanding of NRS 100.085 that the Court of Appeals overlooked. It was precisely because of the statute's primary effect of protecting depositories that this Court was able to hold that a joint-account holder's "status as

joint holder … did not preclude the jury from finding that she stole funds which passed through the accounts." Id. The 1995 amendments to NRS 100.085 do not change the fact that it is mere "a statute that protects [institutions] from liability." Natko v. State, Docket No. 73048 (Tao, J., dissenting), at 19.

Accordingly, then, as now, the "mere status as a party to … joint accounts" does not "provide [the party] with lawful authority to use [the other party's] assets for her own benefit." Walch, 112 Nev. at 33, 909 P.2d at 1189. Financial institutions may be free from liability if a joint account holder transfers funds. They may similarly be able to operate under the presumption that a joint account is a joint tenancy *for purposes of* calculating their own liability. The joint account holder has no such presumption. Both the text and the legislative history of the 1995 amendments support this understanding.

The State will start with the text. The legislature made several changes to NRS 100.085 in 1995. First, it added a conditional sentence: "If an account is intended to be held in joint tenancy, the account or proceeds from the account are owned by the persons named." NRS 100.085(1) (1995). It then added section 4, which defined—"[f]or purposes of [NRS 100.085]"—the means of ascertaining the intent. NRS 100.085(4). A "depositor" statutorily shows her intent "that the account be held in joint tenancy" through "the use by the depositor" of "any of the following words or

terms in designating the ownership of an account" Id. (emphasis added). The language of NRS 100.085 that was left unchanged similarly refers to "deposits" and "depositors" as Judge Tao addressed in his dissent:

> Under NRS 100.085(1) and (3), any "deposit made in the name of [two or more persons] and intended to be paid or delivered to any one of them" is the property of all named persons that can be withdrawn by any account holder, and the bank will suffer no liability if the withdrawal turns out to have been against the wishes of other account holders. NRS 100.085(4) specifically states that, "[f]or purposes of this section," the bank may treat a "deposit" into a joint account as if it were intended in joint tenancy so long as the deposit was made in the name of one or more persons into the joint account, unless the "depositor" indicates otherwise.

Natko, Docket No. 73048 (Tao, J., dissenting) at 11.

Reading this statute through the lens of Walch shows just how limited any joint tenancy which it created is. The bank, which otherwise would have faced liability for erroneously permitting a joint holder to remove funds which were not hers from an account, can treat particular deposits into the account as if they were made into a joint tenancy. That is the extent of the statute.

Joint tenancies for all other purposes—including for purposes of actual property ownership—are governed by NRS 111.065. Statutes have been given names by the legislature. NRS 111.065 has been named "Joint tenancy in real and personal property: Creation." NRS 100.085, in contrast, is named "Deposits in names of two or more persons." The name of these statutes alone would suggest that

the general creation of a joint tenancy is governed by NRS 111.065 and *not* by NRS 100.085.

Chapters too have been named by the legislature. NRS Chapter 100 has a name--"Special Relations of Debtor and Creditor; Suretyship"—that is particular to it, just as the names which the legislature has assigned other chapters is similarly particular to each respective one. As relevant here, the legislature has named Chapter 111 "Estates in Property; Conveyancing and Recording." Chapter 100 is in Title VIII of the Nevada Revise Statutes—"Commercial Instruments and Transactions." Chapter 111 is in Title X—"Property Rights and Transactions."

The location of NRS 100.085 within Title VIII and Chapter 100 matters:

> What does this tell us? That NRS 100.085 doesn't govern how bank accounts are set up for all purposes, nor does it supplant centuries of common law (along with several current statutes) to dictate who owns personal property; this chapter would be a pretty incongruous place to bury a statute that revolutionary. Rather, being placed here tells us that it's much narrower and is directed toward problems that may arise in debtor/creditor relations. As the Nevada Supreme Court has described the statute, "[t]he effect of NRS 100.085(1) is to protect a depository, such as a bank, from liability if it pays money out to a joint tenant of an account." Walch v. State, 112 Nev. 25, 31, 909 P.2d 1184, 1188 (1996).

Natko, Docket No. 73048 (Tao, J., dissenting) at 11. The broad reading of the Court of Appeals—under which NRS 100.085 makes every joint account a joint tenancy for all purposes—is not supported or required by the statutory text.

The legislative history of NRS 100.085 further supports the understanding that NRS 100.085 is only meant to protect financial institutions. The legislature "included [it] under chapter 100 of the NRS, which is the section which deals with general debtor and creditor relationships rather than in the section which deals only with banks because they are not the only institutions which accept deposits." Minutes, Assembly Judiciary Committee (Apr. 29, 1977) (Statement of Frank Daykin, Legislative Council Bureau) at 1877-78. One effect of the 1995 modification was that the Welfare Division would be precluded "from pursuing estate recovery cases" in instances where the proceeds from a joint account pass to the surviving account holder—"[c]urrently, joint accounts do not have the luxury of a joint tenancy protection . . . this bill will provide that protection." Minutes, Senate Committee on Judiciary (May 16, 1995) (statement of Gary L. Stagliano, Chief, Investigations and Recovery Services, Welfare Division, Department of Human Resources) at 2431. The decision was meant to resolve "grave problems for the state's banking institutions, as well as account holders who *believe* their joint account will automatically pass to the surviving party." Minutes, Senate Committee on Judiciary (May 5, 1995) (statement of John P. Sande, Nevada Bankers Association) at 2232 (emphasis added). The amendment does not automatically create a joint tenancy.

The Court of Appeals changed all of this. Under its reading, a potential criminal who does not have criminal intent when a joint account is opened suddenly has 'carte blanche' authority to take whatever they want from the bank account because the criminal intent can *never* subsequently be formed. This shields a would-be thief or exploiter from criminal and civil liability for taking money that they did not generate and over which they never received ownership. This is an absurd reading of the law, which is clearly contrary to both Walch and its holding of the effect of NRS 100.085. Because the text and legislative history of the 1995 amendments suggest that NRS 100.085 remains "a statute that protects banks from liability," the order of the Court of Appeals is in conflict with the statute and with Walch. Natko v. State, Docket No. 73048 (Tao, J., dissenting), at 19.

Accordingly, the State respectfully requests that this Court grant its Petition for Review to correct a "decision of the Court of Appeals [in] conflict with a prior decision" of this Court. NRAP 40B(a)(2).

THE ERRONEOUS HOLDING IN THE ORDER OF AFFIRMANCE HAS ENORMOUS CONSEQUENCES.

Beyond being erroneous, the holding of the Court of Appeals has devastating consequences.

First, it changes the means through which joint tenancies are created, removing the requirement of the unity of time. NRS 100.085(1) by its very terms

only gives account ownership to a joint-holder if the "account is intended to be held *in joint tenancy*." NRS 100.085(1) (emphasis added). The statute does not purport to change the definition of joint tenancy, but rather allows banks to treat accounts as joint tenancies if their creation is both (1) intended and (2) satisfies the other requirements for the formation of a joint tenancy. At common law, the creation of joint tenancy required "unities of interest, time, title, and possession." Smolen v. Smolen, 114 Nev. 342, 344, 956 P.2d 128, 130 (1998). "NRS 111.065 adds a writing requirement that did not exist at common law." Natko v. State, Docket No. 73048 (Tao, J., dissenting) at 6. To have the unity of time, the interests in a property must "vest at the same time." Unity of time, Black's Law Dictionary 1770 (10th ed. 2014). Mencarelli added Appellant to be a joint account holder in 2012. Natko v. State, Docket No. 73048 at 2. The account, therefore, decidedly lacked unity of time. Nor was there any "evidence that any of these requirements for creating a joint tenancy were ever met. Natko v. State, Docket No. 73048 (Tao, J., dissenting), at 6. Accordingly, as Judge Tao correctly noted, "there is no proper conveyance in joint tenancy." Id. By construing the mere addition of Appellant to a joint account to be the creation of a joint tenancy "displace[s] quite a lot of statutory and common law." Id. at 6-7.

This displacement makes NRS 100.085 the governing—and sole—statute for joint tenancies in banking despite nothing in the text or the legislative history to even remotely suggest such a requirement. This produces an absurd result, as the mere addition of a person in another person's bank account will:

(1) "convey ownership of the [original accountholder's money] whether or not the [original accountholder] intended to give her a dime";
(2) "convey title as well as possession," whether or not it was intended;
(3) completely remove any requirement that interests "vest at the same time" as required in common law; and
(4) destroy the possibility of creating a tenancy in common "whether or not anyone intended" to create one.

Natko v. State, Docket No. 73048 (Tao, J., dissenting) at 7; Unity of time, Black's Law Dictionary 1770 (10th ed. 2014). NRS 100.085 does not mandate anything of the sort. Because of the ramifications of the holding of the Court of Appeals, the State respectfully petitions this Court to rehear the instant case and clarify the true meaning of the statute in a way that (1) comports with precedent and (2) has less sweeping implications for property law.[1]

Second, the holding of the Court of Appeals conflates possession with title. It is a "foundational principle of property law … that title may transfer from one owner

[1] "If the majority is correct, then NRS 100.085 isn't an obscure and rarely litigated statute unknown to much of the public, but rather one of the most sweeping laws ever enacted in Nevada—one that fundamentally undermines property law all the way back to the founding of this State." Natko v. State, Docket No. 73048 (Tao, J., dissenting), at 5.

(a grantor) to another (a grantee) only if the grantor intended to convey such title." Natko v. State, Docket No. 73048 (Tao, J., dissenting) at 5. The mere possession of a person's property does not imply ownership of it. Yet the order of the Court of Appeals holds that in banking contexts, ownership can be implied by possession of the account alone. A holder of a joint account does not by virtue of the account have automatic legal possession of everything in it. In re Christensen, 122 Nev. 1309, 1323, 149 P.3d 40, 49 (2006) (ownership over funds stays unchanged even when commingled with other funds "so long as tracing is possible"). As Judge Tao recognized, this principle :

> has consistently remained the same right through 2016: money retains its original ownership even when deposited into a joint account, and consequently "[a] judgment creditor may garnish only a debtor's funds that are held in a joint bank account, not the funds in the account owned by the nondebtor." Brooksby v. Nev. State Bank, 129 Nev. 771, 772, 312 P.3d 501 (2013). This is simply because "joint bank account funds [may] truly belong to someone other than the judgment debtor." Id. at 773, 312 P.3d at 502; see Brooks v. Mejia, 2016 WL 197396, Docket No. 67794 (Order of Affirmance, Jan. 14, 2016) (concluding that creditor could not garnish account to pay off debt owed by other account holder because appellant successfully "demonstrated that the funds in the bank account belonged to her alone"). In other words, even when funds from different sources are commingled in a joint bank account, the ownership of the funds does not automatically change merely by being deposited in the joint account.

Natko v. State, Docket No. 73048 (Tao, J., dissenting) at 7.

In sum, the order of the Court of Appeals is broad and consequential. It completely ignores both the common law and NRS 111.065's explicit terms on the creation of joint tenancies, and it makes a presumption that the mere possession of a joint account is sufficient to give ownership to everything in it. This is not required by the statute. Because of the "fundamental issues of statewide importance," the State respectfully requests this Court's review. NRAP 40B(a)(3).

The order of the Court of Appeals is (1) in conflict with a prior decision of this Court and (2) involves fundamental issues of statewide importance.

WHEREFORE, the State respectfully requests Supreme Court review of the Court of Appeals Order Dismissing Appeal.

Dated this 7th day of January, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for review or answer 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40, 40A and 40B because it is proportionately spaced, has a typeface of 14 points and contains 2,688 words.

Dated this 7th day of January, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 7, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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