

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

In the Matter of

THE WILLIAM J. RAGGIO FAMILY  
TRUST.

DALE CHECKET RAGGIO, individually  
and as Trustee of The Marital Deduction  
Portion and Credit Share of the William J.  
Raggio Family Trust,  
Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
WASHOE; AND THE HONORABLE  
DAVID A. HARDY,

Respondents,

and

LESLIE RAGGIO RIGHETTI and  
TRACY RAGGIO CHEW, Co-Trustees of  
the William J. Raggio and Dorothy B.  
Raggio Trust under agreement dated  
January 27, 1998 as decanted and Vested  
Remaindermen of the Marital Deduction  
Trust portion of The William J. Raggio  
Family Trust,  
Real Parties in Interest.

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District Court Consolidated Case  
No. PR13-00624

**PETITION FOR WRIT OF  
PROHIBITION  
OR, ALTERNATIVELY,  
MANDAMUS**

Concerning The District Court,  
Department 15 (Hon. David A.  
Hardy), Second Judicial District

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DALE CHECKET RAGGIO, individually and as trustee of The Marital Deduction  
Portion of the William J. Raggio Family Trust

## **RULE 26.1 DISCLOSURE**

The undersigned associated counsel of record certifies that the following are persons or entities as described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Dale Checket Raggio is an individual and a Trustee of The Marital Deduction Portion and Credit Share of the William J. Raggio Family Trust and currently represented by the law firms of HOLLAND & HART LLP and the ECHEVERRIA LAW OFFICE before the district court and this Court.

2. Leslie Raggio Righetti and Tracy Raggio Chew are individuals and Co-Trustees of the William J. Raggio and Dorothy B. Raggio Trust under agreement dated January 27, 1998 as decanted and Vested Remaindermen of the Marital Deduction portion of The William J. Raggio Family Trust and currently represented by the law firms of MICHAEL A. ROSENAUER, LTD. and MAUPIN, COX & LEGOY before the district court and this Court.

Dated this August 2, 2018.

/s/ Frank Z. LaForge  
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## **ROUTING STATEMENT**

This writ should be assigned to the Court of Appeals because it involves a pretrial challenge to a discovery order under NRAP 17(b)(14).



## **I. INTRODUCTION AND RELIEF SOUGHT**

Senator William Raggio formed a trust that, upon his death, created two discretionary support trusts for his wife, Petitioner Dale Raggio (“Dale”): a marital deduction trust (the “Marital Trust”) and a credit shelter trust (the “Credit Shelter Trust”). Both sub-trusts authorize the trustee to pay Dale “as much of the principal of the Trust as the Trustee, in the Trustee’s discretion, shall deem necessary for the proper support, care, and maintenance of [Dale].” When Dale dies, the remainder of the Marital Trust will flow into a third and preexisting trust, the beneficiaries of which are Senator Raggio’s adult children from an earlier marriage, Tracy Raggio Chew and Leslie Raggio Righetti (“Plaintiffs”). The remainder of the Credit Shelter Trust will pass to Dale’s grandchildren. Senator Raggio made Dale the trustee of both trusts and expressly vested her with the “most liberal” discretion permitted by law.

Plaintiffs claim that Dale breached her duties as the Marital Trust trustee by making distributions to herself as its lifetime beneficiary but neglecting the Credit Shelter Trust, thus leaving more principal for her grandchildren and less for Plaintiffs under the respective trusts. When Plaintiffs propounded broad written discovery concerning the Credit Shelter Trust, Dale refused to provide the requested documents and information because, among other things, her distributions from the Credit Shelter Trust are not legally relevant to Plaintiffs’

rights as beneficiaries to the Marital Trust. The District Court, however, disagreed and granted Plaintiffs' motion to compel Dale to respond to their blanket discovery requests.

At issue in this case is whether Dale, in her capacity as trustee to the Marital Trust, is obligated to consider her other resources—particularly her right to disbursements from the second trust—in making distributions to herself as the beneficiary. NRS 163.4175 provides the answer:

Except as otherwise provided in the trust instrument, the trustee is not required to consider a beneficiary's assets or resources in determining whether to make a distribution of trust assets.

The District Court, however, concluded that the words “necessary” and “proper” in the Marital Trust constitute an exception under NRS 163.4175's “[e]xcept as otherwise provided in the trust instrument” clause. But this legal conclusion is wrong for any one of the following three reasons.

First, the terms “necessary” and “proper” in the Marital Trust do not create a condition of financial need. In other words, they do not obligate the trustee to consider the beneficiary's other financial resources before making a disbursement. Indeed, most courts have directly rejected that argument.

Second, the District Court's restrictive interpretation is contrary to Senator Raggio's express desire “to give the greatest latitude and discretion to the Trustee.”

Third, Senator Raggio’s trust indisputably favors the well-being of Dale over the preservation of principal for Plaintiffs, which strongly indicates that the support trust is a gift and not conditioned on her financial need. While the trust gives Dale several broad powers as trustee, it never requires or even mentions the preservation of principal. Indeed, there was a real risk when Senator Raggio created the trust that the Marital Trust would not be funded at all depending on the federal estate tax the year that Senator Raggio subsequently died.

Accordingly, Dale asks the Court to reverse the District Court’s order compelling Dale to respond to discovery on an irrelevant topic—Dale’s distributions from the Credit Shelter Trust—and to provide confidential information.

## **II. ISSUE PRESENTED**

NRS 163.4175 provides that a trustee is not obligated to consider a beneficiary’s other resources “[e]xcept as otherwise provided in the trust instrument.” Did the District Court err by concluding that the inclusion of the words “necessary” and “proper” satisfied this exception where (a) most courts have rejected similar arguments, (b) the Trust expressly gives the trustee broad discretion, and (c) the dominant purpose of the Trust is to benefit Dale?

### III. FACTUAL BACKGROUND

#### A. Senator Raggio creates the Trust in 2007.

In April 2007, Senator Raggio created The William J. Raggio Family Trust (“the Trust”), which itself created two sub-trusts upon his death: the Marital Trust and the Credit Shelter Trust. PA-0074 at §4.1. All three trusts are contained in the same document.

#### 1. The Marital Trust provides all income to and creates a discretionary support trust for Dale.

The Marital Trust was to be funded with “the maximum marital deduction allowed” at Senator Raggio’s death but could not “exceed the amount necessary to eliminate federal estate tax” on his estate. I PA-0075 at §4.4. “Assets allocated in kind shall be deemed to satisfy this amount on the *basis of their values at the date or dates of allocation* to the Marital Trust.” *Id.* (emphasis added). In other words, because no one could predict the annual federal estate tax after Senator Raggio executed the Trust in 2007, there was a reasonable possibility that the Marital Trust would receive no funding whatsoever. Indeed, had Senator Raggio passed away in 2010, there would have been no funding for the Marital Trust because there was no estate tax that year.<sup>1</sup>

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<sup>1</sup> See, e.g., Peter Whorisky, *Steinbrenner heirs could save millions from one-year gap in estate tax*, THE WASHINGTON POST (July 14, 2010), available at <https://wapo.st/2NkPT5U> (noting that billionaire George Steinbrenner’s death in a

The key provision in this case is Section 5.1 of the Marital Trust. It first provides that the trustee must unconditionally pay to Dale “all of the net income of the Trust.” I PA-0075. Section 5.1 then creates a discretionary support trust on Dale’s behalf:

In addition, the Trustee shall pay to or apply for the benefit of [Dale] as much of the principal of the Trust as the Trustee, in the Trustee’s discretion, shall deem necessary for the proper support, care, and maintenance of [Dale].

*Id.* This provision allows Dale to maintain accustomed standard of living at the time of Senator Raggio’s death. *See, e.g.*, George Gleason Bogert et al., THE LAW OF TRUSTS AND TRUSTEES §229 (2018) (“Unless the settlor has indicated otherwise, a trustee should provide support from the trust to enable the beneficiary to maintain her accustomed standard of living, often referred to as the station in life rule.”) After Dale’s death, the Trust instructs that any remaining principal in the Marital Trust should be distributed to The William and Dorothy Raggio Credit Shelter Trust (the “W&D Trust”). The W&D Trust was created in 1998 and is not part of the underlying subject Trust. I PA-0076 at §5.3. Because Plaintiffs are the beneficiaries of the W&D Trust, any remaining principal in the Marital Trust will pass to them when Dale dies. I PA-0003 at ¶12. The Trust, however, does not

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year in which there was no estate tax added hundreds of millions to his heirs’ inheritance).

contain any instruction for the trustee to preserve the principal in the Marital Trust. Nor does it mention Plaintiffs.

**2. The Credit Shelter Trust also creates a discretionary support trust in favor of Dale.**

The Credit Shelter Trust holds the balance (and greater part) of Senator Raggio's estate. I PA-0075 at §4.6. While it does not automatically pay all income to Dale, like the Marital Trust, the Credit Shelter Trust authorizes the trustee to distribute to Dale "as much of the net income and principal of the Credit Shelter Trust" as the trustee "shall deem necessary for [her] support, care and maintenance." I PA-0077 at §6.1. Unlike the Marital Trust, however, income distributions to Dale are permitted but are not mandatory. Upon Dale's death, her grandchildren from a prior marriage become the beneficiaries of the Credit Shelter Trust. *Id.* at §6.2.

**3. The Trust makes Dale the trustee of both trusts and vests her with "the greatest latitude and discretion."**

Upon Senator Raggio's death, Section 1.6 appoints Dale as the trustee of both the Marital and Credit Shelter Trusts. I PA-0071. Section 8.1(a) provides that any trustees, including Dale, would have all "powers and discretions" provided by Nevada law. But, critically, "[i]n the event any of such powers or discretions is inconsistent with any of the powers or discretions hereinafter set forth, *the most*

*liberal shall control to give the greatest latitude and discretion to the Trustee.”* I PA-0079 (emphasis added).

**B. Nevada makes broad changes to its trust laws promoting flexibility and liberal trustee discretion.**

In 2009, Senate Bill 287 (“S.B. 287”) was introduced before the Senate Committee on Judiciary. S.B. 287 liberally amended both the probate and trust codes in Nevada. The bill was drafted by the 15 members of the Probate and Trust Section of the State Bar, who spent two years soliciting “concerns from practitioners, banks, trustees, the courts and the general Bar Association throughout the State.” Hearing on S.B. 287 Before the Senate Judiciary Comm., 75th Leg. (Nev., March 24, 2009) at 13. The purpose of the changes was to provide “flexibility to trustees, settlors, and beneficiaries” and to “keep Nevada competitive to draw trust business to this State.” *Id.*; *see also* Hearing on S.B. 287 Before the Assembly Committee on Judiciary, 75th Leg. (Nev., May 6, 2009) at 13.

Specifically, S.B. 287 gave trustees more flexibility by adding NRS 163.4175, which provides that trustees are not required to consider a beneficiary’s other resources in making trust distributions:

Except as otherwise provided in the trust instrument, the trustee is not required to consider a beneficiary’s assets or resources in determining whether to make a distribution of trust assets.

75th Leg., S.B. 287 Sec. 14. The Legislature thus rejected the Restatement’s “presumption . . . that the trustee is to take the beneficiary’s other resources into account in determining whether and in what amounts distributions are to be made.”

THIRD RESTATEMENT OF TRUSTS §50, cmt. e (2003).

The Legislature also added NRS 163.419(3), which expressly acknowledges that a trustee’s discretionary distributions between beneficiaries may be unequal but nevertheless generally requires deference to the trustee’s discretion:

Absent express language in a trust to the contrary, if a discretionary interest permits unequal distributions between beneficiaries or to the exclusion of other beneficiaries, the trustee may distribute all of the undistributed income and principal to one beneficiary in the trustee’s discretion.

75th Leg., S.B. 287 Sec. 19(3).

Nevada enacted S.B. 287 in May 2009. Coincidentally, Senator Raggio was present before the Senate Committee on Judiciary when S.B. 287 was first introduced and explained. Hearing on S.B. 287 Before the Senate Judiciary Comm., 75th Leg. (Nev., March 24, 2009) at 1.

#### **IV. PROCEDURAL BACKGROUND**

##### **A. The probate commissioner holds that there is no proportional spend-down requirement when Chew first challenges the Trust.**

In December 2013, nearly two years after Senator Raggio passed away in February 2012, Chew filed a petition requesting, among other things, that Dale



provide an accounting of the Credit Shelter Trust (“2013 Petition”) and served notice on Righetti. I PA-0004 at ¶18; I PA-0088. Chew argued that the Marital and Credit Shelter Trusts’ parallel discretionary-support provisions created a “proportional spend-down” requirement that obligates the trustee (Dale) to disburse funds in equivalent amounts from each sub-trust. I PA-0168. The probate commissioner, however, disagreed: “[A] proportionate spend-down of the Credit and Marital Trusts formed under the Trust is not supported by the terms of the Trust or applicable law.” II PA-0248; *see also* I PA-0243 (holding that Chew’s proportional spend-down “has not been proven by the language of the trusts themselves,” and that a “big discrepancy” in the funds left for remainder beneficiaries between the two trusts was likely the “vision” or “intent” of the Trust). The district court then issued a confirming order. II PA-0250.

**B. Plaintiffs bring the underlying actions in 2015.**

Shortly after the district court rejected their proportional spend-down claim, Plaintiffs initiated the underlying civil action against Dale in June 2015. Their first claim is for breach of trust based on two separate theories: (a) Dale made discretionary distributions to herself (as the beneficiary) from the Marital Trust that were not necessary for her support, care and maintenance (I PA-0005 at ¶¶25–27); and (b) Dale made discretionary distributions primarily from Marital Trust and not the Credit Shelter Trust, which harmed Plaintiffs as remainder beneficiaries of the

Marital Trust. *Id.* at ¶¶29–30. The complaint also asserts unjust enrichment and constructive trust claims based on the same theories. I PA-0006–07 at ¶¶32–38.

Then in July 2015, Plaintiffs filed an NRS 153.031 petition, asserting that Dale breached her fiduciary duties to them as remainder beneficiaries of the Marital Trust by not treating the Marital Trust and Credit Shelter Trust consistently. I PA-0010. For example, they allege that Dale “has consistently made discretionary distributions to herself from the Marital portion of the [] Trust as opposed to the Credit Shelter portion of the [] Trust, thereby intentionally depleting the former to the benefit of the latter.” I PA-0015 at ¶6. Plaintiffs also assert claims for breach of contract and the covenant of good faith and fair dealing on the same basis. I PA-0017–18 at ¶¶22, 27.

In September 2015, the District Court consolidated Plaintiffs’ civil action and 2015 petition. I PA-0044.

Based on their theory that Dale has an obligation to either consider or proportionally use the funds at her disposal in the Credit Shelter Trust before taking disbursements from the Marital Trust, Plaintiffs served broad written discovery demands seeking confidential information about the Credit Shelter Trust in May 2017, which included the following:

**Interrogatory No. 1:** State with particularity the parameters you apply when deciding to distribute funds from the Credit Shelter portion of the William J. Raggio Family Trust.

**Interrogatory No. 6:** State with particularity the controls or methodology you utilize to [e]nsure that any sums received from the Credit Shelter portion of the William J. Raggio Family Trust are utilized consistently with the terms of the William J. Raggio Family Trust.

**[Document] Request No. 4:** Provide all credit card statements, cancelled checks receipts, invoices, bills and other evidences of expenditures from distributions received by you from the Credit Shelter portion of the [Trust].

II PA-0349–50; II PA-0359.

**C. The District Court holds that Dale’s Credit Shelter Trust distributions are relevant to Plaintiffs’ rights under the Marital Trust.**

In July 2017, Dale filed a motion for partial summary judgment on the basis that the probate commissioner’s February 2015 determination that the Trust did not create a proportional spend-down requirement collaterally estopped Plaintiffs’ current claims concerning Dale’s treatment of the Credit Shelter Trust. I PA-0053. The motion, however, did not seek summary judgment on Plaintiffs’ alternate claim that Dale’s discretionary distributions to herself under the Marital Trust were excessive and unnecessary for her support, care, and maintenance (without regard to the Credit Shelter Trust). I PA-0055 at n.2.

In September 2017, Plaintiffs filed a motion to compel Dale’s responses to their written discovery concerning the Credit Shelter Trust. II PA-0335. Plaintiffs asserted that such documents and information are relevant to their claim that Dale breached her fiduciary duties to them by drawing on Marital Trust but neglecting the Credit Shelter Trust. II PA-0337. While they did not identify the specific

discovery requests to which they sought to compel responses, they cited Interrogatory Nos. 1 and 6 and Document Request No. 4. II PA-0339. Dale opposed the motion, arguing that the discovery was irrelevant because the Court previously determined that there was no proportional spend-down requirement in the Trust and that, in any event, consideration of the Credit Shelter Trust was not required under NRS 163.4175. II PA-402.

In January 2018, the probate commissioner denied Dale's motion for partial summary judgment but held Plaintiffs' motion to compel in abeyance. IV PA-0674.

On April 17, 2018, the District Court affirmed the probate commissioner's recommendation denying Dale's motion for partial summary judgment. IV PA-0758. The District Court recognized that while Plaintiffs concede that "a proportionate spenddown of the marital deduction and credit shelter trusts is not legally required, a disproportionate spenddown may reveal the trustee's breach of fiduciary duties, which is a separate issue. IV PA-0761. It went on to reason that the inclusion of the words "necessary" and "proper" in Section 5.1 require the trustee to consider the beneficiary's other resources:

Integral to the present claims is whether the trustee's discretionary principal distributions from the marital deduction trust were "necessary" and "proper." The vested remainder beneficiaries are entitled to examine the need and propriety of the trustee's decision to withdraw principal from the marital deduction trust by reference to

other trust and non-trust resources available for the trustee's necessary and proper support. It appears possible this Court cannot determine what is necessary and proper without a complete understanding of the trustee's circumstances, to include standard of living and supportive resources beyond the marital deduction trust.

IV PA-0761. In other words, the District Court reads Section 5.1 to restrict the trustee's discretion so that the trustee must consider the beneficiary's other resources before making distributions from the Marital Trust. Otherwise, Plaintiffs' discovery requests concerning the Credit Shelter Trust are irrelevant. The District Court further noted the estrangement between Dale and Plaintiffs, that the identical support-trust discretionary language in the two sub-trusts, and that the beneficiaries of the Credit Shelter Trust are Dale's grandchildren. *Id.*

In June 2018, the District Court summarily granted Plaintiffs' motion to compel, presumably based on the same reasoning as in its April 17 order. IV PA-0776–77.

## **V. WHY THE WRIT SHOULD ISSUE**

### **A. A writ is available because the District Court's discovery order requires blanket disclosure and involves sensitive confidential information.**

While this Court does not ordinarily entertain a pretrial petition for an extraordinary writ to review the trial courts' discovery orders, two principal exceptions exist: (1) to thwart improper, blanket discovery orders with no regard to relevance; and (2) to prevent enforcement of discovery orders that compel the

disclosure of privileged information. *Valley Health System, LLC v. Eighth Judicial District Court*, 252 P.3d 676, 679 (Nev. 2011). *Id.* This case has elements of both exceptions.

First, as demonstrated at length below, the District court ordered Dale to respond to *legally irrelevant* discovery requests contrary to both the Trust's terms and NRS 163.4175.

Second, the District Court disregarded Dale's contention that the requested discovery would invade her privacy interests and those of the Credit Shelter Trust beneficiaries. Where, as here, the discovery ordered implicates privacy interests, the need for immediate review is analogous to situations in which disclosure of arguably privileged information is ordered. Once discovery is had, "the bell cannot be unrung,' not even on direct appeal." *Columbia/HCA Healthcare Corp. v. Eighth Judicial District Court*, 936 p.2d 844, 847 (Nev. 1997). In this regard, the District Court's reasoning allows third-parties to probe into the private information of trusts to which they are not beneficiaries.

In addition, whether the Marital Trust trustee is obligated to consider the beneficiary's other resources was not just the focus of a discovery dispute, it is also the central issue in this case. This issue may be decided solely based on the Trust's terms and is thus ripe for appellate review. Thus, adjudication of this writ will

promote judicial efficiency by streamlining the legal issue on which this case largely hinges.

For these reasons, Dale asks the Court to consider the merits of her petition for writ of prohibition.

**B. NRS 163.4175 provides that the Marital Trust trustee is not required to consider Dale’s access to other resources.**

NRS 163.4175 speaks directly the central question in Plaintiffs’ motion to compel: Must the Marital Trust’s trustee consider the beneficiary’s other resources (including the Credit Shelter Trust) in making disbursements? Its answer is unequivocal: “Except as otherwise provided in the trust instrument, the trustee is not required to consider a beneficiary’s assets or resources in determining whether to make a distribution of trust assets.” Nevertheless, Plaintiffs argued, and the District Court seemed to agree, that Section 5.1’s use of the words “necessary” and “proper” necessitate reference to Dale’s other resources and thus fit within NRS 163.4175’s “except as otherwise provided in the trust instrument” clause. II PA-0275; IV PA-0761. Not so.

In Nevada, a settlor’s intent controls the construction of a trust. *Hannam v. Brown*, 956 P.2d 794, 798 (Nev. 1998). Where the trust language is clear, the court cannot consider extrinsic evidence. *Frei ex rel. Litem v. Goodsell*, 305 P.3d 70, 73 (Nev. 2013). While there is no Nevada precedent on the matter, whether a trustee must first take account of the beneficiary’s other assets in a discretionary support

trust is a frequently litigated question. *Discretionary Trusts*, THE LAW OF TRUSTS AND TRUSTEES §228 (2018). In the absence of direct instructions concerning the beneficiaries' other resources, courts look to both the language of the trust itself as well as the settlor's purpose. *See id.* ("Where the trust document is not explicit as to the trustee's duty in this regard, the court must look closely at the trust's language and the settlor's purpose in creating the trust gift."); 41 ALR.3d 255 §2(a) (explaining that each case "requir[es] a close analysis of the settlor's intent in the particular case."). A trustee's discretion to consider a beneficiary's other resources may fall into four possibilities:

- (1) the trustee must ensure that the beneficiaries' other resources are exhausted before distributing from the trust;
- (2) the trustee must consider the other resources but still has discretion as to whether to withhold distributions;
- (3) the trustee must ignore those resources; or
- (4) the trustee may consider or ignore those resources.

Here, the District Court concluded that the Trust restricts the Marital Trust's trustee's discretion to one of the first two possibilities. Specifically, it reasoned that the trustee (Dale) *must* consider the availability of funds in the Credit Shelter Trust



because Section 5.1 limits her discretion to make distributions to those that the trustee “deem[s] *necessary*” and “proper.”<sup>2</sup> IV PA-0761.

But, as shown below, this restrictive construction of the trustee’s discretion (a) is not supported by Section 5.1’s incorporation of the terms “necessary” and “proper,” (b) contradicts Senator Raggio’s express intent to empower the trustee with the broadest discretion allowed by law, and (c) is contrary to the dominant intention of the Trust to benefit Dale.

**1. The District Court’s reliance on the words “necessary” and “proper” is unfounded and contrary to case law.**

The District Court’s conclusion that the words “necessary” and “proper” fit within NRS 163.4175’s “except otherwise provided in the trust instrument” exception is misplaced for four reasons.

First, the term “necessary” defines the scope and range of Senator Raggio’s gift to his wife and does not create a threshold condition of *financial* need:

In addition, the Trustee shall pay to or apply for the benefit of [Dale] as much of the principal of the Trust as the Trustee, in the Trustee’s discretion, shall deem *necessary* for the *proper* support, care, and maintenance of [Dale].

I PA-0075 at §5.1 (emphasis added). In this provision, “necessary” conditions “as much of the principal of the Trust,” which is the *amount* of the disbursement. It

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<sup>2</sup> If the Marital Trust trustee is not obligated to consider the beneficiary’s other resources, then it stands to reason that the trustee does not breach any contractual or fiduciary duties in not doing so.

does not condition the disbursement on the beneficiary's financial need. In other words, "necessary" pertains to whether the *amount of the disbursement* is necessary for Dale's maintenance requirements. *See, e.g., Langagan v. Rorke*, 182 S.W.3d 596, 601 (Mo. Ct. App. 2005) (reasoning that the "necessary" part of a discretionary support trust "is limited to amounts deemed necessary for respondent's health, education, support, or maintenance"); *President, Directors & Co. of Farmers Bank of Delaware v. Delaware Trust Co.*, 95 A.2d 45, 47 (Del. Ch. 1953) (holding that the phrase "as shall be necessary" "is not language of condition but is language fixing the standard by which the trustee is to exercise its discretion in determining the amount to be spent"). For example, if Dale spent approximately \$1,000 annually on lawncare costs for her home while married to Senator Raggio, a \$10,000 disbursement request would be seemingly unnecessary.

Indeed, this is how other courts have interpreted similar "necessary" clauses in discretionary support trusts. Although there is no case law in Nevada construing this kind of language, most courts conclude that this language does not obligate the trustee to consider the beneficiary's other resources before making a trust disbursement. *See, e.g., Howard v. Howard*, 156 P.3d 89, 92 (Ore. 2006) (concluding that the trustee's requirement to pay "such amounts of income and principal of the share as the trustee shall determine to be necessary for [the beneficiary's] health, education, support, and maintenance" did not obligate the

trustee to consider the beneficiary's other resources); *In re Estate of Lindgren*, 885 P.2d 1280, 1282 (Mont. 1994) (holding that the trial court erred in construing the word "necessary" to condition disbursements on the beneficiary's prior exhaustion of other resources); *Godfrey v. Chandley*, 811 P.2d 1248, 1253 (Kan. 1991) (rejecting the remaindermen's argument that the word "necessary" required "the trust to pay only those expenses which exceeded [the beneficiary's] personal income" and holding that the testator's discretionary support trust for his wife was limited only in the sense that "it cannot be used to provide nonessential items"); *Estate of Wells v. Sanford*, 663 S.W.2d 174, 245, 248 (Ark. 1984) (concluding that the phrase "sums necessary for the support and maintenance" allowed the trust estate to be disbursed even though the beneficiary otherwise "had sufficient means"); *In re Worman's Estate*, 4 N.W.2d 373, 375 (Iowa 1942) (holding that provision stating that "my said wife may have full use of all the income from all my property and so much of the principal as may or might be necessary to use for her comfort during her lifetime" did not require trust to consider the wife's other property).

For example, in *Renner v. Castellano*, the settlor left his wife a discretionary support trust giving his estate to her "to have and enjoy without limitation during her lifetime, insofar as it be necessary for her maintenance and care, for and during her natural life" and leaving the remainder to other specific individuals. 91 A.2d

176, 178 (N.J. Super. 1952). The remaindermen construed the provision to create a threshold condition of financial need. *Id.* The New Jersey Superior Court, however, held that the provision created a gift and that the word “necessary” was not conditional on the wife’s other resources:

If the clause ‘insofar as it be necessary for her maintenance and care’ were eliminated from the first paragraph of the will, there would be no doubt but that the entire estate of the testator was dedicated to the maintenance and care of the widow during her lifetime. Does this clause mean that the payment of income and Corpus, or either, is conditional on the financial need of the widow? Does it merely define the scope and range of the gift? Does it merely have reference to the cost of what the testator in the second paragraph of the will described as ‘the care, maintenance, shelter, medical attention and necessities of my said wife’? Does it refer to the accomplishment of the purpose of the testator, namely the comfortable support, maintenance and care of his widow, and not to the matter of her independent means?

\*       \*       \*       \*       \*

The word ‘necessary’ as used here in the first paragraph, considered with the context, and in the light of the surrounding circumstances, refers to what is required to accomplish testator’s intention, namely, the comfortable maintenance and care of his widow, the scope, the range, and the cost of it. Without doing violence to every other expression in the will, it could not be said that the benefaction was conditional upon the widow’s financial inability to support and maintain herself.

*Id.* at 178, 180. The court concluded that discretionary support trust was thus a gift “and that the availability to the widow of proviate means for her support has no

more significance than the possession of wealth by one who is given a specific monetary bequest.” *Id.* at 180.

While every trust is different, these cases show that the word “necessary” is too thin a reed to support the District Court’s conclusion that Dale’s other resources must be considered in making Marital Trust disbursements. Indeed, unlike most of the trusts in the cases cited above, Section 8.1(a) expressly bestows upon the trustee the “most liberal” discretion. Further, unlike other states, Nevada statutorily provides that a trustee need not consider a beneficiary’s other resources absent express trust language to the contrary in NRS 163.4175. Thus, if anything, the basis against construing “necessary” in Section 5.1 is stronger here than in the cases above.

Second, the term “proper” in Section 5.1 does not even remotely suggest that the trustee must consider the beneficiary’s other resources. *See Delaware Trust*, 95 A.2d at 45 (holding that the trustee’s requirement to make discretionary support disbursements as it “shall deem proper” did not obligate the trustee to consider the beneficiary’s other resources). As a starting point, the word “proper” modifies the words “maintenance, care, and support.” It does not, however, condition the provision’s clauses concerning payment or the necessary amount of principal. In other words, the “maintenance, care, and support” Dale seeks under Section 5.1 must be “proper,” whose meaning in this instance is “strictly limited to a specified

thing, place, or idea.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 996, def. 6 (11th ed.). She could not, for example, draw principal from the Marital Trust to open a new business endeavor, which would have little to do with her maintenance, care, or support and would thus be improper.

Third, the District Court’s interpretation of Section 5.1 assumes that Senator Raggio—Nevada’s longest serving legislator and an attorney—chose a clumsy, equivocal means of obligating the trustee to consider the beneficiary’s other resources before issuing a disbursement rather than doing so clearly and directly. For example, had that been Senator Raggio’s wish, he could have included something like the following provision in Section 5.1:

The trustee shall pay to or use for the benefit of the surviving trustor so much of the net income and principal of the [] Trust as the trustee shall deem necessary for the health, education, maintenance, or support of the surviving trustor, *taking into consideration all other means available to the surviving trustor for such purposes from all sources known to our trustee.*

*The Richard Musgrave Bypass Tr. v. Musgrave*, 2015 WL 6955013, at \*2 (N.D. Cal. 2015) construing a trust with the preceding provision) (emphasis added). Indeed, Westlaw is replete with examples of trusts that explicitly require the trustee to either (a) to consider the beneficiary’s other resources or (b) exhaust those resources before making trust disbursements. *See, e.g., Young v. McCoy*, 147 Cal. App. 4th 1078, 1082 (2007) (“The Trustee shall pay to or apply for the benefit of

[the beneficiary] . . . so much of the income, and so much of the principal, of the Trust estate, up to the whole thereof, as the Trustee shall deem necessary for the health, support, maintenance, and education, of [the beneficiary], *taking into consideration all other sources available for such purposes.*”) (emphasis added). Moreover, the section immediately after Section 5.1 provides that if the trustee has any of the Marital Trust treated as a qualified terminable interest property (QTIP), “the Trustee may wish to consider [Dale’s] age and health, the sizes of [her] and Settlor’s respective estates, and a computation of the combined death taxes . . . .” I PA-0076 at §5.2. Thus, where Senator Raggio wished to direct the trustee’s discretion to specific considerations, he did so directly and unequivocally and not obliquely through words like “necessary” and “proper.”

Fourth, to the extent Section 5.1’s text was still considered ambiguous, the Trust’s call for broad discretion and its dominant intent to benefit Dale strongly militate against the District Court’s decision, as shown below.

**2. The Trust gives Dale “the greatest latitude and discretion” in making disbursements, which strongly weighs against the District Court’s restrictive reading of Section 5.1.**

The District Court’s restrictive reading conflicts Senator Raggio’s intent to give his wife the broadest and least restrictive discretion as trustee to both trusts. Accordingly, Section 8.1(a) provides that “the most liberal” construction applies to the trustee’s discretion “to give [the trustee] *the greatest latitude and discretion to*

*the Trustee.*” Yet the District Court construed Section 5.1 to restrict the trustee’s discretion by forcing her to consider and, perhaps even, exhaust the beneficiary’s other resources before making disbursements. IV PA-0761 (“It appears possible this Court cannot determine what is necessary and proper without a complete understanding of the trustee’s circumstances, to include standard of living and supportive resources beyond the marital deduction trust.”).

Further, the language in Section 5.1 itself indicates that Senator Raggio vested broad discretion in the trustee. The provision could have limited distributions to merely “what is necessary for the beneficiary’s proper support, care, and maintenance,” thus creating a more objective standard. Instead, Section 5.1 twice emphasizes the trustee’s discretion in making that determination by including the “in the Trustee’s discretion” and “shall deem” clauses: “In addition, the Trustee shall pay to or apply for the benefit of [Dale] as much of the principal of the Trust as the Trustee, *in the Trustee’s discretion, shall deem* necessary for the proper support, care, and maintenance of [Dale].” I PA-0075 (emphasis added).

Thus, the liberal discretion that the Trust vests in the trustee dovetails with S.B. 287’s intent behind to make trust law in Nevada more “flexible” and competitive with other states. Hearing on S.B. 287 Before the Senate Judiciary Comm., 75th Leg. (Nev., March 24, 2009) at 13. To the extent that there’s any



ambiguity in the construction of Section 5.1, this preference strongly militates toward a more liberal reading.

For example, in *In re Estate of Lindgren*, the settlor provided his wife with a discretionary support trust: “The Trustee shall, *in her, his or its sound discretion*, pay to or apply for my said wife as much of the Trust income and Trust principal *as Trustee deems necessary* for her support, care and health during her life time.” 885 P.2d at 1282 (emphasis added). And, like Section 8.1(a), the trust in *Lingren* provided that “[t]he discretion of the Trustee shall be exercised liberally in favor of my said wife.” *Id.* The trial court took a narrow reading of the trust, concluding that “there was no ‘need’ for the Trust to be invaded.” *Id.* But the Supreme Court of Montana held that the trial court over-emphasized the trust’s necessity component while neglecting its demand for liberal discretion:

What the District Court did was to set the word “need” above the intent of the Trust. That one word cannot be construed in such a way as to negate or even diminish the sole purpose of the Trust which was to provide Mr. Lindgren’s beloved wife with monetary support for both necessities and luxuries during her life and for funeral and burial expenses upon death. *We will not interpret the liberal Trust language by way of a limited reading of the word “necessary,”* referred to by the court as “need.” The Trust does not itself contain any limiting language. While the Trust states that the Trustee has sound discretion it also directs the Trustee to exercise that discretion “liberally” in favor of Mrs. Lindgren. There is nothing in the record to indicate that the Trustee adopted this liberal attitude toward the care of the Beneficiary.

*Id.* at 1282–83 (emphasis added). It therefore rejected the trustee’s claim that the wife “must expend or dispose of her personal estate before the Trust can be invaded. The Trust does not provide for the expenditure of Beneficiary’s estate before any payments are to be made from the Trust.” *Id.* at 1283.

So too here. Like the trial court in *Lindgren*, the District Court put a tenuous reading of Section 5.1’s “necessary” and “proper” clauses over the terms of the Trust and Nevada law’s call for broad discretion.

**3. Senator Raggio prioritized Dale’s support over preservation of principal for Plaintiffs.**

As explained above, the District Court’s decision is contrary to both Section 5.1’s terms and the broad discretion afforded to the trustee. The decision must be reversed for those reasons alone. But the same result is also required when the Trust’s general purpose is considered.

In the absence of direct instructions concerning a beneficiary’s other resources, courts often look to the settlor’s dominant purpose in the trust: “If the trustee first takes account of the beneficiary’s own assets before providing support, the trust’s remaindermen are benefited. If, instead, the trust assets are first used to support the beneficiary, the beneficiary’s heirs or her will beneficiaries benefit.” *Discretionary Trusts*, THE LAW OF TRUSTS AND TRUSTEES §228 (2018). In other words, if the settlor’s dominant purpose was to benefit the lifetime beneficiary, there is a presumption that the discretionary support trust is a gift so that the trustee

should not consider the beneficiary's other resources. *See Renner*, 91 A.2d at 179 (holding that a discretionary support trust as “an absolute gift of maintenance and care to the widow” in part because the “dominant intention of the testator was to have the best care provided for his wife”); *In re Worman's Estate*, 4 N.W.2d at 374–75 (holding that the “dominant purpose evidenced by the testator in this case was the securing of the comfort and support of his widow” and thus the trustee “need not consider her individual property”); *In re G.B. Van Dusen Marital Trust*, 834 N.W.2d 514, 522 (Ct. App. Minn. 2013) (holding that a trustee abused its discretion in denying the beneficiary, who received income from five different trusts, disbursements because the grantor's “dominant intention” was to benefit his wife). On the other hand, if the dominant purpose is to preserve principal for the remaindermen, consideration of the beneficiary's other resources may be mandatory.

There is little question that the Trust's dominant purpose is to benefit Dale. While Section 5.3 provides that the remainder of the principal in the Marital Trust goes to the W&D Trust upon Dale's death, it does not even identify either of Plaintiffs as beneficiaries of that outside trust. Rather, virtually every other feature of the Trust indicates that its dominant purpose is to benefit Dale and, to a lesser extent, her grandchildren over Plaintiffs:

- Dale is the lifetime beneficiary of both the Marital Trust and the Credit Shelter Trust.
- Dale is the trustee of both trusts.
- Dale automatically receives all income from the Marital Trust.
- There are no provisions directing the trustee to endeavor to preserve principal on behalf of the remaindermen.
- There are no provisions requiring any kind of proportional spending from the Marital and Credit Shelter Trusts.

Indeed, if there were any question as to the focus of the Trust, that instrument specifically mentions Dale 43 times and Dale's grandchildren 18 times. Plaintiffs, however, are only mentioned twice.

Additionally, Senator Raggio did not manifest any intent for proportionality between the Marital and Credit Shelter Trusts. When he created the Trust, the Marital Trust was not even guaranteed to be funded at all. If Senator Raggio died in 2010 when there was no federal estate tax, for instance, there would have been no funding for the Marital Trust and thus no remainder Plaintiffs.<sup>3</sup> Yet, in that event, Dale could still look to the Credit Shelter Trust for her support needs. Senator Raggio's election to mandatorily distribute all Marital Trust income (but not Credit Shelter Trust income) to Dale also shows that he did not intend the two trusts to be equivalent. Nor were the two sub-trusts funded with equal amounts.

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<sup>3</sup> When Senator Raggio died, Plaintiffs immediately received a substantial amount from the W&D Trust. So their inheritance is not dependent on the Marital Trust alone.

Thus, Senator Raggio's dominant purpose in creating the Trust also indicates that the Marital Trust's discretionary support trust was a gift to Dale and not conditional on her financial need.

**4. Dale's fiduciary duties do not impose specific obligations on the administration of the Trust that otherwise supplant the Trust's terms and Nevada law.**

As shown above, the Trust's terms and Nevada statutory law do not require the Marital Trust trustee to consider Dale's other resources. Plaintiff fiduciary claims do not change this.

Plaintiffs claim that Dale breached her fiduciary duties of loyalty and impartiality as the Marital Trust trustee by favoring the Credit Shelter beneficiaries over the Marital Trust beneficiaries. I PA-0015 at ¶¶4–6. This argument suggests that when two trusts have the same beneficiary and are governed by the same trustee, that trustee's fiduciary duties obligate it to cross-reference the beneficiary's access to each trust and to proportion its distributions between the two trusts evenly. In other words, Plaintiffs argue that a trustee's fiduciary duties do implicitly what the Trust declined to do explicitly—a proportional spend-down requirement. But this argument fails for two reasons.

First, Plaintiffs cannot use fiduciary duties to create terms that are contrary to the trust's terms. To be sure, a trustee's discretion is never so broad as to completely evade judicial review. But a trustee's fiduciary duties govern *within* the

parameters set by a trust's terms and the statutory law; they do not generally supplant them. *See, e.g., Nemec v. Shrader*, 991 A.2d 1120, 1128–29 (Del. 2010) (holding that claims for breach of fiduciary duty cannot be raised when the relevant conduct is addressed within the terms of a contract); THIRD RESTATEMENT OF TRUSTS §76(1) (2003) (“The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law.”); *Id.* §86 cmt. b (“A trustee’s duties, like trustee powers, may be modified by the terms of the trust, but the duties of trusteeship are subject to certain minimum standards that are fundamental to the trust relationship and normally essential to it.”); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 659 (1995) (explaining that “the duty of loyalty is default law that yields to contrary terms of the trust deal”). Here, had Senator Raggio desired proportional spending under both trusts, one would expect him to have done so explicitly in the Trust. As the probate commissioner and District Court concluded, however, there is no proportional spend-down requirement. II PA-0248; II PA-0250; IV PA-0760. Instead, as explained above, that requirement is contrary to the broad discretionary power the Trust expressly gave to the trustee.

Nor do a trustee’s general fiduciary duties trump specific Nevada statutory law. Where Plaintiffs suggest that a trustee’s fiduciary duties may obligate it to consider a discretionary support-trust beneficiary’s other resources, NRS 163.4175

provides that a trustee does not abuse its discretion by declining to consider a beneficiary's other resources and the Trust's terms do not require "otherwise." And where Plaintiffs suggest that those fiduciary duties may also require even distributions among beneficiaries, NRS 163.419(3) states that a trustee may make unequal discretionary distributions "absent express language . . . to the contrary":

Absent express language in a trust to the contrary, if a discretionary interest permits unequal distributions between beneficiaries or to the exclusion of other beneficiaries, the trustee may distribute all of the undistributed income and principal to one beneficiary in the trustee's discretion.

If the fiduciary duties of loyalty and impartiality generally required even distributions between beneficiaries, NRS 163.419(3) would be rendered meaningless.

Second, Plaintiffs never cited any authority for the proposition that the fiduciary duties of loyalty and impartiality transcend different trusts with different sets of beneficiaries. Instead, these duties are construed within the scope of a single trust. For instance, if Plaintiffs were also beneficiaries of the Marital Trust's discretionary support trust, Dale could not withhold disbursements from Plaintiffs to preserve principal for her herself as a co-beneficiary. Of course, a settlor can explicitly require a trustee to consider the beneficiaries of a separate sub-trust in making disbursements. But, again, that is not the case here.

**C. Plaintiffs' interpretation results in an undefinable standard that is unenforceable either by the trustee or judiciary.**

Putting all else aside and assuming for the sake of argument that Dale is duty-bound to consider her funds in the Credit Shelter Trust before making disbursements under the Marital Trust, Plaintiffs fail to articulate a standard enforceable by either the trustee or the judiciary. Again, Plaintiffs concede that there is no proportional spend-down requirement between the two trusts. *See, e.g.*, IV PA-0731 (Righetti's counsel admitting that the probate commissioner decided that "the spend down need not be proportional."); IV PA-0733–34 ("We forthrightly admit that because net income is mandatory under the marital deduction trust . . . they cannot be proportional, they cannot be equal."). Indeed, the District Court reasoned that a proportional spend-down is impossible given that the Marital Trust automatically pays all income to Dale. IV PA-0760 ("A precisely proportional spenddown is not required and is not possible because the trustee's income right in the marital deduction trust will always allow some unequal depletion between the two trusts."). Yet Plaintiffs assert that Dale must somehow divide her maintenance costs between the two trusts. And this is the problem. If not equally, how is the trustee to portion those costs and how will the court know if the chosen apportionment is permissible? For example, assume that Dale has \$100,000 in annual support costs for which she draws \$90,000 from the Marital Trust and \$10,000 from the Credit Shelter Trust. In this example, has Dale wrongly drawn



too much from the Marital Trust at the expense of the Credit Shelter Trust? If so, exactly how much and by what ascertainable and legally objective standard? Plaintiffs do not identify any kind of proportionality standard that would guide either the trustee's discretion or the judiciary in overseeing that discretion. *Cf., e.g., Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (“[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for ‘abuse of discretion.’”).

## VI. CONCLUSION

The Court should reverse the District Court's order compelling Dale to respond to Plaintiffs' blanket discovery requests concerning the Credit Shelter Trust. As established above, that order was based on an incorrect interpretation of the Trust's terms and Nevada law.

Respectfully submitted this August 2, 2018.

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## VERIFICATION

I, DALE CHECKET RAGGIO, declare:

1. I am the Petitioner in the above-entitled case in my individual capacity and as Trustee of The Marital Deduction Portion and Credit Share of the William J. Raggio Family Trust.

2. I verify that I have read the foregoing **PETITION FOR WRIT OF PROHIBITION, OR ALTERNATIVELY, MANDAMUS**, and that the same is true to the best of my own knowledge, except for those matters therein stated on information and belief, and, as to those matters, I believe them to be true.

I declare under penalty of perjury of the laws of Nevada that the foregoing is true and correct.

EXECUTED on July 31, 2018, in Washoe County, Nevada.

  
DALE CHECKET RAGGIO

## **CERTIFICATE OF COMPLIANCE**

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 Word 2016, in Times New Roman 14-point font, double spaced.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 7904 words.

Finally, I hereby certify that I have read this 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 a reference to the 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 Nevada Rules of Appellate Procedure.

Respectfully submitted this August 2, 2018.

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## CERTIFICATE OF SERVICE

I, Martha Hauser, certify that on August 2, 2018, I electronically filed the foregoing **PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, MANDAMUS**, with the Clerk of the Nevada Supreme Court via the Court's e-Flex system. Service will be made by e-Flex on all registered participants. Non-eFlex participants will be served by U.S. mail, as noted.

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