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 portion of The William J. Raggio Family Trust,
Real Parties in Interest.

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Answer to 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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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.

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ROUTING STATEMENT

This case is not presumptively retained for the Supreme Court because it involves a pretrial challenge to a discovery order under NRAP 17(b)(14). However, the Supreme Court may elect to hear this matter as it raises "as a principal issue a question of statewide public importance." NRAP 17(a)(11).

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I. Introduction

The writ petition should fail on both procedural and substantive grounds. Procedurally, it raises a new argument never presented to the district court. It should be denied for that reason alone. It should also be denied because it seeks relief on a discovery order that is neither an order without regard to *relevance*, nor an order compelling disclosure of *privileged* material; thus, the order does not fit the narrow exceptions to the general bar against extraordinary relief on discovery orders.

Substantively, the petition misstates issues, misapplies a statute, misperceives the relevance of discovery, misrepresents authorities, and misreads the trust agreement. That agreement created two subtrusts with the same trustee, who is the life beneficiary of both, and the same discretionary distribution standard: what is "necessary" for her "proper" "support, care, and maintenance." Petitioner is the trustee and second wife of the settlor, and respondents his daughters from a first marriage. The remainder beneficiaries of one subtrust are respondents, whom he knew and loved, and of the other subtrust petitioner's grandchildren, whom he barely knew and who are not his blood relatives. Respondents sued petitioner, as trustee, for taking discretionary distributions from the

first subtrust but not the second (and despite her own vast assets), thus favoring her grandchildren (and herself) by intentionally depleting the subtrust from which respondents will inherit and preserving the one from which her grandchildren will inherit (and her own assets). Her distributions are also excessive based on her prior living standard.

Respondents sued petitioner for breach of trust under the trust agreement and breach of fiduciary duties she as trustee owes them as remainder beneficiaries under trust law, including duties of good faith (to be fair and honest), loyalty (not to place personal interests in conflict with those of beneficiaries), and impartiality (to balance interests of all life and remainder beneficiaries). They seek discovery as to three issues: (1) whether discretionary distributions from the subtrusts, under the same discretionary distribution standard, are *so disproportional* as to constitute abuse of discretion; (2) whether the trust agreement requires petitioner to consider her *own assets* before making such distributions; and (3) whether distributions from the subtrust from which they will inherit are *excessive* based on petitioner's prior living standard.

The petition does not raise the third issue but conflates the first and second. It argues that, in taking discretionary distributions from one

subtrust, petitioner is not required by NRS 163.4175 to consider the availability of either discretionary distributions from the other subtrust with the same discretionary distribution standard (first issue), or her own substantial assets, including $1.8 million she inherited outright from the settlor (second issue). But NRS 163.4175, by its own terms, does not apply to assets she holds in trust as a trustee (first issue), but only to assets she owns as a beneficiary (second issue). If the Court reaches the merits, it should deny writ relief on both issues. *First*, under the trust agreement and applicable trust law, a discrepancy in discretionary distributions from the related subtrusts with the same discretionary distribution standard is at least relevant and reasonably calculated to lead to the discovery of admissible evidence. It relates to whether petitioner was in fact fair, disinterested, and impartial in her distributions, given that, on information and belief, the remainder beneficiaries of the depleted subtrust are her non-blood relatives (estranged stepdaughters), and of the preserved subtrust her blood relatives (grandchildren). *Second*, although petitioner is not required under NRS 163.4175 to consider "a beneficiary's assets or resources" unless the trust agreement has "otherwise provided," the agreement has

so provided by specifying a standard for her "support, care, and maintenance," plus limitations of necessity for what is "necessary," and of propriety for what is "proper," for that purpose. Hence, petitioner's assets are also relevant and reasonably calculated to lead to the discovery of admissible evidence regarding whether her discretionary distributions were fair, disinterested, and impartial, given her depletion of one subtrust and preservation of her own assets. Accordingly, relief should be denied on multiple, independent grounds.

II. Issues presented

As the petition seeks relief on an order compelling discovery, the issues should be viewed through the lens of Nevada's liberal discovery standard: All non-privileged material is discoverable if it is "relevant" and "reasonably calculated to lead to the discovery of admissible evidence." NRCP 26(b)(1). The petition raises two distinct issues:

1. Are ***disproportional discretionary distributions*** from two different portions of the same trust—by the same trustee to herself as life beneficiary of both subtrusts—relevant and reasonably calculated to lead to the discovery of admissible evidence where: (i) the discretionary distribution standard for both subtrusts is exactly the same; (ii) the

trustee is accused of spending down one subtrust to the detriment of her non-blood relatives and preserving the other subtrust for the benefit of her blood relatives; and (iii) the trustee is being sued for, among other things, breach of trust and fiduciary duties, including the fiduciary duties of good faith, loyalty, and impartiality?

2. Are the beneficiary's ***own assets and resources***, separate and apart from those of the two subtrusts, relevant and reasonably calculated to lead to the discovery of admissible evidence where the trust instrument governing both subtrusts has the same discretionary distribution standard for each based on the necessity and propriety of distributions for support—namely, that the trustee shall distribute to herself, as life beneficiary, so much as she shall deem "necessary" for her "proper" "support, care, and maintenance"?

III. Factual and procedural history

Respondents Leslie Raggio Righetti ("Leslie") and Tracy Raggio Chew ("Tracy") are indefeasibly vested remainder beneficiaries of the William J. Raggio ("Bill") Family Trust (the "Trust"). Petitioner Dale Checket Raggio ("Dale") is both trustee and life beneficiary of different portions of the Trust: (i) a Marital Deduction portion, of which Leslie and

Tracy are remainder beneficiaries; and (ii) a Credit Shelter portion, of which Dale's grandchildren are remainder beneficiaries. Leslie and Tracy are Bill's biological and adopted daughters, respectively, from his first marriage of about 50 years. They are Reno residents and teachers, whom Bill knew well, visited often, and loved. Dale is Bill's second wife of about 9 years. Bill barely knew Dale's grandchildren, who live in Australia and are not his blood relatives. Due to uneven appreciation of assets after Bill's death, the Credit Shelter portion has almost double the value of the assets of the Marital Deduction portion; Bill also gifted Dale around $1.8 million in assets (i.e., cash of $315k+, retirement accounts of $640k+, and a home worth $739k) outright and free of trust, as set forth in a helpful diagram in the appendix. RA 0022. In the Trust Agreement, Bill provided near-identical distribution standards for the subtrusts, with the sole exception that income distributions from the Marital Deduction portion are mandatory (not discretionary), mostly (if not exclusively) so it may qualify for tax breaks under federal law:

> During the life of [Dale], the Trustee shall quarter-annually or at more frequent intervals, pay to or apply for the benefit of [Dale] all of the net income of the **[Marital Deduction] Trust**. 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].
> . . . .
> During the life of [Dale], the Trustee shall pay to or apply for the benefit of [Dale] as much of the net income and principal of the **Credit Shelter Trust** as the Trustee, in the Trustee's discretion, *shall* deem *necessary* for the *proper* support, care, and maintenance of [Dale].

I PA 0076–77 (emphases added).

Notably, the discretionary distribution standards—for principal from the Marital Deduction portion, and both principal and income from the Credit Shelter portion—are identical for both subtrusts. However, on information and belief, Dale's discretionary distributions from the subtrusts have been grossly disproportional. As stated in the first-year accounting, Dale made a discretionary distribution from the Marital Deduction portion of $200,000 and has continued to withdraw $20,000 a month from it. At that rate (assuming a 2% dividend stream like the S&P 500), she will deplete the Marital Deduction portion in about 10 years and within her life expectancy of 11 years. It is believed she has not made discretionary distributions from the Credit Shelter portion—though the discretionary distribution standard is the same, and despite receipt of $1.8 million from Bill (and any inheritance from her deceased parents, RA 0023–25). The net effect—if not intended result—of Dale's actions is

to disinherit Leslie and Tracy, and to increase the inheritance of her own family, under the guise of her authority as trustee, in breach of the Trust Agreement, and in violation of her fiduciary duties of good faith, loyalty, and impartiality, among others. For this reason, Leslie and Tracy sued Dale for breach of trust and fiduciary duties, I PA 0003–06 (Compl. ¶¶ 3 & 30), 0016 (Pet. ¶¶ 9–11), and seek discovery of Dale's discretionary distributions from the Credit Shelter portion, as well as of her own assets and resources, I PA 0061. Dale sought to dodge that discovery by a motion for partial summary judgment, which was denied by both the probate commissioner and probate judge. Leslie and Tracy's motion to compel the discovery was granted, and Dale filed this petition in a last-ditch attempt to skirt her discovery obligations.[1]

IV. The petition should be denied without reaching the merits.

The Court need not reach the merits of the petition and may deny it on two independent procedural grounds.

First, the petition raises a new argument never presented to the district court. *Pn II, Inc v. Eighth Judicial Dist. Court*, No. 71051, 383

[1] The factual history is set forth, in more detail, in the opposition to the motion for partial summary judgment and is incorporated here by reference. II PA 0271–75.

P.3d 755, 2016 WL 5400225, at *1 (Nev. Sept. 16, 2016) (unpublished disposition).[2] In *Pn II*, this Court properly denied writ petitions that raised new arguments: "While the issues presented . . . are novel and of potential statewide significance, the arguments raised in the petitions were not, for the most part, raised or adequately vetted in the district court." *Id.* The reason is that writ relief—the purpose of which is "to correct clear error or an arbitrary or capricious abuse of discretion by the district court"—"requires adequate presentation of the issue to the district court for decision in the first instance." *Id.* A "contrary holding would lead to the inefficient use of judicial resources and allow parties to make an end run around" lower courts. *Id.* (internal quotation marks omitted). Thus, "a point not urged in the trial court . . . is deemed waived and will not be considered on appeal." *Id.* (same). Relatedly, "parties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." *Schuck v. Signature Flight Support*, 245 P.3d 542, 544 (Nev. 2010) (internal quotation marks and brackets omitted).

[2] Leslie and Tracy cite *Pn II*, as "an unpublished disposition" issued by this Court "after January 1, 2016," for "its persuasive value." NRAP 36(c)(3).

NRS 163.4175 provides that, in determining whether to make a distribution of trust assets, the trustee is not required to consider a beneficiary's assets or resources "[e]xcept as otherwise provided in the trust instrument." The petition frames the issue as whether the district court erred by concluding that the words "necessary" and "proper" in the Trust Agreement satisfied that exception where, allegedly: (i) most courts have rejected similar arguments; (ii) the trustee has broad discretion under the Trust Agreement; and (iii) the main purpose of the Trust is to benefit Dale. But that argument is conspicuously absent from the record below. Dale's motion for partial summary judgment does not even mention NRS 163.4175. I PA 0053–67. While Leslie and Tracy's opposition to that motion argues that the words "necessary" for "proper" "support, care, and maintenance" in the Trust Agreement satisfy the exception to NRS 163.4175, Dale's reply merely asserts that claim and issue preclusion prevent Leslie and Tracy from making that argument. II PA 0275, 0297–98. Nowhere does it argue, much less suggest, Dale's new theory that most courts have rejected a conditional reading of "necessary," or that broad discretion or favored beneficiary status is sufficient to override that reading. Then, in her later opposition to Leslie

and Tracy's motion to compel discovery, Dale simply ignores the argument that "necessary" for "proper" support meets the statutory exception. II PA 0414. The reply notes that Dale "fails to engage Leslie and Tracy's prior argument"; that her "silence is telling"; that she "would have this Court place no significance on the word 'necessary' (or 'proper')"; and that, "[a]bsent the sought-after discovery . . . , Leslie and Tracy will be unable to prove . . . whether Dale's distributions" were necessary for proper support. III PA 0637–38.

Although it would have been improper for Dale's counsel to raise a new theory at oral argument, they notably failed to do even that much. IV PA 0686–757. Indeed, it appears the theory set forth in the petition never even occurred to them until long after the motion to compel had been submitted to the district court for decision. They cannot point to anything in the record to the contrary because their new theory made its very first appearance in the petition filed with this Court. That is a patently improper attempt to make an end run around the district court, at the expense of this Court's limited time and scarce judicial resources. As in *Pn II*, and on the authorities cited there, the Court should decline

to exercise its discretion to grant extraordinary relief on a new argument and theory never presented to the district court.[3]

Second, the petition should be denied for the independent reason that it seeks relief on a discovery order that is neither an order without regard to relevance, nor an order compelling disclosure of "privileged," as opposed "private," information. Writ relief is "generally not available to review discovery orders," except where "the resulting prejudice would not only be irreparable, but [also] of a magnitude that could require the imposition of such drastic remedies as dismissal with prejudice or other similar sanctions" that may arise with respect to (i) "blanket discovery orders with no regard to relevance" and (ii) "discovery orders compelling

[3] Dale's own authority on the issuance of writs recognized that the failure to raise an argument, even before a commissioner, constitutes a waiver of the argument before both the district court and this Court. *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 252 P.3d 676 (Nev. 2011). There, a hospital argued that documents sought in discovery fell within a statutory privilege for the records of patient safety committees. But it "did not raise its privilege argument until the discovery commissioner's report and recommendation was before the district court for approval." *Id.* at 679. Still, this Court went on to consider the new argument—which it rejected anyway—only because the applicability of the privilege was so sensitive that, in the absence of writ relief, "the resulting prejudice would not only be irreparable, but of a magnitude that could require the imposition of such drastic remedies as dismissal with prejudice or other similar sanctions." *Id.* at 678–79.

disclosure of privileged information." *Valley Health System*, 252 P.3d at 678–79. Neither exception applies here, and certainly not absent the magnitude of the prejudice contemplated by *Valley Health*.

The order is not "blanket . . . with no regard to relevance." It specifically frames the question in terms of relevance and the applicable procedural rule: "Is the requested discovery relevant to the subject matter and reasonably calculated to lead to the discovery of admissible evidence?" IV PA 0776–77 (citing NRCP 26(b)(1)). Based on its order denying Dale's motion for partial summary judgment, the district court properly answered that question in the affirmative. Thus, the discovery order at issue considers relevance and is not carte blanche.

Nor does it compel disclosure of "privileged" materials. Dale does not even attempt to argue otherwise. Instead, she conflates "privileged" with "private" and, by implication, invites the Court to expand the extremely narrow exception for *privileged* materials to *private* materials too—because, once discovery is had, "'the bell cannot be unrung,' not even on direct appeal." Pet. 14 (citing *Columbia/HCA*, 936 P.2d at 847). But her cited authority applies to privileged information, not information that is merely private without any basis for a privilege. The magnitude

of the prejudice is significantly more attenuated for the improper discovery of private rather than privileged material, which is why the exception is limited to privileged material in the first place. Thus, the Court should deny the petition without reaching the merits.

V. On the merits, writ relief should be denied on both issues.

If the Court reaches the merits, it should still deny the petition on substantive grounds. The substantive grounds that apply to each issue presented—(A) the discoverability of disproportional discretionary distributions under the same discretionary distribution standard, and (B) the discoverability of Dale's own, independent assets and resources in regard to what is "necessary" for her "proper" "support, care, and maintenance"—are related but distinct, as set forth below.

A. Writ relief is improper on the first issue because disproportional discretionary distributions from two subtrusts under the same discretionary distribution standard are discoverable under NRCP 26(b)(1).

The first issue is whether discretionary distributions from the Marital Deduction and Credit Shelter portions, subject to an identical discretionary distribution standard, are so disproportional that they constitute a breach of trust and fiduciary duties of good faith, loyalty, and impartiality. NRS 163.4175 does not apply; and, in any event, a

discrepancy in discretionary distributions is relevant and reasonably calculated to lead to the discovery of admissible evidence.

1. NRS 163.4175 does not apply where, as here, the consideration is of interrelated assets in trust, rather than independent assets of a beneficiary.

The statute does not apply to assets Dale holds in trust as trustee. It provides that a trustee may make a distribution without considering "a *beneficiary's* assets or resources." NRS 163.4175 (emphasis added). It does not mention the assets of someone other than a beneficiary, such as the assets of the two interrelated subtrusts here. Until Dale, as trustee, makes a distribution of assets from the Credit Shelter portion, those assets remain in trust and do not belong to her as a beneficiary. They are her assets as trustee, not as beneficiary. Thus, the statute is simply silent as to the situation in this first issue of disproportional discretionary distributions between portions of the same trust under the same discretionary distribution standard.

The petition is unable to cite even a single on-point authority to the contrary. Cases cited by the petition address the question whether a trustee must consider independent sources of support unrelated to the trust at issue. None squarely addresses the first issue here: whether a

trustee must consider the availability of distributions from a related subtrust, created by the same settlor under the same trust agreement as part of a coordinated estate plan, subject to the same discretionary distribution standard for both subtrusts. The authority that comes closest to addressing that question is the Third Restatement of Trusts, which was cited by Leslie and Tracy in the record below. RA 00014–15 (quoting Restatement (Third) of Trusts § 50, cmt. e (2003)). That authority strongly suggests that the trustee must consider distributions from other, related subtrusts in deciding whether, in what amounts, and from which subtrusts discretionary distributions are to be made. At a minimum, disproportional discretionary distributions from related subtrusts under the same discretionary distribution standard should be relevant to breach-of-fiduciary-duty claims for purposes of discovery.

2. Disproportional discretionary distributions are, in any event, relevant and reasonably calculated to lead to the discovery of admissible evidence.

The discovery of disproportional discretionary distributions from different portions of the Trust under the same discretionary distribution standard relates, notwithstanding NRS 163.4175, to whether Dale was fair, disinterested, and impartial. On information and belief, she has

depleted the Marital Deduction portion from which Leslie and Tracy will inherit but has preserved the Credit Shelter portion from which her own grandchildren will inherit. If so, the net effect of her actions will be to disinherit Leslie and Tracy, and to enhance the inheritance of her own family. Discovery is proper on this central allegation.

Leslie and Tracy have a right to discover non-privileged matter "relevant to the subject matter," including their claims, as long as it "appears reasonably calculated to lead to the discovery of admissible evidence." NRCP 26(b)(1).[4] Under this open, liberal standard, Nevada's discovery-related rules "grant broad powers to litigants promoting and expediting the trial of civil matters by allowing those litigants an[ ] adequate means of discovery during the period of trial preparation." *Maheu v. Eighth Judicial Dist. Court*, 493 P.2d 709, 719 (Nev. 1972).

A discrepancy between Dale's discretionary distributions from the Marital Deduction and Credit Shelter portions of the same Trust under the same discretionary distribution standard would bear, directly and

[4] That rule "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

heavily, on the underlying claims for breach of the Trust Agreement and fiduciary duties of good faith, loyalty, and impartiality. Dale, as trustee, owes Leslie and Tracy, as remainder beneficiaries, both "a duty generally to comply with the terms of the trust" and "a duty to comply with the mandates of trust law," except as "permissibly" modified. Restatement (Third) of Trusts § 76, cmt. b(1) (2007). Notably, "trust terms may not altogether dispense with the fundamental requirement that trustees not behave recklessly but act in ***good faith***, with some suitable degree of care, and in a manner consistent with the terms and purposes of the trust and the interests of the beneficiaries." *Id.* § 77, cmt. d (emphasis added). Here, nothing in the Trust Agreement does or can dispense with the duty of good faith, or eliminates the duties of loyalty and impartiality. Under the duty of ***loyalty***, Dale is "strictly prohibited" from "self-dealing" or having "a conflict between . . . fiduciary duties and personal interests." *Id.* § 78(2). She "violates the duty of loyalty to the beneficiaries by acting in bad faith or unfairly." *Id.*, cmt. c(2). Even "express authorization" in a trust document for self-dealing "would not completely dispense with [her] underlying fiduciary obligations to act in the interest of the beneficiaries." *Id.* That is, "there are limits to the settlor's freedom [of

contract], thereby protecting the fundamental fiduciary character of trust relationships." *Id.* Under the duty of ***impartiality***, she must act "in a manner that is impartial with respect to the various beneficiaries of the trust," including "with due regard for the diverse beneficial interests" under the Trust Agreement. *Id.* § 79(1)(a). Specifically, it requires her (1) "to avoid injecting [her] personal favoritism into [her] decisionmaking and conduct in trust administration," and (2) "to make diligent and good-faith efforts to identify, respect, and balance the various beneficial interests when carrying out [her] fiduciary responsibilities in managing, protecting, and distributing the trust estate." *Id.*, cmt. c. The duty is "particularly important in determining principal-and-income rights" where, as here, she is granted "discretionary authority" as trustee. *Id.*

Indeed, "a power to invade principal conferred upon a trustee is not unrestricted," even if, unlike here, "the power is not conditioned by any statement in the [trust] document." *Woodberry v. Bunker*, 268 N.E.2d 841, 843 (Mass. 1971); *accord NCNB Nat. Bank v. Shanaberger*, 616 So. 2d 96, 98 (Fla. Dist. Ct. App. 1993) ("Even an unlimited power of invasion is subject to implied limitations to protect the remaindermen."). Hence, "in all cases," that power must be exercised with "prudence" and

"reasonableness," beyond just "good faith." *Id.* More to the point, "in exercising discretion granted by the terms of the trust instrument, [Dale] is under a duty to do so in good faith so as to protect the interests of all the beneficiaries of the trust." *In re Wills' Tr. Estate*, 448 P.2d 435, 439 (Ariz. Ct. App. 1968).

The petition asks the Court to view the Marital Deduction portion in isolation, as if discretionary distributions available from the Credit Shelter portion are completely independent and unrelated. The simple fact is that the Credit Shelter portion is closely related to the Marital Deduction portion as part of a coordinated estate plan. The subtrusts arose from the Trust Agreement with the same language—verbatim—for the discretionary distribution standard. So, for denial of the petition on the first issue, it is enough that discretionary distributions from the Credit Shelter portion, compared to those from the Marital Deduction portion under the same discretionary distribution standard, are relevant to Leslie and Tracy's claims for breach of fiduciary duties. That is, a discrepancy—especially where discretionary distributions are grossly disproportional, lopsided, and unequal—may well tend to prove a fact of consequence: whether those distributions are so transparently unfair,

unreasonable, or imbalanced as to create a breach of fiduciary duties of good faith, loyalty, and impartiality Dale owes to Leslie and Tracy. Suppose, for example, that Dale's discretionary distributions to herself are $20,000 a month from the Marital Deduction portion and are $0 a month from the Credit Shelter portion under the same standard for discretionary distributions. Would that not be at least circumstantial evidence of Dale's breach of her fiduciary duties? Indeed, it would be strong circumstantial evidence that Dale acted in bad faith, disloyally toward Leslie and Tracy, and partially toward her grandchildren and herself. That is exactly what Dale is suspected of doing. No professional or independent trustee would ever do that. Condoning her behavior, and shielding her from discovery that may well expose her bad faith, would set a bad precedent. Discovery is therefore warranted on the first issue.

B. Writ relief is improper on the second issue because Dale's own assets are relevant to what is "necessary" for her "proper" "support, care, and maintenance."

The second issue is whether the Trust Agreement requires Dale, as trustee, to consider her own assets and resources before making discretionary distributions from the Marital Deduction portion.

1. NRS 163.4175 does not apply where, per the Trust Agreement, Dale must consider her own assets to decide what is necessary for proper support.

The statute says that a trustee need not consider a beneficiary's assets except as "otherwise provided" in the trust instrument. Here, on a proper reading of the Trust Agreement in light of the modern trend, and arguably the current majority rule, along with the grant of ordinary discretion and express contemplation of a remainder interest for Leslie and Tracy, the Trust Agreement has "otherwise provided" that Dale, as trustee, must consider her own, independent assets. The statutory exception therefore has been satisfied for the second issue.

2. The Trust Agreement should be read to mean what it says: discretionary distributions must be necessary for proper support.

The Trust, including the Marital Deduction and Credit Shelter portions, is a "discretionary support trust"—a "discretionary trust" that imposes a "support standard"—with additional limitations for necessity and propriety. Helen S. Shapo et al., *The Law of Trusts and Trustees* § 228 (June 2018 Update). The standard for interpretation of the Trust Agreement is "the intention of the testator, determined by the meaning of the words used." *Dahlgren v. First Nat. Bank of Nevada*, 580 P.2d 478,

479 (Nev. 1978) (citations omitted). The inquiry is "not what the testator actually intended or what he meant to write," but is "confined to a determination of the meaning of the words used" by the testator. *Zirovcic v. Kordic*, 101 Nev. 740, 741, 709 P.2d 1022, 1023 (1985) (internal quotation marks omitted). If the words of the Trust Agreement are not ambiguous, they determine its meaning without regard to extrinsic evidence. *Frei ex rel. Litem v. Goodsell*, 305 P.3d 70, 74 (Nev. 2013). If, however, they are ambiguous, "resort to extrinsic evidence is required to ascertain the intention of the parties." *Margrave v. Dermody Properties, Inc.*, 878 P.2d 291, 293 (Nev. 1994). Words are ambiguous if they are "reasonably susceptible to more than one interpretation." *Id.*

i. The Trust Agreement is unambiguous that, for the Marital Deduction portion, invasion of principal has a standard and limitations.

For any discretionary distributions of principal from the Marital Deduction portion (or of income and principal from the Credit Shelter portion), the Trust Agreement provides: "as much . . . as the Trustee, in [her] discretion, shall deem necessary for proper support, care, and maintenance." That unambiguously subjects discretionary distributions to a standard and two other limitations. The standard is one of ***support***:

distributions must be for her "support, care, and maintenance." The petition's suggestion that this standard is "undefinable," based on an inapposite administrative-law case, is false. Pet. 32. The standard is ascertainable, objective, and judicially enforceable. *See Woodberry v. Bunker*, 268 N.E.2d 841, 843 (Mass. 1971) (holding a similar standard—"such part . . . as in the opinion of my Trustees shall be needed for . . . support"—was judicially enforceable); Restatement (Third) of Trusts § 50, cmt. e (describing a "support standard" as an "objective standard"). The first limitation on the standard is that of ***necessity***: distributions must be "necessary" for Dale's support, care, and maintenance. Necessary means "needed for some purpose"—here, support. NECESSARY, *Black's Law Dictionary* (10th ed. 2014). It is also means "essential." *Id.* That is a definite limitation. The second limitation is that of ***propriety***: distributions must be for Dale's "proper" support. Proper means, in the relevant word sense, "[a]ppropriate, suitable, right, fit, or correct." PROPER, *Black's Law Dictionary* (10th ed. 2014). That is also a definite limitation, on top of that of necessity.

The petition would have this Court read the above—the support standard ("support, care, and maintenance"), as well as the limitations of

necessity ("necessary") and propriety ("proper")—out of the Trust Agreement. The Court should refuse to do so. Bill could have said in the Trust Agreement that Dale, as trustee, may make distributions in her discretion—without any support standard. He also could have said that she may make distributions for her "support, care, and maintenance"—without any limitations of necessity and propriety. Instead, he chose to use words that reflect not only a support standard, but also limitations for necessity and propriety. A fair reading of those words, as limiting whether and in what amounts discretionary distributions may be made, is not ambiguous. Indeed, the distinction between whether, on the one hand, and in what amounts, on the other, distributions may be made is illusory. Because the amount of a distribution could be zero—as where the distribution is not "necessary" (in light of other assets) or "proper" (in that it provides comfort or luxury beyond support)—the limit on the distribution amount is effectively the same as the limit on whether a distribution may be made in the first place. This point is lost on the petition (and on many of its cited authorities), which would read words of limitation out of the Trust Agreement.

The Trust Agreement is not ambiguous, as the petition's proposed reading of it—to impose nothing more than a limitation on the amount of distributions from an absolute gift of support[5]—is not reasonable. It is unreasonable to read a standard of what is "necessary" for "proper" support to mean even what is "unnecessary" for "any" support, with no regard for Dale's own assets. That reads the Agreement to mean the exact opposite of what it says. The discretionary distribution standard therefore is not ambiguous because the only reasonable reading is that it requires Dale to consider her own assets to determine whether and in what amounts distributions are "necessary" for her "proper" support.

ii. If ambiguous, the Trust Agreement should be read under the circumstances to impose a support standard with limitations.

Even if the standard were somehow ambiguous—in that it could be reasonably read to mean that Dale is either required or not required to consider her assets before making distributions—extrinsic evidence

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[5] *See, e.g., In re Martin's Will*, 199 N.E. 491, 494 (N.Y. 1936) ("[D]oes [it] constitute an absolute gift of support and maintenance which it makes a charge upon the income from the estate and upon principal? If so, then the private income of the beneficiary cannot be considered. If, however, the gift is of income coupled with a provision that the principal may be invaded in case of need, the private income of the beneficiary must be considered in determining whether such need exists.").

reveals that Bill intended her to consider her assets because, just as he intended a remainder for her grandchildren from the Credit Shelter portion, he intended one for his daughters from the Marital Deduction portion. The circumstances of his execution of the Trust Agreement, and its language and structure, support reading it to mean what it says: Dale must consider her assets because distributions must be necessary for her proper support. She cannot know what is necessary for her proper support without considering what she already has in her own right. Indeed, "a trustee can abuse its discretion in circumstances where it should reasonably consider the nature and extent of the beneficiary's financial resources" before making distributions. *Austin v. U.S. Bank of Washington*, 869 P.2d 404, 410 (Wash. Ct. App. 1994).

Treatises have long recognized that at least six circumstances are relevant to whether a trustee, like Dale, has abused her discretion. The circumstances (as applicable to a proper reading of the Trust Agreement here) are: (i) "the *extent of the discretion* intended to be conferred upon the trustee by the terms of the trust" (Dale has ordinary, not maximum, discretion); (ii) "the *purposes of the trust*" (to provide support for Dale and a remainder for Bill's daughters and Dale's grandchildren, not to enhance

Dale's inheritance or her grandchildren's to Leslie and Tracy's detriment); (iii) "the *nature of the power*" (specifically limited to cases of necessity and propriety); (iv) "the existence or non-existence, the definiteness or indefiniteness, of an *external standard* by which the reasonableness of the trustee's conduct can be judged" (necessary for proper support); (v) "the *motives of the trustee* in exercising or refraining from exercising the power" (on information and belief, to enhance Dale's inheritance and her grandchildren's to Leslie and Tracy's detriment); and (vi) "the existence or non-existence of *an interest in the trustee conflicting with that of the beneficiaries*" (to benefit Dale and her grandchildren at the expense of Bill's daughters). Restatement (First) of Trusts § 187, cmt. d (1935) (emphases added); *accord* Restatement (Second) of Trusts § 187, cmt. d (1959).

The Third Restatement also recognizes that "[s]pecific language, facts, and circumstances" should be considered. Restatement (Third) of Trusts § 50, cmt. g. Cases look to "particular language used in the grant of discretion," including: (i) "whether 'may' or 'shall' was used" (Bill said "shall"); (ii) "whether discretion was about amounts 'necessary' rather than 'appropriate' to a beneficiary's support" (he said "necessary" for

"proper" support); and (iii) "whether remainder beneficiaries were to take 'the principal' or 'whatever principal remains'" (he contemplated "remaining principal" for Leslie and Tracy). *Id.*; I PA 0075–76. The petition's proposed reading would thwart Bill's intent to leave an inheritance for his daughters (whom he knew well and loved) because it would give Dale license to disinherit them by making distributions only from the Marital Deduction portion, while amassing a huge inheritance for herself (well beyond what Bill could have imagined and what is necessary for her proper support) and for her grandchildren (whom Bill barely knew and who are not his blood relatives). Depletion of all the principal of the Marital Deduction portion, despite Dale's own assets, is simply incongruent with Bill's testamentary intent. *See, e.g., Brennan v. Russell*, 52 A.2d 308, 309 (Conn. 1947) ("[I]f he is entitled to receive his entire support from the fund a depletion of principal might very likely result, to the loss of those entitled to receive the property at his death."); *see also Renner v. Castellano*, 91 A.2d 176, 177 (N.J. Super. Ct. Ch. Div. 1952) (construing will that contemplated total depletion with the phrase "*if* there be any remainder" (emphasis added)).

Cases also look to "the relationships between the settlor and one or more of the beneficiaries," including (i) "family relationships" and (ii) "the settlor's personal feelings about a beneficiary." Restatement (Third) of Trusts § 50, cmt. g. Those are fact-bound inquiries that favor Leslie and Tracy's reading of the Trust Agreement. Bill was married to Dale, the life beneficiary, for only 9 years; by contrast, he was married to his first wife for 50 years. Leslie and Tracy, remainder beneficiaries of the Marital Deduction portion, are Bill's biological and adopted daughters, respectively, whom he knew, visited, and loved. Bill barely knew and is not biologically related to Dale's grandchildren (who live in Australia), the remainder beneficiaries of the Credit Shelter portion.

Cases further look to: (i) "whether the trustee is also a beneficiary of the power" (Dale is both trustee and life beneficiary); (ii) "whether the discretion is applicable to income as well as principal" (Dale's discretion applies to principal but not to income of the Marital Deduction portion, and to income and principal of the Credit Shelter portion); (iii) "whether the settlor made other provision for the discretionary beneficiary" (Bill gifted Dale $1.8 million); (iv) "whether the settlor was aware of the beneficiary's other resources or of other circumstances" (he was not

aware the Credit Shelter portion would be almost twice the size of the Marital Deduction portion when funded after his death); (v) "whether a spendthrift restraint was imposed on the beneficiary's interest" (he imposed that restraint); and (vi) "whether a given interpretation might incidentally benefit someone other than the designated beneficiary" (Dale's self-serving reading of the discretionary distribution standard would benefit her blood relatives to Leslie and Tracy's detriment). *Id.* Where, as here, Dale has "a permissible, settlor-created conflict of interest," her acts as trustee will be even more "carefully scrutinized" for abuse of discretion than the acts of a neutral trustee. *Compare id.*, illus. 1 (widower as trustee), *with id.*, illus. 2 (financial advisor as trustee). Still, even a professional trustee would not likely ignore Dale's assets when making discretionary distributions that are necessary for her proper support. Bill knew how to leave Dale a gift outright and free of trust, as he did with $1.8 million. That he did not do so for the assets of the Marital Deduction portion is strong circumstantial evidence that he did not intend an absolute gift of them; rather, he intended a gift conditioned by necessity and propriety.

iii. The modern trend, even the majority rule, is to read similar language to require a consideration of the beneficiary's assets.

Contrary to the petition's assertion, reading the word "necessary" in the discretionary distribution standard to require consideration of Dale's assets may even be the ***majority rule*** (*see infra* pages 25–27). *See* Restatement (Third) of Trusts § 50, notes on cmt. e (citing "more recent cases generally supporting th[is] position"). At a minimum, it appears to be the ***modern trend***. *See id.* ("It also appears that the trend of actual results in the more recent cases suggests that this change of view is desirable."). The Second and Third Restatements differ on the default presumption whether, in making discretionary distributions, a trustee must consider a beneficiary's own assets. The former provides that the trustee is not required to consider them. Restatement (Second) of Trusts § 128, cmt. e. By contrast, the latter provides: "[T]he presumption is 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 . . . ." Restatement (Third) of Trusts § 50, cmt. e.

Not surprisingly, confusion exists in the caselaw as to the default presumption. *See id.* (noting that "cases, frequently even within a given

jurisdiction, are in conflict"). But Nevada has resolved some confusion by statute: "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 . . . ." NRS 163.4175. So, at bottom, the question is whether the Trust Agreement has "otherwise provided." The Court need not wade through the morass of conflicting authorities. Counting cases for and against a particular interpretation of the Trust Agreement may not be productive because cases are not equally analogous or well reasoned, and because nuances recommend a case-by-case analysis. *See* Restatement (Third) of Trusts § 50, cmt. e(5).

The petition says most courts read testamentary documents like the Trust Agreement to be an absolute gift, unconditioned by need. But its out-of-state authorities are ***distinguishable and unreasoned***. The court in *Lanagan* held, in conclusory fashion, that the settlor's intent was for his widow to receive "full support" as "an absolute gift." 182 S.W.3d at 602. It relied on a prior case that was itself unreasoned and deferred to the Second Restatement, without explanation. *Id.* (citing *Winkel*). Plus, whereas the Trust Agreement said that Dale "shall" pay according to the standard, the trust agreement in *Lanagan* said only that trustees

"may" pay. *Id.* at 598. *Godfrey* is not only unreasoned but also nonsensical. It held the trustee may pay income to a settlor's widow irrespective of her income because the trust agreement was "limited only by what is necessary," so it "cannot be used to provide nonessential items." 811 P.2d at 1253. But that begs the question. How, it is fair to ask, may a trustee decide what is "nonessential" without a view of the widow's assets? Also, unlike the Agreement here, the agreement there said "primarily" benefiting a widow was its "main" purpose. *Id.* at 1251.

Other relevant cases cited in the petition are also distinguishable. In *Renner*, "the dominant intention of the testator was to have the best care provided for his wife, whom he felt would be helpless upon his death." 91 A.2d at 179. Focus was on the actual text and circumstances:

> The widow was a very sick woman at the time the will was executed [by the testator]. . . . [I]n the second paragraph he described her mental and physical condition . . . . In the third paragraph . . . he instructed his executor and trustee that she should have the best of private care. . . . *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 179–80 (emphasis added).[6]

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[6] *See also Wells*, 663 S.W.2d at 176 (concluding that a will, which was executed in 1997, and used a phrase "necessary for support," which had a legal construction in Arkansas since 1949 to mean "support the

Although Bill could have further specified that Dale has discretion to make distributions "taking into consideration her other assets," this cuts both ways. It is equally true that, instead, Bill could have specified that Dale may exercise discretion to make distributions "liberally" or "with no obligation to consider her other assets," or that she is "not required to consider her other assets" when making distributions.[7]

Notably, the authorities that favor Leslie and Tracy's reading of the Trust Agreement are ***more on point and better reasoned***. For a will

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beneficiary regardless of the beneficiary's own assets," should be given that prior legal construction); *Worman's*, 4 N.W.2d at 373–74 (construing a will that provided for discretionary distributions only as "might" be necessary for comfort, not as "shall" be necessary for proper support); *Delaware Trust Company*, 95 A.2d at 45–47 (construing a will with distributions for the "proper" comfort of the testator's sister, when he knew that her "only asset" was a house and furnishings, making it unreasonable "to infer that he intended that this property should be sold and the money used for her support before the provisions of his will for her benefit should commence to operate").

[7] *See, e.g., Lindgren*, 885 P.2d at 1281–83 (refusing to construe a "liberal" grant of discretion by way of a limited reading of the word "necessary" in a will that said discretion to make distributions should be exercised "liberally"); *Van Dusen*, 834 N.W.2d at 521 (emphasizing that the trust agreement at issue provides that the trustee should "'use principal liberally'" in favor of a widow and "'shall have no obligation to consider other assets or income' in determining whether to distribute principal"); *Howard*, 156 P.3d at 90–91 (construing a trust agreement that provided the trustee "'is not required[ ] to consider any other income, support, or property available to the beneficiary,'" and the beneficiary's support "'shall be preferred over the rights of the remaindermen'").

that is almost verbatim with the distribution standard of the Trust Agreement, a New Jersey court held: "[W]here the life tenant is given the income of the trust, with a further provision authorizing the trustee to invade [principal] if necessary for the life tenant's support, the separate income of the life tenant must be considered in determining whether it is necessary to invade [principal]." *Sibson v. First Nat. Bank & Tr. Co. of Paulsboro*, 165 A.2d 800, 803 (N.J. Super. Ct. App. Div. 1960). In *Sibson*, the will created a trust where the trustee was:

> "To pay in quarter-annual installments the net income . . . to my said wife for as long as she shall live, . . . and further to pay to my said wife, freed and discharged from all trusts and uses, *as much* of the principal as my Trustee in its sole discretion *shall determine necessary* for her support, health and maintenance."

Id. at 801 (quoting will; emphases added).

Sibson is instructive, given the near-exact language and Bill's gift to Dale of $1.8 million in cash, retirement accounts, and a home:

> Normal understanding of the language used by decedent would indicate that [his wife's] separate income was to be considered. *How else would the trustee determine what was necessary for her support?* [Also], the greater part of [her] separate income comes from sources provided or arranged for by decedent during his lifetime. The provisions in the will are *all part of the same pattern* and must be interpreted in the light of these surrounding facts and circumstances. . . . *The [alternative] construction . . . could result in [the wife's]*

> *amassing a large estate for her own testamentary purposes, more or less at the expense of decedent's estate and the remaindermen named in decedent's will.* Clearly, this is contrary to the testamentary plan expressed by decedent.

Id. at 803 (emphases added).

Similarly, the reading urged by the petition would allow Dale to amass—rather transparently—a large estate of her own at the expense of Bill's daughters' interest in the remainder of the Marital Deduction portion. She could achieve that result despite the $1.8 million Bill gifted her. Such a reading does not comport with, and greatly undermines, Bill's coordinated estate planning in the Trust Agreement.

Massachusetts's highest court has also recognized that, "where such terms as 'when in need' or 'if necessary' are used, other resources of the life beneficiary are to be considered." *Woodberry v. Bunker*, 268 N.E.2d 841, 844 (Mass. 1971). In *Woodberry*, a will provided for payment to each life beneficiary of "'*such part or parts* of the principal held in trust for him or her as in the opinion of my Trustees *shall be needed* for his or her comfortable support, medical or nursing care, or other purposes which seem wise to my Trustees.'" *Id.* at 842 (quoting will; emphases added). The language is strikingly similar to that of the Trust

Agreement for the Marital Deduction portion, and the *Woodberry* court held the clause, "and others like it," should be read as follows:

> The beneficiary is to be maintained in accordance with the standard of living which was normal for [her] before [she] became a beneficiary of the trust. Principal is to be paid over, after depletion of trust income and *with reasonable consideration of the beneficiary's other resources*, for *necessary* expenses of the life beneficiary . . . .

Id. at 844 (emphases added).[8]

Connecticut has adopted a similar interpretive rule. *Stempel v. Middletown Tr. Co.*, 15 A.2d 305 (Conn. 1940). The will in *Stempel* gave estate residue to trustees to hold in trust with the following instruction:

> "*So much* of both of the income and principal of such trust fund as is *necessary* in the discretion of said [trustees] to provide for the comfortable support of my daughter, Mary B.

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[8] *See also Lumbert v. Fisher*, 139 N.E. 446, 448 (Mass. 1923) (reading clause of will—providing "that, if *necessary* for her comfort, maintenance and support, my said wife *shall* have, use and expend *any portion or all* of my said real estate"—to mean "the fact that she has property of her own is to be taken into consideration in determining whether she is entitled to an allowance out of the principal for her support" (emphases added)); *Boston Safe Deposit & Tr. Co. v. Boynton*, 443 N.E.2d 1344, 1345–47 (Mass. App. Ct. 1983) (interpreting provision of trust agreement—that "the trustee in its sole discretion may from time to time use *such part* of the principal as it *deems necessary*" for beneficiary's support—to mean that "the trustee is required, under the terms of the trust, to consider [beneficiary's] other resources . . . in determining whether and to what extent she is entitled to receive payments from the principal of the trust." (emphases added)).

> Donovan during the term of her natural life *shall* be expended or paid over by said trustees for said purpose . . . ."

Id. at 306 (quoting will; emphases added).

The above language is similar to that of the Trust Agreement for the Credit Shelter portion, and the court's rationale is again persuasive:

> The provision is that the trustees shall expend for Mary 'so much . . . as is necessary . . . to provide for [her] comfortable support.' The intent so expressed limits the payments to those *required* for such support by reason of her own inability to provide it. In so far as she receives from some other source personal estate which enables her to make such provision, the *necessity* essential to taking . . . disappears.

Id. at 311 (quoting will; emphases added).

Many courts elsewhere have arrived at a similar interpretation based on similar language in the testamentary document at issue.[9]

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[9] *See, e.g., Matter of Estate of Winston*, 205 A.D.2d 922, 922–25 (N.Y. App. Div. 1994) (concluding that an instruction for trustees to pay "so much of the principal of this trust (even to the extent of all) as my trustees in their sole judgment deem appropriate for his support and welfare" was a "condition" that "required that the trustees consider [beneficiary's] need before invading principal during the intervals between periodic distributions"); *Austin v. U.S. Bank of Washington*, 869 P.2d 404, 410–12 & n.8 (Wash. Ct. App. 1994) (stating that, in determining a beneficiary's "need" or "emergency" where a will provided that a trustee should pay [her] $100 a month and "such additional sums therefrom as may be required for any emergency or need, in the sole discretion of my trustee," the trustee "has a duty to consider undisclosed assets . . . which are producing income," and collecting in a footnote cases from Arizona, Florida, and New Hampshire where, based on the language of the

iv. Dale reads her ordinary discretion, subject to limitations in the Trust Agreement, out of context and too broadly.

The petition selectively quotes the Trust Agreement to argue that Dale, as trustee, has "the greatest latitude and discretion." But it reads her grant of discretion out of context. The Agreement says that she has the greatest latitude and discretion "subject to any limitation specified elsewhere in this Trust Agreement," as set forth in a prefatory clause, and only where prior discretions are inconsistent with the discretions "hereinafter set forth." I PA 0079. That is not an invitation to exercise her discretion to make distributions liberally. In fact, it is an instruction to exercise discretion subject to specified limitations, including the prior limitation that distributions must be necessary for her proper support. What is more, the specific grant of discretion to make distributions is only ordinary—"in the Trustee's discretion"—not "extended" discretion that

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document, courts "found a duty on the trustee's part to consider other financial resources of the beneficiary"); *see also In re Ferrall's Estate*, 258 P.2d 1009, 1010–1013 (Cal. 1953) (holding that an instruction—"all income from the trust . . . to and for the use and benefit of my daughter" and, then, that "the trustee may pay to [her] . . . such amounts from the principal or corpus of the trust sufficient to meet her needs, care and comforts"—made "an outright gift to her of the income from the trust but the gift to her of the corpus was conditional").

applies where discretion is said to be "absolute" or "uncontrolled." Restatement (Third) of Trusts § 50, cmt. c. In any event, even if Dale's discretion were somehow extended, she is still subject to fiduciary duties of good faith, prudence, and reasonableness, as set forth above.

v. Though Dale may be a primary beneficiary, Bill contemplated a remainder interest for Leslie and Tracy, his beloved daughters.

The petition assumes, without any express statement in the Trust Agreement, that Bill prioritized support for Dale, his second wife of 9 years, over preservation of principal for Leslie and Tracy, his daughters from a prior marriage of 50 years. The truth is that, by the terms of the Agreement, Bill contemplated a remainder for his daughters; otherwise, he could have just given the assets of the Marital Deduction portion to Dale outright, as he did with $1.8 million. The Agreement instead puts those assets in trust for Dale, as necessary for her proper support, with the remainder for his daughters. That requires Dale, as trustee, to consider her assets before making distributions to herself.[10] The circumstances support that reading because Bill knew and loved his

[10] Even for a "favored" beneficiary, a trustee may withhold principal distributions in light of the beneficiary's other assets. *See* Restatement (Third) of Trusts § 50, cmt. f.

daughters. Thus, the petition's proposed reading of the Agreement as an absolute gift would undo its basic terms and conflict with its surrounding circumstances, by allowing Dale to favor her grandchildren over Bill's daughters. *See, e.g., Guar. Tr. Co. of N.Y. v. New York City Cancer Comm.*, 144 A.2d 535, 537 (Conn. 1958) (holding that, although a "will manifests much concern for the welfare of the testator's widow and makes bountiful provision for her," the trust must still consider the widow's assets); *Lineback by Hutchens v. Stout*, 339 S.E.2d 103, 108 (N.C. Ct. App. 1986) (noting "the testator's intent that the trust funds be used to provide supplemental, rather than total, support").

In the end, the Court need not resolve the two substantive issues above. It is important not to lose sight of the fact that the petition raises a new argument never presented to the district court and seeks writ relief on an order compelling discovery. The petition therefore may be denied solely on procedural grounds. The complexity of the second issue, and the conflicting authority on that issue, are all the more reason not to reach the merits—which were never vetted by the district court in the first place. However, even if the Court reaches the merits, it should deny the petition based on a careful parsing of issues, as well as a close reading of

the trust instrument itself, relevant rules and statutes, and controlling and persuasive authorities, as set forth above.

VI. Conclusion

For the above reasons, the petition should be denied on procedural grounds. Alternatively, it should be denied on substantive grounds as to both issues. Ultimately, granting any part of the petition would flout the plain text of the Trust Agreement and make for bad policy. In similar cases down the road, it would mean not only that stepparents could disinherit stepchildren under the guise of trustee authority, but also that the stepchildren could not even discover the facts they need to prove the underlying bad faith.

Respectfully submitted this October 17, 2018.

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VERIFICATION

I, G. Barton Mowry, state the following:

1. I am a shareholder attorney in the law firm of Maupin, Cox & LeGoy.

2. I am the attorney principally responsible for representing Respondent, Leslie Raggio Righetti, in the above-entitled action.

3. I verify that I have read the foregoing ANSWER PETITION FOR WRIT OF PROHIBITION OR, ALTERNATIVELY, MANDAMUS, and that the same is true to the best of my own knowledge, except for those facts stated 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 forgoing is true and correct.

Executed on October 17, 2018, in Washoe County, Nevada.

/s/ G. Barton Mowry

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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 Century Schoolbook 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 9,500 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 October 17, 2018.

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CERTIFICATE OF SERVICE

I, Michele E. LaHue, certify that on October 17, 2018, I electronically filed the forgoing **Answer to 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 the registered participants. Non-e-Flex participants will be served by U.S. mail, as noted.

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