

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

2 LYNITA SUE NELSON,
3 INDIVIDUALLY, AND IN HER
4 CAPACITY AS INVESTMENT
 TRUSTEE OF THE LYNITA S.
 NELSON NEVADA TRUST DATED
 MAY 30, 2001,

5 Petitioner,

6 v.

7 EIGHTH JUDICIAL DISTRICT
 COURT OF THE STATE OF
8 NEVADA, FAMILY DIVISION,
 CLARK COUNTY; THE
 HONORABLE FRANK P.
9 SULLIVAN,

 Respondents,

10
11 ERIC L. NELSON, INDIVIDUALLY,
 AND IN HIS CAPACITY AS
 INVESTMENT TRUSTEE OF THE
12 ERIC L. NELSON NEVADA TRUST,
 DATED MAY 30, 2001, and MATT
13 KLABACKA, DISTRIBUTION
 TRUSTEE OF THE ERIC L.
14 NELSON NEVADA TRUST, DATED
 MAY 30, 2001,

15 Real Parties in Interest.

Supreme Court Case No.: 77254
Electronically Filed
Jan 14 2019 04:01 p.m.
District Ct. Case No.: D411637
Elizabeth A. Brown
Clerk of Supreme Court

16
17 **PETITION FOR REHEARING OF ORDER DENYING PETITION**
 FOR A WRIT OF MANDAMUS

18 Petitioner, LYNITA SUE NELSON (“Lynita”) by and through her
19 attorneys, ROBERT P. DICKERSON, ESQ., and JOSEF M. KARACSONYI,
20 ESQ., of THE DICKERSON KARACSONYI LAW GROUP, respectfully
21 requests, pursuant to Nevada Rules of Appellate Procedure, Rule 40 (2019), that
22 the Court rehear her Petition for a Writ of Mandamus filed on October 30, 2018,

1 or, in the alternative, that the Court at least reconsider and clarify its Order
2 Denying Petition for a Writ of Mandamus based on the following:

3 1. The Court has overlooked and misapprehended a material fact in the
4 record pursuant to NRAP 40(c)(2)(A); and

5 2. The Court has overlooked and failed to consider, pursuant to NRAP
6 40(c)(2)(B), the demands of the Due Process Clauses of the United States and
7 Nevada Constitutions when formulating its Order Denying Petition for a Writ of
8 Mandamus.

9 This Petition for Rehearing of Order Denying Petition for a Writ of
10 Mandamus is based on all the papers and pleadings on file herein, the Points and
11 Authorities submitted herewith, and is brought in good faith and not to delay
12 justice.

13 Dated this 14 day of January, 2019.

14 Respectfully Submitted,

15 THE DICKERSON KARACSONYI
LAW GROUP

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21 Attorneys for Petitioner,
LYNITA SUE NELSON

1 **I. POINTS AND AUTHORITIES**

2 NRAP 40(a)(2) permits the filing of a petition for rehearing under the
3 following parameters:

4 The petition shall state briefly and with particularity the points of
5 law or fact that the petitioner believes the court has overlooked or
6 misapprehended and shall contain such argument in support of the
7 petition as the petitioner desires to present. Oral argument in
8 support of the petition will not be permitted. Any claim that the
9 court has overlooked or misapprehended a material fact shall be
10 supported by a reference to the page of the transcript, appendix or
11 record where the matter is to be found; any claim that the court has
12 overlooked or misapprehended a material question of law or has
13 overlooked, misapplied or failed to consider controlling authority
14 shall be supported by a reference to the page of the brief where
15 petitioner has raised the issue.

16 In addition to the above, NRAP 40(c)(2) provides that the Court can
17 consider granting such a petition for rehearing when either of the following
18 circumstances apply:

19 (A) When the court has overlooked or misapprehended a material
20 fact in the record or a material question of law in the case, or

21 (B) When the court has overlooked, misapplied or failed to
22 consider a statute, procedural rule, regulation or decision directly
controlling a dispositive issue in the case.

II. ARGUMENT

A. Introduction

On October 30, 2018, Lynita filed a Petition for Writ of Mandamus Or
Other Extraordinary Relief (“Writ Petition”). On December 18, 2018, this Court
filed an Order Denying Petition for a Writ of Mandamus (“Order Denying Writ
Petition”) on the basis that it was “[n]ot convinced that [its] extraordinary and
discretionary interference is warranted as petitioner’s arguments are defeated”

1 by this court's prior opinion in *Klabacka v. Nelson*, 133 Nev. 164, 394 P.3d 940
2 (2017).” Order Denying Writ Petition, page 1 (emphasis added).

3
4 B. **The Court Has Overlooked And Misapprehended A Material Fact In**
5 **The Record Pursuant To NRAP 40(c)(2)(A)**

6 By explicitly and directly tying the denial of Lynita's Writ Petition to its
7 prior opinion in *Klabacka*, the Court made clear that it has overlooked and
8 misapprehended a material fact in the record of this matter, which material fact
9 has been clarified and confirmed by the district court since the entry of the
10 *Klabacka* opinion. The material fact at issue is that there has never been any
11 tracing or other such establishment of the community/separate property nature
12 of the property with which the ELN Trust and LSN Trust (collectively referred
13 to in *Klabacka* as the parties' Self-Settled Spendthrift Trusts (“SSSTs”)) were
14 funded in 2001.

15 In *Klabacka v. Nelson*, 133 Nev. 164, 394 P.3d 940 (2017), this Court
16 stated as follows:

17 In a divorce involving trust assets, the district court **must** trace
18 those trust assets to determine whether any community property
19 exists within the trusts – as discussed below, the parties' respective
20 separate property in the SSSTs would be afforded the statutory
21 protections against court-ordered distribution, while any
22 community property would be subject to the district court's equal
distribution.

23 *Id.*, 394 P.3d at 948 (emphasis added). Accordingly, in order for this Court and
24 the district court to comply with the very rule of rule of law stated by this Court
25 in *Klabacka*, there “**must**” have been, or there has to be, a tracing of the assets

1 that funded the SSSTs in 2001. If no such tracing is/was required, Lynita's
2 community property rights were defeated by Respondent, ERIC L. NELSON
3 ("Eric") simply by him transferring community property assets to the ELN Trust
4 in 2001, which is exactly what this Court tried to prevent in its holding in
5 *Klabacka* quoted above.

6 No tracing of the properties divided in the parties' 1993 Separate Property
7 Agreement ("SPA") to the properties transferred to the SSSTs in 2001 was ever
8 conducted. There was a finding made by the district court that the parties' SPA
9 executed in 1993 was valid,¹ which finding was affirmed by this Court. *Id.*, 394
10 P.3d at 946-47. The SPA transmuted all community property listed therein into
11 the parties' separate property, but there was never any finding made by the
12 district court that the property with which the parties' SSSTs were funded in
13 2001 – almost none of which property existed in 1993² – was the separate
14 property of the parties. The fact that there was never any tracing of the assets
15 divided in the SPA to the assets that funded the SSSTs in 2001 has been
16 confirmed by the district court in the following excerpt from the district court's
17 Decision Affirming the Date of Tracing; Denying a Separate Blocked Account
18 for \$720,000; and Granting a Joint Preliminary Injunction for the Banone, LLC.

19
20 ¹ AAPP V19:4695-96.

21 ² In that regard, even according to the data compiled by Eric's own
22 purported expert witness – Daniel T. Gerety, CPA – none of the assets with
which the ELN Trust was funded in 2001 were in existence at the time the SPA
was entered into in 1993. AAPP V27:6564-6465; AAPP V26:6277-6279.

1 And Lindell Properties entered on May 22, 2018:

2 [D]uring the divorce proceeding, this Court **did not perform a**
3 **tracing of assets contained within either the Eric L. Nelson**
4 **Nevada Trust (“ELN Trust”) or the Lynita S. Nelson Nevada**
5 **Trust (“LSN Trust”).** In its May 25, 2017 Order, the Nevada
6 Supreme Court found that ‘[i]n 2001, Eric and Lynita converted
7 their separate property trusts into Eric’s Trust and Lynita’s Trust,
8 respectively, and funded the SSST’s with the separate property
9 contained within the separate property trusts.’ The Nevada
10 Supreme Court then held that both the ELN and LSN Trusts were
11 funded with separate property based on their findings.

12 **While this Court never performed a tracing of assets in the**
13 **trusts in the underlying divorce proceedings,** the Nevada
14 Supreme Court held that ‘the SSSTs are valid and the trusts were
15 funded with separate property stemming from a valid separate
16 property agreement.’ Therefore, based upon the Nevada Supreme
17 Court’s finding and holding, this Court interprets the proper date to
18 begin tracing as May 30, 2001, the date on which both the ELN and
19 LSN Trusts were executed.

20 PSAPP V2:340:18 - 341:13 (emphasis added).

21 It is likewise clear that this Court did not independently trace the property
22 divided in the SPA in 1993 to the property that funded the SSSTs in 2001. It
would have been impossible for this Court to do so since such tracing did not
occur in the district court, and this Court did not hold any evidentiary proceeding
on the issue. Instead, this Court assumed that the *district court* had previously
made such factual determinations, stating that “[o]n June 3, 2013, the district
court issued the decree. The district court found that the SPA was valid and the
parties’ SSSTs were validly established and funded with separate property.” *Id.*,
394 P.3d at 944 (emphasis added). The district court has now clarified that it
never made such a finding, and that no tracing of the assets in question has ever
been performed. Accordingly, Lynita’s arguments in her Writ Petition could not
have been defeated – let alone addressed – in the prior appeal and in the

1 *Klabacka* opinion. This material fact, however, has been overlooked by this
2 Court in its denial of Lynita's Writ Petition.

3 In its Order Denying Writ Petition, the Court does not specify how
4 Lynita's arguments were defeated by the *Klabacka* opinion. Lynita can only
5 assume that the Court believes it had before it a record which supported a
6 finding in *Klabacka* that property transferred into the SSSTs in 2001 was
7 separate property. As set forth above, however, there was no such record as no
8 tracing of property from the SPA to the SSSTs ever occurred, a fact that has now
9 been made clear by the district court. Additionally, it is important to point out
10 that there were no other agreements by the parties to divide community property
11 between the time of the SPA and SSSTs. *See generally, Klabacka*, and the
12 Decree of Divorce, AAPP V19:4693-4742. Additionally, the SSSTs were not
13 agreements between the parties, and did not divide the parties' community
14 property; the ELN Trust was settled and executed by Eric only, and the LSN
15 Trust was settled and executed by Lynita only. AAPP V26:6475-V27:6508;
16 AAPP V26:6283-6311. To the extent the Court believes there was some other
17 agreement between the parties to transmute community property into separate
18 property in 2001, the Court has misapprehended such fact.

19
20 **C. The Court's Denial of Lynita's Petition Violates the Due Process
Clauses of the United States and Nevada Constitutions**

21 Lynita argued in her Writ Petition at pages 23-26 without relief from this
22 Court, she will have been denied her right to a tracing of her community

1 property to the 2001 SSSTs. By framing its denial of Lynita’s Writ Petition as
2 it did, and by stating that her arguments had previously been defeated by its
3 opinion in *Klabacka*, this Court has violated Lynita’s rights under the Due
4 Process Clauses of the United States and Nevada Constitutions. In short, this
5 Court’s Order Denying Writ Petition has the practical effect of depriving Lynita
6 of her property rights in direct contravention of the Due Process Clauses of both
7 the United States and Nevada Constitutions.

8 “The Due Process Clauses of the United States and Nevada Constitutions
9 protect individuals from state actions that deprive them of life, liberty, or
10 property without due process of law.” *Saticoy Bay LLC v. Wells Fargo Home*
11 *Mort.*, 133 Nev., Adv. Op. 5, 388 P.3d 970, 972 (2017) (citing U.S. Const.
12 amend. XIV, § 1 ; Nev. Const. art. 1, § 8 (5); and *Lugar v. Edmondson Oil Co.*,
13 457 U.S. 922, 936, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)). In that regard, this
14 Court “has recognized that procedural due process ‘requires notice and an
15 opportunity to be heard.’” *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878,
16 879 (2007) (internal citation omitted).

17 As set forth above, in *Klabacka* this Court stated, “In a divorce involving
18 trust assets, the district court must trace those trust assets to determine whether
19 any community property exists within the trusts” *Klabacka*, 394 P. 3d at
20 948. In other words, this Court defined in *Klabacka* the necessary method by
21 which the due process rights of each party to a divorce action involving trust
22 assets must be safeguarded and their property rights protected.

1 In the instant matter, however, and as detailed above, it is undisputed that
2 there has been absolutely no tracing conducted by either the district court or this
3 Court with regard to the property with which the parties' SSSTs were funded in
4 2001. Accordingly, Lynita's due process rights have not yet been afforded to
5 her, as she has not received the benefit of the *Klabacka*-mandated tracing of the
6 assets transferred into the parties' SSSTs upon their creation in 2001. In the
7 absence of such a tracing, the community v. separate property nature of such
8 property remains totally unknown to this Court, to the district court, and even to
9 the parties themselves.

10 In summary, notwithstanding this Court's own ruling in the *Klabacka*
11 opinion that all trust assets must be traced in a divorce action, the language of
12 the Court's instant Order Denying Writ Petition will serve to prevent Lynita
13 from ever having the opportunity to obtain such a tracing, or to participate in
14 litigation regarding same. In the event this Court's Order Denying Writ Petition
15 had simply indicated that it was refusing to exercise its discretion to grant
16 extraordinary relief, Lynita would at least have retained her right to appeal
17 following the conclusion of the district court's improper tracing on remand. By
18 including the statement that Lynita's arguments have already been defeated by
19 the *Klabacka* opinion, however – when, in fact, her arguments were not even
20 contemplated by such opinion – this Court is effectively prohibiting Lynita from
21 even pursuing her claims on appeal following the conclusion of the district
22 court's tracing. Such an Order serves to deny Lynita her property rights (i.e., her

1 rights to any property held in the ELN Trust that actually constituted community
2 property in 2001) without due process of law in violation of the Due Process
3 Clauses of the United States and Nevada Constitutions.

4 **IV. CONCLUSION**

5 As set forth herein, Lynita respectfully requests, pursuant to NRAP 40,
6 that the Court rehear her Writ Petition, or, in the alternative, at least reconsider
7 and clarify its Order Denying Petition for a Writ of Mandamus.

8 Respectfully Submitted on this 14 day of January, 2019, by:

9 THE DICKERSON KARACSONYI
10 LAW GROUP

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21 Attorneys for Petitioner,
22 LYNITA SUE NELSON

CERTIFICATE OF COMPLIANCE

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1. I hereby certify that this Petition for Rehearing (“Petition”) 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 Petition has been prepared in a proportionally spaced typeface using WordPerfect X5 in 14 point Times New Roman type style.

2. I further certify that this Petition complies with the length limitations of NRAP 40(b)(3) because it is ten (10) pages or less (excluding the Certificate of Compliance and Certificate of Service), and contains only 2306 words.

3. I further certify that I have read this Petition, 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 Petition 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

...
...
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...

1 be subject to sanctions in the event that the accompanying brief is not in
2 conformity with the requirements of the Nevada Rules of Appellate Procedure.

3 DATED this 14 day of January, 2019.

4 THE DICKERSON KARACSONYI
LAW GROUP

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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of THE DICKERSON KARACSONYI
3 LAW GROUP, and that on this 14 day of January, 2019, I filed a true and
4 correct copy of the foregoing PETITION FOR REHEARING OF ORDER
5 DENYING PETITION FOR A WRIT OF MANDAMUS, with the Clerk of the
6 Court through the Court's eFlex electronic filing system and notice will be sent
7 electronically by the Court to the following:

8 RHONDA K. FORSBERG, ESQ .
9 FORSBERG LAW OFFICE
Attorneys for Respondent, ERIC L. NELSON

10 MARK A. SOLOMON, ESQ.
11 JEFFREY P. LUSZECK, ESQ.
SOLOMON, DWIGGINS & FREER, LTD.
Attorneys for Respondent, MATT KLABACKA

12 I further certify that on this day a copy of the foregoing document will also
13 be deposited for mailing in the United States Mail, in a sealed envelope upon
14 which first class postage is prepaid, in Las Vegas, Nevada, addressed to the
15 following:

16 RHONDA K. FORSBERG, ESQ .
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HONORABLE FRANK P. SULLIVAN
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An employee of The Dickerson Karacsonyi Law Group