

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

IN THE MATTER OF ELLA E. HORST
REVOCABLE TRUST, u/a/d 05/21/1991

BRIAN HOLIDAY,

Appellant,

vs.

PATRICIA L. HORST, Trustee of the
ELLA E. HORST REVOCABLE TRUST,
u/a/d 05/21/1999; ELLA E. HORST
REVOCABLE TRUST, u/a/d 05/21/1999,

Respondents.

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Eighth Judicial District Court
Case No: P-18-095314-T (In
the Matter of the Ella E.
Horst Revocable Living
Trust u/a/d 05/21/1991)

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities, as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Parent Corporation:
None.
2. Publicly held company that owns 10% or more of the party's stock:
None.
3. Law firms who have appeared or are expected to appear for Brian Holiday (including proceedings in the District Court):
Howard & Howard Attorneys PLLC.

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A. INTRODUCTION

This appeal resulted from the fact that the District Court found that NRS 164.021(4) precluded Appellant from challenging the entirety of the Trust, given the fact that 120 days had lapsed since Respondent submitted her incomplete Notice to Beneficiaries. That finding was made by the District Court despite the fact that Respondent later attempted to add a fourth amendment as part of the Trust and further belatedly disclosed that the Trust Estate had assets substantially lower in value than what should have been held by the Trust. Despite the fact that those two new submissions by Respondent completely changed the lay of the land as to the Trust, the District Court found that there was no flexibility in NRS 164.021(4) and that the District Court was forced to rule that only the last proposed amendment, *i.e.*, the October 11, 2011 handwritten letter was subject to a challenge given the language of the statute.

Contrary to the District Court's analysis, however, the statute should not be interpreted in such a non-flexible manner. While the 120 day statutory limitation period would apply if the Trust documents stood as represented in the Notice to Beneficiaries, once additional Trust documents were added and other items were disclosed, it seems logical that a new limitations period would start to run and that beneficiaries would be able to object to the entirety of the newly-defined Trust, not just the latest additions. Interpreting the statute in that manner would both be logical

and appropriate in light of what the Nevada Legislature must have intended and in view of the due process requirements of the Constitutions of the United States and Nevada. As interpreted by the District Court, NRS 164.021 would allow a corrupt trustee to send repeated notices and then construct in piecemeal fashion a trust tapestry that could not be challenged until the last piece of fabric was in place. Even then, only that last insertion could be challenged, not the entire tapestry as a whole. Such a result must surely not have been contemplated by the Nevada Legislature and makes no sense when considering the overall statutory intent.

If the allowance of a new additional limitations period or the tolling of the original limitations period based upon the new submissions by the Trustee is not to be the interpretation of the statute, then the statutory language must be found to be unconstitutional. Any other finding would deprive Appellant and the other beneficiaries of due process. Due process rights are protected under both the United States Constitution and the Nevada Constitution and any statute that compromises those due process rights must be found unconstitutional pursuant to both the Nevada and United States Constitutions.

In the Answering Brief, Respondent argues that under the statute she could give multiple notices to beneficiaries and for that reason even though the Notice to Beneficiaries given did not include all of the documents that allegedly comprise

Ella's complete Trust, it did not render such notice defective. That is simply not a valid argument for the reasons set forth herein.

B. NOTICE TO BENEFICIARIES WAS NOT COMPLETE AND THEREFORE WAS DEFECTIVE.

The Answering Brief correctly states that notice to beneficiaries pursuant to NRS 164.021 is optional and voluntary. AB, pg. 16, ln. 18. Once the trust becomes irrevocable, the trustee may (but is not required to) notify each beneficiary of the change in status of the Trust. In the event that the Trustee chooses to give such notice, the beneficiaries given such notice then have 120 days to file an action contesting the trust. Although a trustee under NRS 164.021 is not required to provide a notice to beneficiaries under NRS 164.021, once the trustee does so, any notice given to beneficiaries must comply with NRS 164.021(2).

Three months after Ella Horst ("Ella") died, on or about January 27, 2017, Respondent opted to serve a Notice to Beneficiaries to the Trust's beneficiaries. Pursuant to NRS 164.021(2), the Notice to Beneficiaries, served by Respondent had to include the date of execution of the trust document, which if amended, would need to include the date of each amendment to the Original Trust, including the October 11, 2011, handwritten letter that Respondent now claims constitutes the Fourth Amendment to the Trust. The Notice to Beneficiaries must also include any provision of the trust instrument which pertains to the beneficiary or notice that the heir or interested person is not a beneficiary under the trust.

Here, Respondent does not refute that the Notice to Beneficiaries served on January 27, 2017, did not include the date and each purported amendment to the Trust as it failed to reference, contain, or otherwise include a copy of the alleged “Fourth” Amendment to the Trust, the October 11, 2011 handwritten letter, which Respondent is now seeking the District Court to confirm as another amendment to the Trust in the underlying action. The Notice to Beneficiaries served in this case therefore failed to provide or identify the date and provisions of all alleged amendments to the Trust¹ as required under Nevada law. The Notice to Beneficiaries as provided by Respondent was, therefore, incomplete, defective, and did not meet the statutory requirements of NRS 164.021(2), as it did not identify all of the documents that allegedly comprise Ella’s complete Trust. A defective notice should not, and does not, trigger the 120 day challenge period. *Harustak v. Williams*, 84 Cal. App. 4th 208, 215 (2000) (This 120 day statute of limitations does not begin to run until the trustee serves a notice of the change in trust status that complies with [the law]).

¹ In this case, not only did the Notice to Beneficiaries not include any reference to the October 11, 2011, handwritten letter as part of the Trust documents, but the Respondent, in the Notice to Beneficiaries she provided, specifically stated and represented to the Trust’s beneficiaries that Ella’s Original Trust was amended on three occasions only, namely on “March 6, 1998, March 16, 2004, and September 26, 2005.” JA Vol. I, 00095, ¶ 1. The Notice to Beneficiaries further attached a copy of the Original Trust and the three amendments referenced, namely, the First Amendment, the Second Amendment, and the Third Amendment, as the documents comprising the Trust of Ella. JA Vol. I., 00098-00130.

In the Answering Brief, Respondent argues that despite the fact that the Notice to Beneficiaries did not include all of the documents that allegedly comprise Ella's complete Trust, it does not render such notice defective. Rather, Respondent argues that "NRS 164.021 was contemplated to allow the trustee to send more than one notice." AB, pg. 16, lns. 21-22. Therefore, Respondent incorrectly argues that despite the fact that the Notice to Beneficiaries did not include what Respondent now asserts to comprise the entire Ella Horst Trust, it included the Second and Third Amendments to the Trust, and commenced running of the 120 day limitation period as to these amendments, even if the Trust was still incomplete.

As stated in the Opening Brief, where a beneficiary receives an incomplete notice, such as the one given by Respondent in this case, a beneficiary (Appellant) does not have proper notice and sufficient knowledge to decide whether to challenge the trust. Then, when that beneficiary receives another "notice," which notice may be given after the expiration of the original 120 day period under NRS 164.021(4), attaching additional alleged "trust" documents, the beneficiary might then start getting suspicious as to the prior trust documents, as well as the latest additions. That new notice must, by right, start a new 120 day challenge period for the entire Trust. If not, a corrupt trustee could notice the segments of the Trust piecemeal every 120 days locking in the earlier portions and only allowing the latest submission to be challenged, rather than the entire Trust. In fact, that is exactly what Respondent

argues is allowed under NRS 164.021. Such an interpretation is unfair to the beneficiary and essentially denies the beneficiary due process in challenging the trust.

The purpose of NRS 164.021 is to provide notice to beneficiaries in order to give them the opportunity to challenge the Trust. Thus, the NRS 164.021 notice must be sufficient and reasonably calculated, under all of the circumstances, to apprise a beneficiary of the entire Trust in order to afford the beneficiary with an opportunity to present objections in a meaningful manner. *Harustak, supra* (The 120 day statute of limitations begins to run only once the trustee serves a notice that is compliant with law); *Shupe v. Ham*, 98 Nev. 61, 639 P. 2d 540 (1982)(Statute of Limitations tolled until a person knew, or had reason to know, that that person's rights had been violated). Indeed, until the filing of Respondent's Petition, which occurred over one and one-half years after the original Notice to Beneficiaries was provided and long after the 120 day period under NRS 164.021(4) had run, Appellant had no knowledge of the October 11, 2011 handwritten letter that is the purported Fourth Amendment to the Trust and had even less reason to suspect fraud or undue influence relating to either the alleged Fourth Amendment or any of the remaining documents that are asserted to comprise the Trust.

Thus, Respondent's failure to include all of the documents constituting the Trust with the Notice to Beneficiaries thwarted the very purpose of the statutory

intention, *i.e.*, to give notice to beneficiaries of the entire trust so that they may act advisedly to either acquiesce to it or contest all or any portion of the Trust. A beneficiary who is not apprised of the existence of the full trust, *i.e.*, with all alleged amendments thereto, all of which were available to the trustee upon death, has no other means to learn of the existence of various amendments or of the entire distribution plan contained in the Trust.

Here, Appellant, an out-of-state beneficiary and a grandson of Ella, upon receiving the Notice to Beneficiaries, was left completely in the dark as to the existence of the alleged Fourth Amendment to the Trust, which conveniently gives the remaining 25% interest in Rosada Way Property to Respondent. Moreover, by not receiving a Notice to Beneficiaries compliant with NRS 164.021 that included the complete set of documents that allegedly comprise and constitute Ella's Trust, and by not receiving the initial Inventory of the Trust, which Respondent was required to provide within 70 days of Respondent's appointment,² Appellant did not have sufficient notice or information of circumstances to alert him that there may be something suspicious going on with the Trust in order to challenge the Trust within

² See NRS 165.030. The initial Inventory was not provided to the beneficiaries until well after 120 days from the service of the Notice to Beneficiaries.

120 days of receipt of the Notice to Beneficiaries.³ While each of the alleged amendments benefitted Respondent to the detriment of all other beneficiaries, the cumulative effect of all of the amendments⁴ give rise to serious questions about Ella's intent, undue influence and possible outright fraud.

It was not until the filing of Respondent's Petition that Respondent sent out a complete set of documents that she asserts comprise Ella's trust in compliance with NRS 164.021. To the extent that Respondent's Petition is, or can be, deemed to be a notice to beneficiaries,⁵ this Court should hold that the 120 day limitation was not

³ Additionally, Respondent failed to provide the beneficiaries with the initial Inventory of the Trust which, under NRS 165.030 was due within 70 days from her appointment as the Trustee of the Trust. In fact, the initial Inventory was not even provided within 120 days of the service of the initial Notice to Beneficiaries. Thus, Appellant not only did not have the documents that comprise a complete Trust, but also did not have the initial Inventory of the Trust's assets as of Ella's death, which when viewed together as a whole, raises serious questions about Ella's intent, undue influence and possible outright fraud.

⁴ The initial Inventory shows significant depletion of Ella's estate since Ella moved to Las Vegas and lived with Respondent. Although the Notice of Beneficiary did not include a schedule of assets referenced in the Original Trust ("Schedule A"), upon Appellant's request, Respondent's counsel subsequently provided Schedule A to Appellant. Schedule A listed many of the assets of the Trust that ultimately were not on the initial Inventory finally provided by Respondent.

⁵ At best, Respondent's Petition, which included a complete set of documents that allegedly comprise Ella's Trust documents, was, and could be deemed to be, a notice to beneficiaries pursuant to NRS 164.021, as it for the first time gives Trust beneficiaries, including Appellant, sufficient notice of the documents comprising the Trust in order for Appellant to be able to determine whether a challenge to any of the Trust documents may be warranted.

triggered and did not start to run until such time as Respondent's Petition was served on the Trust beneficiaries. The service of the Petition was the first time that the full scope of the Trust and Trust transfers to Respondent were noticed to the beneficiaries. Appellant's Objection/Counter-Petition was clearly filed within 120 days from the date "a complete notice to beneficiaries" was given through Respondent's Petition; therefore, Appellant's challenge of the Second Amendment and the Third Amendment to the Trust should be deemed timely under NRS 164.021.

C. THE DISTRICT COURT'S CONSTRUCTION OF NRS 164.021 WOULD RENDER NRS 164.021 UNCONSTITUTIONAL AS IT DEPRIVES APPELLANT OF DUE PROCESS.

In her Answering Brief, Respondent asserts that "NRS 164.021 is voluntary, and gives the trustee discretion to release 'any' provision to start the 120-day notice period." AB, pg. 20, lns. 2-3. Based on that incorrect position, Respondent then goes on to argue that the Notice to Beneficiaries "provided by Respondent to all beneficiaries including, but not limited to, Appellant on January 27, 2017, for the Original Trust and the First, Second, and Third Amendments satisfied the four corners of the statute." AB, pg. 20, lns. 4-7.

Respondent does not refute, however, that the interpretation of a statute or constitutional provision must be harmonized with other statutes or provisions to

avoid unreasonable or absurd results such as the one proposed by Respondent,⁶ nor the fact that “[t]his court construes statutes, if reasonably possible, so as to be in harmony with the constitution.”⁷ Respondent further does not deny the fact that substantive due process guarantees that no person shall be deprived of life, liberty, or property for arbitrary reasons⁸ or the fact this Court has recognized that procedural due process “requires notice and an opportunity to be heard.”⁹ Finally, Respondent does not refute the fact that the application of NRS 164.021 without consideration of due process requirements of the Nevada and United States Constitution would render NRS 164.021 unconstitutional.

Under the Nevada and United States Constitutions, Appellant clearly is entitled to a notice that is reasonably calculated, under all circumstances, to apprise him as a beneficiary of all the documents that comprise the entire Trust in a single notice, in order to be afforded meaningful opportunity to analyze all documents and determine whether to object to or contest the Trust as a whole. Indeed, under NRS

⁶ *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999); *We the People Nevada ex rel. Angle v. Miller*, 124 Nev. 874, 192 P.3d 1166 (2008).

⁷ *Cornella v. Justice Court*, 132 Nev. 587, 377 P.3d 97, 100 (2016) (internal quotation marks omitted).

⁸ *Allen v. State; Pub. Emp. Ret. Bd.*, 100 Nev. 130, 134, 676 P.2d 792, 794 (1984); *see also*, Nev. Const. art. 1, § 8(5); U.S. Const. amend. XIV, § 1.

⁹ *Maiola v. State*, 120 Nev. 671, 675, 99 P.3d 227, 229 (2004); *see also*, *Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998).

164.021, once Respondent opted to provide a notice, Respondent in her Notice to Beneficiaries, was required to set forth all documents comprising the trust. NRS 164.021(2). The purpose of NRS 164.021 clearly is to provide a meaningful notice to the trust beneficiaries so that a beneficiary can make an educated and well-informed decision as to whether or not to contest the trust within the 120 day period. Meaningful notice is one that provides a beneficiary with notice of what constitutes the complete trust, including all amendments thereto. To the extent that a notice to beneficiaries does not contain such information, it should be deemed incomplete and defective. A defective notice should not trigger the running of the 120 day limitation period of NRS 164.021(4). That defective notice should be void as a matter of law.

In this case, the District Court acknowledged that until all of the Trust documents are actually provided to a beneficiary and evaluated as a whole, a beneficiary may not necessarily be in a position to find any issue with the Trust documents that were previously provided. The District Court then found, however, that NRS 164.021(4), as strictly construed, precludes the challenge of documents after the lapse of the 120 day period to the extent such documents were part of a notice provided under NRS 164.021, irrespective of whether such notice was technically deficient and excluded other documents. Basically, the District Court construed NRS 164.021 to allow multiple notices to be given; *i.e.*, the trustee could provide more than one notice, on a piecemeal basis, and a beneficiary could only

object to those trust documents to which he objected to within the 120 day period, losing the ability to challenge earlier incomplete submissions.

Respondent's position is that pursuant to NRS 164.021, Respondent was able to give separate notices of what constituted the trust as she deemed appropriate. Such piecemeal notices clearly do not comport with the Legislative intent of NRS 164.021. Furthermore, such application or construction violates due process rights, as the beneficiary (Appellant) is clearly not afforded notice, reasonably calculated, under all circumstances, to apprise the beneficiary (Appellant) of the facts necessary to afford the beneficiary (Appellant) with an adequate opportunity to present his objections to or challenge of the Trust documents, as a whole or in part.

In harmony with the due process rights afforded under the Constitutions of the United States and Nevada, NRS 164.021 must be construed to require that a complete notice to beneficiaries (*i.e.*, all documents that comprise the Trust) be provided to beneficiaries before the 120 day limitation is triggered. Anything less fails basic constitutional due process requirements.

D. THE 120 DAY STATUTE OF LIMITATIONS UNDER NRS 164.021(4) SHOULD BE EQUITABLY TOLLED AS NOTICE GIVEN BY RESPONDENT WAS INCOMPLETE.

Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. *Rodriguez v. Superior Court*, 176 Cal.App.4th 1461, 98 Cal.Rptr.3d 728 (2009). "Where a statute

sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period ‘to ensure fundamental practicality and fairness.’ ” *Id.* at 736 (citation omitted). “Equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.” *Ocana v. Am. Furniture Co.*, 91 P.3d 58, 66 (N.M. 2004).

In the present case, the District Court, in finding NRS 164.021 “really rigid,” determined that Appellant’s challenge of the Second Amendment and the Third Amendment was barred as it was not made within 120 days of the Notice to Beneficiaries, despite the fact that the Notice provided was not complete so as to give Appellant sufficient facts to determine whether or not to challenge the Trust. More specifically, the District Court held that NRS 164.021(4)¹⁰ imposes a 120 day statute of limitations upon a beneficiary to contest the validity of the trust once he is served with the notice to beneficiaries, regardless of whether the Notice is incomplete.

It is not disputed that the deficient and incomplete notice misled the beneficiaries as to what actually allegedly constituted the entire Trust of Ella Horst. By misleading the beneficiaries as to what documents constituted the entire Trust,

¹⁰ NRS 164.021(4) provides: No person upon whom notice is served pursuant to this section may bring an action to contest the validity of the trust more than 120 days from the date the notice is served upon the person, unless the person proves that he or she did not receive actual notice.

Respondent thereby prevented Appellant from raising any questions or to challenge even the incomplete Trust within 120 days of the Notice. Respondent's failure to provide the beneficiaries with a complete notice as to what documents constituted the entire Trust prevented Appellant from challenging Trust, namely the Second Amendment and Third Amendment to the Trust, within 120 days of Appellant's receipt of the Notice to Beneficiaries.

Although Respondent argued that Appellant's challenge of the Second Amendment and Third Amendment is barred under NRS 164.021(4), nowhere in her argument does she acknowledge the obvious fact that the reason that Appellant failed to challenge the Trust within 120 days of the defective and incomplete Notice to Beneficiaries was Respondent's failure to supply the correct information and complete Trust documents to the beneficiaries in the first place.¹¹ Thus, it is not equitable that Respondent be the beneficiary of the drastic consequence of Appellant not being able to challenge the Second Amendment and the Third Amendment to the Trust at this time. As utilized with other statutes of limitation, the equitable tolling doctrine should be applied by this Court to NRS 164.021(4) under the present

¹¹ Respondent also failed to provide the initial Inventory of the Trust in a timely manner. At the time of the incomplete Notice to Beneficiaries, Appellant did not have complete Trust documents nor the Trust initial Inventory, which when viewed together as a whole, would have set off an alarm leading to a challenge of the Trust as a whole.

circumstances so as to extend the limitations period until the alleged full Trust was disclosed to the beneficiaries.

E. IF NRS 164.021 PRECLUDES APPELLANT FROM CONTESTING THE SECOND AMENDMENT AND THE THIRD AMENDMENT, NRS 164.021 ALSO PRECLUDES RESPONDENT FROM HAVING THE OCTOBER 11, 2011 HANDWRITTEN LETTER CONFIRMED AS A FOURTH AMENDMENT TO THE TRUST.

The Answering Brief did not address or otherwise refute the arguments asserted by Appellant in Section H of Appellant's Opening Brief. Based on the Notice to Beneficiaries, *albeit* defective, the District Court confirmed the following documents as comprising the Trust of Ella: the Original Trust, the First Amendment, the Second Amendment, and the Third Amendment. The District Court held that a challenge of the Trust documents referenced in the Notice to Beneficiaries cannot be brought more than 120 days after service of the Notice to Beneficiaries. The District Court found that under NRS 164.021, Appellant's challenge of the Second Amendment and the Third Amendment to the Trust was untimely because it was made more than 120 days after service of the Notice to Beneficiaries which, *albeit* incomplete, included copies of the Second Amendment and the Third Amendment.

Such a result is contrary to statutory intent, but if it is upheld, this Court should collaterally find that Respondent's Petition seeking to confirm the October 11, 2011 handwritten letter as an amendment to the Trust well after the expiration of the 120 day Notice to Beneficiaries is also untimely under NRS 164.021 and must be

disregarded as a part of the Trust. Respondent's Petition seeking to confirm the October 11, 2011 handwritten letter as the Fourth Amendment to the Trust is basically challenging the documents that comprise the Trust, and is untimely as it was not brought within 120 days of the Notice. As no opposition was made to this position, the argument should be adopted in this appeal and the alleged Fourth Amendment should not be allowed to be incorporated into the Trust if the 120 day limitation period is strictly construed.

F. THE COURT MUST DISREGARD ANY REFERENCE, RELIANCE OR ARGUMENT SET FORTH IN RESPONDENT'S ANSWERING BRIEF THAT WERE NOT PART OF THE RECORD ON APPEAL OF THIS CASE.

The "record on appeal," consists of the materials which the trial court is required to transmit to the reviewing court. Nevada Rule of Appellate Procedure 10(a). The Court, on appeal, can only consider the record as it was made and considered by the court below. *Carson Ready Mix, Inc. v. First Nat. Bank of Nevada*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981); *Lindauer v. Allen*, 85 Nev. 430, 433, 456 P.2d 851, 853 (1969). The Nevada Supreme Court has consistently held that the Court "cannot consider matters not properly appearing in the record on appeal." *Carson Ready Mix, Inc., supra*. "As this court stated long ago in *Alderson v. Gilmore*, 13 Nev. 84, 85 (1878), 'We have no power to look outside of the record of a case.' We have consistently recognized this limitation." *Id.* (*citations omitted*).

Respondent's Answering Brief goes beyond the record on appeal of this case. More specifically, the Statement of the Case, the Statement of Facts and Summary of the Argument found in the Answering Brief contain matters not contained in the record on appeal. There is no reason or valid basis for the Answering Brief to contain matters outside of the record on appeal. Presumably, Respondent improperly included them as an attempt to obtain an advantage on this appeal and somehow justify her unreasonable interpretation of the applicable statutes.

As an example, some of the unsupported statements made in the Answering Brief that were not part of the record on appeal and must therefore be disregarded and not considered by this Court on appeal include:

- (1) "On July 16, 2018, Appellant filed his Objection to Respondent's Petition to confirm her as trustee, and requested the District Court confirm the Original Trust, First Amendment, Second Amendment, and Third Amendment as Trust documents." *See* Answering Brief ("AB"), pg. 2, lns. 4-6.¹²

¹² In fact, Appellant's Objection to Respondent's Petition specifically did not object to the Court's confirmation of the Original Trust and First Amendment. Appellant sought instruction as to the validity of the Second Amendment, Third Amendment, and the handwritten note that Respondent sought to have confirmed as the proposed Fourth Amendment to the Trust. JA 76-78.

- (2) “In fact, Respondent did not know of the October 11, 2011 handwritten letter in 2017. JA, Vol. I, 000001-000053.” AB, pg. 3, lns. 7-8.¹³
- (3) “When discovered, the subject October 11, 2011 handwritten letter was provided by Respondent and submitted by undersigned counsel with her Petition to Confirm, et. al, filed in the District Court May 9, 2018. *Id.*” AB, pg. 3, lns. 8-11.¹⁴
- (4) Simply put, when Respondent discovered the subject October 11, 2011 handwritten letter, she placed it before the District Court for proper consideration and review. *Id.*” AB, pg. 3, lns. 11-13.¹⁵
- (5) “However, the fact of the matter is Respondent did not discover the October 11, 2011 handwritten note of Ella until 2018. Joint Appendix (“JA”), Vol. I, 000001-000053.”, AB, pg. 3, ln.20, pg. 4, lns. 1-2.¹⁶
- (6) “Settlor Ella, as Respondent’s grandmother, raised Respondent for twelve years as a child. Thus, a close bond developed in Respondent’s formative years which led to Settlor Ella living with Respondent when

¹³ There is no reference in Respondent’s Petition nor exhibits attached thereto (*i.e.*, JA Vol. I, 000001-000053) to support this statement. *See also*, Footnote 7 below.

¹⁴ Again, there is nothing in the record on appeal to support the statement that the handwritten note was only discovered and become known to Respondent around the time of filing Respondent’s Petition; *i.e.*, around May 9, 2018. *See also*, Footnote 7 below.

¹⁵ *See* Footnotes 3 and 4 above. *See also*, Footnote 7 below.

¹⁶ *See* Footnote 4 above.

Ella moved to Las Vegas in 2001. Their relationship remained close as they lived together until Ella's death October 26, 2016. JA Vol. I, 000001-000053." AB, pg. 4, lns. 9-13.¹⁷

- (7) "As Respondent was raised by her grandmother, Settlor Ella, and forged a multi-generational bond with her, it is not surprising Respondent was designated by Settlor Ella to receive the benefits set forth in the successive Trust amendments." AB, page 6, lns. 13-15.
- (8) "Subsequently, as a final amendment to the Trust, Settlor Ella ... " AB, pg. 7, ln. 4.
- (9) "Accordingly, Respondent submitted the proposed Fourth Amendment to the District Court for review once it was found."¹⁸ AB, pg. 11, lns. 2-3.

Respondent's Answering Brief repeatedly relies upon the matters that clearly are not part of the record on appeal. None of the above matters were before the

¹⁷ Nothing in the record on appeal, or otherwise, supports these allegations. JA, Vol. I, 000001-000054 is also devoid of any such assertions.

¹⁸ In fact, to date in the underlying district court matter, which remains subject to discovery, the timing of when Respondent actually became aware of the handwritten note she alleges to be the Fourth Amendment has not been established and remains unknown. Since the handwritten letter was allegedly witnessed by Respondent's friend, and since Respondent has access to all of Ella's records prior to and after Ella's death, it would seem inconceivable that she would not become aware of this document for well over a year after she submitted the Notice to Beneficiaries.

district court in making the order now being appealed and, therefore, have no validity other than as an improper attempt to sway or invoke empathy from this Court. Accordingly, the Court should disregard and strike any reference and/or argument made by the Respondent in the Respondent's Answering Brief in regard to the above items.

G. CONCLUSION.

Based on the forgoing and on the argument presented in his Opening Brief, Appellant respectfully requests that the Order of the District Court be reversed, and that Appellant be allowed to challenge the entirety of the Trust, namely the Second, Third, and alleged Fourth Amendment, on issues of undue influence and fraud, rather than just being allowed to challenge the newly-proposed Fourth Amendment to the Trust. Appellant requests that such decision be made based upon a reasonable interpretation of NRS 164.021, equitable tolling and/or a finding that strict construction of the statute would be an unconstitutional denial of due process.

As an alternative argument, should this Court find that under NRS 164.021 Appellant is barred from challenging the Second and Third Amendment to the Trust, then this Court should also find that Respondent is barred under NRS 164.021(4) from presenting the October 11, 2011 handwritten letter as a new amendment to the Trust. In that event, Appellant requests that this Court direct the District Court to dismiss Respondent's Petition to have the October 11, 2011 handwritten letter

deemed as the Fourth Amendment to the Trust, given the fact Respondent's notice excluded that document in identifying the complete Trust Agreement in her original deficient Notice to Beneficiaries and given the fact that Respondent never opposed the argument on this appeal.

Dated this 10th day of June 2020.

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CERTIFICATE OF COMPLIANCE

1. 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 Office 365 in 14pt Times New Roman Font; or

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3. Finally, I hereby certify that I have read this appellate 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.

Dated this 10th day of June 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that the Appellant's Reply Brief was filed electronically with the Nevada Supreme Court on the 10th day of June, 2020. Electronic Service of the Appellants' Reply Brief shall be made in accordance with the Master Service List as follows:

S. Don Bennion

I further certify that on this 10th day of June 2020, I served a copy of the foregoing Appellants' Reply Brief by mailing a true and correct copy thereof, First-Class U.S. Mail, postage prepaid, addressed to:

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