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IN THE SUPREME COURT FOR THE STATE OF NEVADA

IN THE MATTER OF THE JORDAN
DANA FRASIER FAMILY TRUST

AMY FRASIER WILSON,

Appellant,

v.

DINNY FRASIER; PREMIER TRUST,
INC.; JANIE L. MULRAIN; NORI
FRASIER; and BRADLEY L. FRASIER,
M.D.;

Respondents.

Case No. 77981

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that following are persons and entities described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the Court may evaluate possible disqualification or recusal. Appellant Amy Frasier-Wilson is an individual who

represented herself for the majority of the district court proceedings; however, she was at one point represented by Aaron Bart Fricke, Esq.

DATED this 11th day of June, 2019.

DOYLE LAW OFFICE, PLLC

By: /s/ Kerry S. Doyle
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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE	i
I. INTRODUCTION	vii
II. JURISDICTIONAL STATEMENT	ix
III. ROUTING STATEMENT	ix
IV. ISSUES ON APPEAL	x
1. Did the district court err as a matter of law when it declined to consider Dinny Frasier's capacity and the role of undue influence on her capacity to make the Third, Fourth, and Fifth amendments to the Trust by finding that those questions were beyond its jurisdiction?.....	x
2. Did the district court err as a matter of law by confirming the Third, Fourth, and Fifth amendments to the Trust without making a legal determination of the proper standard under which capacity should be considered?	x
3. Did the district court err as a matter of law by confirming the Third, Fourth, and Fifth amendments to the Trust without making a factual finding regarding Dinny Frasier's capacity or the effect of undue influence on her capacity despite recognizing serious questions regarding her capacity?	x
4. Did the district court err as a matter of law by awarding Janie Mulrain fees without making a determination that Dinny Frasier had capacity to execute the powers of attorney or contract engaging Janie Mulrain?	x
V. STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	xi
VI. SUMMARY OF ARGUMENT.....	1

VIII.	ARGUMENT	3
A.	Standard of Review	3
B.	The District Court Had Jurisdiction to Determine Dinny’s Capacity.	3
C.	The District Court Erred as a Matter of Law by Confirming the Amendments to the Trust Without Determining the Proper Standard for Capacity.....	7
D.	The District Court Erred as a Matter of Law by Confirming the Amendments Without Factual Findings Regarding Dinny’s Capacity or the Effect of Undue Influence.	12
E.	Did the District Court Err as a Matter of Law by Awarding Fees to Janie Mulrain Without Determining Dinny’s Capacity?.....	14
IX.	CONCLUSION.....	16
	ATTORNEY CERTIFICATE.....	17

TABLE OF AUTHORITIES

Cases

<i>Floyd v. Sixth Judicial Dist. Court</i> , 36 Nev. 349, 135 P. 922 (1913)	7
<i>Gorden v. Gorden</i> , 93 Nev. 494, 569 P.2d 397 (1977)	12
<i>Hannam v. Brown</i> , 114 Nev. 350, 956 P.2d 794 (1998)	5
<i>In re Marriage of Greenway</i> , 217 Cal. App. 4th 628, 158 Cal. Rptr. 3d 364 (2013)	7, 11
<i>Lintz v. Lintz</i> , 222 Cal. App. 4th 1346, 167 Cal. Rptr. 3d 50 (Cal. Ct. App. 2014)	8, 11
<i>Nayeli M.G. v. Graviel G. (In re Guardianship of N.M.)</i> , 131 Nev. 751, 358 P.3d 216 (2015)	3
<i>Pan v. Eighth Judicial Dist. Court</i> , 120 Nev. 222, 88 P.3d 840 (2004)	7
<i>Rivero v. Rivero</i> , 125 Nev. 410, 216 P.3d 213 (2009)	12, 13
<i>Rocker v. KPMG LLP</i> , 122 Nev. 1185, 148 P.3d 703 (2006)	13
<i>Sterling v. Sterling</i> , 242 Cal. App. 4th 185, 194 Cal. Rptr. 3d 867 (Cal. Ct. App. 2015)	8
<i>Thomas v. MEI-GSR Holdings, Ltd. Liab. Co.</i> , 2018 WL 1129664 (Nev. 2018)	3
<i>Westpark Owners' Ass'n v. Eighth Judicial Dist. Court</i> , 123 Nev. 349, 167 P.3d 421 (2007)	3

Statutes

Cal. Prob. Code § 6100.5.....	8
Cal. Prob. Code, §§ 810-812	7, 9, 10
NRS 155.190	viii
NRS 164.010	passim
NRS 164.015	xvii, 1, 4, 5

Other Authorities

Restatement 3d of Trusts, § 11	5
--------------------------------------	---

Rules

NRAP 17	viii
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I. INTRODUCTION

Dinny Frasier (“Dinny”)¹ and her husband, Jordan (“Joe”) Dana Frasier, established a trust in 1980. (1 Appellant’s Appendix “AA” 12-33). They amended it five times before Joe’s death in 2014. (1 AA 36-115). When Joe passed away, the Trust’s terms split it into two Trusts: Trust A – the survivor’s trust, and Trust B – the tax exempt trust. (1 AA 101). The co-trustees of Trust A were Premier Trust, Inc. and Dinny. As the settlor, Dinny also retained the ability to amend Trust A.

For years, this litigation proceeded with disputes over the nature of money the Trusts contributed to purchase a medical building with one of Dinny and Joe’s children, Dr. Bradley Frasier, i.e. whether it was a loan or an investment by which and ownership interest had been obtained. (9 AA 2036-37). This issue was ultimately resolved by settlement, under which Dinny was to amend the survivor’s trust to distribute properties to each of her three children and allow for equalization payments at the time of her death, to create equal distribution in light of the differences in property value. (1 AA 159-60; 9 AA 2037-38). However, during the litigation and the settlement process, several questions arose regarding Dinny’s capacity and the undue and improper influence of some of the professionals that had been hired to ensure her welfare. (*See* 9 AA 2038).

¹ In this appeal, several of the parties are from the same family, to eliminate confusion, the family members are each referred to by their first names.

After recognizing concerns regarding Dinny's capacity, the district court entered an order in October 2018 in which it distributed property to each of the children to effectuate a part of the settlement agreement. Because it could not rule that Dinny had capacity to amend the Trust, it modified the Trust pursuant to NRS 153.031(1)(n). (9 AA 2038). The Court did not, however, modify the Trust to allow for the equalization payments. (*Id.*).

After an evidentiary hearing in which the Court "invited the parties to comment upon the propriety of an independent investigator to confirm Dinny's capacity, removing [Janie] Mulrain as Dinny's attorney-in-fact, and appointing a guardian ad litem," the district court determined that all of those issues were beyond its jurisdiction. (10 AA 2210-11). However, in that same order, the district court confirmed the Third, Fourth, and Fifth amendments to the Trust, and also affirmed the payment of over \$180,000 in fees to Ms. Mulrain, without ever appointing the independent investigator or making any factual finding regarding Dinny's capacity or the effect of undue influence on her capacity. (*Id.*).

This appeal therefore presents the legal question of whether the district court had jurisdiction to determine Dinny's capacity to make the amendments, and whether it erred as a matter of law by refusing to make those determinations before confirming the amendments.

II. JURISDICTIONAL STATEMENT

Several subsections of NRS 155.190(1) provide for the appealability of the Order After Hearing (Dec. 21, 2018) and the Order Confirming the Fifth Amendment (Jan. 15, 2019). (10 AA 2199-2211). Specifically subsection (f) allows an appeal from an order conveying property, (g) allows an appeal from an order settling an account of a personal representative or trustee, (h) allows an appeal from an order instructing a trustee, (j) allows an appeal from an order directing the payment of a debt or a devise, (l) allows an appeal from an order distributing property, & (n) allows an appeal from any order in which the decision involves an amount in controversy in excess of \$10,000. As this appeal was filed within 30 days of notice of entry of the December 21, 2018 Order, the Court has jurisdiction over this timely appeal. (10 AA 2227). *See* NRS 155.190(1).

III. ROUTING STATEMENT

As a case involving trust and estate matters in which the corpus of the estate exceeds \$5,430,000, this case would not be presumptively assigned to the Court of Appeals. NRAP 17(b)(14). However, as the appeal presents primarily an error correction issues, Amy Frasier-Wilson does not object to assignment to the Court of Appeals.

IV. ISSUES ON APPEAL

1. Did the district court err as a matter of law when it declined to consider Dinny Frasier's capacity and the role of undue influence on her capacity to make the Third, Fourth, and Fifth amendments to the Trust by finding that those questions were beyond its jurisdiction?
2. Did the district court err as a matter of law by confirming the Third, Fourth, and Fifth amendments to the Trust without making a legal determination of the proper standard under which capacity should be considered?
3. Did the district court err as a matter of law by confirming the Third, Fourth, and Fifth amendments to the Trust without making a factual finding regarding Dinny Frasier's capacity or the effect of undue influence on her capacity despite recognizing serious questions regarding her capacity?
4. Did the district court err as a matter of law by awarding Janie Mulrain fees without making a determination that Dinny Frasier had capacity to execute the powers of attorney or contract engaging Janie Mulrain?

V. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The factual issues in this case mainly involve Dinny Frasier's competence to make testamentary and contract decisions. At one point or another, every party to the litigation raised questions regarding Dinny's competence. (*See, e.g.*, 1 AA 128 (conditioning the settlement agreement upon a determination of capacity)). Indeed, the district court confirmed Dinny's resignation as co-trustee of the trust after recognizing the questions regarding her competence. (*See* 2 AA 362; 3 AA 499; 4 AA 800, 816, 844). Nevertheless, the district court confirmed the validity of certain amendments to her trust and contractual transaction, without ever making any factual findings that she had the requisite capacity. (*See* 10 AA 2180).

Dinny and Joe established a trust in 1980. (1 AA 12-33). They amended it five times before Joe's death in 2014. (1 AA 36-115). Those amendments are not in dispute. When Joe passed away, the trust's terms split it into two trusts: Trust A – the survivor's trust, and Trust B – the tax exempt trust. (1 AA 101). The co-trustees of Trust A were Premier Trust, Inc. and Dinny. As the settlor, Dinny also retained the ability to amend Trust A.

Dinny and Joe had three children, all of whom are now adults and are involved in this litigation: Bradley ("Brad"), Nori, and Amy. (10 AA 2200). The family dynamics have been turbulent and difficult for Dinny and all three children. (*Id.*)

This action was commenced on March 2, 2016, when Dinny and Premier filed a petition pursuant to NRS 164.010 to confirm them as co-trustees, and for

instructions on how to deal with a dispute between the Trusts and Brad over the nature of money contributed by the Trusts towards the purchase of Brad's medical building. (1 AA 1). The district court assumed jurisdiction over the Trusts, and set a bench trial for May 8, 2017 to resolve the dispute. (*See* 10 AA 2280-81).

In the course of the litigation, around November or December 2016, Dinny retained Barnet Resnick to represent her personally. (6 AA 1173). Resnick introduced Dinny to Janie Mulrain in December 2016. (6 AA 1215). Although Mulrain called it an interview, Dinny purportedly hired Mulrain at their first meeting. (8 AA 1686, 1702). Dinny also executed a power of attorney over her finances and health care to Janie Mulrain. (*See* 4 AA 894). Mulrain almost immediately began experiencing difficulty because other entities questioned Dinny's capacity. (*See* 9 AA 2110-11 (noting that a bank was demanding a declaration of capacity for Dinny)).

Prior to the date set for trial on the dispute over Brad's medical building, the parties informed the district court that they had mediated the dispute on January 27, 2017, and reached a settlement. (1 AA 232). The parties (or their counsel) each signed an informal settlement agreement at the conclusion of the mediation.² (1 AA 214-17). However, the parties were later unable to agree to a formal settlement agreement, and in certain respects, contested whether an enforceable settlement agreement had in fact been reached. (*See* 1 AA 116).

² Dinny, who left the mediation early, signed the informal agreement after that day. (1 AA 118).

The informal settlement agreement generally provided for the distribution of three pieces of real property from the Trusts, one to each of the children. (1 AA 214-17). Because the properties differed in value, the informal settlement agreement also provided for equalizing cash payments to each of the children. (*Id.*) To effectuate these distributions, the informal settlement agreement required Dinny to amend Trust A. (*Id.*) The informal settlement agreement was expressly contingent on approval by the district court. (*Id.*) Finally, the informal settlement agreement provided that: “Dinny shall be evaluated by a qualified gerontologist to assess her capacity to contract and to make testamentary disposition of her estate.” (*Id.*) It was expressly contingent both on district court approval and a capacity assessment: “Contingent on Court approval of this Agreement, and subject to a capacity assessment by a qualified gerontologist, Dinny shall distribute or authorize to distribute [the real property].” (*Id.*)

As contemplated in the settlement agreement, Dinny was evaluated for competency by Dr. Spar on February 28, 2017. (1 AA 211-12). Dr. Spar’s report stated that Dinny was not oriented to “the year, month, date, day, season, place” and showed “moderate cognitive impairments.” (*Id.*) However, Dr. Spar concluded that Dinny retained testamentary capacity, and that she also retained contractual capacity, “**as long as she is not required to rely on her unaided recall alone.**” (*Id.* (emphasis in original)).

On April 14, 2017, Dinny filed a Motion to Approve and Enforce Settlement Agreement and to Vacate Trial Date. (1 AA 116). In that Motion, Dinny noted that the informal settlement agreement expressly stated that it was contingent upon court approval and that “confirmation of Dinny’s capacity is also an implied condition.” (1 AA 117). The district court vacated the May 8, 2017, trial and set an evidentiary hearing in its place (which was then continued to May 9th), to determine whether the parties agreed to all material terms of the settlement. (1 AA 232). It also ordered the parties to file pre-hearing statements. (*Id.*)

As Premier noted in its May 5, 2017 pre-hearing statement, “it is clear the evaluation [by Dr. Spar] was rushed and the conclusions reached by Dr. Spar appear in some places to be contradictory.” (2 AA 249). Premier urged the district court to interview Dinny, reach its own conclusions, and to make findings of fact regarding her capacity. (2 AA 248-49). However, Dinny did not attend the evidentiary hearing (2 AA 319), and the district court did not make any findings regarding her capacity.

While the dispute over the settlement agreement continued and with her capacity significantly questioned, on April 27, 2017, Dinny executed the Third Amendment to Trust A, by which she amended the distribution of the Trust A assets upon her death to several charities. (*See* 9 AA 2064-65). Premier Trust, however, never signed the amendment. (9 AA 2082).

In an attempt to address the concerns regarding Dinny’s capacity to serve as co-trustee, Dinny was evaluated by Dr. Spar again on May 19, 2017. (2 AA 427). After

that evaluation, Dr. Spar concluded that Dinny retained the ability to make decisions regarding the trust, such as whether to replace the co-trustee, or hire or fire attorneys. (2 AA 428). Dr. Spar did not make any findings regarding contractual capacity. (*Id.* at 428). Dr. Spar did not address Dinny's inaccurate factual recall, in which she stated that Amy and her husband had promised to move in with her and then refused to do so. (9 AA 2121). Shortly thereafter, however, Dinny agreed to resign as co-trustee, to prevent further disputes over her ability to carry out her duties as trustee. (3 AA 490).

While these evaluations were occurring, the district court was deciding the pending motions. It entered three orders on July 6, 2017. In the first order, the district court held that the informal settlement agreement was enforceable. (2 AA 456). Again, it made no findings as to Dinny's capacity. (*See* 2 AA 458-59). In the second order, the district court held that Dinny could make amendments to Trust A, including alternate distributions, "so long as she is capacitated." (2 AA 462). In the third order, the court stated: "This Court is concerned about [Dinny's] cognition and capacity, and the external influences that have been excluded from and introduced into [Dinny's] life . . . [Dinny] shall appear in person and be available for observation, cross-examination, and possible evaluation." (2 AA 454). The district court also stated that: "based upon the current allegations, **no amendment to any trust documents will be effective without proof to this Court of [Dinny's] testamentary and contractual capacity.** The evaluation provided by Dr. Spar is **not** preponderant proof of [Dinny's] capacity." (2 AA 455 (emphasis added)). Finally, the district court

authorized Premier to engage a geriatric psychiatrist or similar expert to make observations of Ms. Frasier's cognition and capacity, and whether further evaluation may be necessary. (*Id.*).

Dr. Spar evaluated Dinny a third time on September 22, 2017, and again concluded that Dinny retained testamentary and contractual capacity. (9 AA 2124-25). Dinny was also evaluated on July 12, 2018, and August 30, 2018, by Dr. Sandra Klein,³ a gerontologist at University of California, Irvine. (9 AA 2136-39). Dr. Klein noted that Dinny believed it was December 2001, when in fact the exam occurred in August 2018. (9 AA at 2137). Dr. Klein noted that Dinny claimed to be "disappointed and frustrated" with her children for "trying to get [her] money." (7 AA 1560). However, as Dr. Klein stated, that was "in direct contrast to [Dinny's] comment in the [July] evaluation when she reported being close to all her children." (*Id.*). Dr. Klein concluded that Dinny retained testamentary capacity but did not have contractual capacity. (7 AA 1563). Dr. Klein directly opined that Dinny was vulnerable to undue influence by others when it comes to her financial affairs. (*Id.*).

In another evidentiary hearing on October 11 and 12, 2018, which Dinny did not attend, the district court again expressed concerns regarding Dinny's capacity, stating that it could not determine at that time whether she had capacity or not. (9 AA

³ Dr. Klein notes in her evaluative report that Dinny was also seen in her office on July 12, 2018, however, a report of that evaluation could not be located in the record. (*See* 7 AA 1560).

1988). The district court indicated that it would require a determination of Dinny's capacity to execute the Amendments, and that there would be a right to contest that determination. (9 AA 2018, 2021, 2028). The district court also indicated that it had concerns about its jurisdiction with respect to the various allegations related to Dinny's care and allegations of abuse and undue influence. (9 AA 1965-66, 2014-15). However, the district court also made it clear that it intended to relinquish or transfer jurisdiction to a California court "but only after this litigation is complete." (9 AA 2015; *see also* 9 AA 2028 ("[the court's] relinquishment of jurisdiction is anticipated, but not yet. I talked about completing the deal...")).

As a result of that hearing, Dr. Klein again evaluated Dinny on November 12, 2018. (9 AA 2142-45). Dr. Klein concluded that Dinny "is unable to manipulate information and balance the pros and cons of her immediate situations because information becomes overwhelming for her and she needs assistance keeping facts and details correct without forgetting." (9 AA 2145). Dr. Klein stated "This makes her vulnerable to undue influence by others when it comes to her financial affairs." (*Id.*) Finally, Dr. Klein opined that Dinny retained testamentary capacity, but she "would need trusted advisors to help her understand information sufficient to ensure contractual capacity." (*Id.*).

After the properties that were the subject of the settlement agreement had been appraised, on November 13, 2018, Dinny executed the Fourth Amendment to Trust A to provide for the monetary equalization distributions to each of her children that

would be made upon her passing. (9 AA 2091). Dinny then filed a “Petition to Confirm the Third and Fourth Amendments to Survivor’s Trust to Effectuate Terms of Settlement Agreement & Certain Transfers Payable Upon Death of the Survivor – Mrs. Dinny Frasier.” (9 AA 2045).

Appellant Amy Frasier Wilson timely filed objections to Dinny’s Petition to Confirm the Third and Fourth Amendments. (9 AA 2094-10 AA 2198). Amy asserted that the Fourth Amendment contained mathematical errors in calculating the equalization payments, and she also objected that Dinny lacked capacity to execute the Third and Fourth Amendments (collectively, “Amendments”). (*Id.*)

In an order dated December 21, 2018, the district court granted the Petition to Confirm the Third and Fourth Amendments. (10 AA 2199). The district court made numerous findings of fact, but none related to Dinny’s capacity. The district court noted that it had “previously expressed its concerns and invited the parties to comment upon the propriety of an independent investigator to confirm Dinny’s capacity, removing Ms. Mulrain as Dinny’s attorney-in-fact, and appointing a guardian ad litem.” (10 AA 2210-11). However, the district court then concluded that these matters were “ancillary issues” that must be addressed in a California court. (*Id.*) The order provided that the district court would only “modestly intervene in personal issues in accordance with NRS 164.010 and NRS 164.015.” (*Id.*) The court then denied Appellant Amy’s objections to capacity without any factual findings, analysis, or explanation. (*Id.*) Thus, the district court approved the amendments to the Trusts,

without ever making any findings or conclusions regarding Dinny's capacity or undue influence, despite Amy directly objecting to the petition on those grounds.

The district court had recognized a potential calculation error in determining the amounts of the equalization payments and ordered Dinny and her counsel to correct the error. (10 AA 2211). In response, Dinny executed the Fifth Amendment to Trust A on December 4, 2018, still without any legal determination of capacity or her understanding at the time she executed the Fifth Amendment. (10 AA 2220-23). Premier Trust never signed the Third, Fourth, or Fifth Amendments to Trust A. (*See* 9 AA 2082; 10 AA 2187, 2224).

On January 15, 2019, the district court entered an order confirming the Fifth Amendment to the Trust, which rectified the arithmetic error that Amy had pointed out in her objections to the Third and Fourth Amendments. (10 AA 2246-48). However, the district court still did not make any findings as to Dinny's capacity. (*Id.*)

VI. SUMMARY OF ARGUMENT

The district court's order approving the Third, Fourth, and Fifth Amendments ("Amendments") to the Trusts and approving the payment of over \$180,000 in fees to Mulrain must be reversed and remanded for further proceedings.

First, the district court improperly determined that it lacked jurisdiction to determine Dinny's capacity, even though her capacity is critical to the validity of the Amendments and her power of attorney to Mulrain. The district court properly had jurisdiction under NRS 164.010 and 164.015 to determine the validity of the Amendments. By exercising that jurisdiction, yet refusing to determine Dinny's capacity, the district court abdicated its duty to decide contested issues, and effectively denied Appellant her day in court.

Second, the district court did not make any determination of the proper legal standard for capacity in this case. California law controls the validity and interpretation of the Trusts. California law provides for a "sliding scale" level of capacity, depending on the complexity of the decision at issue. Here, Dinny was presented with three amendments to an AB Trust, intended to effectuate a settlement agreement that required equalizing payments to her children upon her death. Thus she was faced with issues and decisions that were considerably more complex than making a simple will. Because the district court failed to identify the proper legal standard, it is not possible to meaningfully review the correctness of any implied finding that Dinny had the required capacity.

Third, the district court, because it refused to decide the issue of capacity, also did not make any factual findings in that respect. On numerous occasions, the district court expressed concerns about Dinny's capacity, and contemplated appointing an independent investigator to determine whether Dinny had capacity or was under undue influence. However, the district court ultimately declined to do so, instead holding that these were "ancillary issues" that must be heard by a California court.

Finally, the district court erred by refusing to determine Dinny's capacity at the time she engaged Mulrain and executed a power of attorney giving her full authority over her finances. Shortly after doing so, Dinny suddenly ceased communications with all her children, her co-trustee, and many friends and neighbors. She purportedly also requested, through Mulrain, substantial sums from the Trust, which she had never done before. Further, nearly \$200,000 was spent from Dinny's accounts over the course of only several months, which was also very unusual. These are just a few examples of the strange events that occurred shortly after Mulrain became involved.

As with the Amendments to the Trust, the validity of Mulrain's engagement agreement and the power of attorney to her depend on Dinny's capacity to execute them, free of undue influence. Thus, for the same reasons as set forth with respect to the Amendments, the district court also erred in approving over \$180,000 in fees to Mulrain, without first determining that Dinny had capacity to hire Mulrain and did so free of undue influence.

The district court had jurisdiction to determine the validity of the Amendments and of the power of attorney to Mulrain, and it approved them both. However, it expressly declined to determine Dinny's capacity, which of course is a prerequisite to any finding that either the Amendments or power of attorney were valid. This was error as a matter of law. Accordingly, Appellant respectfully requests this Court to reverse the district court's decision and remand for further proceedings.

VIII. ARGUMENT

A. Standard of Review

Issues of subject matter jurisdiction and statutory interpretation are reviewed de novo. *Nayeli M.G. v. Graviel G. (In re Guardianship of N.M.)*, 131 Nev. 751, 754, 358 P.3d 216, 218 (2015); *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 426 (2007); *see also Thomas v. MEI-GSR Holdings, Ltd. Liab. Co.*, 2018 WL 1129664 at *2 (Nev. 2018) ("Subject matter jurisdiction and statutory interpretation are questions of law subject to de novo review.").

B. The District Court Had Jurisdiction to Determine Dinny's Capacity.

This case was commenced when Dinny and Premier Trust filed a "Petition for Confirmation of Trustees, for Construction of the Trust Instruments, and for Instructions." The Petition requested the district court to assume jurisdiction of the Trust pursuant to NRS 164.010. The district court assumed jurisdiction of the Trusts and made various orders related to the administration of the Trusts.

NRS 164.010(1) provides that a district court in the county in which any of the trustees resides “shall assume jurisdiction” of the trust upon filing such a petition, if no other court has already assumed jurisdiction. No other court had previously assumed jurisdiction of the Trusts. Accordingly, the district court assumed jurisdiction.

NRS 164.010(5)(b) provides that when the district court assumes jurisdiction of the trust, it is deemed to have personal jurisdiction over any trustee confirmed by the court and any other party who appears in the matter. Additionally, NRS 164.015(1) states that the district court has “exclusive jurisdiction” over “proceedings initiated by the petition of an interested person concerning the internal affairs of a nontestamentary trust, . . . if the interested person shows that the settlor is incompetent or susceptible to undue influence.”

NRS 164.015(3) provides that in such a proceeding, the written challenge to the validity of the trust is treated as a pleading, whether it is raised by a petition or by an objector.

Finally, NRS 164.015(4) provides in its entirety:

“In a proceeding pursuant to subsection 3, the competency of the settlor to make the trust, the freedom of the settlor from duress, menace, fraud or undue influence at the time of execution of the will, the execution and attestation of the trust instrument, or any other question affecting the validity of the trust is a question of fact and must be tried by the court, subject to the provisions of subsection 5.”

(emphasis added.) According to the plain language of NRS 164.010 and 164.015, the district court had **exclusive** jurisdiction over the challenge to Dinny’s capacity to execute the Amendments, and “must” have tried that issue.

In its December 21, 2018 order, the district court made extensive findings of fact. (10 AA 2200-2207). However, none of those findings relate to Dinny’s capacity, despite the court’s repeated and unequivocal statements that it would require proof of capacity. (*See e.g.*, 9 AA, 2018, 2021, 2028). Nor do any of those findings even mention any of the evaluations by either Dr. Spar or Dr. Klein. (10 AA 2200-2207). Finally, the district court held that it did not have jurisdiction to appoint an independent investigator “to confirm Dinny’s capacity,” to remove Mulrain as Dinny’s attorney-in-fact, or appoint a guardian ad litem, and that these matters⁴ must be addressed in a California court. (10 AA 2210-11).

It is axiomatic that an indispensable prerequisite to the validity of a trust (or any amendments to a trust) is that the settlor has the requisite capacity. *See* Restat. 3d of Trusts, § 11; *see e.g.*, *Hannam v. Brown*, 114 Nev. 350, 354, 956 P.2d 794, 797 (1998).

⁴ The district court indicated during the hearing that certain issues such as the various parties’ allegations of elder abuse, isolation, exploitation, or neglect are “jurisdictionally problematic” and “must be remedied in California.” (9 AA 2014). Appellant does not dispute that such issues could be heard in California, as they relate to tortious or criminal activity. However, in the district court’s written order, it declines jurisdiction over completely different issues, specifically Dinny’s capacity and potential undue influence, both of which are key issues related to the validity of the Amendments to the Trust and the Power of Attorney to Mulrain.

The district court explicitly acknowledged this requirement numerous times, including at the October 12, 2018 hearing:

The problem that I have, that we all have, all of us together in the room, including [Dinny's] children, is that to complete the [settlement] agreement that was reached so long ago, Ms. Frasier has to sign a trust amendment. And her ability to sign that trust amendment is connected to her capacity.

(9 AA 2000).

Thus the district court erred as a matter of law when it affirmed the Amendments to the Trusts, while simultaneously holding that it lacked jurisdiction to determine the issue of Dinny's capacity or the potential of undue influence, despite those issues being squarely raised in Amy's objections to the Petition.

It appears that the district court was anxious to get rid of this case, and that, unfortunately, likely fueled its error. The district court repeatedly noted that the relationships between the various parties have been strained, to put it mildly, and stated its concerns that future litigation might occur. (*See e.g.*, 9 AA 2012 (commenting on how two of the parties have described each other and stating that it is appropriate to "put a lockbox" on the litigation). The district court also stated at least twice that it had a desire to "complete" this litigation regarding the Trusts before relinquishing jurisdiction to a California court. (9 AA 2015-16).

Whatever the reasons, the district court clearly had jurisdiction to determine Dinny's capacity, and its refusal to hear evidence and decide that issue was an

“abdication of the jurisdiction which the court is bound in every proper case to exercise.” *Floyd v. Sixth Judicial Dist. Court*, 36 Nev. 349, 355, 135 P. 922, 924 (1913).⁵

The district court denied Amy her day in court, and perhaps more importantly, denied Dinny the protections upon which Amy was insisting. Accordingly, this Court should reverse and remand this case.

C. The District Court Erred as a Matter of Law by Confirming the Amendments to the Trust Without Determining the Proper Standard for Capacity.

The construction and validity of the Trust is governed by the laws of California. (1 AA 94). Accordingly, the district court should have determined Dinny’s capacity pursuant to Cal. Prob. Code, sections 810-812, which set forth a “sliding scale” standard for mental capacity.

“Simply stated, the required level of understanding depends entirely on the complexity of the decision being made.” *In re Marriage of Greenway*, 217 Cal. App. 4th 628, 641, 158 Cal. Rptr. 3d 364, 374 (2013). Only an “extremely low level of mental capacity” is required for the creation of a will or the decision to enter into a marriage contract. *Id.* By contrast, the execution of complex trust documents requires a higher

⁵ The court in *Floyd* states that a writ of mandamus is the proper remedy in such cases, but the Nevada Supreme Court has since clarified that where elements of finality are met, an appeal, rather than a writ, is the appropriate way to review a district court’s erroneous refusal to take jurisdiction. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

level of capacity. *Lintz v. Lintz*, 222 Cal. App. 4th 1346, 1353, 167 Cal. Rptr. 3d 50, 55 (Cal. Ct. App. 2014).

Undue influence also bears on capacity, as does a person's ability to resist undue influence. For example, in *Sterling v. Sterling*, 242 Cal. App. 4th 185, 192, 194 Cal. Rptr. 3d 867, 872 (Cal. Ct. App. 2015), the court affirmed the finding of incapacity and removal of a co-trustee. In that case, Dr. Spar (the same Dr. Spar who evaluated Dinny in this case) found that the co-trustee was "substantially unable to manage his finances and resist fraud and undue influence." *Id.*

In this case, Dr. Spar found that Dinny retained testamentary capacity as defined in Cal. Prob. Code § 6100.5, and that she also retained contractual capacity "as long as she is not required to rely on her unaided recall alone." (1 AA 211-12). Dr. Spar did not make any determinations related to Dinny's ability to recognize or resist undue influence.

Dr. Klein also found that Dinny retained testamentary capacity. (9 AA 2139). However, she initially determined that Dinny did **not** have contractual capacity. (*Id.*). In a later evaluation, Dr. Klein determined that Dinny is "not capable of appreciating the situation or consequences of her decisions independently" and "would need to have trusted advisors to help her understand information sufficiently to ensure contractual capacity." (9 AA 2145). Notably, Dr. Klein's report states that Dinny's cognitive ability "has remained stable" compared to her previous evaluations. (*Id.*) This statement indicates that Dinny's contractual capacity was no greater in

November, 2018 than it was on August 30, 2018, when Dr. Klein opined that Dinny lacked contractual capacity.

Furthermore, Dr. Klein found that Dinny was “unable to manipulate information and balance the pros and cons of her immediate situations because information becomes overwhelming for her and she needs assistance keeping the facts and details correct without forgetting.” This in turn makes Dinny “vulnerable to undue influence by others when it comes to her financial affairs.” (9 AA 2144-45).

Both Dr. Spar and Dr. Klein found that Dinny retained testamentary capacity. (9 AA 2125; 2144-45). However, they did not agree that she retained contractual capacity. (*Id.*) Furthermore, Dr. Spar’s opinion that Dinny had contractual capacity was qualified by the statement that Dinny would not be able to rely on her unaided memory. (9 AA 2118-19). These qualified conclusions present several legal and evidentiary problems.

First, as noted above, Cal. Prob. Code sections 810-812 do not neatly distinguish between “testamentary capacity” and “contractual capacity.” It is unclear how Dr. Spar and Dr. Klein are distinguishing or defining those terms. The district court in fact recognized that problem, stating: “I have been troubled by these declarations of, She retains contractual capacity; she retains testamentary capacity. Those are very complex legal determinations, and I just don’t know how those amendments will shake out.” (7 AA 1589).

Second, nothing in Cal. Prob. Code sections 810-812 provides for whether, how, or under what circumstances, a person can “gain” contractual capacity with the assistance of third parties, as Dr. Spar and Dr. Klein appear to suggest in their evaluations. It seems illogical that a person can have “capacity,” i.e., the ability to freely and intentionally make choices for themselves, yet be dependent on a third party for that capacity. Adding the additional variables of what is the appropriate level of assistance, and by whom, also seems like a recipe for endless litigation. Dinny’s counsel did not provide the district court any legal authority by which such supported decision making confers capacity.

Third, as Dr. Klein found, Dinny is vulnerable to undue influence because of her inability to process and remember the information without substantial help from others. To allow capacity to be “gained” using assistance of others invites the very problem Dr. Klein fears: that those others will exert undue influence over Dinny.

Fourth, the Third Amendment to the Trust A defined “incapacity” to include if:

(i) The person is unable to provide properly for that person’s own needs for physical health, food, clothing, or shelter; **to manage substantially that person’s own financial resources; or to resist fraud or undue influence.**

(9 AA 2080). Given Dr. Spar and Dr. Klein’s evaluations that indicated Dinny was susceptible to undue influence and Dinny’s execution of a financial power of attorney,

Dinny did not even meet the terms of capacity under her proposed amendment. (*See id.*).

In this case, Dinny was not presented with simple provisions equivalent to creating a basic will. Like in *Lintz*, she was dealing with multiple amendments to a complex AB Trust arrangement. *See Lintz*, 222 Cal. App. 4th at 1353, 167 Cal. Rptr. 3d at 55 (applying a higher requirement of capacity due to the complexity of the trust). Dinny was also presented with a settlement agreement that provided for the resolution of a long-standing dispute over whether money given to Dr. Bradley Frasier for his medical building was a loan, a gift, or an investment. It also provided that the Trust would distribute certain property to Dinny's children, but required her to make amendments to her Trust for equalizing payments to the children upon her death, following appraisals of those properties. These are complex transactions that require more than the "extremely low level of mental capacity" that is required for making a basic will. *See In re Marriage of Greenway*, 217 Cal. App. 4th at 641, 158 Cal. Rptr. 3d at 374.

Appellant does not ask this Court to resolve these issues. Instead, they are pointed out to illustrate that determining the proper legal standard for capacity is the critical first step to determining capacity. Since California law controls, it is not a simple finding of the typically low requirement for testamentary capacity under Nevada law. After determining the proper standard, the district court would then need to apply it to the facts of this case, e.g., the complexity of the decisions at issue,

the doctors' evaluations, and so forth. However, the district court abdicated its duty, and failed to address any of these issues. This Court should therefore reverse and remand for those determinations in the first instance.

D. The District Court Erred as a Matter of Law by Confirming the Amendments Without Factual Findings Regarding Dinny's Capacity or the Effect of Undue Influence.

The validity of the Amendments depends on whether Dinny had sufficient capacity to execute them, and whether she was under undue influence. However, as described above, the district court refused to decide this issue and never made any factual findings that Dinny had either testamentary or contractual capacity.

This failure to make factual findings is contrary to the district court's own orders. In its July 6, 2017 Order Regarding Hearing, the district court stated: "Further, based upon the current allegations, no amendment to any trust documents will be effective **without proof to this Court of [Dinny's] testamentary and contractual capacity.** The evaluation provided by Dr. Spar is **not** preponderant proof of [Dinny]'s capacity." (2 AA 455 (emphasis added)).

Nevada appellate courts may imply factual findings where it is able to do so, and "the evidence clearly supports the judgment." *Gorden v. Gorden*, 93 Nev. 494, 496, 569 P.2d 397, 398 (1977). However, reversal and remand is required where the lack of findings prevents appellate review. *See e.g., Rivero v. Rivero*, 125 Nev. 410, 441, 216 P.3d 213, 234 (2009) (reversing and remanding order imposing attorneys' fees as sanctions where district court made no factual findings regarding whether party's motions were

frivolous); *Rocker v. KPMG LLP*, 122 Nev. 1185, 1196, 148 P.3d 703, 710 (2006) (vacating ruling related to personal jurisdiction where the lack of factual findings prevented appellate review of that decision).

The lack of factual findings in this case requires reversal and a remand for two main reasons. First, the district court expressly **declined** to decide the issue of capacity. (10 AA 2210-11). Thus this case is markedly different from those cases where the district court ruled on the issue, but failed to make express factual findings. Here, the district court's ruling that the Amendments to the Trust are valid is a *non-sequitur*, since the validity of the Amendments hinges on capacity, which the district court refused to decide.

Second, even if this Court were to construe the district court's order as impliedly holding that Dinny had adequate capacity, remand is nevertheless required. Without any factual findings, this Court cannot meaningfully review the correctness of that decision on appeal because it is not possible to imply the necessary findings of fact in this case, similar to *Rivero* and *Rocker*, *supra*.

As described above, California law controls in this case, and California law uses a "sliding scale" of capacity, depending on the complexity of the decision at issue. Since there are no findings of fact, it is impossible to tell whether the district court found that Dinny had "testamentary capacity" or "contractual capacity," or both. Nor is it possible to review the correctness of that decision, because there are no findings regarding what facts the district court used to support its conclusion.

For example, if the district court applied the testamentary capacity test, that was clearly in error, because the Settlement Agreement and the Amendments are undoubtedly much more complicated than a simple will. Even if the district court found that Dinny had “contractual capacity,” that would also be in error. The evaluations from Dr. Spar and Dr. Klein both state that Dinny lacked “contractual capacity,” Dr. Klein stating so unequivocally and Dr. Spar stating it was true without the aid of third parties. (9 AA 2115, 2118-19, 2139). Assuming it is even possible to gain capacity through reliance on others, there are no findings regarding whether Dinny had such aid, and if she did, whether that aid was sufficient and free of undue influence.

Reversal and remand are therefore required so that the district court can determine the facts that would or would not support a finding that Dinny had the necessary capacity to execute the Amendments.

E. Did the District Court Err as a Matter of Law by Awarding Fees to Janie Mulrain Without Determining Dinny’s Capacity?

Amy also objected to the payment of nearly \$200,000 in fees to Mulrain, Dinny’s attorney in fact. (4 AA 855). Among other things, Amy challenged Mulrain’s fees on the basis that Dinny lacked capacity or was unduly influenced to engage Mulrain and execute a power of attorney giving Mulrain complete control of Dinny’s finances. (4 AA 859-62).

Dinny purportedly engaged Mulrain in December, 2016. Also beginning at that time, Dinny cut off all communication with all of her children and also with Premier. This prompted Premier to file its Second Supplemental Petition for Instructions on May 31, 2017, expressing its concerns about Dinny's welfare due to "multiple strange events that have occurred in the past seven months involving both Dinny personally and her finances." (2 AA 380).

The Second Supplemental Petition goes on to detail these events, which include: (1) a check to Resnick's firm in the amount of \$10,000 with what appears to be a forgery of Dinny's signature; (2) Mulrain requesting substantial funds from the trust to pay legal and medical bills, when Premier has previously paid all legal and medical bills; (3) the spending of approximately \$200,000 over just a few months, which is very unusual for Dinny; and (4) the sudden isolation of Dinny from her children, her co-trustee (Premier), and her friends and neighbors. (2 AA 381-86).

Like the Amendments, the validity of the power of attorney and the engagement agreement with Mulrain depends on Dinny's capacity to understand the transaction, its consequences, and to make her decision free of undue influence. Both Dr. Spar and Dr. Klein found that Dinny either lacked contractual capacity or needed assistance in order to have contractual capacity. It is obvious that such assistance should not come from the persons who stand to profit from the transaction. However, the district court made no findings of fact as to whether Dinny had such assistance, and from whom.

For these reasons, the district court erred in awarding more than \$180,000 in fees to Mulrain, without deciding and without making any findings of fact regarding Dinny's capacity to engage Mulrain and grant full authority over her finances. The district court therefore erred as a matter of law, and the matter must be reversed and remanded for further proceedings.

IX. CONCLUSION

The validity of a trust (or amendment thereto) depends on the capacity of the person executing it. Here, the district court not only had jurisdiction, but was required to determine Dinny's capacity to execute the Amendments to the Trusts or to engage Mulrain and give her power of attorney over all of her finances. By refusing to do so, the district court abdicated its duty and denied Amy her day in court. More importantly, the district court denied Dinny the protections Amy was fighting to invoke. Additionally, even if this Court were to determine that the district court impliedly decided that Dinny had capacity, the district court's failure to make any factual findings regarding Dinny's capacity makes meaningful appellate review of that decision impossible.

The court should therefore reverse the district court and remand for further proceedings to determine the correct legal standard for capacity and to try and decide whether Dinny had capacity to execute the Amendments or power of attorney to Mulrain.

ATTORNEY CERTIFICATE

Pursuant to NRAP 28.2, undersigned counsel certifies that:

1. This Opening 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond in size 14 point font.

2. I further certify that this Opening Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is less than 8,649 words (less than the 14,000 word count available for an opening brief).

3. Finally, I certify that I have read this Opening 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 Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by a

reference to the page of the record on appeal where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying Opening Brief is not in compliance.

DATED this 11th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Doyle Law Office, PLLC and that on the 11th day of June, 2019, a true and correct copy of the above **APPELLANT'S OPENING BRIEF** was e-filed and e-served on all registered parties to the Nevada Supreme Court's electronic filing system as listed below:

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