

IN THE SUPREME COURT OF THE STATE OF NEVADA

**IN THE MATTER OF THE
JORDAN DANA FRASIER
FAMILY TRUST**

No. 77981

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AMY FRASIER WILSON,

Appellant,

vs.

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

Respondents.

RESPONDENT'S ANSWERING BRIEF

Appeal from the Second Judicial District Court
of the State of Nevada
In and For the County of Washoe,
Department 15
The Honorable David Hardy
(the "District Court")

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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.

Wallace & Millsap LLC District Court & Appellate Counsel

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The District Court lawfully denied Appellant's objections to Mrs. Dinny Frasier's ability to lawfully execute the Third, Fourth, and Fifth Amendments to the Trust, as well as engage Janie Mulrain's services pursuant to a financial power of attorney, after extensive litigation and evidence presented to the Court regarding Mrs. Frasier's level of capacity and freedom from undue influence.

STATEMENT OF THE CASE

This case arose in District Court when Mrs. Dinny Frasier and Premier Trust, Inc. ("PT") filed a "Petition for Confirmation of Trustees, for Construction of the Trust Instruments, and for Instructions" on March 2, 2016 regarding the Jordan Dana Frasier Family Trust, as amended and restated (the "Trust"). 1 AA 1-115. The Petition requested the District Court assume jurisdiction over the Trust pursuant to NRS 164.010, confirm Mrs. Frasier as a co-trustee of the Trust, confirm PT is the corporate and primary co-trustee of the Trust, order PT to provide an annual accounting of the Trust to Mrs. Frasier, and provide guidance on PT's duties with respect to a medical office building in which the Trust allegedly had partial ownership. 1 AA 7. After a lawfully noticed hearing before the Honorable Probate Commissioner of the Second Judicial District Court of the State of Nevada, Robin Wright, on April 13, 2016, Commissioner Wright issued a Recommendation for Order on April 21, 2016. 1 RA 1-5.

The Recommendation stated the District Court assumed ongoing jurisdiction over the Trust pursuant to NRS 164.010 until otherwise ordered by the Court. 1 RA 1. The Recommendation confirmed PT was

the primary Co-Trustee of the Trust. 1 RA 2. The District Court adopted and confirmed the Recommendation for Order in a Minute Order dated August 18, 2016 with the exception of Paragraph 13 of the Recommendation. 1 RA 6. The District Court then issued a written Order on August 29, 2016 adopting the Recommendation for Order, excluding Paragraph 13 of the Recommendation. 1 RA 7. Therefore, the District Court assumed ongoing jurisdiction over the Trust pursuant to NRS 164.010 in August of 2016.

After assuming jurisdiction over the Trust, the initial dispute before this Court involved the Trust's purported ownership interest in a medical office building in Southern California. 1 RA 8-92. The Court set a bench trial on May 8, 2017, to determine the Trust's legal rights and responsibilities with respect to the medical office building in dispute. 1 AA 232. However, on February 24, 2017, PT filed a "Status Report" indicating the Parties mediated the medical office building issues to resolution on January 27, 2017 (the "Medical Building Settlement"). 1 RA 93-94. Mrs. Amy Frasier Wilson was a Party to, and executed, the Medical Building Settlement. 1 AA 214-217. Thereafter, the Parties engaged in a dispute over the terms of settlement, and in certain respects,

contested whether there was an enforceable settlement agreement reached during mediation. 1 AA 116-231.

In response, the District Court conducted an evidentiary hearing on May 9, 2017 regarding the enforceability of the Medical Building Settlement and its specific terms. 2 AA 317-377. After the hearing, the District Court ordered the Settlement Agreement reached during the January 27, 2017 mediation was valid and enforceable. 2 AA 456-460. The Court further clarified the Medical Building Settlement should be enforced as written subject only to the requirement that equalization payments to Mrs. Frasier's children required by the settlement should be made upon Mrs. Frasier's passing. 2 AA 460. Therefore, the disputes arising out of the Trust's ownership interest in the Medical Office Building were resolved by the Parties during mediation, and the terms of the Medical Building Settlement were enforced by the District Court in its July 6, 2017 Order. 2 AA 456-460. No Party has appealed the Court's July 6, 2017 Order. 1 RA 95-103. Each Party, including Mrs. Amy Frasier Wilson, signed the Medical Building Settlement. 1 AA 214-217.

Part of the Medical Building Settlement required Mrs. Frasier to amend her Trust to equalize certain payments from the Trust to her three

children – Bradley Frasier, Nori Frasier, and Amy Frasier Wilson. 1 AA 214-217. Despite the Parties' Agreement to the Medical Building Settlement requiring Mrs. Frasier to amend the Trust, PT questioned whether Mrs. Frasier had capacity to participate in ongoing administration of the Trust. 2 AA 378-432. PT filed a request for instructions seeking guidance on how to address Mrs. Frasier's alleged lack of capacity to administer the Trust on May 31, 2017. *Id.* Following PT's May 31, 2017 request for instructions, over a year's worth of litigation ensued regarding Mrs. Frasier's capacity and PT's administration of the Trust culminating in a two-day evidentiary hearing held October 11 and 12, 2018. This appeal arises from the District Court's December 21, 2018 Order resolving the issue of Mrs. Frasier's lawful ability to amend the Trust, which concluded:

1. Mrs. Amy Frasier Wilson failed to prove her Objection by a preponderance of the evidence to Mrs. Frasier's capacity to contract with Janie Mulrain; and
2. The Court's denial of Mrs. Amy Frasier Wilson's Objection to confirmation of the Third and Fourth Amendments to the Trust based on Mrs. Frasier's alleged lack of capacity and susceptibility

to undue influence.

The facts supporting the Court's denial of Mrs. Amy Frasier Wilson's Objections to confirmation of the Third and Fourth Trust Amendments, as well as to payment of Janie Mulrain's fees, are set forth below.

STATEMENT OF FACTS RELEVANT TO THE ISSUES
SUBMITTED FOR REVIEW

The Parties first questioned Mrs. Frasier's capacity in the context of her ability to agree to the terms of the Medical Building Settlement, and in fact, made her capacity a condition to precedent to the enforceability of the Medical Building Settlement. 1 AA 159. Specifically, the Parties, including Appellant, signed a "Settlement Agreement" on January 27, 2017 following a mediation before the Honorable Jeffrey King (retired). 1 AA 214-217. Paragraph 2 of the Settlement Agreement makes Mrs. Frasier's capacity to contract and testamentary dispositions of her Estate a condition precedent to the Settlement Agreement. 1 AA 216. In accordance with the Agreement, Mrs. Frasier submitted an evaluation by J. Edward Spar, M.D., a Professor of Psychiatry, Division of Geriatric Psychiatry, at the

University of California, Los Angeles. 1 AA 219-231. Dr. Spar concluded Mrs. Frasier retained capacity to make dispositions of her Estate, to contract with appropriate assistance, and to serve as Co-Trustee of the Trust with the assistance of a qualified co-trustee. 1 AA 230-231. Despite Dr. Spar's findings, the Parties contested the enforceability of the Medical Building Settlement, due in part, to concerns regarding Mrs. Frasier's capacity, forcing Mrs. Frasier to bring a Motion before the District Court to enforce the Settlement Agreement. 1 AA 116-231. In support of the Motion to Approve and Enforce the Settlement Agreement, Mrs. Frasier attached a Declaration from Dr. Spar dated April 14, 2017, which confirmed his February 28, 2017 evaluation of Mrs. Frasier concluding she retained contractual and testamentary capacity. 1 AA 219-231.

In response to the Motion to Enforce the Settlement Agreement, the Court scheduled an evidentiary hearing on May 8, 2017, to determine the enforceability of the Medical Building Settlement. 1 AA 232. The Order permitted the Parties to file pre-hearing statements by May 5, 2017. *Id.* PT filed its Pre-Hearing Statement on May 5, 2017, in which it acknowledged its Trust Officer did not witness any signs of undue

influence or lack of capacity exhibited by Mrs. Frasier. 2 AA 241. PT further confirmed the Amen Clinic performed a competency evaluation of Mrs. Frasier on March 25, 2016 and found her to be competent. 2 AA 245. PT then requested the Court find Mrs. Frasier competent to enter into the Medical Building Settlement. 2 AA 248-249. Following the Hearing, the Court entered three Orders on July 6, 2017. 2 AA 454-462. First, the Court concluded the Medical Building Settlement was enforceable and did not invalidate the Settlement due to allegations of Mrs. Frasier's incapacity to contract. 2 AA 456-460. Second, the Court set a future hearing for July 24, 2017 to examine Mrs. Frasier's capacity and the influences exerted over her in light of the allegations presented to the Court prior to and during the May 2017 Evidentiary Hearing. 2 AA 454-455. Therefore, Mrs. Frasier's capacity was litigated for over a year prior to the October 11-12, 2018 Hearing. *Id.*

In fact, PT filed a Second Supplemental Request for Instructions regarding Mrs. Frasier's capacity and her ability to administer the Trust on May 31, 2017 (the "Instructions Request"). 2 AA 378-432. Appellant filed a Joinder to the Instructions Request, wherein she raised concerns to the District Court regarding manipulation of Mrs. Frasier and her

capacity. 2 AA 433-440. Thus, Appellant, in proper person, raised the issues of Mrs. Frasier's capacity and susceptibility to influence to the District Court via her Joinder. *Id.* The District Court then set this matter for hearing on October 17, 2017 to address the Instructions Request and Appellant's Joinder to the Instructions Request in light of the capacity concerns raised by PT and Appellant. 4 AA 796-843.

Prior to the October 17, 2017 Hearing, Mrs. Frasier responded to the Instructions Request and Appellant's Joinder on July 12, 2017 ("Mrs. Frasier's Response"). 3 AA 463 – 4 AA 711. In Mrs. Frasier's Response, she offers to resign as Co-Trustee of the Trust in order to avoid further litigation over her capacity to administer the Trust and manage its affairs. 3 AA 490. Nonetheless, Mrs. Frasier's Response presented substantial evidence of her capacity and ability to exercise her own free will absent influence undue influence. 3 AA 463 – 4 AA 711. Of note, Mrs. Frasier's Response included a letter from Dr. Spar summarizing a second capacity assessment of Mrs. Frasier he performed on May 19, 2017. 3 AA 517-518. Dr. Spar concluded from his second capacity assessment of Mrs. Frasier she is competent to make trust related decisions. 3 AA 518. Thus, PT, the Appellant and Mrs. Frasier presented

written briefing to the District Court regarding Mrs. Frasier's capacity, and then the Parties appeared before the District Court on October 17, 2017 for hearing on the issue. 4 AA 844. Appellant did not attend the October 17, 2017 to argue the contents of her Joinder to the Instructions Request. *Id.*

At the hearing, Mrs. Frasier, through her counsel, renewed her offer to resign as Co-Trustee of the Trust to eliminate on-going litigation over her capacity to administer the Trust and make Trust-related decisions. 4 AA 814. In light of the Instructions Request and Mrs. Frasier's consent to resign as Co-Trustee of the Trust, the Court ordered Mrs. Frasier removed as Co-Trustee of the Trust. 4 AA 844. The Court further permitted Mrs. Frasier to Petition the Court for removal of the PT as Trustee of the Trust upon appropriate grounds.

In accordance with the Court's Order, Mrs. Frasier petitioned the District Court for a final accounting and removal of PT as Trustee of the Trust on June 18, 2018. 2 RA 104-227. Mrs. Frasier then withdrew her Petition for Final Accounting pursuant to a Stipulation and Order filed August 7, 2018. 2 RA 228-230. The Stipulation and Order confirmed PT would file a petition to confirm its accountings, PT would resign as

Trustee of the Trust, and PT would not object to appointment of a court-approved Successor Trustee. *Id.* The Stipulation and Order further confirmed PT's petition to confirm its accountings would be heard on August 17, 2018. *Id.*

Prior to the August 17 hearing date, the Court requested a telephonic conference to consider the scope of the hearing. 4 AA 851. The Court identified its desire to provide finality to the Parties in order to reduce costs and expenses of litigation. 4 AA 852. Therefore, the Court ordered the "final hearing" in the case would occur on October 11, 2018. *Id.* The District Court permitted any person to appear at the hearing and be heard on the condition the Party filed an objection identifying its concerns to the Court by August 24, 2017. *Id.* The District Court further ordered Counsels Millsap and Resnick to submit a Statement of Compliance with RPC 1.14 to alleviate the concerns regarding Mrs. Frasier's capacity. 4 AA 853. All Parties were authorized to file hearing statements no later than October 5, 2018 identifying resolved issues, new fact allegations, and issues of law regarding matters of substance. *Id.*

Therefore, Appellant filed an Objection to PT's accountings and "Statement of Concerns" on August 24, 2018. 4 AA 855-869. Appellant

also filed a Prehearing Statement on October 8, 2018. 7 AA 1438-1547. Appellant's Statement of Concerns placed the issue of Mrs. Frasier's cognitive capacity before the Court. 4 AA 855-869. Appellant's Prehearing Statement also placed at issue allegations of undue influence exerted on Mrs. Frasier, allegations of her inability to understand the Trust and her corresponding cognitive decline, and the propriety of services provided by Janie Mulrain. 7 AA 1438-1547.

In addition to Appellant's prehearing filings, Counsels Resnick and Millsap filed RPC 1.14 Statements of Compliance as directed by the Court to address Mrs. Frasier's capacity and involvement in the litigation. 4 AA 873-882; 6 AA 1173-1263. Counsel Resnick's Statement of Compliance provided three separate capacity assessments from Dr. Spar all concluding Mrs. Frasier had testamentary and contractual capacity. 6 AA 1201-1207. The Court then conducted the evidentiary hearing on October 11 and 12 of 2018, which included consideration of Mrs. Frasier's dealings with Janie Mulrain and Mrs. Frasier's capacity, which were placed at issue before the Court by Appellant in her prehearing filings with the District Court. 4 AA 855-869; 7 AA 1438-1547. Specifically, the District Court questioned Appellant regarding the

issues she brought before the Court for hearing, and Appellant indicated she would like Mrs. Frasier's ability to amend the Trust considered and determined by the Court. 7 AA 1622-1624.

Following the October 11 and 12, 2018 Hearing, the Court entered an Order on October 15, 2018 modifying the Trust to make the certain property conveyances required by the Medical Building Settlement. 9 AA 2036-2039. Additionally, Mrs. Frasier filed a Petition to Confirm the Third and Fourth Amendments to the Trust on November 19, 2018 in light of the evidence presented at the Hearing. 9 AA 2045-2093. Appellant objected to the Petition on December 10, 2018 based on the allegation that Mrs. Frasier lacked capacity to amend the Trust. 9 AA 2094-2105. Mrs. Frasier's Objection presented evidence and argument regarding Mrs. Frasier's alleged lack of capacity in addition to the evidence presented during the October 11 and 12, 2018 Hearing, where Mrs. Frasier asked the Court to consider Mrs. Frasier's capacity to amend the Trust. 9 AA 2094 – 10 AA 2198.

After considering the evidence presented during the October 2018 hearing, the evidence presented throughout the case regarding Mrs. Frasier's capacity, and Appellant's Objection filed December 10, 2018 and

its corresponding evidence, the Court made the following findings in its December 21, 2018 Order After Hearing:

1. Appellant generally alleges Mrs. Frasier lacks capacity. 10 AA 2210.
2. Appellant did not prove her objections by a preponderance of the evidence. *Id.*
3. The Petition to confirm the Third and Fourth Amendments to the Trust are approved. 10 AA 2211.
4. Appellant's objections to the Trust Amendments, primarily related to Mrs. Frasier's capacity, are denied. 10 AA 2211.

The Court correctly denied Appellant's Objection to the Trust Amendments as argued below.

SUMMARY OF THE ARGUMENT

The District Court offered Appellant several opportunities to substantiate her allegations of incapacity and undue influence specific to Mrs. Frasier. Appellant presented her arguments and evidence of alleged incapacity and undue influence in multiple filings with the District Court, as well as in person during the October 11 and 12, 2018 Evidentiary Hearing. In contrast, the Court considered multiple filings,

evidence, and argument presented by Mrs. Frasier substantiating her testamentary and contractual capacity. When considering the totality of evidence accrued during the years of litigation described above, the District Court found substantial evidence required denial of Appellant's challenge to Mrs. Frasier's ability to amend the Trust. The District Court's finding regarding Mrs. Frasier's capacity was not clearly erroneous and, therefore, should be affirmed by the Appellate Court.

ARGUMENT

STANDARD OF REVIEW

Appellant contests the District Court's approval of the Petition to Confirm the Third and Fourth Amendments to the Trust and the Court's denial of her Objection to Mrs. Frasier's ability to amend the Trust, primarily related to capacity and the exertion of undue influence over Mrs. Frasier. *See* Appellant's Opening Brief, Statement of Issues. A district court's findings regarding capacity and the exertion of undue influence over a testator are factual in nature. *In re Peterson's Estate*, 77 Nev. 87, 94, 360 P.2d 259, 263 (1961). Nevada Appellate Courts do not disturb a district court's findings regarding capacity and the exertion of undue influence over a testator when those findings are supported by

substantial evidence. *Id.* at 93; *see also Hannam v. Brown*, 114 Nev. 350, 357, 956 P.2d 794, 799 (1998) (holding a district court's factual findings will not be disturbed unless they are clearly erroneous and are not based on substantial evidence). Thus, the District Court's denial of Appellant's objection to Mrs. Frasier's capacity to amend the Trust and undue influence exerted over Mrs. Frasier should not be disturbed on appeal because the findings are supported by substantial evidence and are not clearly erroneous.

I. The District Court's denial of Appellant's Objection to Mrs. Frasier's capacity to amend the Trust and ability to do so free of undue influence is supported by substantial evidence and was not clearly erroneous.

Prefatorily, Mrs. Frasier acknowledges the simplicity and brevity of the following argument. This argument is intentionally brief because of the District Court's thorough consideration of Mrs. Frasier's capacity, which left no unanswered questions to address on appeal. Specifically, allegations regarding Mrs. Frasier's lack of capacity surfaced when the Parties disputed the validity and terms of the Medical Building Settlement. 1 AA 159; 1 AA 214-217. In the context of enforcing the Medical Building Settlement, PT disclosed Mrs. Frasier was evaluated by the Amen Clinic in March of 2016 and was found to have capacity. 2

AA 245. PT further confirmed its Trust Officer had not witnessed any signs of undue influence or lack of capacity exhibited by Mrs. Frasier. 2 AA 241. In addition, Mrs. Frasier submitted to another capacity evaluation in February of 2017 performed by Dr. Spar pursuant to the terms of the Medical Building Settlement. 1 AA 219-231. Dr. Spar concluded Mrs. Frasier had contractual and testamentary capacity. *Id.* Thereafter, litigation ensued for over one year where a primary area of inquiry was Mrs. Frasier's capacity and susceptibility to undue influence. Consequently, Mrs. Frasier voluntarily submitted to two more capacity evaluations performed by Dr. Spar. 6 AA 1201-1207. Following all three capacity evaluations Dr. Spar performed on Mrs. Frasier, he concluded she had testamentary and contractual capacity on each occasion. *Id.*

Furthermore, the Court required Mrs. Frasier's attorneys to submit Statements of Compliance with RPC 1.14 to address the Parties' concerns regarding Mrs. Frasier's capacity to direct litigation. 4 AA 853; 4 AA 873-882; 6 AA 1173-1263. The Court conducted an evidentiary hearing to confirm the Medical Building Settlement on May 8, 2017, as well as an evidentiary hearing on October 11 and 12, 2018 to consider among other issues Mrs. Frasier's capacity and susceptibility to undue influence. 4

AA 855-869; 7 AA 1438-1547; 7 AA 1622-1624. The Court permitted Appellant to file an Objection and Statement of Concerns in advance of the October 2018 Hearing, a Prehearing Statement in advance of the same Hearing, and an Objection to the Petition to Confirm the Third and Fourth Trust Amendments following the October 2018 Hearing. 4 AA 855-869; 7 AA 1438-1547; 9 AA 2094-2105. The Court considered all of the Appellant's filings disputing Mrs. Frasier's capacity to amend the Trust, as well as the arguments presented to the Court during multiple evidentiary hearings considering Mrs. Frasier's capacity. 10 AA 2210-2211. The sum of these extensive litigation efforts indicate the District Court granted Appellant multiple opportunities via her Court filings and argument offered during hearing to present evidence of Mrs. Frasier's alleged incapacity and susceptibility to undue influence. After considering Appellant's evidence and arguments regarding Mrs. Frasier's alleged incapacity and susceptibility to undue influence, the District Court concluded Appellant's Objection to the Third and Fourth Trust Amendments was without merit because substantial evidence refuted Appellant's allegations of undue influence and incapacity. *Id.* Therefore, no further argument is required because there is no evidence in the

record to suggest the District Court was clearly erroneous when denying Appellant's factual allegations of incapacity and undue influence. In fact, the District Court was remarkably thorough in its exploration of Mrs. Frasier's capacity and relied upon substantial evidence, including multiple capacity assessments, representations from her Counsel, and evidence and arguments presented at an evidentiary hearing, to deny Appellant's Objection to Mrs. Frasier's ability to amend the Trust. As such, Mrs. Frasier's Personal Representative respectfully requests the Appellate Court deny this Appeal so the Parties may conclude years' worth of litigation and bring finality to this matter.

NRAP 28.2 ATTORNEY'S CERTIFICATE

I hereby certify 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 for Office 365 in Century Schoolbook 14 pt. font.

I further certify this 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 30 pages.

Finally, I hereby certify 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 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 I may be subject to sanctions in the event the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of September, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Wallace & Millsap LLC and that on the 9th day of September, 2019, a true and correct copy of the above **RESPONDENT'S ANSWERING 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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DATED this 9th day of September, 2019.

/s/ Megan Wallace
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