IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF MILTON I. SCHWARTZ, DECEASED.

A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ,

Appellant/Cross-Respondent,

vs.

THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,

Respondent/Cross-Appellant.

THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,

Appellant,

vs.

A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ,

Respondent.

No. 78341

No. 79464

RESPONDENT/CROSS-APPELLANT'S COMBINED:

REPLY BRIEF ON CROSS-APPEAL (NO. 78341)
&
REPLY BRIEF ON APPEAL (NO. 79464)

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INTRODUCTION

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The district court's denial of the The Dr. Miriam and Sheldon G. Adelson Educational Institute's (the "School") Petition was erroneous. As a matter of law, the district court erred in concluding that the Bequest was ambiguous. The Estate does not dispute the Bequest was unambiguous. (Appellant's Combined Reply & Answering Briefs ("AAB") at 73, 77-78; 14 App. 3475-76). Instead, the Estate incorrectly argues that "any" extrinsic evidence is always admissible where a will is involved, ignoring black letter Nevada law requiring that a will (or any instrument for that matter) actually be ambiguous on its face before resort to parol evidence. Rather than construe the unambiguous Bequest within the four corners of the Will, the district court erroneously allowed the Estate to manufacture an ambiguity out of whole cloth, and then determined an ambiguity existed based on extrinsic facts that have no connection to the language Milton Schwartz used in the Bequest. (12 App. 2796-2810). Therefore, the district court erred in finding an ambiguity existed.

As a result of this erroneous finding, and despite the fact that nothing in the Bequest implicates perpetual naming rights, the district

court then erroneously permitted the Estate to offer parol evidence (mostly in the form of self-serving, inadmissible hearsay testimony) related to the alleged perpetual naming rights contract the Estate claims exists between Milton Schwartz and the School. The district court improperly permitted the Estate to proffer evidence regarding perpetual naming rights to add language and/or conditions to the Bequest not found on its face. This error was compounded by the fact that the parol evidence did nothing to purportedly explain Milton Schwartz's actual intent in making the Bequest at the time it was drafted, but instead was proffered by the Estate to backdoor unrelated testimony regarding the alleged perpetual naming rights contract between Milton Schwartz and the School. (*See* 13 App. 3154-55, 3172, 3382-87; 14 App. 3527-38).

Assuming arguendo that the Bequest was ambiguous, the district court abused its discretion in permitting the Estate to introduce inadmissible hearsay, prejudicing the School. The only evidence the Estate offered to purportedly explain Milton Schwartz's intent in making the Bequest was hearsay testimony from Milton Schwartz, who died years before the trial began, made years, or sometimes decades before or after Milton Schwartz executed the Bequest. Compounding this error, all

this blatant hearsay testimony related to the alleged perpetual naming rights, rather than the unambiguous language of the Bequest. The unambiguous language in the Bequest provides that the Estate provide $500,000 to the School for the limited and specific purpose of providing scholarships for the education of Jewish students. That bequest is for the benefit of Jewish children attending the School and not for the direct benefit of the School, and it says nothing that conditions the Bequest on perpetual naming rights. The only possible way that the Court could get to that conclusion is by improperly admitting unmitigated hearsay evidence from statements made by Milton Schwartz before he died, and then extrapolating that those hearsay statements somehow qualified an unambiguous bequest. In other words, not only were the statements hearsay, they also required the district court to speculate as to what Milton Schwartz meant by these statements because the statements themselves do not explicitly make any connection between the Bequest and perpetual naming rights. Rather than demonstrate that specific hearsay exceptions applied to these statements, the Estate continues to rely on its erroneous contention that the mere fact that a will provision is at issue in the litigation renders **all** of Milton Schwartz's statements

admissible, regardless of their substance or timing. Had the district court properly excluded this inadmissible hearsay, the Estate would have had no evidence purportedly linking the Bequest to the alleged perpetual naming rights contract or Milton Schwartz's alleged beliefs regarding the same to support its decision denying the School's Petition. The School unquestionably was prejudiced by the district court's errors in admitting this evidence, as this inadmissible hearsay was the only possible basis for the trial court's decision.

While the parties clearly have differing positions regarding the facts and circumstances underlying this action, there can be no doubt that the purpose of the Bequest can be effectuated – that Jewish children attending the School be provided scholarships – regardless of the name change. In other words, even the Estate cannot reasonably deny that Milton Schwartz's clear intent was to provide Jewish children a $500,000 scholarship fund for their education. What the Estate is insisting on doing, and the district court wrongfully acquiesced to, is to insert into the unambiguous language in the Bequest a secondary intent based on inadmissible hearsay from a deceased person. Making this assumed connection more tenuous, if that's even possible, is the fact that these

hearsay statements span a time frame from a few years to decades, both before and after the Will was written. Accordingly, the Court must vacate and reverse the district court's judgment denying the Estate's Petition.

I.

Arguments in Support of the School's Reply Brief in Case No. 79464:

The district court erroneously and arbitrarily determined that the Estate was the prevailing party and entitled to its costs, despite the fact that while neither party prevailed on its affirmative claims, the School prevailed on what was unquestionably the most significant issue in the case.

Contrary to the Estate's contention, Nevada law does not require a party to succeed in bringing suit to be a prevailing party. Thus, the mere fact that the School did not prevail on its Petition is not dispositive. Likewise, the fact that the Estate succeeded on two of its affirmative defenses/counterclaims, which were asserted directly in response to the School's Petition, and thus sought opposite relief, is not dispositive. Rather, under the circumstances of the case, a review of the overall claims and issues was required. And, under the proper analysis, there can be no legitimate dispute that the School is the prevailing party. The

School prevailed against the Estate's affirmative claim for specific performance of the alleged perpetual naming rights contract with Milton Schwartz, the most significant claim made by the Estate and the claim that dominated the lengthy jury trial. (19 App. 4526-32). As a result, the School did not have to return over $100,000,000 in gifts to the Adelsons (which would have bankrupted the School), or lose all future funding from the Adelson family, which constituted many millions of additional funds each year up through the time of trial. (15 App. 3622-23, 3625). The Estate also lost its affirmative claim for disgorgement from the School for Milton Schwartz's past gifts plus interest, in the approximate amount of $2,800,000 (25 App 6005). In comparison, the School lost its affirmative claim for the $500,000 in scholarship money the Estate already had set aside in a blocked account, and would have to pay regardless due to the tax consequences of recognizing the Bequest years before. (3 App. 685-90; 14 App. 3430-32; 24 App. 5994).

Under the above irrefutable facts, considering the litigation as a whole, it is overwhelmingly clear that the School prevailed on the most consequential issues before the court. No legal or factual support thus exists for the district court's decision, especially given the Court's failure

to provide specific findings on this issue. Accordingly, Nevada law dictates that the School should have been declared the "prevailing party" in this litigation and entitling it to recover its costs under NRS 18.020. This Court must vacate the district court's cost award to the Estate.

Even assuming the district court did not arbitrarily determine the Estate was the prevailing party, the district court erred in awarding $11,747.68 in costs to the Estate. This amount includes both costs that are not recoverable under NRS 18.005 and costs for which the Estate failed to provide the proper backup and documentation. Therefore, at a minimum, the Estate's costs award must be reduced accordingly.

ARGUMENTS

I. Arguments in Support Of Reply Brief on Cross-Appeal

This Court must reverse the district court's judgment denying the School's request to compel the Bequest. As a matter of law, the district court erred in refusing to interpret the unambiguous Bequest on its face. Had the district court properly limited its inquiry into Milton Schwartz's intent from the actual words he used in the Bequest, no valid basis existed to deny the School's Petition. As such, the district court's refusal to compel the Bequest was erroneous.

Moreover, even assuming an ambiguity existed to justify the district court's consideration of parol evidence, the district court erred in admitting extrinsic evidence that had no discernible connection to the purported ambiguity. Instead, the parol evidence proffered by the Estate related solely to the alleged perpetual naming rights contract, not the Bequest language at issue. Thus, the district court improperly permitted the Estate to introduce and rely on extrinsic evidence that did not actually relate to or explain the alleged ambiguity found by the district court or otherwise explain any purported ambiguity in the Bequest. Under black letter Nevada law, the district court erred in denying the School's Petition on this basis.

The district court also abused its discretion in admitting and then relying on inadmissible hearsay evidence to deny the School's Petition. Milton Schwartz's hearsay statements related to the alleged perpetual naming rights contract and had no discernible connection to the Bequest, either in timing or substance. Because no valid exception exists, the district court erred in admitting these hearsay statements. Without Milton Schwartz's improper hearsay statements, the Estate could not demonstrate any valid basis to avoid the Bequest. This evidentiary

failure becomes even more obvious considering, under Nevada law, the Estate was required to prove by clear and convincing evidence that the existence of the perpetual naming rights contract was an invalidating mistake. No support exists for the Estate's contention the Bequest was conditioned on perpetual naming rights for Milton Schwarz, let alone clear and convincing evidence.

Finally, equitable considerations required the district court to grant the School's Petition and order the Estate to effectuate the Bequest establishing a scholarship fund for Jewish children. The Estate should not benefit from its delay and attempts to re-write the Bequest to the detriment of the students who would otherwise receive a scholarship for their education. Accordingly, this Court must reverse the Judgments on the School's Petition and the Estate's related affirmative defenses/counterclaims.

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A. The District Court Should Have Granted the School's Request to Compel the Bequest for Scholarships.

1. The Parties agree the Bequest was not ambiguous; thus, the district court should have excluded the Estate's parol evidence and granted the School's Petition to effectuate the Bequest.

The district court erroneously determined an ambiguity existed regarding which grade levels the scholarships funded and then permitted the Estate to offer extrinsic evidence in support of this contention, none of which actually explained the purported ambiguity. The Estate does not dispute that the Bequest unambiguously states that the Bequest for scholarships go to the "Milton I. Schwartz Hebrew Academy," but contends that extrinsic evidence is always admissible if it allegedly "explains" the meaning of the testator's words. This argument ignores the critical requirement that the will must be ambiguous *i.e.*, subject to two constructions, before extrinsic evidence is considered to purportedly explain the ambiguity. *In re Walters' Estate,* 75 Nev. 355, 359 (1959); *see also Howard Hughes Med. Inst. v. Gavin*, 96 Nev. 905, 908, 621 P.2d 489, 490–91 (1980) (noting "a testator's declarations may be useful in interpreting **ambiguous terms** of an established will…) (emphasis added). Thus, extrinsic evidence is only permitted to explain the allegedly

ambiguous language not the entire will or any other provision the Estate wants to re-write.

Here, because the Bequest was admittedly not ambiguous or subject to two different constructions, extrinsic evidence was not necessary or appropriate to explain the meaning of the testator's words. *Gianoli v. Gabaccia*, 82 Nev. 108, 110 (1966);*see also* 80 Am. Jur. 2d Wills § 989 ("When the language of a will is clear and unambiguous, the testator's intent must be ascertained from the express terms of the will itself."). The Bequest did not become ambiguous simply because the Estate self-servingly *argued* that Milton Schwartz's motive in making the Bequest was based on his alleged belief he had a perpetual naming rights contract with the School. There is no dispute that nothing in the actual language of the Bequest implicates a perpetual naming rights contract in any way. Thus, because the Estate's alleged condition does not exist on the face of the unambiguous Bequest, the district court erred by not limiting its inquiry into Milton Schwartz's intent from the actual words he used in the Bequest. *In re Walters' Estate*, 75 Nev. at 359. The district court incorrectly construed the Bequest the way that the Estate believed Milton Schwartz allegedly intended to have written it and not "in accord

with the meaning of the words [Milton Schwartz] used." *Zirovcic v. Kordic*, 101 Nev. 740, 742 (1985). Under black letter Nevada law, there can be no dispute the district court erred in refusing to interpret the Bequest without resort to parol evidence.

The Estate argues that any finding the Bequest was unambiguous only benefits the Estate because it would preclude extrinsic evidence demonstrating the link between the Milton I. Schwartz Hebrew Academy and the School, and without this evidence, the gift fails. This argument is flawed because it again misconstrues the law regarding ambiguity and extrinsic evidence. Clearly, the extrinsic evidence offered must actually relate to and explain the alleged ambiguity. *See In re Jones' Est.*, 72 Nev. 121, 123, 296 P.2d 295, 296 (1956). In the event the Court had made an express determination an ambiguity existed regarding the link between the Milton I. Schwartz Hebrew Academy and the Adelson Educational Institute, then extrinsic evidence to explain that link would be appropriate. *See* 96 C.J.S. Wills § 1015.

Next, contrary to the Estate's assertion, the Bequest does not lapse simply because the School is no longer known as the "Milton I. Schwartz Hebrew Academy." First, the School was known as the "Milton I.

Schwartz Hebrew Academy" at the time of Milton Schwartz's death when the gift effectively vested, and the elementary school continued to be known as the same for approximately the next six years until after the litigation commenced. Had the Executor properly and **timely** effectuated or funded the Bequest then this entire argument would evaporate. (16 App. 3780; 17 App. 4136, 4164). The Estate's dilatory actions in carrying out the directives of the Will created the very circumstances it now points to as the reason it does not have to honor the Bequest. The Court must reject the Estate's manufactured and self-serving defense.

Further, contrary to the Estate's assertion, the absence of a successor clause in the Bequest is not conclusive proof that Milton Schwartz intended that the Bequest only go to a school bearing his name in perpetuity such that the gift fails. At most, the absence of a successor clause creates an inference. However, without more, the Estate cannot demonstrate the Bequest should simply fail on this basis.

Unlike the cases relied on by the Estate, this is not a case where the designated charity ceases to exist. Instead, the School simply changed the elementary school's name years after Milton Schwartz's passing, but continues to exist as a Jewish school for which scholarships can be

provided in compliance with the Bequest. The Estate's reliance on *In re Est. of Beck*, 272 Ill. App. 3d 31, 37-38, 649 N.E.2d 1011, 1015-16 (1995) for the proposition that the Bequest fails is also misplaced. In that case, the court determined that the successor charity was not entitled to the gift because it did not provide the same or similar services as the prior charity (orphanage versus general child welfare services). *Id.* Conversely, here, the Bequest was intended to provide scholarships to Jewish children attending the School. The School provides the same "services"[1] as it did when it was named the Milton I. Schwartz Hebrew Academy and, thus Milton Schwartz's intent to provide scholarships for Jewish children to attend the School can still be accomplished. In addition, "[a] testamentary gift to a charitable organization is generally valid, even though the object is imperfectly designated, if it can be identified with reasonable certainty from the description in the will and the surrounding circumstances." 96 C.J.S. Wills § 1091. Therefore, because there is no dispute that the School still exists and the Bequest can still be effectuated

[1] In fact, because of the gifts by the Adelsons, the School provides a much improved and more extensive educational services to Jewish children than it did before. The whole point of Milton Schwartz's scholarship Bequest was to enhance the educational opportunities for Jewish children. It begs credulity and common sense that Milton Schwartz would be upset that his scholarship fund would help Jewish children attend such a highly regarded school.

to provide scholarships for Jewish children attending the School, the Court must reject the Estate's argument that the gift fails.

Finally, contrary to the Estate's assertions, the Bequest should be construed against the drafter. The Estate fails to cite to any Nevada authority holding that this black letter rule regarding the construction of written instruments does not apply to wills. According to the Executor, Jonathan Schwartz, Milton Schwartz dictated the Will himself and the Will reflects his own words. (14 App. 3401). Now, Jonathan Schwartz seeks to avoid effectuating the Bequest based on contentions that the Bequest actually included conditions not present in the express language of the Bequest. Under these circumstances, any ambiguity arising from Milton Schwartz's failure to include an express condition in the Bequest should be construed against the Estate and in favor of the School, especially because it can be determined with reasonable certainty that Milton Schwartz intended the $500,000 bequest to go to the School to fund scholarships for Jewish children. *See* 96 C.J.S. Wills § 1091.

2. Even if an ambiguity existed, the district court erred by relying on extrinsic evidence related solely to the alleged perpetual naming rights agreement rather than to explain the alleged ambiguity.

Even assuming an ambiguity existed in the Bequest, the Court must reverse the Judgment on the School's Petition because the district court admitted and relied on extrinsic evidence that did not relate to the purported ambiguity the district court actually found. According to the district court, the purported ambiguity related to which grade levels the scholarships funded by the Bequest could apply to in light of the changes to the structure of the School. (12 App. 2810-2817). However, the extrinsic evidence proffered by the Estate and admitted by the district court went substantially outside whether Milton Schwartz intended that the money benefit grades pre-K through 8 (which were the only grades at the original Milton I. Schwartz Hebrew Academy) versus only certain grades at the newly restructured School, and instead related only to the alleged perpetual naming rights contract with the School. (13 App. 3154-55, 3167, 3171-72, 3179-80, 3210-11, 3230, 3238; 14 App. 3383-85, 3392-93, 3410, 3412-13, 3420-22). The Estate seeks to now recast the district court's finding to support its arguments, but the district court never expressly found an ambiguity existed regarding the existence of a

perpetual naming rights contract to permit the Estate to bootstrap or back door extrinsic evidence regarding Milton Schwartz's alleged beliefs regarding the same. And, contrary to the Estate's contentions, extrinsic evidence that Milton Schwartz believed he had a perpetual naming rights agreement has absolutely nothing to do with which grades Milton Schwartz purportedly intended to benefit via the Bequest. Thus, even assuming the Bequest contained a latent ambiguity, which it did not, the district court erred in admitting and relying on extrinsic evidence that did not relate to or explain the supposed ambiguity.

The Estate also argues that Milton Schwartz's out of court statements were nonetheless admissible to purportedly explain the meaning of the words in the Bequest (*i.e.*, what Milton Schwartz "actually" meant when he unambiguously identified the "Milton I. Schwartz Hebrew Academy" as the beneficiary in the Bequest for scholarship money). However, even assuming extrinsic evidence was admissible on this basis, the extrinsic evidence proffered by the Estate and admitted by the district court did nothing to achieve this purpose. Rather than explain the meaning of the actual words used in the Bequest, the extrinsic evidence related to the alleged perpetual naming rights

contract, and entirely unrelated subject. As such, the district court permitted the Estate to admit and rely on extrinsic evidence related to the contract dispute, under the ruse of some nebulous and dubious alleged connection to Milton Schwartz's intent regarding the Bequest to then add language into the Bequest that is simply not there (*i.e.*, the condition that the Bequest go to the School *only if the School shall be named after him in perpetuity*). This extrinsic evidence thus either improperly contradicted, or added unwritten language to, the express and unambiguous terms of the Bequest in violation of Nevada law. *In re Jones' Estate*, 72 Nev. at 124 ("[E]vidence is admissible which, in its nature and effect, simply explains what the testator has written; **but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written**.") (emphasis added); *see also Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 409, 305 P.3d 70, 73 (2013) (Extrinsic or parol evidence is not admissible to contradict or vary the terms of an unambiguous written instrument.). The district court unquestionably erred in admitting this evidence. *See Frei*, 129 Nev. Adv. Op. 42 at *8, 305 P.3d at 73.

The Court must also reject the Estate's contention that Milton Schwartz's statements referring to the School with the words "in perpetuity" constitute permissible extrinsic evidence of idiosyncratic use. Milton Schwartz's use of the terms "in perpetuity" when referring to the School is not an idiosyncrasy. Even if it was, the circumstances here are the opposite of those generally used to justify reliance on extrinsic evidence. This case does not involve idiosyncratic terminology in the testamentary instrument for which the court permitted extrinsic evidence to explain. *Flannery v. McNamara*, 432 Mass. 665, 672, 738 N.E.2d 739, 745 (2000) ("all of the relevant illustrations of this principle set forth in the Restatement make it clear that 'personal usage' evidence is permitted only where the testator habitually referred to someone or something in an idiosyncratic manner during his lifetime, ***and then used that idiosyncratic terminology in his will***.")(emphasis added). Instead, Milton Schwartz referred to the School in a straightforward manner in the Bequest. In other words, he never used the idiosyncratic words "in perpetuity" anywhere in his Will, let alone in the Bequest, and certainly not in connection with the words "the Milton I. Schwartz Hebrew Academy" in the Bequest. In spite of that fact, the Estate seeks to use

this extrinsic evidence regarding how Milton Schwartz allegedly referred to the School outside any connection to his Will to prove his alleged intent with respect to the Bequest. Thus, no legal or admissible evidentiary support exists for the Estate's position on this issue.

Because the Estate's alleged conditional language does not exist on the face of the unambiguous Bequest, the district court erred by not limiting its inquiry into Milton Schwartz's intent from the actual words he used in the Bequest. *In re Walters' Estate*, 75 Nev. at 359. In effect, the district court erroneously concluded that what Milton Schwartz **intended to write** was that the Bequest would go to the School so long as it was named the "Milton I. Schwartz Hebrew Academy" and would remain that way forever. *See id.* ("The question before us is not what the testatrix ***actually intended*** or what she meant to write."). The district court thus, incorrectly construed the Bequest the way that it (and the Estate) believed Milton Schwartz "meant to write" the Bequest and not "in accord with the meaning of the words [Milton Schwartz] used. *Zirovcic*, 101 Nev. at 742. Under black letter Nevada law, the district court erred in denying the School's Petition on this basis.

B. The District Court Abused Its Discretion in Admitting and Relying on Inadmissible Hearsay to Construe the Bequest, which was Not Harmless.

Even if this Court finds that district court did not commit legal error in admitting extrinsic evidence to add to and/or amend the language of the Bequest to allegedly demonstrate what Milton Schwartz actually meant, the district court erred when it improperly admitted numerous hearsay statements to purportedly connect the Bequest to Milton Schwartz's alleged belief he had a perpetual naming right contract with the School. (12 App. 2796, 2800-03, 2835-36, 2840-42; 13 App. 3154-55, 3172, 14 App. 3383-87, 3412-13, 3415-18; 15 App. 3527, 3529, 3537).

The Estate incorrectly argues that the statements at issue are not hearsay because they were not offered for their truth. The truth of the hearsay statements was, however, precisely the purpose for which they were offered. The Estate offered these hearsay statements from the deceased Milton Schwartz to prove that Milton Schwartz believed he had a perpetual naming rights agreement in order to argue that he would not have made the Bequest *but for this belief*. Thus, in the context of this case, Milton Schwartz's statements about his alleged belief was hearsay because it was used to prove the truth of the matter asserted – that he

believed he had a perpetual naming rights agreement. In other words, because these statements were used to actually prove Milton Schwartz's intent with respect to the circumstances as he purportedly understood them, they were used to prove the truth of the very matter at issue before the court, and thus constitute hearsay. The point being, if the district court hadn't believed these statements were true, that Milton Schwartz he had perpetual naming rights in the School, then there was no basis for the district's decision denying the Bequest.

Likewise, the Estate's reliance on NRS 51.105 is misplaced. The mere fact that the Estate *argued* that Milton Schwartz only made the Bequest based on his belief that he had a perpetual naming rights contract did not automatically transform every single alleged statement Milton Schwartz made regarding the alleged agreement with School into an admissible state of mind exception or render it a statement related to the terms of his Will to render it admissible under NRS 51.105. *See Lasater v. House*, 841 N.E.2d 553, 556 (Ind. 2006) ("a statement or declaration of a testator that is considered classic hearsay is not transformed into non-hearsay simply because it tangentially involves a state of mind."). Yet, this is precisely what the Estate argued and the

district court improperly allowed in at trial. (15 App. 3527-38). This is especially obvious given that many of the hearsay statements the district court admitted were made years, and in some instances, decades, *before* Milton Schwartz made the Bequest; thus the Estate failed to demonstrate how these statements could even conceivably be related to his intent in making the Bequest. (13 App. 3154-55, 3169-72; 14 App. 3383-87). Because a valid hearsay exception does not apply to each of these hearsay statements, the district court abused its discretion in admitting them into evidence as the basis of denying the Bequest.

The Estate further argues that the School waived its ability to challenge the district court's improper admission and reliance on inadmissible hearsay if it did not object to each and every instance. However, the district court denied the School's motions in limine to preclude this hearsay evidence prior to trial and School clearly lodged its ongoing objections to the district court's ruling regarding the Estate's hearsay evidence prior to and during trial. (12 App. 2795-2845; 13 App. 3154-55, 3169-72; 14 App. 3382-87, 3412-13, 3415-21; 15 App. 3527-38, 3529, 3537); Respondents' Reply Appendix ("Reply App.") 1-99).[2]

[2] The Estate's argument here is ironic given its position that "there was

Therefore, the School did not waive its ability to challenge the district court's improper hearsay rulings. *See Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 137, 252 P.3d 649, 659 (2011).

The admission of these improper hearsay statements was not harmless. These inadmissible hearsay statements constituted the only evidence supposedly linking the Bequest to Milton Schwartz's purported belief he had an enforceable perpetual naming rights agreement with the School. Despite Milton Schwartz's substantial business and contract experience, his history with the School, and Jonathan Schwartz's testimony regarding Milton Schwartz's alleged instructions to him regarding School documents, there is no dispute Milton Schwartz failed to actually include any language whatsoever connecting the Bequest to the alleged and completely unfounded perpetual naming rights agreement. (*See* RAB, Statement of Facts, § B(2)-(3); 14 App. 3413, 3422-23, 3478-79, 3481-83). Thus, without the improperly admitted hearsay evidence, the Estate would no competent evidence to refute the School's Petition based on Milton Schwartz's purported intent regarding the

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no point in objecting" to statements from the School where the district court had ruled against the Estate on a particular issue. (Appellant's Reply Brief at 42).

alleged contract. Because the district court denied the Petition and determined that the Bequest was ultimately tied to the alleged perpetual naming rights contract, it is clear the district court relied on this improperly admitted extrinsic evidence as there was no other evidence proffered on which it could have otherwise relied.

The Estate incorrectly argues that the absence of a successor clause is sufficient evidence of Milton Schwartz's belief the School would be named after him forever. At most, the absence of a successor clause could provide an inference of Milton Schwartz's alleged intent regarding a successor entity. However, this alone would not provide substantial evidence to support the district court's findings that the Bequest was conditioned on the existence of an enforceable perpetual naming rights contract and tying the Bequest to Milton Schwartz's alleged mistaken belief regarding the same. (24 App. 5994-95). Thus, because the district court incorrectly admitted and presumably relied on the substantial extrinsic, including inadmissible hearsay, evidence regarding Milton Schwartz's alleged belief he had a perpetual naming rights contract with the School, the Court must reverse the Judgment on the School's Petition.

1. **The Estate's arguments regarding the existence of an invalidating mistake and that the Bequest was conditional are misplaced.**

Next, the Estate argues that the Judgment on the School's Petition should be affirmed because the Bequest was an invalidating mistake and/or conditioned on the School bearing the name the "Milton I. Schwartz Hebrew Academy" in perpetuity. This argument is circular because it ignores the fact that the district court rendered this ruling based on the extrinsic evidence proffered by the Estate that the district court improperly relied on as set forth herein and in the School's Opening Brief. *See infra*, at Arguments, § I(B); Respondents' Combined Answering Brief and Opening Briefs ("RAB") at 117-134.

Regardless, the Estate failed to demonstrate Milton Schwartz's alleged belief he had a perpetual naming rights agreement was an invalidating mistake. The party advocating the unilateral mistake as a basis for obtaining relief from a donative transfer has the burden of proving the testator's intent and the alleged mistake by clear and convincing evidence. *See In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 607, 331 P.3d 881, 888 (2014). An invalidating mistake occurs when "but for the mistake the transaction in question would not have

taken place." Restatement (Third) of Restitution & Unjust Enrichment § 5(2)(a) (2011). "**The donor's mistake must have induced the gift; it is not sufficient that the donor was mistaken about the relevant circumstances.**" *Id.* § 11 cmt. C; *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 605–06, 331 P.3d at 887 (emphasis added).

The Estate failed to prove by clear and convincing evidence that Milton Schwarz *only* made the Bequest because he thought he had perpetual naming rights at the School, and was not motivated by anything else, including his desire to continue to support the School and promote Jewish education. To the contrary, the evidence admitted during trial demonstrates that Milton Schwartz was dedicated to and supported the School over approximately two decades. As Jonathan Schwartz stated in his May 2010 letter to the Board: "To list everything my dad did for the MISHA and its predecessors would fill volumes… *Beyond the money, my dad loved the school and was proud to spend his time making certain that kids in Las Vegas could obtain a quality Jewish education*." (27 App. 6687-89) (emphasis added).

Jonathan Schwartz, discussed in detail his father's dedication and support of the school. (14 App. 3385-86 ("He was incredibility dedicated

to the school. He was involved with the school on a daily basis. It wasn't just, you know, write a big check and get some naming rights. He was involved with the day to day operations of the school….So he was dedicated to it like it was one of his businesses. He was managing at times, on a daily basis.")). Several other witnesses similarly testified that Milton Schwartz loved the School and worked hard to see that the School and its students thrived. Susan Pacheco, Milton Schwartz's longtime assistant, testified that he loved the School and was involved in its operation. (13 App. 3180-81, 3240). Former Board member Dr. Roberta Sabbath testified that Milton Schwartz worked toward the goal of making the Hebrew Academy a better place. (14 App. 3343-44).

The foregoing testimony provides substantial evidence the Bequest was motivated, at least in part, by Milton Schwartz's support and dedication to the School, ***not*** solely because he allegedly thought he had perpetual naming rights. Thus, even if the Bequest may have been premised in part on the fact that Milton Schwartz subjectively believed the School would be named after him "in perpetuity," this is not sufficient to support a finding of an invalidating mistake. The Estate thus failed to meet its substantial burden to adduce clear and convincing evidence at

trial that ***but for*** Milton Schwartz's mistaken belief that he had perpetual naming rights of the School, he would have ***never*** made the Bequest. As a result, the jury's advisory finding on this issue and the district court's adoption of the same was erroneous.

Likewise, the Estate cannot demonstrate the Bequest was conditional on perpetual naming rights. "Whether a gift is conditional or absolute is a question of the donor's intent, to be determined from any **express declaration** by the donor **at the time of the making of the gift** or from the circumstances." *Cooper v. Smith*, 155 Ohio App. 3d 218, 228, 800 N.E.2d 372, 380 (*citing* 38 American Jurisprudence 2d (1999) 767–768, Gifts, Section 72).

Here, there is no dispute the Bequest is not expressly conditioned on the School bearing Milton Schwartz's name forever. Moreover, the perpetual naming rights condition cannot be inferred from the circumstances, especially if Milton Schwartz's improper hearsay statements are excluded. Contrary to the Estate's argument, the absence of a successor clause does not in and of itself support a finding of a condition precedent or subsequent to justify forfeiture.[3] And, even

[3] Notably, even assuming a condition precedent existed, it would literally

assuming this alleged condition existed, it would be a condition subsequent as the Estate appears to concede (AAB at 95), under which courts generally seek to avoid forfeitures where possible. *See Tizard v. Eldredge*, 25 N.J. Super. 477, 481, 96 A.2d 689, 691 (App. Div. 1953) ("Forfeitures under wills or deeds are not favored 'and if they can be avoided on a fair and reasonable interpretation of the instrument involved, a court of equity will undertake to do so…'") (citation omitted). Regardless, because the Estate cannot demonstrate the Bequest was conditional on the School bearing Milton Schwartz's name forever, this Court must reject this argument.

2. Equity favors the School's Receipt of the Bequest for Scholarships.

Milton Schwartz unambiguously made the Bequest to pay for scholarships for Jewish children attending the School. At the time of Milton Schwartz's death and for approximately six years after, there is no dispute that the Milton I. Schwartz Hebrew Academy was there to receive the Bequest for scholarships. The Executor's unreasonable delay

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be impossible to discern the satisfaction of this alleged condition prior to payment, which would allow the Estate to essentially hold off on effectuating the Bequest indefinitely.

in effectuating the Bequest despite the fact that, as the Estate admits, he identified the School in his petition to probate the Will, and his actions in suing the School after unreasonably demanding the School agree to honor a contract the Estate cannot prove exists, led to the removal of Mr. Schwartz's name from the elementary school. However, regardless of the Estate's contentions, the fact remains that the Milton I. Schwartz Hebrew Academy existed at the time of Milton Schwartz's death and even after the School was forced to seek court intervention to compel payment of the Bequest. And, the School was and continues to remain able to receive and effectuate the Bequest for scholarships. Notably, the only people who stand to benefit from the Bequest are the students who would obtain scholarships. It is not as though the School seeks to compel the Bequest to spend half a million dollars as it so chooses. Rather, it is clear that Milton Schwartz loved and devoted substantial time to the School and its students. As such, equity favors effectuating the Bequest. Regardless of the Estate's contentions regarding the School's motivations, the Estate cannot rewrite the Bequest and has failed to demonstrate any valid reason why it should not effectuate the Bequest

for scholarships. Accordingly, the Court must reverse the district court's ruling denying the School's Petition.

II. Arguments In Support Of Reply Brief in Case No. 79464.

A. The School and Not the Estate was the Prevailing Party Entitled to Its Costs under NRS 18.020.

NRS 18.020(3) required the district court to award costs to the prevailing party in this matter. The district court erroneously and arbitrarily concluded the Estate was the prevailing party despite the fact that neither party succeeded on its request(s) for affirmative relief, and the School succeeded on what was unquestionably the most significant issue in the litigation. The Estate's contentions seeking to uphold the district court's erroneous ruling significantly misconstrue the law and facts and must be rejected by this Court.

While the Estate admits that the prevailing party analysis encompasses defendants, its arguments effectively ignore this black letter law. The Estate incorrectly focuses on the language in *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005), which states that a party can prevail under NRS 18.010 "if it succeeds on any significant issue in the litigation which achieves some of the benefit it sought in bringing suit." However, *Valley Electric* also makes it clear that

"the term 'prevailing party' is broadly construed so as to encompass plaintiffs, counterclaimants, and defendants." *Id.* Clearly, a defendant does not "bring suit" and thus, under the strict construction offered by the Estate, cannot feasibly "achieve some of the benefit it sought in bringing suit." Because Nevada law is clear that a defendant can be a prevailing party for purposes of NRS 18.010 and NRS 18.020, the fact that the School did not succeed on its Petition is not dispositive. *Id.*; *see also 145 E. Harmon II Tr. v. Residences at MGM Grand - Tower A Owners' Ass'n*, 136 Nev. 115, 120, 460 P.3d 455, 459 (2020). Therefore, the Court must reject the Estate's flawed argument on this issue.

The Estate's position also ignores the fact that the "counterclaims" in its Petition on which it succeeded were all directly related to its attempts to avoid the relief sought in the School's Petition. In other words, the School sought to compel the Bequest and the Estate sought to avoid it with its first through fourth "counterclaims." There is no dispute Estate prevailed on that issue. Conversely, the Estate's breach of contract claim was an independent, affirmative claim for relief. There is no dispute the School prevailed on that issue. Similarly, the School succeeded in defending against the Estate's affirmative claims for

"Revocation of Gift and Constructive Trust" (which the Estate later repackaged and submitted to the jury as a claim for promissory estoppel). Thus, both parties succeeded on some issues for purposes of the prevailing party analysis. Because only one party could prevail on claims regarding the Bequest, and the Court must reject the Estate's attempt to "double dip" by claiming both that it prevailed on its counter-claims to avoid the Bequest and that the School did not succeed on its Petition, all while ignoring the fact that it lost on the affirmative relief it sought. Therefore, the fact that the Estate succeeded on its "counterclaims" asserted in direct response to the School's Petition is not determinative of the prevailing party issue.

The district court recognized that neither party succeeded on its affirmative claims, but then with no analysis or explanation, arbitrarily concluded that the Estate was the prevailing party. (27 App. 6585-95). Because the district court failed to analyze the weight and importance of the issues in this litigation as required under Nevada law, the district court abused its discretion in awarding costs to the Estate.

As set forth in detail in the School's Combined Brief, the School is the prevailing party because it prevailed on the most significant issue in

the litigation – the existence of the alleged naming rights contract and the far-reaching consequences related thereto. *See* RAB at 134-40. The Estate lost its affirmative claim for specific performance of the alleged perpetual naming rights contract with Milton Schwartz, the most consequential claim made by the Estate. (19 App. 4526-32). As a result, the School did not have to return over $100,000,000 in gifts to the Adelsons, or lose all future funding from the Adelson family, which up through the time of trial, constituted many millions of additional funds each year (15 App. 3622-23, 3625). In addition, the Estate lost its affirmative claim for reimbursement or restitution from the School for Milton Schwartz's past gifts almost $3 million (25 App 6005). In comparison, the School lost its affirmative claim for the $500,000 in scholarship money that the Estate would have to pay regardless of the outcome of the case. (3 App. 685-90; 14 App. 3430-32; 24 App. 5994).

The fact that the issues were necessarily related is irrelevant. While the Bequest was the initial focus of the litigation, the contract issue became the focus of the litigation as the proceedings advanced and the case was tried. The vast majority of the parties' opening and closing statements, the testimony and evidence introduced at trial, and the jury

instructions related to the alleged perpetual naming rights contract and this issue was the primary focus of the parties and the Court, and had by far the greatest economic implications in the case, and the most far-reaching consequences for the parties. Thus, the School prevailed on what was unquestionably the most significant issue tried by the parties.

The Court must also reject the Estate's contention that the damages each party sought is irrelevant. The School does not dispute that there are no monetary judgments to compare or offset. However, for purposes of the prevailing party analysis, because both parties succeeded on some of the issues, the relief sought by the parties is a relevant consideration to explain and put the importance of the issues into perspective. For instance, had the Estate succeed on its contract claim and request for specific performance thereunder, the School would have been subject to the catastrophic economic consequences related to thereto. Similarly, the Estate's related claim for "Revocation of Gift and Constructive Trust," for which the Estate sought over $2.8 Million in damages, was necessarily a significant issue that would have had a dramatic adverse economic impact on the School. The fact that the School prevailed on these issues and the Estate did not obtain a judgment on

either of these counterclaims is the lynch pin to the prevailing party analysis.

Accordingly, the School was clearly the prevailing party under NRS 18.020 because it prevailed on what was unquestionably the most significant issue in the litigation, the existence of the alleged naming rights contract and the far-reaching economic and non-economic consequences related thereto. The district court abused its discretion by arbitrarily determining that the Estate was the prevailing party entitled to its costs, and this Court must reverse the district court's ruling.

B. The Estate cannot recover unsupported, unreasonable, and unnecessary costs.

Assuming the Estate is the "prevailing party," the district court erroneously awarded the Estate $11,747.68 in costs in contravention of NRS 18.005. Specifically, the Estate failed to demonstrate that the district court's award of certain costs was warranted under NRS 18.020 and/or NRS 18.005, and its costs award must be reduced accordingly.

1. The Estate is not entitled to recover costs for deposition transcripts for its excluded experts.

The Estate argues that the district court's award of $586.75 for *deposition transcript costs* for its experts Layne Rushforth, Esq. and

Rabbi Wyne, which were the Estate's "expert" witnesses that were precluded from testifying as experts at trial was not erroneous because "witness fees" are allowable costs. The Estate mistakenly relies on *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993) *superseded by statute on other grounds as recognized in In re DISH Network Derivative Litig.*, 133 Nev. 438, 451 n.6, 401 P.3d 1081, 1093 n.6 (2017), for the proposition that a witness does not have to be called at trial to award witness fees. However, the costs here relate to the Estate's voluntary deposition transcript fees – not fees provided to a witness pursuant to a trial subpoena. Thus, *Bergmann* does not support the Estate's position. The School only conducted these depositions based on the fact that the Estate designated Mr. Rushforth and Rabbi Wyne as expert witnesses. Because the district court excluded these witnesses from testifying as experts, and the Estate cannot demonstrate it is otherwise entitled to recover the deposition transcript costs it voluntarily incurred for these inappropriately designated witnesses, this Court should reduce any cost award to the Estate accordingly.

2. The Estate is not entitled to certain processor fees.

The district court erroneously awarded the Estate its costs for three categories of processor fees, totaling $2,430. (27 App. 6593). First, the district court improperly awarded the Estate $1,920 in expedited service fees. No basis exists to award the Estate $1,920 in costs resulting from unnecessary expedited service charges, especially without any explanation as to why expediting these services was necessary. The Estate offers no explanation or justification for why these costs were "reasonable and necessary," instead relying on the general contention of the "time-sensitive nature of litigation." The Estate fails to account for the fact that litigants are regularly able to effectuate service of process without the use of the significantly more costly expedited services. The Estate's delay or failure to plan accordingly or to account for time to effectuate service without the need to resort to paying exorbitant fees without explanation does not render these costs necessary and reasonable.

Second, the district court erred in awarding the Estate $235 in process server fees to serve a trial subpoena on Dr. Neville Pokroy. The Estate does not dispute that it did not call Dr. Pokroy at trial, but

contends, without any valid explanation that it should nonetheless recover subpoena costs for witnesses it did not actually call. Similar to NRS 18.110(2), which provides that witness fees are only recoverable for witnesses who are actually sworn in and testify), trial subpoena costs should only be permitted for witnesses who actually testify at trial. *See also* NRS 18.005(4); *Bergmann*, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993) (trial court discretion to award costs "should be sparingly exercised when considering whether or not to allow expenses not specifically allowed by statute and precedent," and the trial court should exercise restraint because "statutes permitting recovery of costs, being in derogation of the common law, must be strictly construed") (citations omitted).

Third, the district court erred in awarding the Estate $510 in process server fees to serve Dr. Miriam Adelson with deposition subpoenas when Dr. Adelson was never actually deposed in the matter. (27 App. 6593). The fact that the court issued a protective order to preclude the Estate from deposing Dr. Adelson demonstrates that service of the subpoena was not necessary. Thus, the district court abused its discretion in awarding these costs. Therefore, the Court should reduce

any costs awarded to the Estate by $2,430 to account for these inappropriate service of process costs.

3. The Estate is not entitled to costs for Westlaw legal research because it failed to properly document these costs.

The district court erroneously awarded the Estate $8,730.93 in Westlaw research costs because the Estate failed to properly demonstrate the reasonableness and necessity of these charges under NRS 18.005(17). (27 App. 6593). The Estate contends that the School simply "does not like the Estate's billing method" and contends that "nothing prohibits billing clients on a pro-rata share of the firm's total monthly Westlaw charges." These arguments fail to explain how this method of billing permits a court to determine whether the costs were reasonably, necessarily and actually incurred, especially where, as here, the Estate failed to provide any mathematical or other data demonstrating how the pro-rata share is actually determined. *See* NRS 18.020; NRS 18.005. Accordingly, the district court erred in awarding the Estate its costs associated with legal research and its cost award must be reduced accordingly.

As the School is the prevailing party, the district court's costs award to the Estate must be vacated. However, should this Court affirm the district court's determination that the Estate is the prevailing party,

then it must reduce the award by $11,747.68, which represents costs not recoverable by statute as set forth in the School's Combined Response and Opening Brief and herein.

CONCLUSION

For the foregoing reasons this Court should vacate the Judgment on the School's and the Estate's Petitions regarding the Bequest and remand with instructions that the district court grant the School's Petition, or at a minimum, remand for further proceedings.

In the event the Court maintains the status quo, then it should vacate the district court's costs award to the Estate or, at a minimum, reduce the costs award by $11,747.68.

DATED this 4th day of June, 2021.

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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 of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in Century.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2)(C) and NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 8,411 words. The Court's April 9, 2021 Order directed the School to file a single combined reply brief on cross-appeal (Case No. 78341), and reply brief (Case No. 79464) ("Combined Brief"). Pursuant to NRAP 28.1(e)(2)(C) and NRAP 32(a)(7)(A)(ii), the School's Reply Brief (Case No. 78341) and the School's Reply Brief (Case No. 79464) each cannot exceed 7,000 words. Thus, the School in under the impression its Combined Reply Brief cannot exceed 14,000 words [7,000 + 7,000] in total. The Combined Reply Brief contains 8,411 words and, therefore, is in compliance with the aggregate type-volume limitations set forth above.

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 an 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 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 4th day of June, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 4th day of June, 2021, I caused to be served via the District Court's e-filing system and pursuant to NRAP 25(b) and NEFCR 9, and electronically filed the foregoing RESPONDENT/CROSS-APPELLANT'S COMBINED REPLY BRIEF ON CROSS-APPEAL (NO. 78341) & REPLY BRIEF ON APPEAL (NO. 79464) with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (Eflex). Participants in the case who are registered Eflex users will be served by the Eflex system as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF MILTON I. SCHWARTZ, DECEASED.

A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ,

Appellant/Cross-Respondent,

vs.

THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,

Respondent/Cross-Appellant.

THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,

Appellant,

vs.

A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ,

Respondent.

No. 78341

No. 79464

RESPONDENT/CROSS-APPELLANT'S COMBINED:

REPLY BRIEF ON CROSS-APPEAL (NO. 78341)
&
REPLY BRIEF ON APPEAL (NO. 79464)

RESPONDENT/CROSS-APPELLANT'S COMBINED:
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INTRODUCTION

I. The School's Reply to its Opening Brief on Cross-Appeal

The district court's denial of the The Dr. Miriam and Sheldon G. Adelson Educational Institute's (the "School") Petition was erroneous. As a matter of law, the district court erred in concluding that the Bequest was ambiguous. The Estate does not dispute the Bequest was unambiguous. (Appellant's Combined Reply & Answering Briefs ("AAB") at 73, 77-78; 14 App. 3475-76). Instead, the Estate incorrectly argues that "any" extrinsic evidence is always admissible where a will is involved, ignoring black letter Nevada law requiring that a will (or any instrument for that matter) actually be ambiguous on its face before resort to parol evidence. Rather than construe the unambiguous Bequest within the four corners of the Will, the district court erroneously allowed the Estate to manufacture an ambiguity out of whole cloth, and then determined an ambiguity existed based on extrinsic facts that have no connection to the language Milton Schwartz used in the Bequest. (12 App. 2796-2810). Therefore, the district court erred in finding an ambiguity existed.

As a result of this erroneous finding, and despite the fact that nothing in the Bequest implicates perpetual naming rights, the district

court then erroneously permitted the Estate to offer parol evidence (mostly in the form of self-serving, inadmissible hearsay testimony) related to the alleged perpetual naming rights contract the Estate claims exists between Milton Schwartz and the School. The district court improperly permitted the Estate to proffer evidence regarding perpetual naming rights to add language and/or conditions to the Bequest not found on its face. This error was compounded by the fact that the parol evidence did nothing to purportedly explain Milton Schwartz's actual intent in making the Bequest at the time it was drafted, but instead was proffered by the Estate to backdoor unrelated testimony regarding the alleged perpetual naming rights contract between Milton Schwartz and the School. (*See* 13 App. 3154-55, 3172, 3382-87; 14 App. 3527-38).

Assuming arguendo that the Bequest was ambiguous, the district court abused its discretion in permitting the Estate to introduce inadmissible hearsay, prejudicing the School. The only evidence the Estate offered to purportedly explain Milton Schwartz's intent in making the Bequest was hearsay testimony from Milton Schwartz, who died years before the trial began, made years, or sometimes decades before or after Milton Schwartz executed the Bequest. Compounding this error, all

this blatant hearsay testimony related to the alleged perpetual naming rights, rather than the unambiguous language of the Bequest. The unambiguous language in the Bequest provides that the Estate provide $500,000 to the School for the limited and specific purpose of providing scholarships for the education of Jewish students. That bequest is for the benefit of Jewish children attending the School and not for the direct benefit of the School, and it says nothing that conditions the Bequest on perpetual naming rights. The only possible way that the Court could get to that conclusion is by improperly admitting unmitigated hearsay evidence from statements made by Milton Schwartz before he died, and then extrapolating that those hearsay statements somehow qualified an unambiguous bequest. In other words, not only were the statements hearsay, they also required the district court to speculate as to what Milton Schwartz meant by these statements because the statements themselves do not explicitly make any connection between the Bequest and perpetual naming rights. Rather than demonstrate that specific hearsay exceptions applied to these statements, the Estate continues to rely on its erroneous contention that the mere fact that a will provision is at issue in the litigation renders **all** of Milton Schwartz's statements

admissible, regardless of their substance or timing. Had the district court properly excluded this inadmissible hearsay, the Estate would have had no evidence purportedly linking the Bequest to the alleged perpetual naming rights contract or Milton Schwartz's alleged beliefs regarding the same to support its decision denying the School's Petition. The School unquestionably was prejudiced by the district court's errors in admitting this evidence, as this inadmissible hearsay was the only possible basis for the trial court's decision.

While the parties clearly have differing positions regarding the facts and circumstances underlying this action, there can be no doubt that the purpose of the Bequest can be effectuated – that Jewish children attending the School be provided scholarships – regardless of the name change. In other words, even the Estate cannot reasonably deny that Milton Schwartz's clear intent was to provide Jewish children a $500,000 scholarship fund for their education. What the Estate is insisting on doing, and the district court wrongfully acquiesced to, is to insert into the unambiguous language in the Bequest a secondary intent based on inadmissible hearsay from a deceased person. Making this assumed connection more tenuous, if that's even possible, is the fact that these

hearsay statements span a time frame from a few years to decades, both before and after the Will was written. Accordingly, the Court must vacate and reverse the district court's judgment denying the Estate's Petition.

I.

Arguments in Support of the School's Reply Brief in Case No. 79464:

The district court erroneously and arbitrarily determined that the Estate was the prevailing party and entitled to its costs, despite the fact that while neither party prevailed on its affirmative claims, the School prevailed on what was unquestionably the most significant issue in the case.

Contrary to the Estate's contention, Nevada law does not require a party to succeed in bringing suit to be a prevailing party. Thus, the mere fact that the School did not prevail on its Petition is not dispositive. Likewise, the fact that the Estate succeeded on two of its affirmative defenses/counterclaims, which were asserted directly in response to the School's Petition, and thus sought opposite relief, is not dispositive. Rather, under the circumstances of the case, a review of the overall claims and issues was required. And, under the proper analysis, there can be no legitimate dispute that the School is the prevailing party. The

School prevailed against the Estate's affirmative claim for specific performance of the alleged perpetual naming rights contract with Milton Schwartz, the most significant claim made by the Estate and the claim that dominated the lengthy jury trial. (19 App. 4526-32). As a result, the School did not have to return over $100,000,000 in gifts to the Adelsons (which would have bankrupted the School), or lose all future funding from the Adelson family, which constituted many millions of additional funds each year up through the time of trial. (15 App. 3622-23, 3625). The Estate also lost its affirmative claim for disgorgement from the School for Milton Schwartz's past gifts plus interest, in the approximate amount of $2,800,000 (25 App 6005). In comparison, the School lost its affirmative claim for the $500,000 in scholarship money the Estate already had set aside in a blocked account, and would have to pay regardless due to the tax consequences of recognizing the Bequest years before. (3 App. 685-90; 14 App. 3430-32; 24 App. 5994).

Under the above irrefutable facts, considering the litigation as a whole, it is overwhelmingly clear that the School prevailed on the most consequential issues before the court. No legal or factual support thus exists for the district court's decision, especially given the Court's failure

to provide specific findings on this issue. Accordingly, Nevada law dictates that the School should have been declared the "prevailing party" in this litigation and entitling it to recover its costs under NRS 18.020. This Court must vacate the district court's cost award to the Estate.

Even assuming the district court did not arbitrarily determine the Estate was the prevailing party, the district court erred in awarding $11,747.68 in costs to the Estate. This amount includes both costs that are not recoverable under NRS 18.005 and costs for which the Estate failed to provide the proper backup and documentation. Therefore, at a minimum, the Estate's costs award must be reduced accordingly.

ARGUMENTS

I. Arguments in Support Of Reply Brief on Cross-Appeal

This Court must reverse the district court's judgment denying the School's request to compel the Bequest. As a matter of law, the district court erred in refusing to interpret the unambiguous Bequest on its face. Had the district court properly limited its inquiry into Milton Schwartz's intent from the actual words he used in the Bequest, no valid basis existed to deny the School's Petition. As such, the district court's refusal to compel the Bequest was erroneous.

Moreover, even assuming an ambiguity existed to justify the district court's consideration of parol evidence, the district court erred in admitting extrinsic evidence that had no discernible connection to the purported ambiguity. Instead, the parol evidence proffered by the Estate related solely to the alleged perpetual naming rights contract, not the Bequest language at issue. Thus, the district court improperly permitted the Estate to introduce and rely on extrinsic evidence that did not actually relate to or explain the alleged ambiguity found by the district court or otherwise explain any purported ambiguity in the Bequest. Under black letter Nevada law, the district court erred in denying the School's Petition on this basis.

The district court also abused its discretion in admitting and then relying on inadmissible hearsay evidence to deny the School's Petition. Milton Schwartz's hearsay statements related to the alleged perpetual naming rights contract and had no discernible connection to the Bequest, either in timing or substance. Because no valid exception exists, the district court erred in admitting these hearsay statements. Without Milton Schwartz's improper hearsay statements, the Estate could not demonstrate any valid basis to avoid the Bequest. This evidentiary

failure becomes even more obvious considering, under Nevada law, the Estate was required to prove by clear and convincing evidence that the existence of the perpetual naming rights contract was an invalidating mistake. No support exists for the Estate's contention the Bequest was conditioned on perpetual naming rights for Milton Schwarz, let alone clear and convincing evidence.

Finally, equitable considerations required the district court to grant the School's Petition and order the Estate to effectuate the Bequest establishing a scholarship fund for Jewish children. The Estate should not benefit from its delay and attempts to re-write the Bequest to the detriment of the students who would otherwise receive a scholarship for their education. Accordingly, this Court must reverse the Judgments on the School's Petition and the Estate's related affirmative defenses/counterclaims.

. . .

. . .

A. The District Court Should Have Granted the School's Request to Compel the Bequest for Scholarships.

1. The Parties agree the Bequest was not ambiguous; thus, the district court should have excluded the Estate's parol evidence and granted the School's Petition to effectuate the Bequest.

The district court erroneously determined an ambiguity existed regarding which grade levels the scholarships funded and then permitted the Estate to offer extrinsic evidence in support of this contention, none of which actually explained the purported ambiguity. The Estate does not dispute that the Bequest unambiguously states that the Bequest for scholarships go to the "Milton I. Schwartz Hebrew Academy," but contends that extrinsic evidence is always admissible if it allegedly "explains" the meaning of the testator's words. This argument ignores the critical requirement that the will must be ambiguous *i.e.*, subject to two constructions, before extrinsic evidence is considered to purportedly explain the ambiguity. *In re Walters' Estate,* 75 Nev. 355, 359 (1959); *see also Howard Hughes Med. Inst. v. Gavin*, 96 Nev. 905, 908, 621 P.2d 489, 490–91 (1980) (noting "a testator's declarations may be useful in interpreting **ambiguous terms** of an established will…) (emphasis added). Thus, extrinsic evidence is only permitted to explain the allegedly

ambiguous language not the entire will or any other provision the Estate wants to re-write.

Here, because the Bequest was admittedly not ambiguous or subject to two different constructions, extrinsic evidence was not necessary or appropriate to explain the meaning of the testator's words. *Gianoli v. Gabaccia*, 82 Nev. 108, 110 (1966);*see also* 80 Am. Jur. 2d Wills § 989 ("When the language of a will is clear and unambiguous, the testator's intent must be ascertained from the express terms of the will itself."). The Bequest did not become ambiguous simply because the Estate self-servingly *argued* that Milton Schwartz's motive in making the Bequest was based on his alleged belief he had a perpetual naming rights contract with the School. There is no dispute that nothing in the actual language of the Bequest implicates a perpetual naming rights contract in any way. Thus, because the Estate's alleged condition does not exist on the face of the unambiguous Bequest, the district court erred by not limiting its inquiry into Milton Schwartz's intent from the actual words he used in the Bequest. *In re Walters' Estate*, 75 Nev. at 359. The district court incorrectly construed the Bequest the way that the Estate believed Milton Schwartz allegedly intended to have written it and not "in accord

with the meaning of the words [Milton Schwartz] used." *Zirovcic v. Kordic*, 101 Nev. 740, 742 (1985). Under black letter Nevada law, there can be no dispute the district court erred in refusing to interpret the Bequest without resort to parol evidence.

The Estate argues that any finding the Bequest was unambiguous only benefits the Estate because it would preclude extrinsic evidence demonstrating the link between the Milton I. Schwartz Hebrew Academy and the School, and without this evidence, the gift fails. This argument is flawed because it again misconstrues the law regarding ambiguity and extrinsic evidence. Clearly, the extrinsic evidence offered must actually relate to and explain the alleged ambiguity. *See In re Jones' Est.*, 72 Nev. 121, 123, 296 P.2d 295, 296 (1956). In the event the Court had made an express determination an ambiguity existed regarding the link between the Milton I. Schwartz Hebrew Academy and the Adelson Educational Institute, then extrinsic evidence to explain that link would be appropriate. *See* 96 C.J.S. Wills § 1015.

Next, contrary to the Estate's assertion, the Bequest does not lapse simply because the School is no longer known as the "Milton I. Schwartz Hebrew Academy." First, the School was known as the "Milton I.

Schwartz Hebrew Academy" at the time of Milton Schwartz's death when the gift effectively vested, and the elementary school continued to be known as the same for approximately the next six years until after the litigation commenced. Had the Executor properly and **timely** effectuated or funded the Bequest then this entire argument would evaporate. (16 App. 3780; 17 App. 4136, 4164). The Estate's dilatory actions in carrying out the directives of the Will created the very circumstances it now points to as the reason it does not have to honor the Bequest. The Court must reject the Estate's manufactured and self-serving defense.

Further, contrary to the Estate's assertion, the absence of a successor clause in the Bequest is not conclusive proof that Milton Schwartz intended that the Bequest only go to a school bearing his name in perpetuity such that the gift fails. At most, the absence of a successor clause creates an inference. However, without more, the Estate cannot demonstrate the Bequest should simply fail on this basis.

Unlike the cases relied on by the Estate, this is not a case where the designated charity ceases to exist. Instead, the School simply changed the elementary school's name years after Milton Schwartz's passing, but continues to exist as a Jewish school for which scholarships can be

provided in compliance with the Bequest. The Estate's reliance on *In re Est. of Beck*, 272 Ill. App. 3d 31, 37-38, 649 N.E.2d 1011, 1015-16 (1995) for the proposition that the Bequest fails is also misplaced. In that case, the court determined that the successor charity was not entitled to the gift because it did not provide the same or similar services as the prior charity (orphanage versus general child welfare services). *Id.* Conversely, here, the Bequest was intended to provide scholarships to Jewish children attending the School. The School provides the same "services"[1] as it did when it was named the Milton I. Schwartz Hebrew Academy and, thus Milton Schwartz's intent to provide scholarships for Jewish children to attend the School can still be accomplished. In addition, "[a] testamentary gift to a charitable organization is generally valid, even though the object is imperfectly designated, if it can be identified with reasonable certainty from the description in the will and the surrounding circumstances." 96 C.J.S. Wills § 1091. Therefore, because there is no dispute that the School still exists and the Bequest can still be effectuated

[1] In fact, because of the gifts by the Adelsons, the School provides a much improved and more extensive educational services to Jewish children than it did before. The whole point of Milton Schwartz's scholarship Bequest was to enhance the educational opportunities for Jewish children. It begs credulity and common sense that Milton Schwartz would be upset that his scholarship fund would help Jewish children attend such a highly regarded school.

to provide scholarships for Jewish children attending the School, the Court must reject the Estate's argument that the gift fails.

Finally, contrary to the Estate's assertions, the Bequest should be construed against the drafter. The Estate fails to cite to any Nevada authority holding that this black letter rule regarding the construction of written instruments does not apply to wills. According to the Executor, Jonathan Schwartz, Milton Schwartz dictated the Will himself and the Will reflects his own words. (14 App. 3401). Now, Jonathan Schwartz seeks to avoid effectuating the Bequest based on contentions that the Bequest actually included conditions not present in the express language of the Bequest. Under these circumstances, any ambiguity arising from Milton Schwartz's failure to include an express condition in the Bequest should be construed against the Estate and in favor of the School, especially because it can be determined with reasonable certainty that Milton Schwartz intended the $500,000 bequest to go to the School to fund scholarships for Jewish children. *See* 96 C.J.S. Wills § 1091.

2. Even if an ambiguity existed, the district court erred by relying on extrinsic evidence related solely to the alleged perpetual naming rights agreement rather than to explain the alleged ambiguity.

Even assuming an ambiguity existed in the Bequest, the Court must reverse the Judgment on the School's Petition because the district court admitted and relied on extrinsic evidence that did not relate to the purported ambiguity the district court actually found. According to the district court, the purported ambiguity related to which grade levels the scholarships funded by the Bequest could apply to in light of the changes to the structure of the School. (12 App. 2810-2817). However, the extrinsic evidence proffered by the Estate and admitted by the district court went substantially outside whether Milton Schwartz intended that the money benefit grades pre-K through 8 (which were the only grades at the original Milton I. Schwartz Hebrew Academy) versus only certain grades at the newly restructured School, and instead related only to the alleged perpetual naming rights contract with the School. (13 App. 3154-55, 3167, 3171-72, 3179-80, 3210-11, 3230, 3238; 14 App. 3383-85, 3392-93, 3410, 3412-13, 3420-22). The Estate seeks to now recast the district court's finding to support its arguments, but the district court never expressly found an ambiguity existed regarding the existence of a

perpetual naming rights contract to permit the Estate to bootstrap or back door extrinsic evidence regarding Milton Schwartz's alleged beliefs regarding the same. And, contrary to the Estate's contentions, extrinsic evidence that Milton Schwartz believed he had a perpetual naming rights agreement has absolutely nothing to do with which grades Milton Schwartz purportedly intended to benefit via the Bequest. Thus, even assuming the Bequest contained a latent ambiguity, which it did not, the district court erred in admitting and relying on extrinsic evidence that did not relate to or explain the supposed ambiguity.

The Estate also argues that Milton Schwartz's out of court statements were nonetheless admissible to purportedly explain the meaning of the words in the Bequest (*i.e.*, what Milton Schwartz "actually" meant when he unambiguously identified the "Milton I. Schwartz Hebrew Academy" as the beneficiary in the Bequest for scholarship money). However, even assuming extrinsic evidence was admissible on this basis, the extrinsic evidence proffered by the Estate and admitted by the district court did nothing to achieve this purpose. Rather than explain the meaning of the actual words used in the Bequest, the extrinsic evidence related to the alleged perpetual naming rights

contract, and entirely unrelated subject. As such, the district court permitted the Estate to admit and rely on extrinsic evidence related to the contract dispute, under the ruse of some nebulous and dubious alleged connection to Milton Schwartz's intent regarding the Bequest to then add language into the Bequest that is simply not there (*i.e.*, the condition that the Bequest go to the School *only if the School shall be named after him in perpetuity*). This extrinsic evidence thus either improperly contradicted, or added unwritten language to, the express and unambiguous terms of the Bequest in violation of Nevada law. *In re Jones' Estate*, 72 Nev. at 124 ("[E]vidence is admissible which, in its nature and effect, simply explains what the testator has written; **but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written**.") (emphasis added); *see also Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 409, 305 P.3d 70, 73 (2013) (Extrinsic or parol evidence is not admissible to contradict or vary the terms of an unambiguous written instrument.). The district court unquestionably erred in admitting this evidence. *See Frei*, 129 Nev. Adv. Op. 42 at *8, 305 P.3d at 73.

The Court must also reject the Estate's contention that Milton Schwartz's statements referring to the School with the words "in perpetuity" constitute permissible extrinsic evidence of idiosyncratic use. Milton Schwartz's use of the terms "in perpetuity" when referring to the School is not an idiosyncrasy. Even if it was, the circumstances here are the opposite of those generally used to justify reliance on extrinsic evidence. This case does not involve idiosyncratic terminology in the testamentary instrument for which the court permitted extrinsic evidence to explain. *Flannery v. McNamara*, 432 Mass. 665, 672, 738 N.E.2d 739, 745 (2000) ("all of the relevant illustrations of this principle set forth in the Restatement make it clear that 'personal usage' evidence is permitted only where the testator habitually referred to someone or something in an idiosyncratic manner during his lifetime, ***and then used that idiosyncratic terminology in his will***.")(emphasis added). Instead, Milton Schwartz referred to the School in a straightforward manner in the Bequest. In other words, he never used the idiosyncratic words "in perpetuity" anywhere in his Will, let alone in the Bequest, and certainly not in connection with the words "the Milton I. Schwartz Hebrew Academy" in the Bequest. In spite of that fact, the Estate seeks to use

this extrinsic evidence regarding how Milton Schwartz allegedly referred to the School outside any connection to his Will to prove his alleged intent with respect to the Bequest. Thus, no legal or admissible evidentiary support exists for the Estate's position on this issue.

Because the Estate's alleged conditional language does not exist on the face of the unambiguous Bequest, the district court erred by not limiting its inquiry into Milton Schwartz's intent from the actual words he used in the Bequest. *In re Walters' Estate*, 75 Nev. at 359. In effect, the district court erroneously concluded that what Milton Schwartz **intended to write** was that the Bequest would go to the School so long as it was named the "Milton I. Schwartz Hebrew Academy" and would remain that way forever. *See id.* ("The question before us is not what the testatrix ***actually intended*** or what she meant to write."). The district court thus, incorrectly construed the Bequest the way that it (and the Estate) believed Milton Schwartz "meant to write" the Bequest and not "in accord with the meaning of the words [Milton Schwartz] used. *Zirovcic*, 101 Nev. at 742. Under black letter Nevada law, the district court erred in denying the School's Petition on this basis.

B. The District Court Abused Its Discretion in Admitting and Relying on Inadmissible Hearsay to Construe the Bequest, which was Not Harmless.

Even if this Court finds that district court did not commit legal error in admitting extrinsic evidence to add to and/or amend the language of the Bequest to allegedly demonstrate what Milton Schwartz actually meant, the district court erred when it improperly admitted numerous hearsay statements to purportedly connect the Bequest to Milton Schwartz's alleged belief he had a perpetual naming right contract with the School. (12 App. 2796, 2800-03, 2835-36, 2840-42; 13 App. 3154-55, 3172, 14 App. 3383-87, 3412-13, 3415-18; 15 App. 3527, 3529, 3537).

The Estate incorrectly argues that the statements at issue are not hearsay because they were not offered for their truth. The truth of the hearsay statements was, however, precisely the purpose for which they were offered. The Estate offered these hearsay statements from the deceased Milton Schwartz to prove that Milton Schwartz believed he had a perpetual naming rights agreement in order to argue that he would not have made the Bequest *but for this belief*. Thus, in the context of this case, Milton Schwartz's statements about his alleged belief was hearsay because it was used to prove the truth of the matter asserted – that he

believed he had a perpetual naming rights agreement. In other words, because these statements were used to actually prove Milton Schwartz's intent with respect to the circumstances as he purportedly understood them, they were used to prove the truth of the very matter at issue before the court, and thus constitute hearsay. The point being, if the district court hadn't believed these statements were true, that Milton Schwartz he had perpetual naming rights in the School, then there was no basis for the district's decision denying the Bequest.

Likewise, the Estate's reliance on NRS 51.105 is misplaced. The mere fact that the Estate *argued* that Milton Schwartz only made the Bequest based on his belief that he had a perpetual naming rights contract did not automatically transform every single alleged statement Milton Schwartz made regarding the alleged agreement with School into an admissible state of mind exception or render it a statement related to the terms of his Will to render it admissible under NRS 51.105. *See Lasater v. House*, 841 N.E.2d 553, 556 (Ind. 2006) ("a statement or declaration of a testator that is considered classic hearsay is not transformed into non-hearsay simply because it tangentially involves a state of mind."). Yet, this is precisely what the Estate argued and the

district court improperly allowed in at trial. (15 App. 3527-38). This is especially obvious given that many of the hearsay statements the district court admitted were made years, and in some instances, decades, *before* Milton Schwartz made the Bequest; thus the Estate failed to demonstrate how these statements could even conceivably be related to his intent in making the Bequest. (13 App. 3154-55, 3169-72; 14 App. 3383-87). Because a valid hearsay exception does not apply to each of these hearsay statements, the district court abused its discretion in admitting them into evidence as the basis of denying the Bequest.

The Estate further argues that the School waived its ability to challenge the district court's improper admission and reliance on inadmissible hearsay if it did not object to each and every instance. However, the district court denied the School's motions in limine to preclude this hearsay evidence prior to trial and School clearly lodged its ongoing objections to the district court's ruling regarding the Estate's hearsay evidence prior to and during trial. (12 App. 2795-2845; 13 App. 3154-55, 3169-72; 14 App. 3382-87, 3412-13, 3415-21; 15 App. 3527-38, 3529, 3537); Respondents' Reply Appendix ("Reply App.") 1-99).[2]

[2] The Estate's argument here is ironic given its position that "there was

Therefore, the School did not waive its ability to challenge the district court's improper hearsay rulings. *See Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 137, 252 P.3d 649, 659 (2011).

The admission of these improper hearsay statements was not harmless. These inadmissible hearsay statements constituted the only evidence supposedly linking the Bequest to Milton Schwartz's purported belief he had an enforceable perpetual naming rights agreement with the School. Despite Milton Schwartz's substantial business and contract experience, his history with the School, and Jonathan Schwartz's testimony regarding Milton Schwartz's alleged instructions to him regarding School documents, there is no dispute Milton Schwartz failed to actually include any language whatsoever connecting the Bequest to the alleged and completely unfounded perpetual naming rights agreement. (*See* RAB, Statement of Facts, § B(2)-(3); 14 App. 3413, 3422-23, 3478-79, 3481-83). Thus, without the improperly admitted hearsay evidence, the Estate would no competent evidence to refute the School's Petition based on Milton Schwartz's purported intent regarding the

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no point in objecting" to statements from the School where the district court had ruled against the Estate on a particular issue. (Appellant's Reply Brief at 42).

alleged contract. Because the district court denied the Petition and determined that the Bequest was ultimately tied to the alleged perpetual naming rights contract, it is clear the district court relied on this improperly admitted extrinsic evidence as there was no other evidence proffered on which it could have otherwise relied.

The Estate incorrectly argues that the absence of a successor clause is sufficient evidence of Milton Schwartz's belief the School would be named after him forever. At most, the absence of a successor clause could provide an inference of Milton Schwartz's alleged intent regarding a successor entity. However, this alone would not provide substantial evidence to support the district court's findings that the Bequest was conditioned on the existence of an enforceable perpetual naming rights contract and tying the Bequest to Milton Schwartz's alleged mistaken belief regarding the same. (24 App. 5994-95). Thus, because the district court incorrectly admitted and presumably relied on the substantial extrinsic, including inadmissible hearsay, evidence regarding Milton Schwartz's alleged belief he had a perpetual naming rights contract with the School, the Court must reverse the Judgment on the School's Petition.

1. **The Estate's arguments regarding the existence of an invalidating mistake and that the Bequest was conditional are misplaced.**

Next, the Estate argues that the Judgment on the School's Petition should be affirmed because the Bequest was an invalidating mistake and/or conditioned on the School bearing the name the "Milton I. Schwartz Hebrew Academy" in perpetuity. This argument is circular because it ignores the fact that the district court rendered this ruling based on the extrinsic evidence proffered by the Estate that the district court improperly relied on as set forth herein and in the School's Opening Brief. *See infra*, at Arguments, § I(B); Respondents' Combined Answering Brief and Opening Briefs ("RAB") at 117-134.

Regardless, the Estate failed to demonstrate Milton Schwartz's alleged belief he had a perpetual naming rights agreement was an invalidating mistake. The party advocating the unilateral mistake as a basis for obtaining relief from a donative transfer has the burden of proving the testator's intent and the alleged mistake by clear and convincing evidence. *See In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 607, 331 P.3d 881, 888 (2014). An invalidating mistake occurs when "but for the mistake the transaction in question would not have

taken place." Restatement (Third) of Restitution & Unjust Enrichment § 5(2)(a) (2011). "**The donor's mistake must have induced the gift; it is not sufficient that the donor was mistaken about the relevant circumstances.**" *Id.* § 11 cmt. C; *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 605–06, 331 P.3d at 887 (emphasis added).

The Estate failed to prove by clear and convincing evidence that Milton Schwarz *only* made the Bequest because he thought he had perpetual naming rights at the School, and was not motivated by anything else, including his desire to continue to support the School and promote Jewish education. To the contrary, the evidence admitted during trial demonstrates that Milton Schwartz was dedicated to and supported the School over approximately two decades. As Jonathan Schwartz stated in his May 2010 letter to the Board: "To list everything my dad did for the MISHA and its predecessors would fill volumes… *Beyond the money, my dad loved the school and was proud to spend his time making certain that kids in Las Vegas could obtain a quality Jewish education*." (27 App. 6687-89) (emphasis added).

Jonathan Schwartz, discussed in detail his father's dedication and support of the school. (14 App. 3385-86 ("He was incredibility dedicated

to the school. He was involved with the school on a daily basis. It wasn't just, you know, write a big check and get some naming rights. He was involved with the day to day operations of the school….So he was dedicated to it like it was one of his businesses. He was managing at times, on a daily basis.")). Several other witnesses similarly testified that Milton Schwartz loved the School and worked hard to see that the School and its students thrived. Susan Pacheco, Milton Schwartz's longtime assistant, testified that he loved the School and was involved in its operation. (13 App. 3180-81, 3240). Former Board member Dr. Roberta Sabbath testified that Milton Schwartz worked toward the goal of making the Hebrew Academy a better place. (14 App. 3343-44).

The foregoing testimony provides substantial evidence the Bequest was motivated, at least in part, by Milton Schwartz's support and dedication to the School, ***not*** solely because he allegedly thought he had perpetual naming rights. Thus, even if the Bequest may have been premised in part on the fact that Milton Schwartz subjectively believed the School would be named after him "in perpetuity," this is not sufficient to support a finding of an invalidating mistake. The Estate thus failed to meet its substantial burden to adduce clear and convincing evidence at

trial that ***but for*** Milton Schwartz's mistaken belief that he had perpetual naming rights of the School, he would have ***never*** made the Bequest. As a result, the jury's advisory finding on this issue and the district court's adoption of the same was erroneous.

Likewise, the Estate cannot demonstrate the Bequest was conditional on perpetual naming rights. "Whether a gift is conditional or absolute is a question of the donor's intent, to be determined from any **express declaration** by the donor **at the time of the making of the gift** or from the circumstances." *Cooper v. Smith*, 155 Ohio App. 3d 218, 228, 800 N.E.2d 372, 380 (*citing* 38 American Jurisprudence 2d (1999) 767–768, Gifts, Section 72).

Here, there is no dispute the Bequest is not expressly conditioned on the School bearing Milton Schwartz's name forever. Moreover, the perpetual naming rights condition cannot be inferred from the circumstances, especially if Milton Schwartz's improper hearsay statements are excluded. Contrary to the Estate's argument, the absence of a successor clause does not in and of itself support a finding of a condition precedent or subsequent to justify forfeiture.[3] And, even

[3] Notably, even assuming a condition precedent existed, it would literally

assuming this alleged condition existed, it would be a condition subsequent as the Estate appears to concede (AAB at 95), under which courts generally seek to avoid forfeitures where possible. *See Tizard v. Eldredge*, 25 N.J. Super. 477, 481, 96 A.2d 689, 691 (App. Div. 1953) ("Forfeitures under wills or deeds are not favored 'and if they can be avoided on a fair and reasonable interpretation of the instrument involved, a court of equity will undertake to do so…'") (citation omitted). Regardless, because the Estate cannot demonstrate the Bequest was conditional on the School bearing Milton Schwartz's name forever, this Court must reject this argument.

2. Equity favors the School's Receipt of the Bequest for Scholarships.

Milton Schwartz unambiguously made the Bequest to pay for scholarships for Jewish children attending the School. At the time of Milton Schwartz's death and for approximately six years after, there is no dispute that the Milton I. Schwartz Hebrew Academy was there to receive the Bequest for scholarships. The Executor's unreasonable delay

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be impossible to discern the satisfaction of this alleged condition prior to payment, which would allow the Estate to essentially hold off on effectuating the Bequest indefinitely.

in effectuating the Bequest despite the fact that, as the Estate admits, he identified the School in his petition to probate the Will, and his actions in suing the School after unreasonably demanding the School agree to honor a contract the Estate cannot prove exists, led to the removal of Mr. Schwartz's name from the elementary school. However, regardless of the Estate's contentions, the fact remains that the Milton I. Schwartz Hebrew Academy existed at the time of Milton Schwartz's death and even after the School was forced to seek court intervention to compel payment of the Bequest. And, the School was and continues to remain able to receive and effectuate the Bequest for scholarships. Notably, the only people who stand to benefit from the Bequest are the students who would obtain scholarships. It is not as though the School seeks to compel the Bequest to spend half a million dollars as it so chooses. Rather, it is clear that Milton Schwartz loved and devoted substantial time to the School and its students. As such, equity favors effectuating the Bequest. Regardless of the Estate's contentions regarding the School's motivations, the Estate cannot rewrite the Bequest and has failed to demonstrate any valid reason why it should not effectuate the Bequest

for scholarships. Accordingly, the Court must reverse the district court's ruling denying the School's Petition.

II. Arguments In Support Of Reply Brief in Case No. 79464.

A. The School and Not the Estate was the Prevailing Party Entitled to Its Costs under NRS 18.020.

NRS 18.020(3) required the district court to award costs to the prevailing party in this matter. The district court erroneously and arbitrarily concluded the Estate was the prevailing party despite the fact that neither party succeeded on its request(s) for affirmative relief, and the School succeeded on what was unquestionably the most significant issue in the litigation. The Estate's contentions seeking to uphold the district court's erroneous ruling significantly misconstrue the law and facts and must be rejected by this Court.

While the Estate admits that the prevailing party analysis encompasses defendants, its arguments effectively ignore this black letter law. The Estate incorrectly focuses on the language in *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005), which states that a party can prevail under NRS 18.010 "if it succeeds on any significant issue in the litigation which achieves some of the benefit it sought in bringing suit." However, *Valley Electric* also makes it clear that

"the term 'prevailing party' is broadly construed so as to encompass plaintiffs, counterclaimants, and defendants." *Id.* Clearly, a defendant does not "bring suit" and thus, under the strict construction offered by the Estate, cannot feasibly "achieve some of the benefit it sought in bringing suit." Because Nevada law is clear that a defendant can be a prevailing party for purposes of NRS 18.010 and NRS 18.020, the fact that the School did not succeed on its Petition is not dispositive. *Id.*; *see also 145 E. Harmon II Tr. v. Residences at MGM Grand - Tower A Owners' Ass'n*, 136 Nev. 115, 120, 460 P.3d 455, 459 (2020). Therefore, the Court must reject the Estate's flawed argument on this issue.

The Estate's position also ignores the fact that the "counterclaims" in its Petition on which it succeeded were all directly related to its attempts to avoid the relief sought in the School's Petition. In other words, the School sought to compel the Bequest and the Estate sought to avoid it with its first through fourth "counterclaims." There is no dispute Estate prevailed on that issue. Conversely, the Estate's breach of contract claim was an independent, affirmative claim for relief. There is no dispute the School prevailed on that issue. Similarly, the School succeeded in defending against the Estate's affirmative claims for

"Revocation of Gift and Constructive Trust" (which the Estate later repackaged and submitted to the jury as a claim for promissory estoppel). Thus, both parties succeeded on some issues for purposes of the prevailing party analysis. Because only one party could prevail on claims regarding the Bequest, and the Court must reject the Estate's attempt to "double dip" by claiming both that it prevailed on its counter-claims to avoid the Bequest and that the School did not succeed on its Petition, all while ignoring the fact that it lost on the affirmative relief it sought. Therefore, the fact that the Estate succeeded on its "counterclaims" asserted in direct response to the School's Petition is not determinative of the prevailing party issue.

The district court recognized that neither party succeeded on its affirmative claims, but then with no analysis or explanation, arbitrarily concluded that the Estate was the prevailing party. (27 App. 6585-95). Because the district court failed to analyze the weight and importance of the issues in this litigation as required under Nevada law, the district court abused its discretion in awarding costs to the Estate.

As set forth in detail in the School's Combined Brief, the School is the prevailing party because it prevailed on the most significant issue in

the litigation – the existence of the alleged naming rights contract and the far-reaching consequences related thereto. *See* RAB at 134-40. The Estate lost its affirmative claim for specific performance of the alleged perpetual naming rights contract with Milton Schwartz, the most consequential claim made by the Estate. (19 App. 4526-32). As a result, the School did not have to return over $100,000,000 in gifts to the Adelsons, or lose all future funding from the Adelson family, which up through the time of trial, constituted many millions of additional funds each year (15 App. 3622-23, 3625). In addition, the Estate lost its affirmative claim for reimbursement or restitution from the School for Milton Schwartz's past gifts almost $3 million (25 App 6005). In comparison, the School lost its affirmative claim for the $500,000 in scholarship money that the Estate would have to pay regardless of the outcome of the case. (3 App. 685-90; 14 App. 3430-32; 24 App. 5994).

The fact that the issues were necessarily related is irrelevant. While the Bequest was the initial focus of the litigation, the contract issue became the focus of the litigation as the proceedings advanced and the case was tried. The vast majority of the parties' opening and closing statements, the testimony and evidence introduced at trial, and the jury

instructions related to the alleged perpetual naming rights contract and this issue was the primary focus of the parties and the Court, and had by far the greatest economic implications in the case, and the most far-reaching consequences for the parties. Thus, the School prevailed on what was unquestionably the most significant issue tried by the parties.

The Court must also reject the Estate's contention that the damages each party sought is irrelevant. The School does not dispute that there are no monetary judgments to compare or offset. However, for purposes of the prevailing party analysis, because both parties succeeded on some of the issues, the relief sought by the parties is a relevant consideration to explain and put the importance of the issues into perspective. For instance, had the Estate succeed on its contract claim and request for specific performance thereunder, the School would have been subject to the catastrophic economic consequences related to thereto. Similarly, the Estate's related claim for "Revocation of Gift and Constructive Trust," for which the Estate sought over $2.8 Million in damages, was necessarily a significant issue that would have had a dramatic adverse economic impact on the School. The fact that the School prevailed on these issues and the Estate did not obtain a judgment on

either of these counterclaims is the lynch pin to the prevailing party analysis.

Accordingly, the School was clearly the prevailing party under NRS 18.020 because it prevailed on what was unquestionably the most significant issue in the litigation, the existence of the alleged naming rights contract and the far-reaching economic and non-economic consequences related thereto. The district court abused its discretion by arbitrarily determining that the Estate was the prevailing party entitled to its costs, and this Court must reverse the district court's ruling.

B. The Estate cannot recover unsupported, unreasonable, and unnecessary costs.

Assuming the Estate is the "prevailing party," the district court erroneously awarded the Estate $11,747.68 in costs in contravention of NRS 18.005. Specifically, the Estate failed to demonstrate that the district court's award of certain costs was warranted under NRS 18.020 and/or NRS 18.005, and its costs award must be reduced accordingly.

1. The Estate is not entitled to recover costs for deposition transcripts for its excluded experts.

The Estate argues that the district court's award of $586.75 for *deposition transcript costs* for its experts Layne Rushforth, Esq. and

Rabbi Wyne, which were the Estate's "expert" witnesses that were precluded from testifying as experts at trial was not erroneous because "witness fees" are allowable costs. The Estate mistakenly relies on *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993) *superseded by statute on other grounds as recognized in In re DISH Network Derivative Litig.*, 133 Nev. 438, 451 n.6, 401 P.3d 1081, 1093 n.6 (2017), for the proposition that a witness does not have to be called at trial to award witness fees. However, the costs here relate to the Estate's voluntary deposition transcript fees – not fees provided to a witness pursuant to a trial subpoena. Thus, *Bergmann* does not support the Estate's position. The School only conducted these depositions based on the fact that the Estate designated Mr. Rushforth and Rabbi Wyne as expert witnesses. Because the district court excluded these witnesses from testifying as experts, and the Estate cannot demonstrate it is otherwise entitled to recover the deposition transcript costs it voluntarily incurred for these inappropriately designated witnesses, this Court should reduce any cost award to the Estate accordingly.

2. The Estate is not entitled to certain processor fees.

The district court erroneously awarded the Estate its costs for three categories of processor fees, totaling $2,430. (27 App. 6593). First, the district court improperly awarded the Estate $1,920 in expedited service fees. No basis exists to award the Estate $1,920 in costs resulting from unnecessary expedited service charges, especially without any explanation as to why expediting these services was necessary. The Estate offers no explanation or justification for why these costs were "reasonable and necessary," instead relying on the general contention of the "time-sensitive nature of litigation." The Estate fails to account for the fact that litigants are regularly able to effectuate service of process without the use of the significantly more costly expedited services. The Estate's delay or failure to plan accordingly or to account for time to effectuate service without the need to resort to paying exorbitant fees without explanation does not render these costs necessary and reasonable.

Second, the district court erred in awarding the Estate $235 in process server fees to serve a trial subpoena on Dr. Neville Pokroy. The Estate does not dispute that it did not call Dr. Pokroy at trial, but

contends, without any valid explanation that it should nonetheless recover subpoena costs for witnesses it did not actually call. Similar to NRS 18.110(2), which provides that witness fees are only recoverable for witnesses who are actually sworn in and testify), trial subpoena costs should only be permitted for witnesses who actually testify at trial. *See also* NRS 18.005(4); *Bergmann*, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993) (trial court discretion to award costs "should be sparingly exercised when considering whether or not to allow expenses not specifically allowed by statute and precedent," and the trial court should exercise restraint because "statutes permitting recovery of costs, being in derogation of the common law, must be strictly construed") (citations omitted).

Third, the district court erred in awarding the Estate $510 in process server fees to serve Dr. Miriam Adelson with deposition subpoenas when Dr. Adelson was never actually deposed in the matter. (27 App. 6593). The fact that the court issued a protective order to preclude the Estate from deposing Dr. Adelson demonstrates that service of the subpoena was not necessary. Thus, the district court abused its discretion in awarding these costs. Therefore, the Court should reduce

any costs awarded to the Estate by $2,430 to account for these inappropriate service of process costs.

3. The Estate is not entitled to costs for Westlaw legal research because it failed to properly document these costs.

The district court erroneously awarded the Estate $8,730.93 in Westlaw research costs because the Estate failed to properly demonstrate the reasonableness and necessity of these charges under NRS 18.005(17). (27 App. 6593). The Estate contends that the School simply "does not like the Estate's billing method" and contends that "nothing prohibits billing clients on a pro-rata share of the firm's total monthly Westlaw charges." These arguments fail to explain how this method of billing permits a court to determine whether the costs were reasonably, necessarily and actually incurred, especially where, as here, the Estate failed to provide any mathematical or other data demonstrating how the pro-rata share is actually determined. *See* NRS 18.020; NRS 18.005. Accordingly, the district court erred in awarding the Estate its costs associated with legal research and its cost award must be reduced accordingly.

As the School is the prevailing party, the district court's costs award to the Estate must be vacated. However, should this Court affirm the district court's determination that the Estate is the prevailing party,

then it must reduce the award by $11,747.68, which represents costs not recoverable by statute as set forth in the School's Combined Response and Opening Brief and herein.

CONCLUSION

For the foregoing reasons this Court should vacate the Judgment on the School's and the Estate's Petitions regarding the Bequest and remand with instructions that the district court grant the School's Petition, or at a minimum, remand for further proceedings.

In the event the Court maintains the status quo, then it should vacate the district court's costs award to the Estate or, at a minimum, reduce the costs award by $11,747.68.

DATED this 4th day of June, 2021.

KEMP JONES, LLP

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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 of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in Century.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2)(C) and NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 8,411 words. The Court's April 9, 2021 Order directed the School to file a single combined reply brief on cross-appeal (Case No. 78341), and reply brief (Case No. 79464) ("Combined Brief"). Pursuant to NRAP 28.1(e)(2)(C) and NRAP 32(a)(7)(A)(ii), the School's Reply Brief (Case No. 78341) and the School's Reply Brief (Case No. 79464) each cannot exceed 7,000 words. Thus, the School in under the impression its Combined Reply Brief cannot exceed 14,000 words [7,000 + 7,000] in total. The Combined Reply Brief contains 8,411 words and, therefore, is in compliance with the aggregate type-volume limitations set forth above.

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 an 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 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 4th day of June, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 4th day of June, 2021, I caused to be served via the District Court's e-filing system and pursuant to NRAP 25(b) and NEFCR 9, and electronically filed the foregoing RESPONDENT/CROSS-APPELLANT'S COMBINED REPLY BRIEF ON CROSS-APPEAL (NO. 78341) & REPLY BRIEF ON APPEAL (NO. 79464) with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (Eflex). Participants in the case who are registered Eflex users will be served by the Eflex system as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF MILTON I. SCHWARTZ, DECEASED.

A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ,

Appellant/Cross-Respondent,

vs.

THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,

Respondent/Cross-Appellant.

THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,

Appellant,

vs.

A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ,

Respondent.

No. 78341

No. 79464

RESPONDENT/CROSS-APPELLANT'S COMBINED:

REPLY BRIEF ON CROSS-APPEAL (NO. 78341)
&
REPLY BRIEF ON APPEAL (NO. 79464)

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REPLY BRIEF ON CROSS-APPEAL (NO. 78341)
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INTRODUCTION

I. The School's Reply to its Opening Brief on Cross-Appeal

The district court's denial of the The Dr. Miriam and Sheldon G. Adelson Educational Institute's (the "School") Petition was erroneous. As a matter of law, the district court erred in concluding that the Bequest was ambiguous. The Estate does not dispute the Bequest was unambiguous. (Appellant's Combined Reply & Answering Briefs ("AAB") at 73, 77-78; 14 App. 3475-76). Instead, the Estate incorrectly argues that "any" extrinsic evidence is always admissible where a will is involved, ignoring black letter Nevada law requiring that a will (or any instrument for that matter) actually be ambiguous on its face before resort to parol evidence. Rather than construe the unambiguous Bequest within the four corners of the Will, the district court erroneously allowed the Estate to manufacture an ambiguity out of whole cloth, and then determined an ambiguity existed based on extrinsic facts that have no connection to the language Milton Schwartz used in the Bequest. (12 App. 2796-2810). Therefore, the district court erred in finding an ambiguity existed.

As a result of this erroneous finding, and despite the fact that nothing in the Bequest implicates perpetual naming rights, the district

court then erroneously permitted the Estate to offer parol evidence (mostly in the form of self-serving, inadmissible hearsay testimony) related to the alleged perpetual naming rights contract the Estate claims exists between Milton Schwartz and the School. The district court improperly permitted the Estate to proffer evidence regarding perpetual naming rights to add language and/or conditions to the Bequest not found on its face. This error was compounded by the fact that the parol evidence did nothing to purportedly explain Milton Schwartz's actual intent in making the Bequest at the time it was drafted, but instead was proffered by the Estate to backdoor unrelated testimony regarding the alleged perpetual naming rights contract between Milton Schwartz and the School. (*See* 13 App. 3154-55, 3172, 3382-87; 14 App. 3527-38).

Assuming arguendo that the Bequest was ambiguous, the district court abused its discretion in permitting the Estate to introduce inadmissible hearsay, prejudicing the School. The only evidence the Estate offered to purportedly explain Milton Schwartz's intent in making the Bequest was hearsay testimony from Milton Schwartz, who died years before the trial began, made years, or sometimes decades before or after Milton Schwartz executed the Bequest. Compounding this error, all

this blatant hearsay testimony related to the alleged perpetual naming rights, rather than the unambiguous language of the Bequest. The unambiguous language in the Bequest provides that the Estate provide $500,000 to the School for the limited and specific purpose of providing scholarships for the education of Jewish students. That bequest is for the benefit of Jewish children attending the School and not for the direct benefit of the School, and it says nothing that conditions the Bequest on perpetual naming rights. The only possible way that the Court could get to that conclusion is by improperly admitting unmitigated hearsay evidence from statements made by Milton Schwartz before he died, and then extrapolating that those hearsay statements somehow qualified an unambiguous bequest. In other words, not only were the statements hearsay, they also required the district court to speculate as to what Milton Schwartz meant by these statements because the statements themselves do not explicitly make any connection between the Bequest and perpetual naming rights. Rather than demonstrate that specific hearsay exceptions applied to these statements, the Estate continues to rely on its erroneous contention that the mere fact that a will provision is at issue in the litigation renders **all** of Milton Schwartz's statements

admissible, regardless of their substance or timing. Had the district court properly excluded this inadmissible hearsay, the Estate would have had no evidence purportedly linking the Bequest to the alleged perpetual naming rights contract or Milton Schwartz's alleged beliefs regarding the same to support its decision denying the School's Petition. The School unquestionably was prejudiced by the district court's errors in admitting this evidence, as this inadmissible hearsay was the only possible basis for the trial court's decision.

While the parties clearly have differing positions regarding the facts and circumstances underlying this action, there can be no doubt that the purpose of the Bequest can be effectuated – that Jewish children attending the School be provided scholarships – regardless of the name change. In other words, even the Estate cannot reasonably deny that Milton Schwartz's clear intent was to provide Jewish children a $500,000 scholarship fund for their education. What the Estate is insisting on doing, and the district court wrongfully acquiesced to, is to insert into the unambiguous language in the Bequest a secondary intent based on inadmissible hearsay from a deceased person. Making this assumed connection more tenuous, if that's even possible, is the fact that these

hearsay statements span a time frame from a few years to decades, both before and after the Will was written. Accordingly, the Court must vacate and reverse the district court's judgment denying the Estate's Petition.

I.

Arguments in Support of the School's Reply Brief in Case No. 79464:

The district court erroneously and arbitrarily determined that the Estate was the prevailing party and entitled to its costs, despite the fact that while neither party prevailed on its affirmative claims, the School prevailed on what was unquestionably the most significant issue in the case.

Contrary to the Estate's contention, Nevada law does not require a party to succeed in bringing suit to be a prevailing party. Thus, the mere fact that the School did not prevail on its Petition is not dispositive. Likewise, the fact that the Estate succeeded on two of its affirmative defenses/counterclaims, which were asserted directly in response to the School's Petition, and thus sought opposite relief, is not dispositive. Rather, under the circumstances of the case, a review of the overall claims and issues was required. And, under the proper analysis, there can be no legitimate dispute that the School is the prevailing party. The

School prevailed against the Estate's affirmative claim for specific performance of the alleged perpetual naming rights contract with Milton Schwartz, the most significant claim made by the Estate and the claim that dominated the lengthy jury trial. (19 App. 4526-32). As a result, the School did not have to return over $100,000,000 in gifts to the Adelsons (which would have bankrupted the School), or lose all future funding from the Adelson family, which constituted many millions of additional funds each year up through the time of trial. (15 App. 3622-23, 3625). The Estate also lost its affirmative claim for disgorgement from the School for Milton Schwartz's past gifts plus interest, in the approximate amount of $2,800,000 (25 App 6005). In comparison, the School lost its affirmative claim for the $500,000 in scholarship money the Estate already had set aside in a blocked account, and would have to pay regardless due to the tax consequences of recognizing the Bequest years before. (3 App. 685-90; 14 App. 3430-32; 24 App. 5994).

Under the above irrefutable facts, considering the litigation as a whole, it is overwhelmingly clear that the School prevailed on the most consequential issues before the court. No legal or factual support thus exists for the district court's decision, especially given the Court's failure

to provide specific findings on this issue. Accordingly, Nevada law dictates that the School should have been declared the "prevailing party" in this litigation and entitling it to recover its costs under NRS 18.020. This Court must vacate the district court's cost award to the Estate.

Even assuming the district court did not arbitrarily determine the Estate was the prevailing party, the district court erred in awarding $11,747.68 in costs to the Estate. This amount includes both costs that are not recoverable under NRS 18.005 and costs for which the Estate failed to provide the proper backup and documentation. Therefore, at a minimum, the Estate's costs award must be reduced accordingly.

ARGUMENTS

I. Arguments in Support Of Reply Brief on Cross-Appeal

This Court must reverse the district court's judgment denying the School's request to compel the Bequest. As a matter of law, the district court erred in refusing to interpret the unambiguous Bequest on its face. Had the district court properly limited its inquiry into Milton Schwartz's intent from the actual words he used in the Bequest, no valid basis existed to deny the School's Petition. As such, the district court's refusal to compel the Bequest was erroneous.

Moreover, even assuming an ambiguity existed to justify the district court's consideration of parol evidence, the district court erred in admitting extrinsic evidence that had no discernible connection to the purported ambiguity. Instead, the parol evidence proffered by the Estate related solely to the alleged perpetual naming rights contract, not the Bequest language at issue. Thus, the district court improperly permitted the Estate to introduce and rely on extrinsic evidence that did not actually relate to or explain the alleged ambiguity found by the district court or otherwise explain any purported ambiguity in the Bequest. Under black letter Nevada law, the district court erred in denying the School's Petition on this basis.

The district court also abused its discretion in admitting and then relying on inadmissible hearsay evidence to deny the School's Petition. Milton Schwartz's hearsay statements related to the alleged perpetual naming rights contract and had no discernible connection to the Bequest, either in timing or substance. Because no valid exception exists, the district court erred in admitting these hearsay statements. Without Milton Schwartz's improper hearsay statements, the Estate could not demonstrate any valid basis to avoid the Bequest. This evidentiary

failure becomes even more obvious considering, under Nevada law, the Estate was required to prove by clear and convincing evidence that the existence of the perpetual naming rights contract was an invalidating mistake. No support exists for the Estate's contention the Bequest was conditioned on perpetual naming rights for Milton Schwarz, let alone clear and convincing evidence.

Finally, equitable considerations required the district court to grant the School's Petition and order the Estate to effectuate the Bequest establishing a scholarship fund for Jewish children. The Estate should not benefit from its delay and attempts to re-write the Bequest to the detriment of the students who would otherwise receive a scholarship for their education. Accordingly, this Court must reverse the Judgments on the School's Petition and the Estate's related affirmative defenses/counterclaims.

. . .

. . .

A. The District Court Should Have Granted the School's Request to Compel the Bequest for Scholarships.

1. The Parties agree the Bequest was not ambiguous; thus, the district court should have excluded the Estate's parol evidence and granted the School's Petition to effectuate the Bequest.

The district court erroneously determined an ambiguity existed regarding which grade levels the scholarships funded and then permitted the Estate to offer extrinsic evidence in support of this contention, none of which actually explained the purported ambiguity. The Estate does not dispute that the Bequest unambiguously states that the Bequest for scholarships go to the "Milton I. Schwartz Hebrew Academy," but contends that extrinsic evidence is always admissible if it allegedly "explains" the meaning of the testator's words. This argument ignores the critical requirement that the will must be ambiguous *i.e.*, subject to two constructions, before extrinsic evidence is considered to purportedly explain the ambiguity. *In re Walters' Estate,* 75 Nev. 355, 359 (1959); *see also Howard Hughes Med. Inst. v. Gavin*, 96 Nev. 905, 908, 621 P.2d 489, 490–91 (1980) (noting "a testator's declarations may be useful in interpreting **ambiguous terms** of an established will…) (emphasis added). Thus, extrinsic evidence is only permitted to explain the allegedly

ambiguous language not the entire will or any other provision the Estate wants to re-write.

Here, because the Bequest was admittedly not ambiguous or subject to two different constructions, extrinsic evidence was not necessary or appropriate to explain the meaning of the testator's words. *Gianoli v. Gabaccia*, 82 Nev. 108, 110 (1966);*see also* 80 Am. Jur. 2d Wills § 989 ("When the language of a will is clear and unambiguous, the testator's intent must be ascertained from the express terms of the will itself."). The Bequest did not become ambiguous simply because the Estate self-servingly *argued* that Milton Schwartz's motive in making the Bequest was based on his alleged belief he had a perpetual naming rights contract with the School. There is no dispute that nothing in the actual language of the Bequest implicates a perpetual naming rights contract in any way. Thus, because the Estate's alleged condition does not exist on the face of the unambiguous Bequest, the district court erred by not limiting its inquiry into Milton Schwartz's intent from the actual words he used in the Bequest. *In re Walters' Estate*, 75 Nev. at 359. The district court incorrectly construed the Bequest the way that the Estate believed Milton Schwartz allegedly intended to have written it and not "in accord

with the meaning of the words [Milton Schwartz] used." *Zirovcic v. Kordic*, 101 Nev. 740, 742 (1985). Under black letter Nevada law, there can be no dispute the district court erred in refusing to interpret the Bequest without resort to parol evidence.

The Estate argues that any finding the Bequest was unambiguous only benefits the Estate because it would preclude extrinsic evidence demonstrating the link between the Milton I. Schwartz Hebrew Academy and the School, and without this evidence, the gift fails. This argument is flawed because it again misconstrues the law regarding ambiguity and extrinsic evidence. Clearly, the extrinsic evidence offered must actually relate to and explain the alleged ambiguity. *See In re Jones' Est.*, 72 Nev. 121, 123, 296 P.2d 295, 296 (1956). In the event the Court had made an express determination an ambiguity existed regarding the link between the Milton I. Schwartz Hebrew Academy and the Adelson Educational Institute, then extrinsic evidence to explain that link would be appropriate. *See* 96 C.J.S. Wills § 1015.

Next, contrary to the Estate's assertion, the Bequest does not lapse simply because the School is no longer known as the "Milton I. Schwartz Hebrew Academy." First, the School was known as the "Milton I.

Schwartz Hebrew Academy" at the time of Milton Schwartz's death when the gift effectively vested, and the elementary school continued to be known as the same for approximately the next six years until after the litigation commenced. Had the Executor properly and **timely** effectuated or funded the Bequest then this entire argument would evaporate. (16 App. 3780; 17 App. 4136, 4164). The Estate's dilatory actions in carrying out the directives of the Will created the very circumstances it now points to as the reason it does not have to honor the Bequest. The Court must reject the Estate's manufactured and self-serving defense.

Further, contrary to the Estate's assertion, the absence of a successor clause in the Bequest is not conclusive proof that Milton Schwartz intended that the Bequest only go to a school bearing his name in perpetuity such that the gift fails. At most, the absence of a successor clause creates an inference. However, without more, the Estate cannot demonstrate the Bequest should simply fail on this basis.

Unlike the cases relied on by the Estate, this is not a case where the designated charity ceases to exist. Instead, the School simply changed the elementary school's name years after Milton Schwartz's passing, but continues to exist as a Jewish school for which scholarships can be

provided in compliance with the Bequest. The Estate's reliance on *In re Est. of Beck*, 272 Ill. App. 3d 31, 37-38, 649 N.E.2d 1011, 1015-16 (1995) for the proposition that the Bequest fails is also misplaced. In that case, the court determined that the successor charity was not entitled to the gift because it did not provide the same or similar services as the prior charity (orphanage versus general child welfare services). *Id.* Conversely, here, the Bequest was intended to provide scholarships to Jewish children attending the School. The School provides the same "services"[1] as it did when it was named the Milton I. Schwartz Hebrew Academy and, thus Milton Schwartz's intent to provide scholarships for Jewish children to attend the School can still be accomplished. In addition, "[a] testamentary gift to a charitable organization is generally valid, even though the object is imperfectly designated, if it can be identified with reasonable certainty from the description in the will and the surrounding circumstances." 96 C.J.S. Wills § 1091. Therefore, because there is no dispute that the School still exists and the Bequest can still be effectuated

[1] In fact, because of the gifts by the Adelsons, the School provides a much improved and more extensive educational services to Jewish children than it did before. The whole point of Milton Schwartz's scholarship Bequest was to enhance the educational opportunities for Jewish children. It begs credulity and common sense that Milton Schwartz would be upset that his scholarship fund would help Jewish children attend such a highly regarded school.

to provide scholarships for Jewish children attending the School, the Court must reject the Estate's argument that the gift fails.

Finally, contrary to the Estate's assertions, the Bequest should be construed against the drafter. The Estate fails to cite to any Nevada authority holding that this black letter rule regarding the construction of written instruments does not apply to wills. According to the Executor, Jonathan Schwartz, Milton Schwartz dictated the Will himself and the Will reflects his own words. (14 App. 3401). Now, Jonathan Schwartz seeks to avoid effectuating the Bequest based on contentions that the Bequest actually included conditions not present in the express language of the Bequest. Under these circumstances, any ambiguity arising from Milton Schwartz's failure to include an express condition in the Bequest should be construed against the Estate and in favor of the School, especially because it can be determined with reasonable certainty that Milton Schwartz intended the $500,000 bequest to go to the School to fund scholarships for Jewish children. *See* 96 C.J.S. Wills § 1091.

2. Even if an ambiguity existed, the district court erred by relying on extrinsic evidence related solely to the alleged perpetual naming rights agreement rather than to explain the alleged ambiguity.

Even assuming an ambiguity existed in the Bequest, the Court must reverse the Judgment on the School's Petition because the district court admitted and relied on extrinsic evidence that did not relate to the purported ambiguity the district court actually found. According to the district court, the purported ambiguity related to which grade levels the scholarships funded by the Bequest could apply to in light of the changes to the structure of the School. (12 App. 2810-2817). However, the extrinsic evidence proffered by the Estate and admitted by the district court went substantially outside whether Milton Schwartz intended that the money benefit grades pre-K through 8 (which were the only grades at the original Milton I. Schwartz Hebrew Academy) versus only certain grades at the newly restructured School, and instead related only to the alleged perpetual naming rights contract with the School. (13 App. 3154-55, 3167, 3171-72, 3179-80, 3210-11, 3230, 3238; 14 App. 3383-85, 3392-93, 3410, 3412-13, 3420-22). The Estate seeks to now recast the district court's finding to support its arguments, but the district court never expressly found an ambiguity existed regarding the existence of a

perpetual naming rights contract to permit the Estate to bootstrap or back door extrinsic evidence regarding Milton Schwartz's alleged beliefs regarding the same. And, contrary to the Estate's contentions, extrinsic evidence that Milton Schwartz believed he had a perpetual naming rights agreement has absolutely nothing to do with which grades Milton Schwartz purportedly intended to benefit via the Bequest. Thus, even assuming the Bequest contained a latent ambiguity, which it did not, the district court erred in admitting and relying on extrinsic evidence that did not relate to or explain the supposed ambiguity.

The Estate also argues that Milton Schwartz's out of court statements were nonetheless admissible to purportedly explain the meaning of the words in the Bequest (*i.e.*, what Milton Schwartz "actually" meant when he unambiguously identified the "Milton I. Schwartz Hebrew Academy" as the beneficiary in the Bequest for scholarship money). However, even assuming extrinsic evidence was admissible on this basis, the extrinsic evidence proffered by the Estate and admitted by the district court did nothing to achieve this purpose. Rather than explain the meaning of the actual words used in the Bequest, the extrinsic evidence related to the alleged perpetual naming rights

contract, and entirely unrelated subject. As such, the district court permitted the Estate to admit and rely on extrinsic evidence related to the contract dispute, under the ruse of some nebulous and dubious alleged connection to Milton Schwartz's intent regarding the Bequest to then add language into the Bequest that is simply not there (*i.e.*, the condition that the Bequest go to the School *only if the School shall be named after him in perpetuity*). This extrinsic evidence thus either improperly contradicted, or added unwritten language to, the express and unambiguous terms of the Bequest in violation of Nevada law. *In re Jones' Estate*, 72 Nev. at 124 ("[E]vidence is admissible which, in its nature and effect, simply explains what the testator has written; **but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written**.") (emphasis added); *see also Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 409, 305 P.3d 70, 73 (2013) (Extrinsic or parol evidence is not admissible to contradict or vary the terms of an unambiguous written instrument.). The district court unquestionably erred in admitting this evidence. *See Frei*, 129 Nev. Adv. Op. 42 at *8, 305 P.3d at 73.

The Court must also reject the Estate's contention that Milton Schwartz's statements referring to the School with the words "in perpetuity" constitute permissible extrinsic evidence of idiosyncratic use. Milton Schwartz's use of the terms "in perpetuity" when referring to the School is not an idiosyncrasy. Even if it was, the circumstances here are the opposite of those generally used to justify reliance on extrinsic evidence. This case does not involve idiosyncratic terminology in the testamentary instrument for which the court permitted extrinsic evidence to explain. *Flannery v. McNamara*, 432 Mass. 665, 672, 738 N.E.2d 739, 745 (2000) ("all of the relevant illustrations of this principle set forth in the Restatement make it clear that 'personal usage' evidence is permitted only where the testator habitually referred to someone or something in an idiosyncratic manner during his lifetime, ***and then used that idiosyncratic terminology in his will***.")(emphasis added). Instead, Milton Schwartz referred to the School in a straightforward manner in the Bequest. In other words, he never used the idiosyncratic words "in perpetuity" anywhere in his Will, let alone in the Bequest, and certainly not in connection with the words "the Milton I. Schwartz Hebrew Academy" in the Bequest. In spite of that fact, the Estate seeks to use

this extrinsic evidence regarding how Milton Schwartz allegedly referred to the School outside any connection to his Will to prove his alleged intent with respect to the Bequest. Thus, no legal or admissible evidentiary support exists for the Estate's position on this issue.

Because the Estate's alleged conditional language does not exist on the face of the unambiguous Bequest, the district court erred by not limiting its inquiry into Milton Schwartz's intent from the actual words he used in the Bequest. *In re Walters' Estate*, 75 Nev. at 359. In effect, the district court erroneously concluded that what Milton Schwartz **intended to write** was that the Bequest would go to the School so long as it was named the "Milton I. Schwartz Hebrew Academy" and would remain that way forever. *See id.* ("The question before us is not what the testatrix ***actually intended*** or what she meant to write."). The district court thus, incorrectly construed the Bequest the way that it (and the Estate) believed Milton Schwartz "meant to write" the Bequest and not "in accord with the meaning of the words [Milton Schwartz] used. *Zirovcic*, 101 Nev. at 742. Under black letter Nevada law, the district court erred in denying the School's Petition on this basis.

B. The District Court Abused Its Discretion in Admitting and Relying on Inadmissible Hearsay to Construe the Bequest, which was Not Harmless.

Even if this Court finds that district court did not commit legal error in admitting extrinsic evidence to add to and/or amend the language of the Bequest to allegedly demonstrate what Milton Schwartz actually meant, the district court erred when it improperly admitted numerous hearsay statements to purportedly connect the Bequest to Milton Schwartz's alleged belief he had a perpetual naming right contract with the School. (12 App. 2796, 2800-03, 2835-36, 2840-42; 13 App. 3154-55, 3172, 14 App. 3383-87, 3412-13, 3415-18; 15 App. 3527, 3529, 3537).

The Estate incorrectly argues that the statements at issue are not hearsay because they were not offered for their truth. The truth of the hearsay statements was, however, precisely the purpose for which they were offered. The Estate offered these hearsay statements from the deceased Milton Schwartz to prove that Milton Schwartz believed he had a perpetual naming rights agreement in order to argue that he would not have made the Bequest *but for this belief*. Thus, in the context of this case, Milton Schwartz's statements about his alleged belief was hearsay because it was used to prove the truth of the matter asserted – that he

believed he had a perpetual naming rights agreement. In other words, because these statements were used to actually prove Milton Schwartz's intent with respect to the circumstances as he purportedly understood them, they were used to prove the truth of the very matter at issue before the court, and thus constitute hearsay. The point being, if the district court hadn't believed these statements were true, that Milton Schwartz he had perpetual naming rights in the School, then there was no basis for the district's decision denying the Bequest.

Likewise, the Estate's reliance on NRS 51.105 is misplaced. The mere fact that the Estate *argued* that Milton Schwartz only made the Bequest based on his belief that he had a perpetual naming rights contract did not automatically transform every single alleged statement Milton Schwartz made regarding the alleged agreement with School into an admissible state of mind exception or render it a statement related to the terms of his Will to render it admissible under NRS 51.105. *See Lasater v. House*, 841 N.E.2d 553, 556 (Ind. 2006) ("a statement or declaration of a testator that is considered classic hearsay is not transformed into non-hearsay simply because it tangentially involves a state of mind."). Yet, this is precisely what the Estate argued and the

district court improperly allowed in at trial. (15 App. 3527-38). This is especially obvious given that many of the hearsay statements the district court admitted were made years, and in some instances, decades, *before* Milton Schwartz made the Bequest; thus the Estate failed to demonstrate how these statements could even conceivably be related to his intent in making the Bequest. (13 App. 3154-55, 3169-72; 14 App. 3383-87). Because a valid hearsay exception does not apply to each of these hearsay statements, the district court abused its discretion in admitting them into evidence as the basis of denying the Bequest.

The Estate further argues that the School waived its ability to challenge the district court's improper admission and reliance on inadmissible hearsay if it did not object to each and every instance. However, the district court denied the School's motions in limine to preclude this hearsay evidence prior to trial and School clearly lodged its ongoing objections to the district court's ruling regarding the Estate's hearsay evidence prior to and during trial. (12 App. 2795-2845; 13 App. 3154-55, 3169-72; 14 App. 3382-87, 3412-13, 3415-21; 15 App. 3527-38, 3529, 3537); Respondents' Reply Appendix ("Reply App.") 1-99).[2]

[2] The Estate's argument here is ironic given its position that "there was

Therefore, the School did not waive its ability to challenge the district court's improper hearsay rulings. *See Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 137, 252 P.3d 649, 659 (2011).

The admission of these improper hearsay statements was not harmless. These inadmissible hearsay statements constituted the only evidence supposedly linking the Bequest to Milton Schwartz's purported belief he had an enforceable perpetual naming rights agreement with the School. Despite Milton Schwartz's substantial business and contract experience, his history with the School, and Jonathan Schwartz's testimony regarding Milton Schwartz's alleged instructions to him regarding School documents, there is no dispute Milton Schwartz failed to actually include any language whatsoever connecting the Bequest to the alleged and completely unfounded perpetual naming rights agreement. (*See* RAB, Statement of Facts, § B(2)-(3); 14 App. 3413, 3422-23, 3478-79, 3481-83). Thus, without the improperly admitted hearsay evidence, the Estate would no competent evidence to refute the School's Petition based on Milton Schwartz's purported intent regarding the

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no point in objecting" to statements from the School where the district court had ruled against the Estate on a particular issue. (Appellant's Reply Brief at 42).

alleged contract. Because the district court denied the Petition and determined that the Bequest was ultimately tied to the alleged perpetual naming rights contract, it is clear the district court relied on this improperly admitted extrinsic evidence as there was no other evidence proffered on which it could have otherwise relied.

The Estate incorrectly argues that the absence of a successor clause is sufficient evidence of Milton Schwartz's belief the School would be named after him forever. At most, the absence of a successor clause could provide an inference of Milton Schwartz's alleged intent regarding a successor entity. However, this alone would not provide substantial evidence to support the district court's findings that the Bequest was conditioned on the existence of an enforceable perpetual naming rights contract and tying the Bequest to Milton Schwartz's alleged mistaken belief regarding the same. (24 App. 5994-95). Thus, because the district court incorrectly admitted and presumably relied on the substantial extrinsic, including inadmissible hearsay, evidence regarding Milton Schwartz's alleged belief he had a perpetual naming rights contract with the School, the Court must reverse the Judgment on the School's Petition.

1. **The Estate's arguments regarding the existence of an invalidating mistake and that the Bequest was conditional are misplaced.**

Next, the Estate argues that the Judgment on the School's Petition should be affirmed because the Bequest was an invalidating mistake and/or conditioned on the School bearing the name the "Milton I. Schwartz Hebrew Academy" in perpetuity. This argument is circular because it ignores the fact that the district court rendered this ruling based on the extrinsic evidence proffered by the Estate that the district court improperly relied on as set forth herein and in the School's Opening Brief. *See infra*, at Arguments, § I(B); Respondents' Combined Answering Brief and Opening Briefs ("RAB") at 117-134.

Regardless, the Estate failed to demonstrate Milton Schwartz's alleged belief he had a perpetual naming rights agreement was an invalidating mistake. The party advocating the unilateral mistake as a basis for obtaining relief from a donative transfer has the burden of proving the testator's intent and the alleged mistake by clear and convincing evidence. *See In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 607, 331 P.3d 881, 888 (2014). An invalidating mistake occurs when "but for the mistake the transaction in question would not have

taken place." Restatement (Third) of Restitution & Unjust Enrichment § 5(2)(a) (2011). "**The donor's mistake must have induced the gift; it is not sufficient that the donor was mistaken about the relevant circumstances.**" *Id.* § 11 cmt. C; *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 605–06, 331 P.3d at 887 (emphasis added).

The Estate failed to prove by clear and convincing evidence that Milton Schwarz *only* made the Bequest because he thought he had perpetual naming rights at the School, and was not motivated by anything else, including his desire to continue to support the School and promote Jewish education. To the contrary, the evidence admitted during trial demonstrates that Milton Schwartz was dedicated to and supported the School over approximately two decades. As Jonathan Schwartz stated in his May 2010 letter to the Board: "To list everything my dad did for the MISHA and its predecessors would fill volumes… *Beyond the money, my dad loved the school and was proud to spend his time making certain that kids in Las Vegas could obtain a quality Jewish education*." (27 App. 6687-89) (emphasis added).

Jonathan Schwartz, discussed in detail his father's dedication and support of the school. (14 App. 3385-86 ("He was incredibility dedicated

to the school. He was involved with the school on a daily basis. It wasn't just, you know, write a big check and get some naming rights. He was involved with the day to day operations of the school….So he was dedicated to it like it was one of his businesses. He was managing at times, on a daily basis.")). Several other witnesses similarly testified that Milton Schwartz loved the School and worked hard to see that the School and its students thrived. Susan Pacheco, Milton Schwartz's longtime assistant, testified that he loved the School and was involved in its operation. (13 App. 3180-81, 3240). Former Board member Dr. Roberta Sabbath testified that Milton Schwartz worked toward the goal of making the Hebrew Academy a better place. (14 App. 3343-44).

The foregoing testimony provides substantial evidence the Bequest was motivated, at least in part, by Milton Schwartz's support and dedication to the School, ***not*** solely because he allegedly thought he had perpetual naming rights. Thus, even if the Bequest may have been premised in part on the fact that Milton Schwartz subjectively believed the School would be named after him "in perpetuity," this is not sufficient to support a finding of an invalidating mistake. The Estate thus failed to meet its substantial burden to adduce clear and convincing evidence at

trial that ***but for*** Milton Schwartz's mistaken belief that he had perpetual naming rights of the School, he would have ***never*** made the Bequest. As a result, the jury's advisory finding on this issue and the district court's adoption of the same was erroneous.

Likewise, the Estate cannot demonstrate the Bequest was conditional on perpetual naming rights. "Whether a gift is conditional or absolute is a question of the donor's intent, to be determined from any **express declaration** by the donor **at the time of the making of the gift** or from the circumstances." *Cooper v. Smith*, 155 Ohio App. 3d 218, 228, 800 N.E.2d 372, 380 (*citing* 38 American Jurisprudence 2d (1999) 767–768, Gifts, Section 72).

Here, there is no dispute the Bequest is not expressly conditioned on the School bearing Milton Schwartz's name forever. Moreover, the perpetual naming rights condition cannot be inferred from the circumstances, especially if Milton Schwartz's improper hearsay statements are excluded. Contrary to the Estate's argument, the absence of a successor clause does not in and of itself support a finding of a condition precedent or subsequent to justify forfeiture.[3] And, even

[3] Notably, even assuming a condition precedent existed, it would literally

assuming this alleged condition existed, it would be a condition subsequent as the Estate appears to concede (AAB at 95), under which courts generally seek to avoid forfeitures where possible. *See Tizard v. Eldredge*, 25 N.J. Super. 477, 481, 96 A.2d 689, 691 (App. Div. 1953) ("Forfeitures under wills or deeds are not favored 'and if they can be avoided on a fair and reasonable interpretation of the instrument involved, a court of equity will undertake to do so…'") (citation omitted). Regardless, because the Estate cannot demonstrate the Bequest was conditional on the School bearing Milton Schwartz's name forever, this Court must reject this argument.

2. Equity favors the School's Receipt of the Bequest for Scholarships.

Milton Schwartz unambiguously made the Bequest to pay for scholarships for Jewish children attending the School. At the time of Milton Schwartz's death and for approximately six years after, there is no dispute that the Milton I. Schwartz Hebrew Academy was there to receive the Bequest for scholarships. The Executor's unreasonable delay

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be impossible to discern the satisfaction of this alleged condition prior to payment, which would allow the Estate to essentially hold off on effectuating the Bequest indefinitely.

in effectuating the Bequest despite the fact that, as the Estate admits, he identified the School in his petition to probate the Will, and his actions in suing the School after unreasonably demanding the School agree to honor a contract the Estate cannot prove exists, led to the removal of Mr. Schwartz's name from the elementary school. However, regardless of the Estate's contentions, the fact remains that the Milton I. Schwartz Hebrew Academy existed at the time of Milton Schwartz's death and even after the School was forced to seek court intervention to compel payment of the Bequest. And, the School was and continues to remain able to receive and effectuate the Bequest for scholarships. Notably, the only people who stand to benefit from the Bequest are the students who would obtain scholarships. It is not as though the School seeks to compel the Bequest to spend half a million dollars as it so chooses. Rather, it is clear that Milton Schwartz loved and devoted substantial time to the School and its students. As such, equity favors effectuating the Bequest. Regardless of the Estate's contentions regarding the School's motivations, the Estate cannot rewrite the Bequest and has failed to demonstrate any valid reason why it should not effectuate the Bequest

for scholarships. Accordingly, the Court must reverse the district court's ruling denying the School's Petition.

II. Arguments In Support Of Reply Brief in Case No. 79464.

A. The School and Not the Estate was the Prevailing Party Entitled to Its Costs under NRS 18.020.

NRS 18.020(3) required the district court to award costs to the prevailing party in this matter. The district court erroneously and arbitrarily concluded the Estate was the prevailing party despite the fact that neither party succeeded on its request(s) for affirmative relief, and the School succeeded on what was unquestionably the most significant issue in the litigation. The Estate's contentions seeking to uphold the district court's erroneous ruling significantly misconstrue the law and facts and must be rejected by this Court.

While the Estate admits that the prevailing party analysis encompasses defendants, its arguments effectively ignore this black letter law. The Estate incorrectly focuses on the language in *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005), which states that a party can prevail under NRS 18.010 "if it succeeds on any significant issue in the litigation which achieves some of the benefit it sought in bringing suit." However, *Valley Electric* also makes it clear that

"the term 'prevailing party' is broadly construed so as to encompass plaintiffs, counterclaimants, and defendants." *Id.* Clearly, a defendant does not "bring suit" and thus, under the strict construction offered by the Estate, cannot feasibly "achieve some of the benefit it sought in bringing suit." Because Nevada law is clear that a defendant can be a prevailing party for purposes of NRS 18.010 and NRS 18.020, the fact that the School did not succeed on its Petition is not dispositive. *Id.*; *see also 145 E. Harmon II Tr. v. Residences at MGM Grand - Tower A Owners' Ass'n*, 136 Nev. 115, 120, 460 P.3d 455, 459 (2020). Therefore, the Court must reject the Estate's flawed argument on this issue.

The Estate's position also ignores the fact that the "counterclaims" in its Petition on which it succeeded were all directly related to its attempts to avoid the relief sought in the School's Petition. In other words, the School sought to compel the Bequest and the Estate sought to avoid it with its first through fourth "counterclaims." There is no dispute Estate prevailed on that issue. Conversely, the Estate's breach of contract claim was an independent, affirmative claim for relief. There is no dispute the School prevailed on that issue. Similarly, the School succeeded in defending against the Estate's affirmative claims for

"Revocation of Gift and Constructive Trust" (which the Estate later repackaged and submitted to the jury as a claim for promissory estoppel). Thus, both parties succeeded on some issues for purposes of the prevailing party analysis. Because only one party could prevail on claims regarding the Bequest, and the Court must reject the Estate's attempt to "double dip" by claiming both that it prevailed on its counter-claims to avoid the Bequest and that the School did not succeed on its Petition, all while ignoring the fact that it lost on the affirmative relief it sought. Therefore, the fact that the Estate succeeded on its "counterclaims" asserted in direct response to the School's Petition is not determinative of the prevailing party issue.

The district court recognized that neither party succeeded on its affirmative claims, but then with no analysis or explanation, arbitrarily concluded that the Estate was the prevailing party. (27 App. 6585-95). Because the district court failed to analyze the weight and importance of the issues in this litigation as required under Nevada law, the district court abused its discretion in awarding costs to the Estate.

As set forth in detail in the School's Combined Brief, the School is the prevailing party because it prevailed on the most significant issue in

the litigation – the existence of the alleged naming rights contract and the far-reaching consequences related thereto. *See* RAB at 134-40. The Estate lost its affirmative claim for specific performance of the alleged perpetual naming rights contract with Milton Schwartz, the most consequential claim made by the Estate. (19 App. 4526-32). As a result, the School did not have to return over $100,000,000 in gifts to the Adelsons, or lose all future funding from the Adelson family, which up through the time of trial, constituted many millions of additional funds each year (15 App. 3622-23, 3625). In addition, the Estate lost its affirmative claim for reimbursement or restitution from the School for Milton Schwartz's past gifts almost $3 million (25 App 6005). In comparison, the School lost its affirmative claim for the $500,000 in scholarship money that the Estate would have to pay regardless of the outcome of the case. (3 App. 685-90; 14 App. 3430-32; 24 App. 5994).

The fact that the issues were necessarily related is irrelevant. While the Bequest was the initial focus of the litigation, the contract issue became the focus of the litigation as the proceedings advanced and the case was tried. The vast majority of the parties' opening and closing statements, the testimony and evidence introduced at trial, and the jury

instructions related to the alleged perpetual naming rights contract and this issue was the primary focus of the parties and the Court, and had by far the greatest economic implications in the case, and the most far-reaching consequences for the parties. Thus, the School prevailed on what was unquestionably the most significant issue tried by the parties.

The Court must also reject the Estate's contention that the damages each party sought is irrelevant. The School does not dispute that there are no monetary judgments to compare or offset. However, for purposes of the prevailing party analysis, because both parties succeeded on some of the issues, the relief sought by the parties is a relevant consideration to explain and put the importance of the issues into perspective. For instance, had the Estate succeed on its contract claim and request for specific performance thereunder, the School would have been subject to the catastrophic economic consequences related to thereto. Similarly, the Estate's related claim for "Revocation of Gift and Constructive Trust," for which the Estate sought over $2.8 Million in damages, was necessarily a significant issue that would have had a dramatic adverse economic impact on the School. The fact that the School prevailed on these issues and the Estate did not obtain a judgment on

either of these counterclaims is the lynch pin to the prevailing party analysis.

Accordingly, the School was clearly the prevailing party under NRS 18.020 because it prevailed on what was unquestionably the most significant issue in the litigation, the existence of the alleged naming rights contract and the far-reaching economic and non-economic consequences related thereto. The district court abused its discretion by arbitrarily determining that the Estate was the prevailing party entitled to its costs, and this Court must reverse the district court's ruling.

B. The Estate cannot recover unsupported, unreasonable, and unnecessary costs.

Assuming the Estate is the "prevailing party," the district court erroneously awarded the Estate $11,747.68 in costs in contravention of NRS 18.005. Specifically, the Estate failed to demonstrate that the district court's award of certain costs was warranted under NRS 18.020 and/or NRS 18.005, and its costs award must be reduced accordingly.

1. The Estate is not entitled to recover costs for deposition transcripts for its excluded experts.

The Estate argues that the district court's award of $586.75 for *deposition transcript costs* for its experts Layne Rushforth, Esq. and

Rabbi Wyne, which were the Estate's "expert" witnesses that were precluded from testifying as experts at trial was not erroneous because "witness fees" are allowable costs. The Estate mistakenly relies on *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993) *superseded by statute on other grounds as recognized in In re DISH Network Derivative Litig.*, 133 Nev. 438, 451 n.6, 401 P.3d 1081, 1093 n.6 (2017), for the proposition that a witness does not have to be called at trial to award witness fees. However, the costs here relate to the Estate's voluntary deposition transcript fees – not fees provided to a witness pursuant to a trial subpoena. Thus, *Bergmann* does not support the Estate's position. The School only conducted these depositions based on the fact that the Estate designated Mr. Rushforth and Rabbi Wyne as expert witnesses. Because the district court excluded these witnesses from testifying as experts, and the Estate cannot demonstrate it is otherwise entitled to recover the deposition transcript costs it voluntarily incurred for these inappropriately designated witnesses, this Court should reduce any cost award to the Estate accordingly.

2. The Estate is not entitled to certain processor fees.

The district court erroneously awarded the Estate its costs for three categories of processor fees, totaling $2,430. (27 App. 6593). First, the district court improperly awarded the Estate $1,920 in expedited service fees. No basis exists to award the Estate $1,920 in costs resulting from unnecessary expedited service charges, especially without any explanation as to why expediting these services was necessary. The Estate offers no explanation or justification for why these costs were "reasonable and necessary," instead relying on the general contention of the "time-sensitive nature of litigation." The Estate fails to account for the fact that litigants are regularly able to effectuate service of process without the use of the significantly more costly expedited services. The Estate's delay or failure to plan accordingly or to account for time to effectuate service without the need to resort to paying exorbitant fees without explanation does not render these costs necessary and reasonable.

Second, the district court erred in awarding the Estate $235 in process server fees to serve a trial subpoena on Dr. Neville Pokroy. The Estate does not dispute that it did not call Dr. Pokroy at trial, but

contends, without any valid explanation that it should nonetheless recover subpoena costs for witnesses it did not actually call. Similar to NRS 18.110(2), which provides that witness fees are only recoverable for witnesses who are actually sworn in and testify), trial subpoena costs should only be permitted for witnesses who actually testify at trial. *See also* NRS 18.005(4); *Bergmann*, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993) (trial court discretion to award costs "should be sparingly exercised when considering whether or not to allow expenses not specifically allowed by statute and precedent," and the trial court should exercise restraint because "statutes permitting recovery of costs, being in derogation of the common law, must be strictly construed") (citations omitted).

Third, the district court erred in awarding the Estate $510 in process server fees to serve Dr. Miriam Adelson with deposition subpoenas when Dr. Adelson was never actually deposed in the matter. (27 App. 6593). The fact that the court issued a protective order to preclude the Estate from deposing Dr. Adelson demonstrates that service of the subpoena was not necessary. Thus, the district court abused its discretion in awarding these costs. Therefore, the Court should reduce

any costs awarded to the Estate by $2,430 to account for these inappropriate service of process costs.

3. The Estate is not entitled to costs for Westlaw legal research because it failed to properly document these costs.

The district court erroneously awarded the Estate $8,730.93 in Westlaw research costs because the Estate failed to properly demonstrate the reasonableness and necessity of these charges under NRS 18.005(17). (27 App. 6593). The Estate contends that the School simply "does not like the Estate's billing method" and contends that "nothing prohibits billing clients on a pro-rata share of the firm's total monthly Westlaw charges." These arguments fail to explain how this method of billing permits a court to determine whether the costs were reasonably, necessarily and actually incurred, especially where, as here, the Estate failed to provide any mathematical or other data demonstrating how the pro-rata share is actually determined. *See* NRS 18.020; NRS 18.005. Accordingly, the district court erred in awarding the Estate its costs associated with legal research and its cost award must be reduced accordingly.

As the School is the prevailing party, the district court's costs award to the Estate must be vacated. However, should this Court affirm the district court's determination that the Estate is the prevailing party,

then it must reduce the award by $11,747.68, which represents costs not recoverable by statute as set forth in the School's Combined Response and Opening Brief and herein.

CONCLUSION

For the foregoing reasons this Court should vacate the Judgment on the School's and the Estate's Petitions regarding the Bequest and remand with instructions that the district court grant the School's Petition, or at a minimum, remand for further proceedings.

In the event the Court maintains the status quo, then it should vacate the district court's costs award to the Estate or, at a minimum, reduce the costs award by $11,747.68.

DATED this 4th day of June, 2021.

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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 of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in Century.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2)(C) and NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 8,411 words. The Court's April 9, 2021 Order directed the School to file a single combined reply brief on cross-appeal (Case No. 78341), and reply brief (Case No. 79464) ("Combined Brief"). Pursuant to NRAP 28.1(e)(2)(C) and NRAP 32(a)(7)(A)(ii), the School's Reply Brief (Case No. 78341) and the School's Reply Brief (Case No. 79464) each cannot exceed 7,000 words. Thus, the School in under the impression its Combined Reply Brief cannot exceed 14,000 words [7,000 + 7,000] in total. The Combined Reply Brief contains 8,411 words and, therefore, is in compliance with the aggregate type-volume limitations set forth above.

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 an 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 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 4th day of June, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 4th day of June, 2021, I caused to be served via the District Court's e-filing system and pursuant to NRAP 25(b) and NEFCR 9, and electronically filed the foregoing RESPONDENT/CROSS-APPELLANT'S COMBINED REPLY BRIEF ON CROSS-APPEAL (NO. 78341) & REPLY BRIEF ON APPEAL (NO. 79464) with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (Eflex). Participants in the case who are registered Eflex users will be served by the Eflex system as follows:

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