

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE TRUST
AGREEMENT, 23 PARTNERS TRUST I, AN
IRREVOCABLE TRUST.

MICHAEL T. NEDDER; AND DOUGLAS
DELUCA,

Appellants/Cross-Respondents,

v.

JOANNE S. BRIGGS, AS PARENT AND
GUARDIAN OF JULIA ANN DELUCA AND
ALEXANDER IAN DELUCA, PRIMARY
BENEFICIARIES OF THE 23 PARTNERS
TRUST I,

Respondents/Cross-Appellants.

Supreme Court No: 82991

District Court Case No: P-20-104279-T

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APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

MICHAEL T. NEDDER, Independent Trustee of the 23 PARTNERS TRUST I.

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 2nd day of February, 2022.

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JURISDICTIONAL STATEMENT

This is an appeal from district court order issued by Eighth Judicial District Court, Department XXVI, the Honorable Gloria Sturman, District Judge.

Appellants appeal from the district court's Order Granting in Part and Denying in Part Petition to (1) Assume Jurisdiction Over Trust, (2) Confirm Douglas Scott DeLuca as Trustee, (3) Compel an Accounting, and (4) Obtain Copy of Trust entered on April 23, 2021 (the "Order"). APP 498-502. Notice of entry of the Order was also filed on April 23, 2021. APP 509. The Order is independently appealable under NRS 155.190(h) because the Order instructs the trustee to take certain actions concerning the administration of a trust to which the trustee objects because the instructions contradict the terms of the trust and Nevada law. A timely notice of appeal was filed on May 24, 2021. NRAP 4(a).

ROUTING STATEMENT

This appeal arises from the administration of a trust where the corpus of the trust has a value that is greater than \$5,430,000 and therefore that matter would *not* be presumptively assigned to the Court of Appeals. *See* NRAP 17(b)(14).

Though this is not a matter that, on its face must be heard by the Supreme Court under NRAP 17(a), Appellant requests that the Supreme Court hear the matter.

This matter involves issues of statutory construction that have not been directly

addressed by any appellate court concerning whether Nevada law will allow beneficiary of a trust with discretionary interest — an interest that relies on the sole, absolute, and unreviewable discretion of the trustees — the rights to compel the trustees to annually account for the assets of the trust and provide copies of the actual portions of the trust documents contrary to the terms of the trust and Nevada law. Further, if discretionary beneficiaries do have any rights to information from a trustee with sole, absolute, and unreviewable discretion concerning the trust even where it is clear that the law does not grant such discretionary beneficiaries any general right to an accounting or to copies of the trust agreement, what information should be provided? These are all important issues that should be addressed by the Nevada Supreme Court. Therefore, Appellant requests that the Supreme Court retain this matter for review.

STATEMENT OF THE ISSUES

- I. Whether the district court erred in concluding that the trustees of a trust with sole, absolute, and unreviewable discretion concerning distributions made to or for the benefit of the beneficiaries are not obligated to provide an annual accounting to beneficiaries holding a discretionary interest, but ordering that the trustees are required to:

provide the discretionary beneficiaries annual financial information concerning the trust including:

- A. The annual federal income tax return for the trust, as well as any form K-1, which the beneficiaries would receive.
- B. A complete beginning and ending inventory of the trust assets, to be delivered no more frequently than annually.
- C. A summary of all financial transactions, including the trustees' fees, reconciling the ending inventory to the beginning inventory for the period provided, to be delivered annually.

II. Whether the district court erred in finding and ordering that the trustees of a trust have no obligation to provide a copy of the trust agreement to beneficiaries holding a discretionary interest but must provide these beneficiaries copies of the pertinent sections or subsections of the trust that contain information that affect them and their rights under the trust agreement with respect to their beneficial interest, the trustees, and the administration of the trust.

STATEMENT OF THE CASE

This is an appeal from district court order instructing a trustee to provide certain to beneficiaries holding a discretionary interest in the trust with annual

financial information accounting for the assets of the trust and copies of all sections and subsections of the trust agreement that affect the discretionary beneficiaries and their rights with respect to their interest, the trustees, and the administration of the trust contrary to the terms of the trust and Nevada law.

Jon A. DeLuca (“Jon”), the trustor of the 23 Partners Trust I (“Trust”), dated February 1, 2017, created the Trust as an irrevocable trust for the benefit of his children, Julia Ann DeLuca (“Julia”) and Alexander Ian DeLuca (“Alex”) and subsequent generations to be administered under the terms of the Trust. The Trust grants the trustees of the Trust sole, absolute, and unreviewable discretion in determining whether to provide any distributions to the beneficiaries for their own benefit, comfort, and enjoyment. Trustee Michael Nedder (“Appellant” or “Michael” or “Independent Trustee”) is the currently serving Independent Trustee under the Trust, and Trustee Douglas Scott DeLuca (“Doug”), Jon’s brother, is the currently serving Family Trustee of the Trust. Michael and Doug are collectively referred to as the “Trustees.”

Jon passed away on July 14, 2018. Since that time, Julia and Alex, who were both minors at the time Jon passed and at the time the original petition at issue here was filed, have received distributions from the Trust in various amounts to pay for private school education, medical expenses, vacations and

extracurricular activities, all at the discretion of the Trustees. Since Jon passed away, Julia and Alex have been living with their mother, Joanne S. Briggs (“Joanne” or “Appellee”), who was divorced from Jon prior to the formation of the Trust. For ease of reference, the following chart provides basic information about each of the relevant parties:

Party	Status	Description
23 Partners Trust I (the “Trust”)	Subject of underlying district court action	Spendthrift trust organized under laws of Nevada
Jon A. DeLuca (“Jon”)	Deceased	Grantor and Trustor of the 23 Partners Trust I
Michael Nedder (“Michael” or “Independent Trustee”)	Underlying Respondent Appellant Cross-Appellee	Independent Trustee of the 23 Partners Trust I
Douglas Scott DeLuca (“Doug” of “Family Trustee”)	Non-Party	Family Trustee of the 23 Partners Trust I
Joanna S. Briggs (“Joanna”)	Underlying Petitioner Appellee Cross-Appellant	Parent and Guardian of minor beneficiaries Julia Ann DeLuca and Alexander DeLuca
Julia Ann DeLuca (“Julia”)	Underlying Petitioner Appellee Cross-Appellant	Child of Jon A. DeLuca and discretionary beneficiary of the 23 Partners Trust I
Alexander DeLuca (“Alex”)	Underlying Petitioner Appellee Cross-Appellant	Child of Jon A. DeLuca and discretionary beneficiary of the 23 Partners Trust I

On September 21, 2020, Joanne petitioned the district court on behalf of her two minor children, Julia and Alex, to assume jurisdiction over the Trust, confirm

Doug as a trustee, and obtain an accounting of Trust assets and a copy of the Trust agreement. The Trustees objected to the Petition to the extent it sought an accounting of Trust assets and a copy of the Trust agreement. The Court initially granted the petition to assume jurisdiction and confirm Doug's appointment as a Family Trustee of the Trust and further ordered that the Trust documents be submitted to the district court *in camera* and only disclosed to the attorneys. The district court set a briefing schedule to allow further briefing on the issue concerning whether Julia and Alex, by and through their mother Joanne, were entitled to an accounting of Trust assets and a copy of the Trust agreement.

After receiving additional briefing and hearing argument of counsel, the district court determined that the beneficiary interests of Julia and Alex in the Trust were not vested and they were not entitled to an accounting of Trust assets or a copy of the Trust agreement based on the language of the Trust and Nevada law. Despite finding that Julia and Alex were not vested beneficiaries and not entitled to an accounting, the district instructed the Trust to provide Julia and Alex with the annual federal tax return and additional information concerning the Trust assets that amounts to an annual accounting of Trust assets. Despite finding that Julia and Alex were not entitled to a copy of the Trust, the district court instructed the Trust to identify every section or subsection of the Trust agreement that addressed

Julia's and Alex's rights as beneficiaries with respect to their interest, the Trustees, and the administration of the Trust, and provide Julia and Alex with copies of each of these sections and subsections. The district court provided no guidance to the Trust in determining which sections and subsections of the Trust agreement were to be provided to Julia and Alex.

The district court erred when it instructed the Trust to provide an annual account of Trust assets and financial transactions to Julie and Alex. The district court further erred when it instructed the Trustees to provide to Julia and Alex copies of all sections and subsections of the Trust agreement that affect Julia's and Alex's rights with respect to their interest, the Trustees, and the administration of the Trust. The district court's instructions not only directly contradict the terms of the Trust and Nevada law, but contradict the district court's own findings and conclusions concerning the terms of the Trust and Julia's and Alex's rights under the Trust and Nevada law.

STATEMENT OF FACTS

I. Underlying Facts

A. The Formation of the Trust and the Trust's Terms.

Jon and Joanne were married and had two children, Julia and Alex. APP 2. Sometime before February 1, 2017, when Jon created the Trust, Jon and Joanne

were divorced. APP 13. The Trust is irrevocable and was created primarily for the benefit, enjoyment, and use of Julia and Alex and subsequent generations.

APP 14. Jon passed away on July 14, 2018, leaving only the two living children, Julia and Alex, and no deceased children. APP 3, 14.

The Trust provides that “[u]pon the death of the Grantor, without the necessity of physical segregation, the trust estate shall be divided into as many equal shares as there are children of the Grantor then living,” APP 242.¹ Each child is referred to as the “primary beneficiary” of his or her Trust share to be administered according to the Trust terms. APP 242.

Section 3.2.1 of the Trust provides for completely discretionary distributions to the Beneficiaries as follows:

The Independent Trustee, in its sole, absolute and unreviewable discretion ..., shall have the power, the exercise of which shall be absolutely binding on all persons interested now or in the future in this trust, to distribute to or apply for the benefit, enjoyment or use of ... any one or more of the following permissible distributees:

- A. The primary beneficiary, and/or
- B. The descendants of the primary beneficiary who are then living

¹ The Trust documents were provided in their entirety to the district court *in camera* and to the attorneys representing both the Petitioners and Respondent and were not publicly filed. APP 239, 240. However, the relevant portions of the Trust documents are quoted in the briefing submitted to the Court. Because attorneys for all parties were provided with copies of the Trust documents, the quoted portions in the briefing can be viewed as the definitive terms of the Trust at issue on this appeal.

(even though not now living), including a descendant whose parent or parents are then living,

so much of the income or principal, or both, of the trust estate, in equal or unequal proportions, and at such times as such Independent Trustee deems appropriate for such beneficiaries' benefit, care, comfort, enjoyment, or for any other purposes.

APP 242. The Trust also provides a confidentiality clause at Section 5.1 E., specifically stating, "Notwithstanding anything herein to the contrary and to the extent permitted by applicable law, the Trustee shall not provide notice of the existence of the trust to any beneficiary hereunder." APP 243.

The Trust does not require the Trustees to provide a copy of the Trust agreement to the Beneficiaries. The Trust does specifically require the Trustees to deliver copies of "instruments of amendment, revocation, exercise of power, designation, release, disclaimer, etc. as well as of a trustee's resignation, removal, appointment and/or acceptance" to the beneficiaries upon request. APP 499.

Section 5.2 of the Trust limits the financial disclosures required of the trustees, expressly providing that a corporate trustee, if serving or other trustee if no corporate trustee is serving, shall make the books of account and records of the Trust available for inspection by "the Grantor, if then living, each then *presently vested* income, principal and remainder beneficiary of such trust, and their respective representatives." APP 123 (emphasis added). The section continues,

“such corporate fiduciary upon request shall furnish to each such person, with respect to each federal income tax accounting year of such trust, a complete beginning and ending inventory ... and an accounting summarizing all financial transactions for such period thereby reconciling such ending inventory with the beginning inventory, fully reflecting all principal and income activity including all distributions of every kind.” APP 123. No other financial disclosures are required.

B. The Trustees administer the Trust per the directions of the Grantor after his death.

Pursuant to the terms of the Trust, both Julia and Alex received discretionary distributions to pay for their comfort, care, an enjoyment, including the costs of a private education, medical expenses, extracurricular activities, vacations, and other expenses. APP 257. These distributions were made in the sole, absolute, and unreviewable discretion of the Trustees. APP 257.

Julia and Alex have been amply provided for. Since November 2019, pursuant to a probate court order, Jon’s estate has paid \$7,200 per month to Joanne as an apportioned housing expenses attributable to Julia and Alex. APP 257.

The Trust has also provided Joanne, Julia, and Alex their own credit cards to make charges directly from the Trust for a combined total of approximately \$20,000 per

month in living expenses, and pays automobile expenses of \$1,260.53 per month.
APP 257.

Joanne also makes requests for reimbursement by the Trust for other monthly expenses she alleges are for the benefit of Julia and Alex. APP 257. Joanne typically makes the requests for reimbursement via email and does not provide credit card statements, bank statements, receipts, invoices or evidence of the expense or service being provided nor of payment being made. APP 257

From December 2019 through July 2020, in addition to the monthly \$7,200 apportioned housing expense, the expenses on the three credit cards issued to Joanne, Julia, and Alex to pay for the children's expenses, and automobile expenses of \$1,260.53 per month, the Trustees issued checks from assets and accounts held by the Trust in the following amounts totaling \$38,019.99 to Joanne to reimburse her for additional expenses:

- a. \$17,111.24 on December 26, 2019
- b. \$8,092.71 on February 13, 2020
- c. \$6,860.91 on March 31, 2020
- d. \$5,955.13 on July 10, 2020

APP 258.

Michael, in his role as the Independent Trustee has repeatedly informed Joanne the Trustees' preference that the credit cards be used for expenses instead of requesting reimbursements. APP 271, 277, 359. The Trustees also requested that Joanne provide advance notice of expenses in excess of \$2,000.00 and reserved the right to deny any reimbursement that was not pre-approved. APP 271, 277, 359.

On July 30, 2020 and again on September 14, 2020, Joanne again sent an emails listing various purported expenses that she alleged to have paid during the period June 1, 2020 through August 30, 2020 and requested reimbursement in the amount of \$18,208.18 from the Trust. APP 277, 359. Joanne again provided no receipts, invoices, credit card statements, bank statements nor any other form of supporting documentation to substantiate these expenses. For the period May 1, 2020 through August 30, 2020 charges to the credit cards issued to Petitioner and the Beneficiaries were as follows:

- a. May 2020 - \$6,851.33
- b. June 2020 - \$11,351.00
- c. July 2020 - \$11,994.73
- d. August 2020 - \$14,281.00

APP 258-59.

The extensive charges on the three credit cards and the additional \$18,208.18 requested in reimbursement for a grant total of \$62,686.24 represented a significant increase in the prior monthly expenses. Joanne requested reimbursement without any advance notice expenses of more than \$2,000 and without first seeking pre-approval of the expenses to be reimbursed. The financial advisers for the Trust did not anticipate the increase in required cash flow to cover the new and increased expense, which required the Trustees liquidate other Trust assets to cover the larger than anticipated expenses. APP 259. Indeed, this increase in expenditures on the credit cards exceeded the credit limit and caused holds be placed on each of the credit cards. APP 259.²

On September 24, 2020 a check in the amount of \$18,208.18 issued to Joanne was inadvertently processed to be sent out by administrative staff in the Independent Trustee's office in error. No receipts, invoices, bank statements, credit card statements or any kind of supporting documentation for these expenses had been provided; therefore, the Independent Trustee had not approved the payment of such reimbursement. APP 259.

In August and September 2020, the Independent Trustee corresponded with Joanne via email concerning Julia's request for an accounting and a copy of the

² Some of the charges on the credit cards were identified as "adult" in nature and/or fraudulent by the issuer and were placed on hold for that reason as well. APP 259.

Trust agreement. These emails informed Joanne that the terms of the trust were “explicitly private” but that “the firm who created the trust has a one-page summary that can be shared.” APP 259-60, 277, 359. The Independent Trustee also offered to meet with the Beneficiaries to review a summary of trust finances and answer questions. APP 259-60, 277, 359.

Instead of accepting a summary of the Trust and Trust finances and meeting with the Independent Trustee, which would have satisfied any demand by a beneficiary under Section 5.2.A of the Trust even if it applied, Joanne — apparently not satisfied with the liberal distributions to pay for Julia’s and Alex’s lifestyle — filed a petition with the district court.

II. Procedural Facts.

On September 21, 2020, Joanne petitioned the district court on behalf of her then two minor children, Julia and Alex, to assume jurisdiction over the Trust, confirm Doug as a trustee, and obtain a copy of the Trust and an accounting of Trust assets. APP 1. The Trustees objected to the Petition to the extent it sought an accounting of Trust assets and a copy of the Trust agreement. APP 13. The Court initially granted the petition to assume jurisdiction and confirm Doug’s appointment as a trustee of the Trust and further ordered that the Trust documents be submitted to the district court *in camera* and only disclosed to the attorneys.

APP 106-07, 239. The district court set a schedule to allow further briefing on the issue concerning whether Julia and Alex, by and through their mother Joanna, were entitled to a copy of the Trust or an accounting of Trust assets. APP 106-07.

After reviewing the pleadings, a copy of the Trust, supplemental pleadings and written argument, and hearing oral argument of the parties, the district court determined that the Beneficiaries were not entitled to an accounting or any of the financial disclosures mandated in Section 5.2 under Nevada law or the terms of the Trust because the Beneficiaries' interests are based on the sole, absolute, and unreviewable discretion of the Trustees and, therefore, are not vested. APP 499-501. The district court further concluded and because the specific language of the Trust and because the Beneficiaries' interests are, again, not vested, the Beneficiaries are not entitled to a copy of the Trust Agreement. APP 499-500.

Despite making these clear findings, the district court instructed the Trustees to provide specific financial information annually that mirrors the disclosure requirements of Section 5.2 of the Trust and amounts to an annual accounting of Trust assets. APP 501. The district court also instructed the Trustees to provide copies of the specific sections and subsections of the Trust documents that affect the Beneficiaries and their rights under the Trust agreements. APP 501. The Court, however, provided no guidance as to what sections and subsections should

be included.

A. The district court's order concerning providing an accounting.

As to the request for an accounting, the district court found that under the terms of the Trust the “Beneficiaries are not entitled to an annual accounting” and “are not entitled to audit the books and records every year.” APP 499. The Court concluded that the “Trustees have no obligation to provide an annual accounting to the Beneficiaries pursuant to NRS 165.1207(1)(b)(5)” or “a full accounting” or “to permit the Beneficiaries to audit the books and records of the Trust every year.” APP 500. The district court explained that “because the Trust is discretionary, the Beneficiaries here, although clearly Primary Beneficiaries under the Trust’s terms, *are not vested beneficiaries* and so they are not entitled to an accounting, nor are they entitled to rights under the Trust’s Section 5.2A.” APP 501. At best, the district court found that the Beneficiaries are only “entitled to a baseline of information in the Trust because they have rights under other sections of the Trust.” APP 501.

Despite these clear findings and conclusions, the Court instructed the Trustees to provide the following information to the Beneficiaries:

- A. The annual Federal Income Tax Return for the Trust, as well as any From K-1, which the Beneficiaries would receive.

- B. A complete beginning and ending inventory of Trust assets, to be delivered no more frequently than annually.
- C. A summary of all financial transactions, including Trustees' fees, reconciling the ending inventory to the beginning inventory for the period provided, to be delivered annually.

APP 501. The information that the district court instructed must be provided to the Beneficiaries mirrors the requirements of Section 5.2 that the district court held did not apply. Further, the information the district court required amounts to an annual accounting of trust assets and financial transactions.

B. The district court's ruling on the request for a copy of the Trust documents.

In responding to the request for a copy of the Trust agreement, the district court specifically found:

The Trust is specific and not vague. In particular, the Trust specifically does not contain any requirement that the Trustees must provide a copy of the Trust agreement to the Beneficiaries. The Trust requires the Trustees to deliver copies of "instruments of amendment, revocation, exercise of power, designation, release, disclaimer, etc. as well as of a trustee's resignation, removal, appointment and/or acceptance" to the Beneficiaries on request.

...

The Beneficiaries, although not entitled to a copy of the Trust agreement are entitled to know the information in the Trust regarding what sections affect them, their rights under the Trust agreement with

respect to their beneficial interest or the Trustees administration of the Trust, to be conveyed without delivering a copy of the entire Trust Agreement.

APP 499-500. Based on these findings, the district court concluded: “Because the language in the Trust is so specific and there is no provision in the Trust requiring the Trustees to provide a copy of the Trust to the Beneficiaries, the Beneficiaries are not entitled to a copy of the entire Trust agreement.” APP 500. However, despite the Court’s clear findings and conclusions, the Court still instructed the Trustees to deliver any sections or subsections of the Trust agreement that affect the Beneficiaries and their rights under the Trust agreement with respect to their interest, the Trustees, and the administration of the Trust, concluding that:

the Beneficiaries are entitled to information in the Trust related to what sections affect them and their rights under the Trust agreement with respect to their interest, the Trustees and the administration of the Trust. This information must be conveyed to the Beneficiaries without delivering a copy of the entire Trust agreement. Instead, this information must be conveyed by providing the Beneficiaries with copies of the pertinent sections or subsections of the Trust.

APP 500.

Even though the district court had reviewed a copy of the entire Trust agreement, the Court gave no direction as to which sections or subsections should be provided to the Beneficiaries. It is difficult to identify any sections or subsections of the Trust documents that would not somehow affect the

Beneficiaries and their rights with respect to their interests, the Trustees and administration of the Trust.

SUMMARY OF ARGUMENT

The district court's instructions to the Trustees directly contradicts both the district court's own findings and conclusions, the language of the Trust, and Nevada law. The district court found and concluded that the Beneficiaries' interests in the Trust are discretionary, and therefore they are not a vested interest. Based on this finding, the district court concluded that the Beneficiaries are not entitled to an annual account of the Trust assets nor to any of the information the Trustees are required to disclose under Section 5.2 of the Trust agreement, but then found that the Beneficiaries are entitled to that information. Similarly, the district court concluded that the Beneficiaries were not entitled to a copy of the Trust agreement, but then ordered that every section and subsection that affected the Beneficiaries rights had to be disclosed without providing any direction as to how that order would not require disclosure of the entire Trust agreement, that is, every section or subsection of the Trust agreement has an effect on the Beneficiaries' rights.

The Trust grants the Trustees sole, absolute, and unreviewable discretion as to when and how to distribute funds, if any, to the Beneficiaries. As such, there is

no question that the Beneficiaries interests, though primary, are not vested. Under these circumstances, the Beneficiaries are not entitled to the documents and information they seek.

This Court should reverse the district court order by concluding that the district court's findings and conclusions as to the applicable terms of the Trust and Nevada law do not require the Trustees to provide any of the information ordered by the district court.

ARGUMENT

I. Standard of Appellate Review

NRS 155.210 governs the appellate court's review of district court orders instructing trustees and provides that the Supreme Court "may reverse, affirm or modify the order appealed from, and as to any or all of the parties, and order a remittitur as in other cases." Generally, "questions of law, including statutory interpretation, are reviewed de novo." *Klabacka v. Nelson*, 133 Nev. 164, 175, 394 P.3d 940, 949 (2017) (citing *Waldman v. Maini*, 124 Nev. 1121, 1136, 195 P.3d 850, 860 (2008)). Further, when "the facts in a case are not in dispute, contract interpretation is a question of law, which this court reviews de novo." *Id.* at 170, 394 P.3d at 946 (citing *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008)).

Here, the relevant facts are not in dispute. The issues before the Court are questions of statutory interpretation and interpretation of the Trust agreement as signed by the grantor, both of which are afforded de novo review.

II. Neither Nevada law nor the Trust grants Beneficiaries any rights to the annual financial accounting of Trust assets ordered by the district court.

Nevada law does not generally afford a discretionary beneficiary of a trust, especially where distributions are controlled by the sole, absolute, and unreviewable discretion of the trustees, rights to an accounting of trust assets. Such a beneficiary does not have a vested interest in the Trust that the beneficiary can enforce. Here, the Trust does authorize the Trustees to provide financial information similar to an annual accounting to the original grantor of the Trust and to presently vested beneficiaries but does not grant such rights to beneficiaries who do not have a vested interest. APP 123. The district court agreed and found that the Beneficiaries here had no such rights. APP 501. Yet, the district court's order contradicts its own findings by requiring the Trustees to provide an annual account of all Trust assets and financial transactions.

The Beneficiaries have no legal basis for compelling an annual account of Trust assets and financial transactions ordered by the district court under Nevada

law or the terms of the Trust. Although a party may petition a court to compel the trustee to account under NRS 153.031(1)(h), such petition is “[s]ubject to the requirements of chapter 165 of NRS,”

NRS 165.1207(1) establishes that the requirements upon the trustee to account are first established by the Trust, and the statutory requirements only apply “[t]o the extent that the trust instrument does not provide otherwise,” *See* NRS 165.1207(1). Additionally, NRS 165.1207(1)(b)(5) clearly provides, “A trustee is *not required to provide an account to a beneficiary* of an irrevocable trust while that beneficiary’s only interest in the trust estate is a discretionary interest, as described in NRS 163.4185.” (emphasis added). An interest is a “discretionary interest if the trustee has discretion to determine whether a distribution should be made, when a distribution should be made and the amount of the distribution.” *See* NRS 163.4185(1)(c).

Similarly, a beneficiary that has “a vested interest in [that] portion of the trust which was within the reach of creditors.” Restatement (Second) of Trusts § 155 (1959). NRS 163.419(1) provides, “A beneficiary who has a discretionary interest in a trust does not have an enforceable right to a distribution from the trust, and a court may review a trustee’s exercise of discretion concerning a discretionary interest *only if* the trustee acts dishonestly, with bad faith or willful misconduct.”

(emphasis added). Nevada law provides that a “trustee given discretion in a trust instrument that is described as sole, absolute, uncontrolled, unrestricted or unfettered discretion, or with similar words, has no duty to act reasonably in the exercise of that discretion.” NRS 163.419(2).

Here, the Beneficiaries’ interest in the Trust is a “discretionary interest” under NRS 163.4185(1)(c), because the only way they can receive distributions is if the Trustee “in its sole, absolute and unreviewable discretion” makes a distribution or applies, for the benefit or use of the Beneficiaries, trust income or principal, or both.” APP 14, 500. The Beneficiaries do not have an enforceable right to a distribution from the trust. NRS 163.419(1). Where a beneficiary's only interest in the trust estate is discretionary, a trustee is not required to provide respondent an accounting of the trust pursuant to NRS 165.1207(1)(b)(5).

The Trust itself only grants a beneficiary a right to receive and review the financial information of the Trust if the beneficiary holds a vested interest in the Trust interest income or principal. APP 123. Again, the Beneficiaries here only hold a discretionary interest that is not vested and therefore have no rights to obtain an annual account of the Trust assets and financial transactions.

The district court agreed with this analysis. The district court concluded that the Beneficiaries had no rights to an accounting either under Nevada law or

the terms of the Trust. Yet, the district court basically ordered the Trustees to provide an annual accounting. The district court's order requires the Trustees to provide (i) the annual Federal Income Tax Return for the Trust, as well as any Form K-1, which the Beneficiaries would receive; (ii) a complete beginning and ending inventory of Trust assets, to be delivered annually; and (iii) a summary of all financial transactions, including Trustees' fees, reconciling the ending inventory to the beginning inventory for the period provided, to be delivered annually. APP 501. These instructions, which are based on the conclusion that the Beneficiaries are not entitled to an accounting, basically require the Trustees to provide an annual accounting of all Trust assets and financial transactions.

The Beneficiaries do not have a right to compel an annual accounting under the terms of the Trust or under Nevada law. The district court agreed, but then instructed an annual accounting anyway. The district court's order both contradicts its own legal conclusions and Nevada law, and should be reversed.

III. Neither Nevada Law nor the Trust grants the Beneficiaries a right to a copy of the Trust agreement sections and subsections ordered by the district court.

With respect to the Beneficiaries demand for a copy of the Trust agreement, the district court, again, concluded that the Beneficiaries are not entitled to have a

copy of the Trust agreement, yet then ordered that the Trustees are required to identify and provide copies of the sections and subsections of the Trust agreement that affect the Beneficiaries and their rights with respect to their interest, the Trustees, and the administration of the Trust. Although the Court had a complete copy of the Trust documents, the Court provided no guidance as to how the Trustees are to identify the sections and subsections that should be provided. It is difficult to imagine that any of the sections of the Trust agreement will not affect the Beneficiaries and their rights in some way as they are the primary beneficiaries at this time.

The petition, as filed, was based on NRS 165.147(2), and the mistaken belief that the Beneficiaries are entitled to an accounting. APP 4. As already set forth above, the Beneficiaries' interest in the Trust is in the "sole, absolute and unreviewable discretion" of the Trustee. APP 14. As discretionary beneficiaries they are not entitled to an accounting pursuant to NRS 165.1207(5). For the same reasons, they are not entitled to a copy of the Trust.

The district court recognized that the provisions of the Trust agreement did not support the request for a copy of the Trust agreement. APP 499-500. Indeed, specific language of the Trust agreement is the primary basis for the district court's conclusion that the Beneficiaries were not entitled to a copy of the Trust

agreement. APP 499. Section 5.1(C) does require the Trustees to provide a very specific list of documents, but a copy of the Trust agreement itself is not one of them. APP

The district court agreed that the language of the Trust agreement was so specific as to make it clear that the Beneficiaries were not entitled to a copy of the Trust agreement. APP 499. Instead of confirming its own conclusions by ordering that the Beneficiaries are not entitled to a copy of the Trust, the district court contrived a way to require the Trustees to provide copies of the Trust agreement. The district court ordered “Beneficiaries are entitled to information in the Trust related to what sections affect them and their rights under the Trust agreement with respect to their interest, the Trustees and the administration of the Trust” and instructed the Trustees to convey this information “to the Beneficiaries without delivering a copy of the entire Trust agreement,” but further required that the information be “conveyed by providing the Beneficiaries with copies of the pertinent sections or subsections of the Trust.” APP 500. The district court’s description “sections or subsections” that must be provided is so broad as potentially include every provision in the Trust agreement. Indeed, it is difficult to identify any “sections or subsections” that might not be included.

The Independent Trustee informed the district court that the firm that prepared the Trust had also prepared a summary to provide to the Beneficiaries, and that the Trustees had offered to provide this summary and meet with the Beneficiaries. APP 357. Instead of ordering that the Beneficiaries do not have a right to obtain a copy of the Trust agreement, or even considering whether the summary being offered by the Trustees was adequate, the district court instructed the Trustee to provide a copy of every section or subsection in the Trust that might affect the Beneficiaries and their rights with respect to their interests, the Trustees, and the administration of the Trust, which essentially eviscerates the district court's finding that the Beneficiaries are not entitled to a copy of the Trust.

The district court correctly concluded that the law does not grant Beneficiaries a right to a copy of the Trust agreement, but erred in instructing the Trustee to provide actual copies of any section or subsection of the Trust agreement that affect the Beneficiaries and their rights as to their interests and the Trustees administration of the Trust. It is impossible to identify which provisions of the Trust agreement directly affect the Beneficiaries' rights as to their interest and the Trustees administration of the Trust without providing a copy of the entire Trust agreement. The district court's order instructing the Trustees should be reversed. The district court should be instructed to enter an order denying the

request for a copy of the Trust agreement without any qualification in accordance with the Trust and Nevada law.

CONCLUSION

Any distributions from the Trust are in the "sole, absolute and unreviewable discretion" of the Trustees. The Trustees' decisions are not reviewable and therefore they have no duty to act reasonably in the exercise of that discretion pursuant to NRS 163.419(2). The Trustee has no obligation to account to the Beneficiaries pursuant to NRS 165.1207(1)(b)(5) or pursuant to the Trust. For these same reasons, the Trustee has no obligation to provide a copy of the Trust to the Beneficiaries pursuant to NRS 165.147(2). The district court recognized that this is the law, and that the Trustees had no obligations to account to the Beneficiaries or provide a copy of the Trust agreement. APP 500. Despite reaching this correct conclusion, the district court ordered Trustees to provide the Beneficiaries enough financial information as to amount to an annual accounting and essentially provide copies of the Trust agreement in the form of actual copies of the sections that affect the Beneficiaries.

This Court should reverse the district court's order instructing the Trustees to provide a financial annual account of Trust assets and actual copies of the section and subsections of the Trust agreement that affect the Beneficiaries and

direct the district court to enter an order denying the Beneficiaries' petition to the extent it seeks any accounting of Trust assets and copies of all or any part of the Trust agreement.

DATED this 2ND day of February 2022.

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ATTORNEY’S CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 6217 words.

3. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to

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be found. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd of February, 2022.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the *APPELLANT'S OPENING BRIEF* was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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DATED this 2ND day of February, 2022.

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An employee of Hutchison & Steffen, PLLC