

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

MICHAEL T. NEDDER AND DOUGLAS
DELUCA,

Appellants/Cross-Respondents,

vs.

JULIA ANN DELUCA, PRIMARY BENEFICIARY
OF 23 PARTNERS TURST I; AND JOANNE S.
BRIGGS, AS PARENT AND GUARDIAN OF
ALEXANDER IAN DELUCCA, PRIMARY
BENEFICIARY OF 23 PARTNERS TRUST 1.

Respondents/Cross-Appellants.

Supreme Court Case

No.: 82991

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**PETITION
FOR REHEARING**

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NRCP 26.1 DISCLOSURE

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

Petitioners are MICHAEL T. NEDDER and DOUGLAS DELUCA.

Petitioners are represented by Russel J. Geist and Alex Velto of Hutchison & Steffen, PLLC and have been at all times relevant to the District Court Case through the current appeal the attorneys of record for Petitioners. No other attorneys from Hutchison & Steffen are expected to appear before this Court with respect to the appeal now pending.

DATED: January 13, 2023. **HUTCHISON & STEFFEN, PLLC**

By: *Alex Velto.*

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I. INTRODUCTION

Appellant/Cross-Respondents Michael T. Nedder and Douglas Deluca petition this Court for rehearing of its Opinion affirming in-part and reversing in-part filed on December 22, 2022, in the above captioned matter. It appears from the Opinion that:

- (1) The Court overlooked or misapprehended a material issue of fact in the record or a material question of law in the case;
- (2) The Court overlooked or failed to consider a statute or decision directly controlling or dispositive of an issue in the case; and
- (3) The Court overlooked or failed to recognize an important issue of law that requires clarification.

The Court overlooked the material issue of fact n that the Trust provides absolute discretion to the Trustee, which makes the beneficiaries neither present nor vested beneficiaries because the Trustee can decide that no distributions be made, and its application to the language of the Trust. Given this factual basis, the Court overlooked the limited legal obligations of the Trustee and rights under the Trust, and imposed an obligation not contemplated by the Trust or permitted by Nevada law. The Trust does not provide access to the Trust instrument or permit an accounting, and as such, the Court should rehear the matter to protect Respondents/Cross-Appellants and protect the Trustor's intent.

The Court also overlooked NRS 163.419, which makes actions by a discretionary trustee reviewable only for cause. Because there is nothing in the record that establishes any factual basis for cause to review the Trustee's actions, require an accounting, or any of the other actions ordered by the district court, this Court's Opinion creates a conflict with NRS 163.419.

Finally, the Nevada Legislature chose to set Nevada apart from other jurisdictions by creating a state favorable to spendthrift trusts. Since that time, the Nevada Legislature, twice, has reaffirmed the state's commitment as a model for estate planning. Respectfully, because of this Court's broad reading of the Trust document, the Opinion risks ignoring Nevada's statutory scheme that promotes spendthrift trusts and creating a conflict with NRS 163.419. *See In the Matter of The Trust Agreement, 23 Partners Trust I, An Irrevocable Trust*, Case No. 82991, December 22, 2022. A more limited reading that preserves the discretionary status of the beneficiaries, as well the policy behind spendthrift trusts all together. As such, Appellant/Cross-Respondents respectfully submit this Motion for Rehearing.

II. PETITION FOR REHEARING STANDARD

A petition for rehearing is appropriate when "The [C]ourt has overlooked or misapprehended" a point of law or fact. NRAP 40(a)(2). The basis for the Trust's petition rehearing is that the Court overlooked an important issue of law or fact and overlooked an important issue of law that requires clarification.

III. ARGUMENT

- a. The Trustee's absolute discretion makes the beneficiaries neither present nor vested beneficiaries; construing the Trustor's intent as counter to Nevada's statutory scheme will jeopardize Nevada's Legislative Intent promoting spendthrift trusts.*

The Court's conclusion that the Trust places Respondents/Cross-Appellants as presently vested beneficiaries, and not discretionary beneficiaries, is counter to Nevada's statutory scheme and could placing the discretionary beneficiaries at risk. NRS 165.1207 addresses a trustee's duty to account and excludes discretionary interest beneficiaries from those entitled to receive an accounting, providing that 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. NRS 165.1207(1)(b)(5). Under NRS 163.4185(1)(c), a distribution 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."

Here, this Court's opinion dated December 22, 2022, recognizes that the Trustee has absolute discretion to determine what, if any, benefit Respondents/Cross-Appellants receive. This is confirmed in Section 3.2.1 of the Trust, which gives the Trustee "sole, absolute, and unreviewable discretion . . . to distribute to . . . any one or more of the distributives." App. 242. Further, the

discretion is protected by a family trustee, Nevada trustee, review by the Court, and the language of the Trust, and the Trust requires confidentiality. App. 243.

Given that Nevada's Statutory scheme does not entitle Respondents/Cross-Appellants to an accounting, this Court's reading of the Trust contravenes the Statutory scheme and could create harmful unintended consequences. The Trust does not require disclosure to discretionary beneficiaries, only to beneficiaries that are presently vested, principal, or remainder beneficiaries. Rather than adhering to NRS 165 and 163's discretionary beneficiary definitions, the Court read broadly the terms of the Trust to construe the beneficiaries as vested beneficiaries.

A narrow reading of the Trust's language, that preserves the beneficiaries' role as solely discretionary beneficiaries, is important to align with the goals of spendthrift trusts by "secur[ing] it against his improvidence or incapacity. . . or which, in other words, bars such interest from seizure in satisfaction of his debts." *Fornell v. Fornell Equipment, Inc.*, 390 Mich. 540, 548, 213 N.W.2d 172 (1973). A limited reading of the Trust also presents a reasonable compromise between the interests of the spendthrift Trustor and his desired reluctance of the discretionary beneficiary's potential interference with the Trust's administration.

The Court's reading of the Trust opens the door to potential pitfalls the Trustor desired to avoid. First, it could allow claims to be made against discretionary allocations that are routine. The purpose of the spendthrift trust is, in-part, to prevent

creditors from lodging claims. If discretionary beneficiaries are entitled accountings, and gain knowledge of their potential distributions and there is a record of how they are made, creditors could attempt to stand in the discretionary beneficiaries shoes and claim a right to the distributions, cutting against the purpose of their status as discretionary beneficiaries. Second, a more limited reading of the Trust's language protects the fiduciary's role in making decisions that may not always be equitable. The Trustor here wanted the Trustee to act in a manner that does not inhibit his discretion. And the Court's opinion hamstringing the Trustor's ability to act in accordance with the Trustor's intent.

b. The Court overlooked NRS 163.419's limitation on actions by a Trustee, which permits review only for cause, and risks creating a conflict with statute.

The Court's conclusion that Respondents/Cross-Appellants can review the Trust and receive an accounting without cause creates a conflict with NRS 163.419. A discretionary interest is reviewable only for cause if the Trustee acts "dishonestly, with bad faith, or with willful misconduct." NRS 163.419. But here, there is no cause to require an accounting or disclosure of the Trust's terms. When there is only a discretionary interest, public policy should preclude disclosure.

For example, in *Burrows v. Palmer*, 125 N.E.2d 484 (Ill. 1955), the Illinois Supreme Court relied in part on Section 214 of the Restatement (Second) in finding that the contingent beneficiaries were entitled to sue for restoration of trust corpus.

The court made clear that “[i]n general, a trust beneficiary is entitled to such equitable relief as will protect his interest in the trust property when such interest is endangered by the wrongful acts of the trustee.” *Id.* at 486 (emphasis added). The court there expressly recognized that contingent beneficiaries “have an interest in the trust property.” *Id.* at 487.

Here, the terms of the Trust are consistent with the Restatement principles distinguishing a discretionary beneficiary—who has no definite interest in trust corpus—from a remainderman, contingent or otherwise—who has a specific interest in the corpus. When there is only a discretionary interest, requiring disclosure creates a conflict with NRS 163.419 and risks ignoring its cause standard that seeks to protect the rationale for discretion.

IV. CONCLUSION

Appellants/Cross-Respondents merely seeks to protect the motivations of the Trustor and the interests of the discretionary beneficiaries. However, the Court’s conclusion that the Trust places Respondents/Cross-Appellants as presently vested beneficiaries, and not discretionary beneficiaries, is counter to Nevada’s statutory scheme and could placing the discretionary beneficiaries at risk. Further, a broad reading of the Trust document risks creating confusion in district courts’ application of NRS 163.419. As such, they request *rehearing* of the issues on appeal.

Additionally, in the event that this Court directs Respondent to answer this petition rehearing, Appellant respectfully requests that this Court permit leave for Appellant to file a reply in support of this petition.

DATED: January 13, 2023. **HUTCHISON & STEFFEN, PLLC**

By /s/ Alex Velto

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CERTIFICATE OF COMPLIANCE

I, Alex Velto, Esq., declare as follows:

1. I am an attorney with Hutchison & Steffen, PLLC, counsel of record for Petitioners.

2. I certify that I have read the foregoing **Petition for Rehearing**.

3. 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).

4. I further certify that this brief complies with the page- or type- volume limitations of NRAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is either proportionally spaced, has a type face of 14 points or more and contains no more than 4,667 words or does not exceed 10 (ten) pages. This brief contains **2,257 words**.

5. Finally, I hereby certify that I have read this brief, and it is not frivolous of interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40(a)(2) which requires any claim that the court overlooked a material fact be supported by a reference to the page of the transcript appendix or record where the matter may be found; any claim that the court has overlooked a material question of law or has overlooked or misapprehended or failed to consider controlling authority shall be

supported by a reference to the page of the brief where petitioner raised the issue. 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.

I declare under the penalty of perjury the statements herein are true and correct.

Executed on January 13, 2023 in Washoe County, Nevada.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, pursuant to NRAP 25(d), I served the foregoing **PETITION FOR REHEARING** on the following parties, via the manner of service indicated below, on January 13, 2023:

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Alexander Ian DeLuca,
Beneficiaries of 23 Partners
Trust I*

Dated: January 13, 2023

By: */s/ Kaylee Conradi*

An Employee of Hutchison & Steffen, PLLC