

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Clerk of Supreme Court

<p>IN THE MATTER OF THE ADMINISTRATION OF THE SSJ'S ISSUE TRUST,</p> <hr/> <p>IN THE MATTER OF THE ADMINISTRATION OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST.</p> <hr/>	<p>Case No.: 85927</p> <p>District Court Case Nos.: PR17-00445 PR17-00446</p>
<p>SAMUEL JAKSICK, INDIVIDUALLY AND AS CO- TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST, AND AS TRUSTEE OF THE SSJ'S ISSUE TRUST, Appellant, vs. JAMES S. PROCTOR, CPA,CFE, CVA, CFF IN HIS CAPACITY AS THE APPOINTED TRUSTEE OF THE JAKSICK FAMILY TRUST; KEVIN RILEY, INDIVIDUALLY AND AS FORMER TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST, AND AS TRUSTEE OF THE WENDY A. JAKSICK 2012 BHC FAMILY TRUST; MICHAEL S. KIMMEL,</p>	

INDIVIDUALLY AND AS CO- TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST; TODD B. JAKSICK, INDIVIDUALLY AND AS CO- TRUSTEE OF THE SAMUEL S. JAKSICK, JR. FAMLY TRUST, AND AS TRUSTEE OF THE SSJ'S ISSUE TRUST; AND WENDY JAKSICK, INDIVIDUALLY, Respondents.	
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## **OPENING BRIEF**

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## NRAP 26.1 DISCLOSURE STATEMENT

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

There are no parent corporations for Stanley Jaksick or publicly held companies owning 10% or more stock.

Stanley Jaksick has been represented throughout this action by Adam Hosmer-Henner, Esq. of McDonald Carano and Philip Kreitlein, Esq. of Kreitlein Law Group. Stanley Jaksick has also been represented by the law firm of Maupin, Cox & LeGoy in his capacity as co-Trustee of the Samuel S. Jaksick, Jr. Family Trust.

DATED: May 23, 2023.

McDONALD CARANO LLP

By /s/ Adam Hosmer-Henner  
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## JURISDICTIONAL STATEMENT

This Court has jurisdiction over Stanley Jaksick’s appeal as the district court entered an order on December 9, 2022, which was appealable under NRS 155.190. *See also* NRAP 3A(b)(1) (“A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.”) Stanley Jaksick filed a timely Notice of Appeal on January 5, 2023. I AA 338-343.

## ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals as a case “involving trust and estate matters in which the corpus has a value of less than \$5,430,000.” NRAP 17(b)(14). While a previous appeal in this action was decided by the Supreme Court, *In re: Administration of the SSJ’s Issue Trust*, Case No. 81470 (Jun. 22, 2022), and so retention by the Supreme Court may be appropriate, that prior appeal involved more substantial issues and was filed at a time when the corpus of the Samuel S. Jaksick, Jr. Family Trust was larger.

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## STATEMENT OF THE ISSUES

Whether the district court erred by prioritizing payment of the attorney's fees incurred by a current trustee over the unpaid fees incurred by prior trustees?

## STATEMENT OF THE CASE

After a lengthy trial, a jury completely exonerated Stanley Jaksick from any liability as co-Trustee of the Samuel S. Jaksick, Jr. Family Trust ("Family Trust") and from each and every legal claim that had been asserted against him. I AA 112-119. Thereafter, in a bench trial of all remaining equitable claims, the district court entered judgment in favor of Stanley Jaksick again and denied requests to remove him as co-Trustee of the Family Trust, confirming his status instead. I AA 111. These judgments were affirmed on appeal. *In re: Administration of the SSJ's Issue Trust*, Case No. 81470 (Jun. 22, 2022).

After the trials, post-judgment motion practice occurred between Stanley Jaksick and Todd Jaksick concerning the interpretation of their settlement agreement. I AA 60 (wherein the district court described the settlement agreement as a "strategic and well-advised decision" by Stanley and Todd). Perhaps frustrated by the additional disagreement

between the parties, the district court entered an Order Appointing Temporary Trustee on February 24, 2021. I AA 137-139. In that Order, the district court specifically “made no finding that Todd or Stanley Jaksick committed or threatened to commit a breach of trust or a breach of fiduciary duties. The prior order and this order shall not be a favorable imprimatur or a negative implication upon Todd and Stanley Jaksick's post-judgment performance of duties.” I AA 137. Instead, the district court simply found that the existence of a lack of cooperation between the Co-Trustees has and continues to substantially impair the administration of the Family Trust. *Id.* Consequently, the district court suspended Stanley and Todd as co-Trustees of the Family Trust and appointed James Proctor as the Temporary Trustee of the Family Trust. I AA 138.

The Temporary Trustee then retained the law firm of Fletcher & Lee to serve as his counsel. *See e.g.*, I AA 140. While the Family Trust has struggled to meet its external debt obligations and the Temporary Trustee has reported, on various occasions, that the Family Trust has approximately \$100,000 in cash on hand remaining, the fees incurred by Fletcher & Lee have been significant. From the approval of the First

Application in January 2022 to the approval of the Fourth Application in April 2023, Fletcher & Lee have billed the Family Trust approximately \$507,000. I AA 140-143; I AA 144-145; II AA 336-337; II AA 344-346. The district court has not reduced or denied a single dollar from these fee applications. *Id.* While the reasonableness of these fees should be scrutinized by the district court, their reasonableness is not the subject of this appeal. Instead, the sole issue on appeal relates to Fletcher & Lee's position that their fees have priority over all of the other unpaid fees incurred by counsel for the prior trustees of the Family Trust, including Stanley Jaksick and Todd Jaksick. II AA 336-337. The Temporary Trustee initially disputed, but then withdrew, challenges to the fees that the district court had confirmed as due and owing by the Family Trust to counsel for the prior trustees. These unpaid fees were primarily incurred during the initial trials and the appeal between 2019-2021.

The district court found "that the fees incurred by the Trustee for his services and those of his counsel are distinguishable from those incurred by the former trustees who had individual interests at stake. The Court finds that cause exists to approve the payment of these fees

and costs in full, subject to the Temporary Trustee's discretion, and prior to payment of fees incurred on behalf of the co-trustees prior to the appointment of the Temporary Trustee and in connection with the appeal." I AA 342-343.

### **STATEMENT OF THE FACTS**

As the district court did not make factual findings as to why the fees for counsel for the Temporary Trustee merited priority, there are no specific facts that are relevant to the issues on appeal other than those procedural matters already identified in the Statement of the Case, which are incorporated herein.

### **SUMMARY OF THE ARGUMENT**

This appeal presents an extremely narrow question of whether the district court could prioritize the payment of a current trustee's attorney's fees over those unpaid and accrued attorney's fees from a prior trustee. No provision of the trust instrument or Nevada law authorizes such favoritism. There is no dispute raised in this appeal as to the entitlement of any law firm to the payment of their fees from the Family Trust nor to the amounts of these fees. The dispute is only over whether the current Temporary Trustee can pay his own counsel first

before paying any of the prior invoices for the firms who served as counsel for the prior trustees. While authorized by the district court, this partiality should not have been permitted and the district court's unsupported decision should be reversed.

## **ARGUMENT**

### **I. STANDARD OF REVIEW.**

“A district court's order regarding distribution or administration of trust funds will generally not be disturbed unless it clearly demonstrates an abuse of discretion.” *Hannam v. Brown*, 114 Nev. 350, 362, 956 P.2d 794, 802 (1998); *see also Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 580, 427 P.3d 104, 112 (2018) (reviewing a “district court's attorney fees decision for an abuse of discretion”).

## **II. ARGUMENT**

### **A. The Trust Instrument and Nevada Law Prohibit the Temporary Trustee's Prioritization.**

A trustee “has the powers provided in the trust instrument, expressed by law or granted by the court upon petition, as necessary or appropriate to accomplish a purpose of the trust, but the court may not

grant a power expressly prohibited by the trust instrument.” NRS 163.023. The Family Trust instrument permits trustees to “employ attorneys . . . and other assistants and agents.” I AA 30. The expense of employing attorneys “is to be a proper expense of the trust . . .” *Id.* Furthermore, it provides that the Family Trust is to be administered in accordance with Nevada law, *id.*, and NRS 163.305 provides that a trustee “may pay taxes, assessments, compensation of the fiduciary, and other expenses incurred in the collection, care, administration and protection of the trust or estate.”

There is no dispute that the Temporary Trustee was authorized to retain counsel and that the reasonable fees of counsel would be a proper expense of the Family Trust. Nevertheless, neither the Family Trust nor NRS Chapter 163 authorizes a trustee to favor or prioritize their own expenses over the prior expenses of the Family Trust. Such partiality is instead prohibited by both the trust instrument and by Nevada law.

First, the trust instrument frequently refers to the principle of fairness. “The Trustee may allocate the tax benefits among the various beneficiaries to compensate for . . . the effect of directly or indirectly

preferring one beneficiary or group of beneficiaries over others.” I AA 29. The “Trustee may . . . make a nonpro-rata division . . . so long as the assets allocated to the separate trusts or shares, or distributed to the beneficiaries have equivalent or proportionate fair market values.” I AA 31. The same reasoning should prevent a current trustee from preferring their own agents or representatives over the interests of those hired by prior trustees.

Second, NRS 164.720 provides that a trustee “shall administer a trust or estate impartially, based on what is fair and reasonable to all the beneficiaries . . . .” The district court previously recognized this statute when holding that a “trustee has a duty to act impartially, based on what is fair and reasonable to all beneficiaries. Specifically, ‘the trustee shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries.’” I AA 65 (quoting NRS 164.720(1)). Furthermore, it is the “trustee’s duty, reasonably and without personal bias, to seek to ascertain and to give effect to the rights and priorities of the various beneficiaries or purposes as expressed or implied by the terms of the trust.” Restatement (Third) of Trusts § 79 (2007). This duty of

impartiality is “applicable to all duties of the trustee.” *Id.* Here, the Temporary Trustee should have avoided “injecting their personal favoritism into their decision-making . . .” *Id.* This Court has held, in a trust matter, that a trustee violated duties of “impartiality and to avoid conflicts of interest when she unilaterally ceased distributions to respondents without seeking court instructions and when she advocated as trustee for a trust interpretation favoring herself as beneficiary.” *Matter of W.N. Connell & Marjorie T. Connell Living Tr.*, 133 Nev. 137, 141, 393 P.3d 1090, 1094 (2017).

When the Temporary Trustee and his counsel argued for priority of payment in their favor, they immediately violated the duty of impartiality, especially as they lacked any legal support for their position and failed to cite any applicable caselaw or statutory authority. In the absence of any authorization from the Family Trust instrument or from Nevada statutes, the district court abused its discretion in approving the favoritism for the fees incurred by the Temporary Trustee’s counsel, and the disfavoring of all similar expenses incurred by counsel for the prior trustees.

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## **B. The District Court Failed to Make Any Factual Findings.**

“A manifest abuse of discretion is ‘[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.’” *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (alteration in original) (*quoting Steward v. McDonald*, 958 S.W.2d 297, 300 (1997)). “An arbitrary or capricious exercise of discretion is one ‘founded on prejudice or preference rather than on reason,’ or ‘contrary to the evidence or established rules of law.’” *Id.* at 931-32, 267 P.3d at 780 (quotations omitted). The district court found “that the fees incurred by the Trustee for his services and those of his counsel are distinguishable from those incurred by the former trustees who had individual interests at stake. The Court finds that cause exists to approve the payment of these fees and costs in full, subject to the Temporary Trustee’s discretion, and prior to payment of fees incurred on behalf of the co-trustees prior to the appointment of the Temporary Trustee and in connection with the appeal.” I AA 342-343.

Simply, the district court lacked any factual record on which to make such findings and failed to include any facts in this order, which could be subject to scrutiny. The failure of the district court to make

factual findings necessitates reversal. There is no need for a factual hearing though because the district court could not make consistent factual findings.

For example, the trials already confirmed that Stanley Jaksick did not commit a breach of trust. I AA 111-119. Then, the district court's order appointing the Temporary Trustee – effectively the last possible date on which Stanley Jaksick was serving as a co-Trustee of the Family Trust – specifically “made no finding that Todd or Stanley Jaksick committed or threatened to commit a breach of trust or a breach of fiduciary duties. The prior order and this order shall not be a favorable imprimatur or a negative implication upon Todd and Stanley Jaksick's post-judgment performance of duties.” I AA 137. Thus, the district court had the opportunity, but did not, make a factual finding in April 2021 that Stanley Jaksick's actions were improper and subject to sanction through disfavoring his related expenses.

Under NRS 163.115(2), the district court could “remove a trustee” if there was a “[l]ack of cooperation between cotrustees [that] substantially impairs the administration of the trust.” But this is not a ground that is found in subsection NRS 163.115(3), which requires a

breach of trust or threatened breach in order to “reduce or deny the compensation of the trustee” or to take such other acts to remedy the breach of trust. Thus, the district court could not rely on the same factual finding as used for the appointment of the Temporary Trustee to then find that the expenses for Stanley Jaksick’s attorney’s fees should be de-prioritized.

### **C. The Priority of Payments Should Be First-In-First-Out.**

The fees at issue are all within the same category of expenses and should be paid on a first-in-first-out basis. The “first-in-first-out” principle is found elsewhere in Nevada law. *State Dep’t of Tax’n v. Kawahara*, 28 Nev. 425, 428, 351 P.3d 746, 748 (2015) (“At common law, lien priority depends upon the time that liens attach or become perfected: ‘first in time, first in right.’”). There is no justification though for prioritizing the fees of the Temporary Trustee’s counsel. First, there are practical reasons to pay older debts first as law firms charge late fees and interest on unpaid invoices. These fees are continuously accruing to the Family Trust. Second, the “harm” suffered from non-payment is greater with respect to older debts as the law firms with older invoices have had to wait longer and bear the burden of the older

accounts receivable. Third, prioritizing the most recent expenses does not encourage restraint or judiciousness in billing. At a minimum, the fees should be paid on a proportional basis as was adopted by the district court at an earlier point in time. I AA 142 (authorizing payment “to Fletcher & Lee in an amount that is *in pari passu* with the overall attorneys’ fees billed and paid to counsel representing the co-trustees through the appointment of the Temporary Trustee . . .”). Deviating from this proportional principle between January 2022 and December 2022 – when Stanley Jaksick was not even serving as a trustee of the Family Trust – constitutes a clear abuse of discretion.

## CONCLUSION

The district court’s order should be reversed and the matter should be remanded with instructions to administer the Family Trust impartially and pay the administrative expenses of the trust on a first-in-last-out basis or, at a minimum, a pro rata basis.

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### AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the Social Security number of any person.

DATED: May 23, 2023.

McDONALD CARANO LLP

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## CERTIFICATION OF ATTORNEY

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

I further certify that this brief complies with the type-volume limitation 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 or more, and contains 3,412 words.

Pursuant to NRAP 28.2, 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 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 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.

Respectfully submitted on May 23, 2023.

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## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO LLP and that on May 23, 2023, a true and correct copy of the foregoing **OPENING BRIEF** was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system.

/s/ Adam Hosmer-Henner  
An Employee of McDonald Carano