

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ADMINISTRATION OF THE SSJ'S ISSUE TRUST,	Case No. 85927 District Court Case No. PR17-00445	Electronically Filed Jun 22 2023 10:45 AM Elizabeth A. Brown
IN THE MATTER OF THE ADMINISTRATION OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST	PR17-00446	Clerk of Supreme Court
STANLEY 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, 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. FAMILY TRUST,		

AND AS TRUSTEE OF THE SSJ'S ISSUE TRUST; AND WENDY JAKSICK, INDIVIDUALLY, Respondents.	
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RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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 James S. Proctor or publicly held companies owning 10% or more stock.

James S. Proctor has been represented throughout this action by Cecilia Lee, Esq. and Elizabeth Fletcher, Esq. of Fletcher & Lee.

Dated this 22nd day of June, 2023.

FLETCHER & LEE

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STANDARD OF REVIEW

Issue 1: Legal questions, including statutory interpretation, are reviewed de novo. Brock v. Premier Trust, Inc., 133 Nev. 50, 52, 390 P.3d 646, 649 (2017). A district court's order regarding the distribution or administration of trust funds will generally not be disturbed absent clear demonstration of abuse of discretion. Id.; Hannan v. Brown, 114 Nev 350, 362, 956 P.2d 794, 802 (1998).

Issue 2: Findings of fact will not be disturbed if they are supported by substantial evidence. Mainor v. Nault, 120 Nev. 750, 758-59, 101 P.3d 308 (2004); Brock, 133 Nev. at 52, 390 P.3d at 649. Orders of the district court are presumptively valid if regular on their face. Mainor, 120 Nev at 761, 101 P.3d at 315. Substantial evidence is “evidence that a reasonable mind might accept as adequate to support a conclusion.” Brock, 133 Nev. at 52, 390 P.3d at 649; In re Estate of Bethurem, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013).

As a factfinder, the District Court is authorized to consider its everyday common sense and judgment, and determine what inferences may be properly drawn from direct and circumstantial evidence. Lewis v. Sea Ray Boats, Inc., 119 Nev. 100, 105, 65 P.3d 245, 248 (2003).

Issue 3: “[I]n construing a stipulation, a reviewing court may look to the language of the agreement along with the surrounding circumstances.” Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 1118, 197 P.3d 1032, 1042 (2008).

Issue 4: The application of judicial estoppel is a question of law that is reviewed de novo. Brock, 133 Nev. at 56, 390 at 652.

Issue 5 and 6: A question of law is reviewed de novo. Nguyen v. Boynes, 133 Nev. 229, 232, 396 P.3d 774, 777 (2017).

STATEMENT OF THE ISSUES

1. Whether the District Court properly exercised its discretion in applying Nevada law in the prioritization ruling?

2. Whether the District Court’s numerous factual findings meet the standard of substantial evidence to support the prioritization ruling in the Third Fee Order?

3. Whether Appellant/removed cotrustee Stanley Jaksick (“Stan”) is bound by the Stipulated Fee Order?

4. Whether Stan is judicially estopped to request relief from the Third Fee Order?

5. Whether Stan's appeal is an impermissible collateral attack on the Appointment Order, the Stipulated Fee Order and the four fee orders for Proctor's attorneys, including the Third Fee Order?

6. Whether Stan lacks standing because this Court is unable to grant the relief he seeks because it is contrary to the Stipulated Fee Order?

STATEMENT OF THE CASE

On the heels of a jury trial, an equitable trial and an appeal in Nevada Supreme Court Case No. 81470 (the “First Case”), the District Court entered an order (“Appointment Order”) appointing Appellee James Proctor (“Proctor”) the temporary trustee of the Jaksick Family Trust (“Trust”) in February 2021 based on violation of NRS 163.115(2)(b) by cotrustees Stan and his brother, Todd Jaksick (“Todd”). I AA000137-139. Three outcomes from the First Case are important for the appeal at hand: (1) the finding that Stan had not committed a breach of trust from the first trial had no bearing on his subsequent removal as trustee, which was based instead on Stan’s post-trial conduct confirming his inability to separate his personal interests from his fiduciary duty; (2) Stan and Todd had entered into a Settlement Agreement before the trial in the First Case that did not end their disputes. Instead, their post-trial arguments over the implementation of the Settlement Agreement exposed the fault lines between them and laid bare their inability to separate their personal interests from their fiduciary duties to the Trust; and (3) although the Settlement Agreement obligated the Trust to pay for their own personal liabilities (including attorneys’ fees of approximately

\$450,000 for Todd and \$250,000 for Stan for their individual representation),¹ Stan and Todd argued post-trial in the District Court about how the Settlement Agreement was to be funded and how the Trust was to acquire the resources to pay the mounting bills of the First Case. It was in this context that the Court conducted numerous hearings, considered multiple briefs from all parties, reviewed documentary exhibits and heard testimony that confirmed the endemic dysfunction of the brothers to administer the Trust or to take any meaningful steps to generate the cash necessary to pay the Trust's bills.

Stan's offhand comment that the District Court was "[p]erhaps frustrated by the additional disagreement" between the brothers is a gross understatement, divorced from the realities of this case. Opening Brief, p. 2. Post-trial, the District Court was instead deeply concerned that Stan and Todd were unable to separate their own personal interests from their role as trustees. The Court stated its concerns repeatedly at multiple hearings that spanned approximately six months. The Court heard evidence, deliberated, and made extensive findings to support its

¹ The Settlement Agreement also affected the Trust by placing the obligations of Stan, Todd and Wendy to pay capital calls for Jack Rabbit, an entity the Trust no longer had any interest in. III RA0463; V RA0910.

conclusion to remove Stan and Todd for “[l]ack of cooperation between cotrustees [that] substantially impairs the administration of the trust[.]” NRS 163.115(2)(b). These findings are reported more fully in the Statement of Facts segment of this brief, but the important point here is that these extensive findings about Stan’s own post-trial conduct were the factual bases on which the Court ultimately decided to prioritize the payment of Proctor’s administrative expenses, what we will refer to in this brief as the “prioritization ruling” or “prioritization.” We know this because the Court stated so specifically, repeatedly, clearly and unambiguously, thus belying Stan’s representations to the contrary. Opening Brief, pp. 5, 10.

Stan clings to the “no finding of breach of trust” language in the Appointment Order, Opening Brief, p. 11, but the entire context of that Order makes it clear that Stan was not exonerated. The Court plainly stated that its orders “shall not be a favorable imprimatur or a negative implication” on Stan or Todd. I AA000137. This is a disclaimer – neither a finding that Stan breached his duties nor a finding that he *didn’t* breach his duties – but it is not the shield Stan claims. Moreover, the cotrustees’ violation of NRS 163.115(2)(b) is deemed a breach of trust by operation

of law. NRS 163.190. In addition, the Court had ample legal bases for exercising its discretion and its full equitable powers in ordering prioritization of Proctor's administrative fees. The Court properly exercised that discretion based on extensive findings of fact that are supported by the record.²

Stan has not been candid with this Court. He omitted substantial parts of the record in his argument that the District Court did not make factual findings. He failed to inform this Court that the District Court has entered no less than three *other* final orders confirming the prioritization, all of which are final orders and none of which were appealed. He asserted that Proctor is paying his attorneys first before paying "any" of the prior trustees' lawyers. Opening Brief, p. 6. At best, this is hyperbole; at worst, it is an outright misstatement. In either case, Proctor is forced to correct the record herein. He will show this Court with evidence in the record that the Trust had already paid prior counsel (including Stan's lawyers) hundreds of thousands of dollars in fees before

² To be clear, the prioritization ruling applied both to Proctor's compensation and his legal expenses; in this appeal, only one of four orders authorizing payment of Proctor's attorneys is at issue, namely, the Third Fee Order. Proctor's prioritized compensation is not at issue.

Proctor was appointed, that Proctor has made substantial additional payments to these lawyers, and that Proctor's attorneys are, in fact, being paid in roughly the same proportionality as prior counsel in spite of the District Court's prioritization ruling. (Proctor's attorneys also continue to perform legal services, unlike prior trustees' counsel.) Stan's accusation that Proctor and his counsel have breached a duty of impartiality in Proctor's administration – an accusation raised for the first time in the Opening Brief – is entirely unsupported by Proctor's actions and has no support in the law. Opening Brief, p. 9.

Stan's most egregious omission is that he has not informed this Court about his December 20, 2022 Stipulated Fee Order with Proctor. The Stipulated Fee Order (1) provided for the payment by December 24, 2022 of 60 percent of the outstanding fees owed by the Trust to Stan's lawyers and all counsel arising from the First Case litigation, which payments Proctor timely made to these counsel; and (2) provided that the balance owed to Stan's lawyers will be paid in ***Proctor's discretion*** and at a time when ***Proctor determines the Trust has sufficient assets*** – with no other condition. In the final analysis, for all his posturing, Stan himself cured any defect that *might* have existed (but does not exist) in

the prioritization ruling by voluntarily cloaking Proctor with the very discretion and the facts he asserts the Court lacked in ordering prioritization. The Stipulated Fee Order is binding, this Court must enforce it and Stan is prohibited from obtaining any relief by legal principles of judicial estoppel, impermissible collateral attack on multiple final orders and lack of standing.

STATEMENT OF THE FACTS

1. District Court Made Numerous Findings of Facts In Removing Stan

Between August 2020 and February 2021 when the Court entered the Appointment Order, the Court engaged in a lengthy, deliberate and evidence-driven process whereby (1) Stan and Todd were removed as trustees for violation of NRS 163.115(2)(b); and (2) payment of their attorneys' fees was specifically conditioned on further order of the Court. I AA000137-139.

In the proceedings, the Court referred to evidence before it in stating:

[T]his Court is troubled by Mr. Riley's email to co-trustee Michael Kimmel, which is attached as Exhibit 3 to Todd's individual opposition. In summary, Mr. Riley suggests the best practice is full information for everyone, yet he is precluded

by Stanley from conveying information about assets the Family Trust owns. ... This Court is not sure how the Family Trust can be distributed as soon as practicable if it has known interests in entities with unknown values, transactions, and assets. It appears likely to this Court that full disclosure of Family Trust affairs is a necessary predicate to distribution.

I RA0008-9. The Court “read these e-mails and it seems that it’s still unclear to me about whether Stan is doing everything he can through Mr. Riley to produce information necessary to close down the Family Trust.” I RA0119.

The Court heard testimony from Trustee Kimmel, I RA0168-180, that the “nature of the personal dispute between” Stan and Todd includes “personal animosities and trying to advance their own respective pecuniary interests.” I RA0170.

THE COURT: I want to invite you to push back against my observation, Mr. Kimmel. If it’s erroneous, be at ease. Tell me.

My observation has been for some time that Todd and Stan are clothed with Trustee authority, but each pursuing their own individual interests. That the lens they look through is their interest and they have subordinated the larger interests of the trust and all beneficiaries. I’m speaking to the post verdict equitable trial events. Do you agree or disagree with this Court’s observation?

MR. KIMMEL: It's a little of both, Your Honor. I think that it's impossible to separate personal relationships and personal animosities, and so whereas your Honor might characterize everything as one side or the other trying to advance their own pecuniary interest, I think there may be some of that, but I also think it's just the nature of the personal dispute between them.

THE COURT: So you are talking about a sibling dynamic?

MR. KIMMEL: I am, Your Honor. So if you have two people who are distrustful of each other who don't necessarily get along, then each of those might be a little bit of a roadblock to the other. That may have the same affect as appearing like the person who is the roadblock is trying to advance their own pecuniary interest, but I can't say that that's the motivation is to a pecuniary interest.

THE COURT: So regardless of whether it's a pecuniary interest or a sibling dynamic, regardless do you think there has been something between Todd and Stan that has prevented an efficient, expeditious administration of this Trust, the Family Trust."

MR KIMMEL: Yes, Your Honor. **I think that since the trial, the Family Trust as a whole has been largely, forgive the word, I'm struggling for a better word, but largely neutered. In other words, we haven't been able to do much of anything.**

I RA0169-171 (emphasis added).

THE COURT: So I understand those underlying assets. It's what makes this whole experience really complicated, but it seems to me that if I had a neutral Trustee who made a demand upon Stan as a manager of whatever entities, Toiyabe or Montreux, for an accounting and production of documents and if Stan chooses not to give it to the Trustee's satisfaction, the Trustee can cite Stan in and then I all of a sudden have authority over Stan. It just seems that I can have a peripheral reach into those other entities through that front level Trustee.

MR. KIMMEL: Agreed. I think Your Honor could have that same peripheral reach right now.

THE COURT: Except I have Stan and Todd as the Trustees protecting their own sibling perception or pecuniary interest.

I RA0172.

THE COURT: Yes, but also it seems that there is this reluctance of each of them to tender to the Family Trust what the Family Trust owns for fear that that amount will be used.

MR. KIMMEL: I agree, Your Honor.

I RA0173-174. The evidence leading to the Appointment Order also included Kimmel's resignation letter outlining the efforts he had made to

obtain information about assets of the Trust over which Stan had control but for which Stan refused to provide information.³ II RA0299-306.

The Court expressed its increasing alarm about the inability of Stan and Todd to act entirely for the benefit of the Family Trust and to effectuate their Settlement Agreement:

But, counsel, [removal of the trustees] is on my table when I think about how much future litigation we have between siblings who are clothed with fiduciary responsibilities.

I RA0054. The Court made it clear that it was not “reacting to the past” allegations that resulted in the First Case, but in allegations that are “entirely separate from the past and I think I have the ability to entertain and respond to new allegations.” I RA0055; see also, I RA0087 (“I’m not revisiting any of the past. I’m looking at this round of moving papers into the future.”) The Court stated, “You should know I’m still thinking that if this continues, I’m going to remove Todd and Stan. I’m going to bring in somebody neutral who doesn’t have a personal interest.” I RA0087. The Court observed that “for some time that Todd and Stan are clothed with Trustee authority, but each pursuing their own individual interests. That

³ Proctor encountered similar issues during his efforts to sell Trust assets in which Stan had an interest. III RA0615-616.

the lens they look through is their interest and they have subordinated the larger interests of the Trust and all beneficiaries. *I'm speaking to the post verdict equitable trial events.*" I RA0169-170 (emphasis added); see also Order Granting Petition for Instructions and Motion to Partially Enforce Settlement Agreement, in which it set a hearing for January 26, 2021 to address removing the trustees, not related to their prior conduct. I RA0212.

At the January 26, 2021 hearing, the Court made the following findings:

Under NRS 163.115 this court does make a finding under Subsection B that there is a lack of cooperation between the cotrustees that substantially impairs the administration of the trust. I make the finding based upon the sworn testimony of Mr. Kimmel and of Mr. Riley and based upon my longitudinal relationship with this file in its totality.

Both Todd and Stan have approached the trusteeship with intent to vindicate the office of the trustee but also with their own interests in mind.

...

So, I've made the requisite finding to exercise my discretion to remove the trustees. ... I'm not burdened by the costs of a new trustee because of the history of costs in this case and the risks that those costs will continue without court intervention. I wish it were not so, counsel, that

there will be future costs, but there simply will be.
That's the course of this case.

...

My order is not intended to influence settlement.
It's to ensure a future administration of this trust
different from the past[.]

II RA0271-274.

These findings were memorialized in an Order Finding Violation of
NRS 163.115 and Ordering Additional Briefing to Determine Timing of
the Removal of Trustees, in which the Court set forth it had:

[r]eviewed the pleadings and motions on file,
considered the sworn testimony of Kimmel and
Kevin Riley, heard the arguments of the Parties
and based on the Court's long-standing
relationship with the file, finds as follows:

- 1) the existence of a lack of cooperation between
the Co-Trustees has and continues to substantially
impair the administration of the []Family Trust;
and
- 2) the Co-Trustees are susceptible to removal
as Co-Trustees of the Family Trust.

II RA0286. The Court ordered that:

the actions and positions taken by the Co-Trustees
and the discord and conflict of personalities
between the Co-Trustees have and continue to
result in a lack of cooperation between the Co-
Trustees that has and continues to substantially
impair the administration of the Family Trust, in

violation of NRS 163.115(b), warranting possible removal of the Co-Trustees.

II RA0286. The Court further directed the parties to submit briefs on various issues, including “the Court’s authority to prohibit trust counsel from being compensated by the trust corpus[.]” II RA0287.

Wendy was the only party who directly addressed the Court’s inquiry about its authority to deny Stan and Todd compensation. Citing specific Nevada statutes and case law, she argued that by operation of NRS 163.190, the trustees’ violation of NRS 163.115(2)(b) is a breach of trust as a matter of law, that denial of payment of fees for representing Todd and Stan would not be a penalty, but would instead be based on their improper administration of the Trust in the post-trial period for their own benefit. II RA0312-313.

On February 25, 2021 and based on its Order Finding Violation of NRS 163.115 and Ordering Additional Briefing to Determine Timing of the Removal of Trustees, the Court entered its Appointment Order, appointing Proctor as Temporary Trustee of the Trust, holding:

From February 18, 2021, until further order of this Court, Todd and Stanley Jaksick are not entitled to trustee fees or reimbursement or payment from the Family Trust for professional fees, including attorney’s fees

related to this litigation or the Family Trust, with the exception of attorney's fees related to the appeal in this matter (Case No. 81470) currently pending in the Nevada Supreme Court. This Order is not intended [sic] disrupt the appellate proceedings, the relationship between the trustee and their attorneys, the payment of attorney's fees from the Family Trust for the appellate proceedings, or the payment of legal fees or other professional expenses for Todd and Stanley Jaksick that were incurred prior to February 18, 2021. The Temporary Trustee may recommend the payment of attorney's fees to the trustees' trust attorneys if the fees were incurred to effect the orderly and efficient administration from the Co-Trustees to the Temporary Trustee.

I AA000138 (emphasis added). Stan's counsel filed Notice of Entry of the Appointment Order on February 25, 2021. V RA0937. No objections to or appeals of the Appointment Order were filed. V RA0936-937.

2. District Court Incorporated Its Findings of Fact into Prioritization Rulings and Entered Four Fee Orders

Thereafter, the Court informed the parties of its inclination to prioritize Proctor's administrative expenses to be paid first before the expenses incurred by the administration of Todd and Stan. II RA0397. The Court had before it the Trustee's First Status Report, in which Proctor reported that the Trust had less than \$150,000, that the Trust owned minority interests in entities with at most indirect interest in

underlying real property, that the Trust had no readily liquid assets and large amounts of liabilities. II RA0318-319. The Trustee reported that paying ongoing his administrative fees was vital to ascertaining the financial position of the Trust. Id.

At the hearing on the First Application for Approval and Payment of Compensation to Fletcher & Lee (the “First Fee Application”), III RA0410-458, the Court also had before it the Trustee’s Second Status Report, in which Proctor outlined the value of assistance of counsel as a “direct and consequential effect on assets and liabilities of the Trust and what might be available to distribute to beneficiaries of the Trust.” III RA0462. The Court supported its priority ruling: “[a]nd it was the posttrial dysfunction that led to the appointment of Mr. Proctor and his counsel, who I whole heartedly support in her participation. And that’s an integral part of my priority analysis.” III RA0573. “And I’m probably gonna fall back into some equity analysis that is in separable [sic] from the fact that Todd and Stan as trustees are also Todd and Stan as individual siblings.” III RA0564. The Court clarified that he distinguished the issues of priority and entitlement: he did not invalidate the entitlement to fees on counsel for the former trustees but focused on

the priority of payment of fees given the lack of funding in the Family Trust. III RA0574. The Court explained that the progress made by Mr. Proctor was “exactly what I anticipated, and ... the former trustees were unable to bring the same progress that Mr. Proctor has.” III RA0575. The Court emphasized the basis for his findings focused on the posttrial conduct: “I’m focused specifically on posttrial conduct. I am not revisiting what the jury did. But my observation is that Todd and Stan were so blinded by their personal interests under the umbrella of fiduciary duty, that their administration of this trust ground to a halt.” III RA0577.

Four fee orders have been entered granting Proctor’s attorneys’ fees. I AA000140-143; I AA000144-145; II AA000336-337; II AA000344-346. In the First Fee Order and as a result of Proctor’s request that his lawyers be paid *in pari passu* with other counsel for the trust, III RA0416-417; III RA0583-584, the Court found that

[C]ause exists to approve the payment of these fees 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. The Court finds that the proposal of Fletcher & Lee to receive payment at this time *in pari passu* with the fees paid to

counsel for the co-trustees through the appointment of the Temporary Trustee is a reasonable approach at this time. The Court finds that in approving this proposal, the Court's overall approval of Fletcher & Lee's fees in amount and as to first priority of payment along with the Temporary Trustee's fees, is not affected.

I AA000141. The Court also ordered that, for the time being, Fletcher & Lee was to be paid as a first priority obligation along with the Trustee's fees. I AA000142. Although Stan and Todd objected to the First Fee Application, no objections or appeals to the First Fee Order were filed. V RA0929-930.

On May 25, 2022 and without objection from any party, the Court entered its Second Fee Order, approving the fees of Proctor's lawyers and holding that Fletcher & Lee was to be paid as a first priority obligation along with the Trustee's fees. I AA000145. No objections to or appeals from the Second Fee Order were filed. V RA0923-924.

On November 18, 2022, Proctor filed Fletcher & Lee's Third Fee Application, supported by the Declaration of Cecilia Lee and by a request for judicial notice of the record. I AA000153-154. Stan filed his Response to Third Interim Application for Approval and Payment of Compensation to Fletcher & Lee (the "Response"). I AA000211-213. In his Response,

Stan objected to the priority treatment of Fletcher & Lee's fees. I AA000211. Notably absent from the Response are any citations to the law that supports Stan's argument that the Court lacked authority to order Fletcher & Lee's fees to be paid on a first priority basis. I AA000211-213.⁴

On December 8, 2022, the Court conducted a hearing on the Third Fee Application, at which the Court admonished Stan's counsel and asked, "Do you want me to remind you why they [Stan and Todd] were removed as co-trustees, Counsel?" II AA000301. The Court continued, "The reason why we have this trustee is we will be going in perpetuity with these two brothers." II AA000301. The Court noted that Stan "and others at different times assert massive amounts of expectations against [Proctor] and then complain about maximum payment requests from the trustee." II AA000298. The Court made the following findings:

I find the services provided by Mr. Proctor to be distinguishable from the services provided by Trustees Todd and Stan. Trustees Todd and Stan

⁴ Stan is appealing only the portion of the Third Fee Order regarding priority payment, Opening Brief, p. 2. Accordingly, Proctor will not address the other issues in Stan's Response. For the same reasons, Stan should not be heard to characterize Fletcher & Lee's fees as "significant" when he himself admits the reasonableness of the fees are not at issue. Opening Brief, pp. 2-3.

were influenced in some measure by their own individual interests despite the trustee being brought in to protect them, and I will, therefore, treat Mr. Proctor's trustee payments at a higher administrative level.

II AA000323.

On December 9, 2022, the Court entered its Third Fee Order, in which the Court ordered – for the third time – that Fletcher & Lee was to be paid the full amount of its fees as a first priority obligation along with Proctor’s fees, in Proctor’s discretion. II AA000337. The Court found that the fees are reasonable, necessary and beneficial to the Trust and, consistent with its findings placed on the record quoted above, found that “the fees incurred by [Proctor] for his services and those of his counsel are distinguishable from those incurred by the former trustees [Stan and Todd] who had individual interests at stake.” II AA000337.

On March 20, 2023, the Trustee filed Fletcher & Lee’s Fourth Fee Application, supported by the Declaration of Cecilia Lee and by a request for the Court to take judicial notice of the record. V RA0796. No opposition was filed to the Fourth Fee Application. V RA00914. On April 5, 2023, the Fourth Fee Order was entered, in which the Court ordered that Fletcher & Lee was to be paid the full amount of its fees as a first

priority obligation along with Proctor's fees, in Proctor's discretion. II AA000345. The Court entered findings that the fees are reasonable, necessary and beneficial to the Family Trust and that "the fees incurred by the Trustee for his services and those of his counsel are distinguishable from those incurred by the former trustees [Stan and Todd] who had individual interests at stake." II AA000345. No appeal was taken from the Fourth Fee Order. V RA0913-914.

3. District Court Directed Proctor to Investigate Fees and Costs of Litigation

The Trust's obligations were forefront in the Court's thinking when Proctor was appointed, and the Court directed Proctor to develop a plan for payment of the Trust's obligations. II AA000139. Thereafter, the Court held a hearing on the former trustees' request for immediate payment of their attorneys from the Trust. IV RA0712-785. The Court acknowledged the challenge to prevent pushback on the attorneys who earned the fees but to honor Proctor's concern that what the parties were requesting would deplete so much cash as to lead to a potential shortfall in the future. IV RA0744. The Court emphasized his appreciation for Mr. Proctor's appointment and the presence of his counsel: "When I read Mr. Proctor's partial opposition, ... [t]here was a thoroughness and

neutrality about it that was palpable to me. I don't want to give to Mr. Proctor and counsel a blank check in perpetuity, they're not asking for one obviously. But I just acknowledge the expense. But it is through Mr. Proctor's work that this Trust will be administered and terminated. ... I will ensure that all reasonably incurred expenses will be satisfied as presented by Mr. Proctor and his attorney." IV RA0763. The Court stated:

So what I'd like you to do, Ms. Lee, is to get together with Mr. Hosmer-Henner, Mr. Robison, Mr. Lattin, and Mr. Johnson and figure out in consultation with your client what a new proposed stipulation would look like that contemplates immediate 2022 payment of some amount. I'm not troubled at all if it's above the 50,000 dollars earlier contemplated. It just can't be 1.3 million dollars in the aggregate, with what Mr. Proctor has told me.

...

I just have to know that the trustee has preserved whatever amount is professionally reasonable to reserve to pay the unknowns.

IV RA0766; 768.

Proctor investigated the Trust's expenses of the prior trustees' administration arising from the First Case.⁵ III RA0464, 489-491;

⁵ Stan argues that Proctor has breached his duty of impartiality based on NRS 164.720, which deals with treatment of beneficiaries. Opening

IV RA0620-698; IV RA0704-705. Below are charts summarizing evidence presented to the Court of the fees and costs incurred by attorneys who represented Stan, Todd, Kimmel and Riley as co-trustees (Maupin Cox & Legoy);⁶ attorneys who represented Todd individually (Robison Sharp Sullivan & Brust); attorneys who represented Stan as co-trustee (Kreitlein Leeder Moss and McDonald Carano); and attorneys who represented Stan individually (McDonald Carano). The charts report the fees and costs incurred, the fees and costs paid by the Trust before Proctor was appointed; and the fees and costs paid by Proctor:

Client: Todd Jaksick						
Firm & Capacity	Total Liability	Paid Prior to 2/18/2021	Paid After 2/18/2021	Balance	% Paid	Cite
Maupin Cox Legoy - Cotrustee	\$ 792,063.22	\$ 550,099.23	\$ 144,878.39	\$ 97,085.60	88%	IV RA0631; IV RA0793
Robison, Sharp, Sullivan & Brust - Individually	\$ 400,000.00	\$ 224,654.10	\$ 108,000.00	\$ 67,345.90	83%	IV RA0626, 634-635; IV RA0793
Robison, Sharp, Sullivan & Brust - Individually, Appeal	\$ 51,212.20	\$ -	\$ 30,727.32	\$ 20,484.88	60%	IV RA0635; IV RA0793
Total	\$ 1,243,275.42	\$ 774,753.33	\$ 283,605.71	\$ 184,916.38	85%	

Brief, p. 8. At issue here is the priority of payment of expenses of the Trust, not the treatment of beneficiaries who receive distribution only after the Trust's expenses are paid. For the same reasons, Stan's reliance on Ahern v. Montoya (In re Connell Trust), 133 Nev. 137, 140, 393 P.3d 1090, 1093 (2017) is misplaced because Proctor is not a beneficiary of the Trust and has not made any decisions that favor himself.

⁶ The charts do not duplicate the fees incurred by Maupin Cox & Legoy in representing Stan as a co-trustee; Maupin Cox & Legoy's fees are only reflected in the chart pertaining to Todd.

Client: Stan Jaksick						
Firm & Capacity	Total Liability	Paid Prior to 2/18/2021	Paid After 2/18/2021	Balance	% Paid	Cite
Kreitlein Law Firm - Cotrustee	\$ 239,901.61	\$ 222,356.80	\$ 10,526.89	\$ 7,017.92	97%	III RA0612; IV RA0793
McDonald Carano - Cotrustee	\$ 417,043.67	\$ 147,065.64	\$ 161,686.82	\$ 108,291.21	74%	IV RA0633; IV RA0793
McDonald Carano - Individually	\$ 250,000.00	\$ -	\$ 150,000.00	\$ 100,000.00	60%	IV RA0626; IV RA0793
Total	\$ 906,945.28	\$ 369,422.44	\$ 322,213.71	\$ 215,309.13	76%	

Also compiled by evidence in the record, the following chart reports what Proctor's attorneys have been awarded and what they have been paid, and compares that with the percentages paid to the attorneys for the former trustees in the litigation.

Client: Temporary Trustee						
Firm & Capacity	Total Liability	Paid Prior to 2/18/2021	Paid After 2/18/2021	Balance	% Paid	Cite
						I AA000142; I AA000145; II AA000337; II AA000345;
Fletcher & Lee	\$ 491,666.42	\$ -	\$ 469,774.09	\$ 21,892.33	96%	V RA0903
Fletcher & Lee - Appeal	\$ 58,000.00	\$ -	\$ -	\$ 58,000.00	0%	V RA0908
Total	\$ 549,666.42	\$ -	\$ 469,774.09	\$ 79,892.33	85%	

This evidence completely refutes Stan's assertion that Proctor is engaging in "favoritism" of his own lawyers over those of the prior administration. Opening Brief, p. 5. The evidence further corrects Stan's unsupported assertion that Proctor has not paid "any" of the former lawyers. Opening Brief, pp. 5-6. Moreover, unlike prior attorneys in the First Case, whose fees are fixed, Proctor's attorneys continue to perform legal services on behalf of Proctor as the sole trustee. As a result, the

proportionality of payment will continue to decrease for Proctor's attorneys in comparison to Stan's lawyers.

Proctor is currently holding approximately \$590,000 in cash, which, in the exercise of his prudent financial discretion, he is reserving for future obligations of administration. V RA0903. These include 2022 and 2023 tax liabilities, the costs of this appeal, ongoing administrative costs and costs associated with further liquidation of the Trust. Id. Although the District Court has consistently allowed payment of Proctor's administrative costs on a priority basis, Proctor always considers overall Trust liabilities before paying his own counsel. Id. Proctor has not paid his counsel in full. Id. The evidence in the record confirms that Proctor continues to incur costs of administration, whereas the expenses of the prior administration are fixed, as discussed below.

4. District Court Approved Stipulated Fee Order

In compliance with the Court's directive,⁷ on December 20, 2022, Proctor, on the one hand, and parties who were authorized to be paid their legal fees by the Trust in the First Case, on the other hand, entered into a Stipulation for Payment of Legal Fees Owed by the Family Trust (the

⁷ IV RA0766, 768.

“Fee Stipulation”), which the Court approved in its Order Granting Stipulation for Payment of Legal Fees Owed by the Family Trust (“Stipulated Fee Order”). IV RA0786-790; IV RA0791-794. In the Fee Stipulation and Stipulated Fee Order, the Court approved the parties’ resolution of the balance of the amount owed by the Trust (1) for the fees incurred in representing the former trustees in the First Case, (2) for the fees Stan and Todd obligated the Trust to pay for their personal representation in the First Case; and (3) for the fees awarded to Wendy in the First Case and for which the Trust was obligated to pay \$198,000. The total outstanding balance owed by the Trust, i.e., net of the amounts the Trust had already paid, on these obligations was \$1,207,699.03; this is referred to as the “TOTAL OWED” in the Fee Stipulation and Stipulated Fee Order. IV RA0788; IV RA0793. The parties stipulated and the Court ordered that Proctor pay 60 percent of the TOTAL OWED to each of the parties’ law firms by December 24, 2022. Significantly, the parties also stipulated that “[i]n the Trustee’s exercise of his prudent business judgment and discretion, the Trustee will remit the unpaid balance of the TOTAL OWED to each of the Law Firms as funds become available

to the Family Trust as determined to be sufficient by the Trustee.”

IV RA0789; IV RA0793 (emphasis added).

Stan is a party to the Fee Stipulation. IV RA0786.

The Trustee timely made the payment of 60 percent of the TOTAL OWED to each law firm by December 24, 2022. V RA0904. After the Trustee timely performed on the Stipulated Fee Order, on January 5, 2023, Stan filed his Notice of Appeal of the Fletcher & Lee Third Fee Order. II AA000338-343. Stan did not inform this Court of the Stipulated Fee Order in his Opening Brief.

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion in ordering Proctor, in his discretion, to prioritize payment of his attorneys in the Third Fee Order. II AA000337. The Trust provisions and Nevada law gives the Court this discretion, which was properly supported by findings of fact. The Third Fee Order should be affirmed on this basis alone.

The Stipulated Fee Order leads to this same conclusion. Its terms bind Stan, IV RA0786, and Nevada law requires that the terms be enforced. The Stipulated Fee Order conditions the payment of the balance to Stan’s attorneys’ solely on Proctor’s *discretion*, nothing more

and nothing less – no “first in first out,” no proportionality, no reference to the payment of Proctor’s counsel or the prioritization ruling. IV RA0793.

Stan apparently seeks to avoid the consequences of his Stipulated Fee Order in the present appeal by not informing the Court about the Stipulated Fee Order. The principle of judicial estoppel is at issue because Stan is taking a contrary position in this Court from the position he agreed to in District Court regarding when his attorneys are to be paid in the Stipulated Fee Order. IV RA0791-794. His conduct is particularly questionable because the Third Fee Order was entered on December 9, 2022 (confirming, for the third time, the prioritization ruling), II AA000336-337; he executed the Stipulated Fee Order on December 20, 2022, IV RA0786-790; and Proctor performed as required by making 60 percent payment on Stan’s behalf by December 24, 2022, V RA0940. The Notice of Appeal then followed on January 5, 2023. II AA000338-343.

Stan also attacks the Stipulated Fee Order by asking this Court in this appeal to impose conditions on Proctor that are simply not contained therein. The relief Stan seeks has the effect of adding a new term or terms to the Stipulated Fee Order, to the effect that Proctor is precluded

from following the prioritization ruling of the Third Fee Order, or adding a new term that Proctor's exercise of discretion in paying Stan's lawyers must be *in pari passu* with Proctor's counsel, or adding a new term that the prior cotrustees' legal fees have to be paid in priority (so-called "first in first out" in Stan's brief). These efforts are a brazen impermissible collateral attack on the Stipulated Fee Order.

This is not the only impermissible collateral attack. Stan's appeal puts at issue the Appointment Order, a final order wherein the District Court unambiguously held that Stan's and Todd's fees were not to be paid without "further order of this court." I AA000137-139. That "further order" came in the form of the Stipulated Fee Order. IV RA0791-794. Stan's appeal also puts at issue Proctor's First Fee Order, in which the District Court unambiguously held that Proctor's lawyers could be paid *in pari passu* with fees from the First Case, but that the Court's prioritization ruling was not altered or affected. I AA000140-143. Stan's appeal puts at issue Proctor's Second Fee Order and Fourth Fee Order, in which the District Court repeated its prioritization ruling and to which no party objected. I AA000144-145; II AA000344-346. All of these are final orders from which no appeal was taken, the holdings of which are

placed at issue here in violation of the rule against impermissible collateral attack.

Stan got the relief he bargained for in the Stipulated Fee Order. He is unaffected by the Third Fee Order, even if it were overturned, because Stan is still bound by the exercise of Proctor's discretion in performing the balance of the Stipulated Fee Order. Stan is thus not aggrieved and lacks standing.

On any one of these grounds, or on all grounds, the Third Fee Order should be affirmed in its entirety.

ARGUMENT

1. Nevada Law Provides for the Court to Exercise its Discretion in Ordering Priority Payment in the Third Fee Order.

On its merits, Stan's appeal from the Third Fee Order is unsupportable. Contrary to the Opening Brief, the Trust provisions and Nevada law permit the District Court to order priority payment of Proctor's attorneys' fees.

Proctor "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[.]" NRS 163.023. In turn, "[t]he

court may enter any order or take any other action necessary or proper to dispose of the matters presented by a petition, including the appointment of a temporary trustee to administer the trust in whole or in part.” NRS 164.020(2).⁸

The Trust Agreement provides that “[t]he Trustee is to be personally liable or subject to surcharge only if the Trustee should act without reason, in bad faith, or in violation of specific provisions of this Trust Agreement.” I AA000033. Proctor may “compromise or otherwise adjust any claims or litigation against or in favor of the trust estate.” I AA000030. In addition, the Trust Agreement gives Proctor discretion in all aspects of managing the Trust, beginning with incorporation of the Prudent Investor Rule: **“[t]he Trustee’s investment and management decisions respecting individual assets and courses of action are to be evaluated not in isolation, but in the context of the trust portfolio as a whole and as part of an overall investment strategy[.]”** I AA000027 (emphasis added). The Trustee is authorized “to operate at the risk of the trust estate” any business the

⁸ Distribution of property and money may also be prorated, NRS 163.027(1)(b), and if without the beneficiaries’ consent, may be prorated “as authorized by law.” NRS 163.027(2).

Trustee considers “advisable[.]” I AA000028. The Trustee has the ability to minimize taxes and “may take any action and make any election, in the Trustee’s discretion[]” to do so. I AA000029. The Trustee “may withhold from distribution, in the Trustee’s discretion” any part of distribution that may be subject to liabilities. I AA000030. Indeed, the limit on the Trustee’s discretionary powers is in connection with a legal obligation, in the Trustee’s *individual* capacity, to support and maintain any of the beneficiaries. I AA000030-31.

Although all of these provisions are not directly related to the Third Fee Order, as a whole they reflect the intention in the Trust Agreement to provide discretion for the Trustee to manage the Trust as Proctor deems advisable. For example, Proctor has reported to the District Court that “in exercising prudent financial discretion, and because of the litigious nature of this matter, the Trustee is reserving the cash balance for future obligations of administering the Family Trust. These obligations include, but are not limited, to the 2022 and 2023 tax liabilities[], the Supreme Court appeal, ongoing administration costs, and costs associated with any further liquidation of Trust assets.” V RA0903. This is precisely the discretion granted Proctor by the Trust

Agreement with respect to planning and setting aside for liabilities, including taxes. I AA000029. It is further in keeping with the District Court's requirement in directing Proctor to pursue what resulted in the Stipulated Fee Order, that Proctor exercise his discretion: "I just have to know that the trustee has preserved whatever amount is professionally reasonable to reserve to pay the unknowns[.]" IV RA0768.

In addition, supported by documentary and testimonial evidence cited above, the District Court made appropriate findings and removed Stan as cotrustee for "[l]ack of cooperation between cotrustees [that] substantially impairs the administration of the trust[.]" NRS 163.115(2)(b).⁹ Stan argues that neither his removal nor the factual basis for his removal could be grounds for prioritization. Opening Brief, pp. 11-12. Neither contention holds up. This is so because as a direct result of Stan's violation of NRS 163.115(2)(b), "the trustee may be removed and denied compensation in whole or in part, and any beneficiary, cotrustee or successor trustee may treat the violation as a breach of trust." NRS

⁹ These findings are found at I RA0008-9; I RA0054-55; I RA0087; I RA0119; I RA0169-174; II RA0271-274; II RA0286; II RA0299-306; I AA000137-138.

163.190¹⁰; King v. King, 295 Ore. App. 176, 190, 434 P.3d 502, 510 (Ore. App. 2018) (breaching trustee was properly surcharged for losses incurred by her breaches, which may be satisfied from trustee's income from the trust without regard to the spendthrift provision; court applied NRS 163.190 to conclude that a violation of NRS 163.010 to NRS 163.200 is a breach of trust, for which Nevada law granting the court "full equitable powers" includes a "practical and fair" method for protecting the interests of trust beneficiaries, citing Diotallevi v. Sierra Dev. Co., 95 Nev. 164, 167, 591 P.2d 270 (1979)). Thus, on this basis alone, the Court had more than sufficient legal basis for prioritization. The District Court did not deny Stan compensation,¹¹ but had its full equitable powers to protect the interests of the beneficiaries as a result of Stan's deemed breach, including prioritization.

¹⁰ Stan argues that he cannot be found in breach of trust. Opening Brief, p. 11-12. His position relies on misreading the Appointment Order, in which the Court made it clear that it was neither finding a breach nor a lack of breach of trust. I AA000137-139. Stan's position also ignores the legal effect of NRS 163.190 which treats Stan's violation of NRS 163.115(2)(b) as a breach of trust as a matter of law.

¹¹ The Court did not invalidate the entitlement to fees on counsel for the former trustee but focused on the priority of payment fees given the lack of funding in the Family Trust. III RA0574.

Additional support for the propriety of the Court's prioritization is in NRS Chapter 153, which "governs fiduciaries acting under trusts, wills and court orders in estate proceedings, whether the estate has been distributed or proceedings are now pending." NRS 153.010. "[A] of the provisions of chapters 132, 153 and 155" apply to the provisions of Chapters 162-167. NRS 164.005. This statutory scheme as a whole specifically empowers the district court with "just and reasonable" supervision regarding payment of trustee expenses and compensation:

The expenses and compensation of a trustee of a testamentary trust must initially be governed by the terms of the will which created the testamentary trust or as otherwise ordered by the court at the time the testamentary trust is established. Thereafter, subject to any contrary terms of the testamentary trust or an order of the court, **the court shall allow the trustee his or her proper expenses and such compensation for services as are just and reasonable. . . . The provisions of this section must not be interpreted to abridge the authority of a court having jurisdiction over a testamentary trust pursuant to NRS 153.020 or 164.010 to review and settle the expenses and compensation of the trustee of a testamentary trust upon the petition of any interested person.**

NRS 153.070 (emphasis added). The “just and reasonable” supervision of the Court over the payment of trustee expenses and compensation is repeated regarding nontestamentary trusts:

The expenses and compensation of a trustee of a nontestamentary trust must initially be governed by the terms of the nontestamentary trust. **Thereafter, subject to any contrary terms of the nontestamentary trust, the court shall allow the trustee his or her proper expenses and such compensation for services as are just and reasonable.**

NRS 164.043(1). In addition,

If the court grants any relief to the petitioner [including removing a trustee, NRS 153.031(1)(k)], the court may, in its discretion, order any or all of the following additional relief if the court determines that such additional relief is appropriate to redress or avoid an injustice:

(a) Order a reduction in the trustee’s compensation.

NRS 153.031(3)(a). Further, “[w]hen a trustee fails to perform any of the duties imposed upon the trustee by this chapter the trustee may be removed, the trustee’s compensation may be reduced or forfeited, or other civil penalty inflicted, **in the discretion of the court.**” NRS 165.200 (emphasis added).

The Trust Agreement provisions in conjunction with the extensive statutory scheme – the specific grant of discretion found in NRS 165.200, the “just and reasonable” standard found in NRS 153.070 and NRS 164.043(1), the power to remove Stan for his breach of NRS 163.115(2)(b) and to treat his breach *as a breach of trust as a matter of law* in NRS 163.190 – gave the District Court power, authority and discretion to enter the prioritization ruling.¹² This is what the Court ordered in the First, Second, Fourth and Third Fee Orders (only the latter of which is on appeal). I AA000142, 145; II AA000337, 345.

But the District Court’s power does not end there. The Nevada Supreme Court has long held that “the court could bring to bear its full equitable powers.” Diotallevi, 95 Nev. at 167, 591 P.2d at 272. This is the subject of the next argument.

2. The District Court Made Numerous Findings of Fact and Properly Exercised its Discretion

A district court’s order regarding the distribution or administration of trust funds will generally not be disturbed absent clear demonstration

¹² The prioritization ruling findings are located at II AA 000301; II AA000323; II AA000337; II RA0397; III RA0564; III RA0573-575, 577; IV RA0763.

of abuse of discretion. Hannan, 114 Nev at 362, 956 P.2d at 802. In Hannan, the district court denied a trustee's request for reimbursement of necessary expenses. Id. The Supreme Court held that the district court abused its discretion "[b]ecause the district court offered no basis for its refusal to reimburse the co-trustees for their reasonably necessary expenses[.]" Id., 114 Nev. at 363, 956 P.2d at 803. Stan cites Hannan but got the application of the case wrong. Opening Brief, p. 6. Hannan is important here because, contrary to Stan's argument, the District Court did exactly what the Supreme Court found lacking in that case: it entered adequate findings of fact.

First, it is important to note that the District Court did not disallow Stan's attorneys' fees for the First Case. Those fees were specifically allowed. III RA0574. Instead, the Court focused on the priority of payment of fees given the lack of funding in the Trust.

The second and most significant distinction from Hannan is that the District Court here *made numerous findings of fact*. These findings of fact supported the removal of Stan and the Appointment Order. II RA0286; I AA000137-139.¹³ These findings of fact were also the foundation on

¹³ These findings are found at I RA0008-9; I RA0054-55; I RA0087; I

which the Court made its prioritization ruling.¹⁴ They included the inability of Stan and Todd to distinguish their personal interests from their fiduciary obligations; the concerns raised by trustee Kimmel that Stan was not allowing access to financial information about assets in which the Trust had an interest; the inability of Stan and Todd to administer the Trust or to liquidate its assets, pay Trust liabilities or to wind up the Trust. I RA0054-55, 87, 169-174; II RA0271-274. The Court also had Proctor's first and second status reports, in which he reported the illiquidity of the Trust and the difficulties in determining asset values, liquidating Trust assets and determining Trust liabilities. I RA0318-319; III RA0461, 463. Importantly, the Court also found that its prioritization ruling was based on the very same facts that led to the removal of Stan and Todd as trustee. III RA0573; III RA0564; III RA0575; III RA0577.

Thus, Stan's argument that the District Court did not make any findings of fact to support the priority payment in the Third Fee Order is entirely belied by the record.

RA0119; I RA0169-174; II RA0271-274; II RA0286; II RA0299-306; I AA000137-138.

¹⁴ The prioritization ruling findings are located at II AA 000301; II AA000323; II AA000337; II RA0397; III RA0564; III RA0573-575, 577; IV RA0763.

Moreover, the District Court's findings are adequate. The findings are supported by substantial evidence that led the Court to enter the Appointment Order: the pleadings, documents and testimony constituted the evidence that the District Court and, applying the legal standard, a reasonable mind, might accept as adequate to support a conclusion. Stan had conducted himself in such a manner as to violate NRS 163.115(2)(b), a violation that is deemed a breach of trust as a matter of law. NRS 163.190. These findings led the District Court to reiterate at the Third Fee Order hearing that Stan's own conduct caused the Court to exercise his discretion to distinguish the administration of Proctor and treat the payment of his administrative expenses at a higher level. II AA000323.

Ignoring the actual record in this case, Stan's argument rests on his assertion that the District Court did not make findings of fact in entering the Third Fee Order. Now that this inaccuracy has been corrected herein, Stan should not be permitted to change his argument or raise new arguments in his Reply. NRAP 28(c); Bongiovi v. Sullivan, 122 Nev. 556, 570, n.5, 138 P.3d 433, 444, n.5 (2006). Even if he were to raise new arguments against the District Court's factual findings, the District Court's findings meet the standard of substantial evidence and should not

be disturbed because there is no demonstration of abuse of discretion. Hannan, 114 Nev. at 362, 956 P.2d at 802. The Third Fee Order should be affirmed.

3. Stan is Bound by the Stipulated Fee Order.

The Stipulated Fee Order to which Stan is a party specifically provided for the timing of payment of the balance of Stan's attorneys' fees to be in Proctor's sole discretion and when Trust funds are available. IV RA0793. Stan got the benefit of the Stipulated Fee Order: his liability to his lawyers was reduced by the Trustee's timely payment of sixty percent (60%) of the TOTAL OWED by December 24, 2022. The Stipulated Fee Order dictates that the balance will be paid when Proctor decides in the exercise of his discretion and when the Trust has sufficient assets. IV RA0793. The law holds that Stan is bound by the Stipulated Fee Order and that this Court is bound to enforce Stan's stipulation.

Stipulations are of an inestimable value in the administration of justice (Hayes v. State, 252 A.2d 431 (N.H. 1969), and valid stipulations are controlling and conclusive and both trial and appellate courts are bound to enforce them. [Citations omitted.] In Garaventa v. Gardella, 63 Nev. 304, 169 P.2d 540 (1946), it was held to be error when the trial judge did not honor the stipulation of the parties where a rule of evidence (the deadman's statute) was waived. (See also,

Scott v. Justice's Court of Tahoe Township, 84 Nev. 9, 435 P.2d 747 (1968).)

Second Baptist Church v. Mount Zion Baptist Church, 86 Nev. 164, 172-73, 466 P.2d 212, 217-18 (1970).

To be valid, a stipulation requires mutual assent to its terms and either a signed writing by the party against whom the stipulation is offered or an entry into the court minutes in the form of an order. “[I]n construing a stipulation, a reviewing court may look to the language of the agreement along with the surrounding circumstances.” Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 1118, 197 P.3d 1032, 1042 (2008). See also, Phung v. Doan, 134 Nev. 996, 420 P.3d 1029 (2018) (attorneys for the parties filed a signed stipulation with the court that vacated upcoming hearings, stipulated a resolution of all matters, and referenced a forthcoming memorialization of the settlement terms that the parties stated had already been reached. Thus, the parties submitted to the court a writing, signed by the agents of both parties, which identified the parties involved, identified that the subject of the settlement was disputes, and indicated that the parties had promised complete resolution of the matter).

Here, Stan entered into a *written Fee Stipulation* with Proctor, signed by Stan's attorney, that resulted in the written Fee Stipulation Order, thereby leaving no doubt as to exactly the terms to which Stan is bound. IV RA0786-790. One of those terms is that Proctor's payment of the balance due by the Trust on Stan's attorney's fees is in the exercise of Proctor's business judgment and discretion and when Proctor determines the Trust has sufficient assets. IV RA0789.

The significance of these agreed-upon terms cannot be overstated. Stan argues here that the District Court erred in holding that Proctor's attorneys are entitled to be paid in full in priority above Stan's lawyers. Opening Brief, p. 12. Because Stan stipulated that Proctor would exercise his business judgment and discretion in the timing of payment of Stan's attorneys' fees, the relief Stan seeks in this appeal is entirely contrary to his stipulation.

Stan already knew that the Third Fee Order (the order on appeal here) included the prioritization ruling when he entered into the Stipulated Fee Order. II AA000336-367; IV RA0786-790. In spite of this knowledge, Stan agreed that the only condition on the timing of payment of Stan's attorneys' fees is Proctor's prudent business judgment and

discretion – period. IV RA0789. The law holds that Stan is not permitted to avoid those terms to which he agreed by arguing in this appeal against Proctor’s own lawyers being paid first.

4. Stan is Judicially Estopped From Challenging the Timing of Payment of His Attorney’s Fees.

The principle of judicial estoppel also applies. Judicial estoppel prevents a party from stating a position in one proceeding that is contrary to his or her position in a previous proceeding. Vaile v. Eighth Judicial District Court, 118 Nev. 262, 273, 44 P.3d 506, 514 (2002). Nevada law holds that judicial estoppel applies when “(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.” Brock, 133 Nev. at 56, 390 P.3d at 652; Delgado v. Am. Family Ins. Grp., 125 Nev. 564, 217 P.3d 563, 567 (2009) (all five elements are required to be met, invalidating that portion of Mainor, 120 Nev.at 765, 101 P.3d at 318, that only a change in position is required). The Court may invoke the doctrine of judicial estoppel in

its discretion. Brock, 133 Nev. at 55, 390 P.3d at 652, citing Marcuse v. Del Webb Communities, Inc., 123 Nev. 278, 287, 163 P.3d 462, 469 (2007). The doctrine should be cautiously applied only when a party's inconsistent position is from intentional wrongdoing or attempt to obtain an unfair advantage. Id., 123 Nev. at 288, 163 P.3d at 468. The policy of judicial estoppel is to prevent parties from deliberately shifting position to suit requirements of another case concerning the same subject matter. Brock, 133 Nev. at 56, 390 P.3d at 652 (citations omitted).

The five elements are satisfied here: (1) Stan took two positions: in the Stipulated Fee Order, he agreed that the balance of his attorneys' fees would be paid in Proctor's discretion and when Proctor decides the Trust has sufficient assets (IV RA0789); yet here, Stan takes a contrary position by asking this Court to order that Stan's fees are to be paid first (his so-called, "first in first out" approach) or that they must be paid in parity with Proctor's attorneys. (2) The positions were taken in judicial proceedings, one in District Court; the other position in this Court. (3) Stan was successful in the District Court because the Stipulated Fee Order was entered, as a result of which Stan's lawyers were paid 60 percent of their total outstanding balance by December 24, 2022.

IV RA0793; V RA0895. (4) Stan's positions are inconsistent: in the Fee Stipulation, Stan represented to the District Court that the balance of the fees owed to his lawyers would be paid in Proctor's discretion and with Proctor deciding when the Trust has sufficient assets (and on the basis of that Fee Stipulation, the Stipulated Fee Order was entered). Here, Stan argues that his lawyers should be paid first or at least in parity with Proctor's lawyers; and (5) finally, there is no suggestion of fraud, ignorance or mistake.

It merits the Court's attention that Stan's Opening Brief does not even mention the Stipulated Fee Order. This failure to inform the Court strongly appears to be an attempt to sanitize the record before the Court from Stan's own conduct. The last thing Stan wants this Court to know is that he stipulated that his attorneys were to be paid the balance of their fees in Proctor's discretion and as funds are available – a stipulation that directly contradicts the relief he seeks here. Stan's stipulation and the Stipulated Fee Order further give Proctor discretion as to when Stan's attorneys' fees will be paid – the very discretion that Stan argues the law does not give the District Court. The Stipulated Fee Order recites facts, also in Stan's incorrect view a missing element in the

District Court's prioritization ruling. IV RA0792. By his own conduct, Stan cured the very things he argues to this Court are missing from the prioritization ruling in the Third Fee Order. The critical point here is that the principle of judicial estoppel should be applied against Stan.

5. This Appeal is an Impermissible Collateral Attack on No Less Than Four Final Orders

A. Appointment Order and Stipulated Fee Order are Impermissibly Collaterally Attacked.

The Appointment Order plainly and unequivocally held that Stan's attorneys' fees were not going to be paid on Stan's demand or on Stan's timetable, but only on "further order of this Court[.]" I AA000138. The Appointment Order removing the co-trustees was a final and appealable order. NRS 155.190(1)(h).¹⁵ The Appointment Order thus constitutes a final order in which the Court held that the payment of Stan's attorneys' fees would be subject to "further order of this Court[.]" I AA000138.

At the Court's specific direction to Proctor's attorney to confer with all counsel regarding the payment of the former trustees' fees, the

¹⁵ The Nevada Supreme Court, "has jurisdiction to consider an appeal from a district court order only when the appeal is authorized by statute or court rule." Brown v. MHC Stagecoach, LLC, 129 Nev. 343, 344, 301 P.3d 850, 850 (2013).

Stipulated Fee Order was entered on December 20, 2022. Stan is a party to the Fee Stipulation. IV RA0786. He stipulated that his lawyers would receive 60 percent of the total unpaid amount by December 24, 2022. IV RA0788. Stan stipulated that the timing of payment of the balance would be “[i]n the Trustee’s exercise of his prudent business judgment and discretion . . . as funds become available to the Family Trust as determined to be sufficient by the Trustee.” IV RA0789 (emphasis added). Proctor filed and served Notice of Entry of the Stipulated Fee Order on December 21, 2022. V RA0917. No appeal from or challenge to the Stipulated Fee Order has been made and the time within which to appeal has long since expired. V RA0916-917; NRS 155.190(1)(j) (“an appeal may be taken ... within 30 days after notice of entry of an order: ... (j) [d]irecting or allowing the payment of ... attorney’s fee.”).

The Stipulated Fee Order is the “further order” of the District Court required by the Appointment Order to pay Stan’s attorney’s fees. The Stipulated Fee Order specifically conditions the payment of the balance of fees owed to Stan on *Proctor’s exercise of prudent business judgment and discretion* and on *funds being available as determined by Proctor to be*

sufficient. IV RA0793. Proctor exercises his discretion on payment of all the administrative expenses: he has not paid his own attorneys in full even though the Court has consistently and repeatedly held that he may do so. V RA0903. Stan’s lawyers had been paid \$369,422.44, and Todd lawyers were paid \$774,753.33 before Proctor was appointed. See infra, pp. 22-23. As a result of the Stipulated Fee Order, Proctor further paid 60 percent of their outstanding balances by December 24, 2022. III RA0612; IV RA0626, 633, 793. Counsel for the prior trustees and for Proctor have thus been paid roughly in parity – between 76 and 85 percent – and Proctor’s own attorneys continue to accrue fees because their work is not completed.

Stan’s appeal is an impermissible collateral attack on both the Appointment Order and its implementing order, the Stipulated Fee Order. This is so because Stan’s only issue on appeal is that the Third Fee Order permits Proctor to pay his own attorneys before Stan’s attorneys. However, the timing of payment of Stan’s attorney’s fees was conclusively resolved in the Appointment Order: it would be upon “further order” of the Court. I AA000138. The timing of payment of Stan’s attorney’s fees was further conclusively defined in the Stipulated Fee

Order: it would be in Proctor's discretion and when Proctor determined the Trust had sufficient funds. IV RA0793. The appeal is thus inescapably an attempt to do an end-run around the Appointment Order and the Stipulated Fee Order because Stan asks this Court to direct that his attorneys are paid first. This effort is an impermissible collateral attack on these two final orders.¹⁶

The law supports this conclusion. In Mainor, 120 Nev. at 756-58, 101 P.3d at 312-314, parents of their disabled son brought a legal malpractice case against lawyers who represented the disabled son and his wife in a prior medical malpractice case, for alleged failure to obtain a guardian for the son in connection with approval of a global settlement. The district court found the settlement was fair and reasonable and no party objected to it. Id., 120 Nev. at 761, 101 P.3d at 316. No one objected to the findings. No one moved to set aside the settlement order. Because

¹⁶ The doctrine of impermissible collateral attack only arose after Stan filed his Notice of Appeal. Timing is important here: the Third Fee Order was entered on December 9, 2022. II AA000342. Thereafter, on December 20, 2022, Stan entered into the Fee Stipulation and the Stipulated Fee Order was entered, IV RA0786, 791, which is the catalyst to the doctrine of impermissible collateral attack on both the Appointment Order and the Stipulated Fee Order that implements the Appointment Order.

orders of the district court are presumptively valid if regular on their face, the Supreme Court reasoned that the order approving the settlement was at most voidable, not void. As a result, even though the settlement order was voidable for failure to obtain a separate guardian for the disabled plaintiff, the conduct of his parents in never contesting approval of the global settlement ratified the order's validity. Id. The Supreme Court held that the District Court erred by permitting the legal malpractice case to proceed as an impermissible collateral attack on the settlement order. Id. 120 Nev. at 764, 101 P.3d at 318. See also, Breckenridge v. Andrews, 88 Nev. 520, 524 501 P.2d 657 (1972) (probate decree in 1952 distributed unconditionally the remainder interest in trust property of the decedent, and was an appealable decree from which no appeal was taken. The decree was final and *res judicata* as to the rights of all persons interested in the estate and immune from collateral attack) (citing with approval Garteiz v. Garteiz, 70 Nev 77, 82, 254 P.2d 804 , 806 (1969)); Rawson v. Ninth Judicial Dist. Court of Nev., 133 Nev. 309, 315-16, 396 P.3d 842 (2017) (a final, appealable judgment provides plain, speedy and adequate remedy that precludes extraordinary writ relief; even if a void order may be attacked collaterally at any time, party

may use extraordinary writ petition as a vehicle to attack a void only when extraordinary writ relief is available – and it is not available when party had the right to appeal the order).

Here, Stan makes no argument that the Appointment Order was improper, voidable, void or subject to any deficiency whatsoever. Stan also does not even mention in his Opening Brief the Stipulated Fee Order to which he himself is party. Stan makes no suggestion that either the Appointment Order or the Stipulated Fee Order suffered from any defect, much less any basis on which to conclude that they are anything but final, nonappealable and entirely enforceable. Significantly, the order on appeal here – Fletcher & Lee’s Third Fee Order – was entered on December 9, 2022, eleven days **before** the Fee Stipulation was filed and the Stipulated Fee Order for the payment of Stan’s outstanding attorney’s fees was entered. II AA000342, IV RA0786, 791. Stan was thus entirely aware in entering into the Fee Stipulation that the Court had already ordered (for the third time) that Fletcher & Lee was to be paid the full amount of its fees as a first priority obligation. II AA000343. In spite of this knowledge, the timing for payment of the balance of Stan’s fees in the Fee Stipulation and Stipulated Fee Order is conditioned *solely*

on Proctor's business judgment and his discretion in determining when to pay the balance of Stan's attorney's fees. IV RA0789, 793. Stan does not argue that Proctor has improperly exercised his discretion.

Accordingly, this appeal of the prioritization ruling of the Third Fee Order is an impermissible collateral attack on the Appointment Order as implemented by the Stipulated Fee Order, in which Stan agreed that Proctor has complete discretion in the timing of payment of Stan's outstanding attorney's fees when the Trust has sufficient assets.

B. The First, Second and Fourth Fee Orders are Impermissibly Collaterally Attacked

In addition, Stan's appeal of the prioritization ruling is an impermissible collateral attack on the First, Second and Fourth Fee Orders. In these Orders, the District Court unequivocally held that Proctor's expenses of his administration, including his attorneys, would be paid first. I AA000142, 145; II AA000345. No party appealed any of these Orders, which are indisputably final. V RA0913, 923-924, 929-930; NRS 155.190(1)(j) (appeal may be taken from an order "appointing a trustee."). The holdings of the First, Second and Fourth Fee Orders may not be altered by the current appeal.

But that is precisely what Stan is requesting in seeking relief of “first in first out” or payment *in pari passu*.¹⁷ The impermissible collateral attack is readily apparent in the First Fee Order, in which the Court authorized Proctor’s counsel to be paid *in pari passu* with prior counsel, but specifically ordered that its holding on prioritization would not be altered. I AA000142. In this appeal, Stan attacks that holding when he asks this Court for the remedy of requiring all payment of all lawyers be made *in pari passu*. The District Court already considered that relief and held it was acceptable at the time but did not alter the prioritization ruling, which the Court subsequently adopted in the Second and Fourth Fee Orders. This is precisely the revision to final orders the doctrine of collateral attack prohibits.

¹⁷ No basis in the law exists for the “first in first out” result. Stan makes unsupported factual assertions regarding hardship to law firms (who are not party to this appeal) and to “judicious billing” in this case where the reasonableness of Proctor’s attorneys’ fees is not at issue. Opening Brief, p. 12. Stan cites only State Dep’t of Taxation v. Kawahara, 131 Nev. 425, 427, 351 P.3d 746, 747 (2015), a case that refers to priority between recorded and unrecorded real property liens. Opening Brief, p. 12. Stan makes no connection between real property recordation – generally, the purpose of which is to provide a subsequent purchaser with notice – and his novel “first in first out” proposition here.

6. Stan is Not Aggrieved and Lacks Standing.

The binding nature of the Stipulated Fee Order also confirms that Stan is not aggrieved and thus lacks standing. Only “[a] party who is aggrieved by an appealable judgment or order” has standing to appeal to this Court. NRAP 3(a); Estate of Hughes v. First Nat’l Bank of Nev., 96 Nev. 178, 180, 605 P.2d 1149, 1150 (1980). In order to be aggrieved, “either a personal right or right of property [must be] adversely and substantially affected’ by a district court’s ruling.” Valley Bank of Nev. v. Ginsburg, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994). The grievance must be substantial in that the district court’s decision imposes an injustice, or illegal obligation or burden, on the party, or denies the party an equitable or legal right. Webb v. Clark Cty. Sch. Dist., 125 Nev. 611, 617, 218 P.3d 1239, 1244 (2009); Tonya M. v. Washoe Cty. Dep’t of Soc. Servs., 133 Nev. 790, 792, 406 P.3d 494, 496 (2017).

Stan is not aggrieved. He agreed in the Stipulated Fee Order that the timing and amount of Proctor’s payment of the balance of Stan’s attorneys’ fees is solely within Proctor’s discretion and based on funds available in the Trust. V RA0789, 793. Stan is bound by his agreement and, as argued above, is not permitted to do an end-run around that

agreement in this Court. Assuming merely for argument's sake that this Court were to reverse the Third Fee Order, that victory would produce nothing for Stan because he has agreed that Proctor has discretion in satisfying the balance of Stan's attorneys' fees as funds become available as determined to be sufficient by Proctor.

CONCLUSION

On any one or all of these grounds, Proctor asks the Court to affirm the Third Fee Order.

Dated this 22nd day of June, 2023.

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NRAP 28.2 CERTIFICATION

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 requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 11,586 words.

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 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 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 22nd day of June, 2023.

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PROOF OF SERVICE

Pursuant to NRAP 25(d), I certify that I am an employee of Fletcher & Lee, 448 Ridge Street, Reno, Nevada 89501, and that on June 22, 2023, I served the Respondent's Answering Brief via notice by electronic means to registered users of the court's electronic filing system consistent with NEFCR 9 as follows:

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I further state that I am familiar with the practice of Fletcher & Lee for service of documents via electronic email and that, in accordance with that standard practice, on June 22, 2023, I caused to be electronically mailed the Respondent's Answering Brief to the following:

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