

IN THE SUPREME COURT OF THE STATE OF NEVADA

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IN THE MATTER OF THE ADMINISTRATION OF THE SSJ'S ISSUE TRUST,	Case No.: 85927
IN THE MATTER OF THE ADMINISTRATION OF THE SAMUEL S. JAKSICK, JR. FAMILY TRUST.	District Court Case Nos.: PR17-00445 PR17-00446
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,	

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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APPELLANT'S REPLY BRIEF ON BEHALF OF STANLEY JAKSICK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	v
INTRODUCTION.....	1
ARGUMENT	6
I. Nevada Law and the Family Trust Do Not Authorize Arbitrary Favoritism Among Categories of Creditors	6
II. The Temporary Trustee’s Attempt to Find Supporting Facts in the Record Fails	10
A. The Timing Of The District Court’s Decisions Compels the Rejection of the Temporary Trustee’s Position.....	12
B. The Temporary Trustee’s Purported Factual Findings are Neither Findings Nor Relevant.....	13
1. Order to Set I RA 0008-9	14
2. Hearing Transcript from Motion to Partially Enforce Settlement Agreement - I RA 54-55 and I RA 87	14
3. Hearing Transcript from Petition for Instructions Regarding Settlement Agreement - I RA 119; I RA 169-174	16
4. Continued Hearing on Removal of Trustees II RA 271-274	17
5. Order Finding Violation of NRS 163.115 and Ordering Additional Briefing to Determine Timing of the Removal of Trustees - II RA 286.....	18
6. Letter from Michael Kimmel - II RA 299-306	18
7. Order Appointing Temporary Trustee - I AA 137-138	18
III. No Other Order Prevents Stanley Jaksick From Challenging the Priority of Payment.....	19

IV. Stanley Jaksick Has Standing to Challenge Prioritization	25
V. CONCLUSION	27
CERTIFICATION OF ATTORNEY	29
CERTIFICATE OF SERVICE	31

TABLE OF AUTHORITIES

Cases

<i>In re Frei Irrevocable Tr. Dated Oct. 29, 1996</i> , 133 Nev. 50, 390 P.3d 646 (2017).....	19
<i>Logan v. Abe</i> , 131 Nev. 260, 350 P.3d 1139 (2015).....	25
<i>Matter of W.N. Connell & Marjorie T. Connell Living Tr.</i> , 133 Nev. 137, 393 P.3d 1090 (2017).....	7
<i>Miller v. Hayes</i> , 95 Nev. 927, 604 P.2d 117 (1979).....	15
<i>Old Aztec Mine, Inc. v. Brown</i> , 97 Nev. 49, 623 P.2d 981 (1981).....	19, 25
<i>Rust v. Clark Cty. Sch. Dist.</i> , 103 Nev. 686, 747 P.2d 1380 (1987).....	15
<i>Watson Rounds v. Eighth Jud. Dist. Ct.</i> , 131 Nev. 783, 358 P.3d 228 (2015).....	25

Statutes

NRS 163.115	8, 17, 18
NRS 163.115(2)(3).....	17
NRS 163.115(2)(b).....	2, 8, 9, 10
NRS 163.115(3)	8
NRS 163.190	8, 9, 10
NRS 164.710(2)	4
NRS 164.720	7

Rules

NRAP 28(e)(1)	29
NRAP 28.2.....	29
NRAP 32(a)(4)	29
NRAP 32(a)(6)	29
NRAP 32(a)(7)	29
NRAP 32(a)(7)(C)	29
NRCP 5(b)	31

Other Authorities

Bogert's The Law of Trusts and Trustees § 543.....	4, 7
Restatement (Third) of Trusts § 79 (2007)	7

INTRODUCTION

The scope of this appeal is extremely narrow, but the issue is important. If the Temporary Trustee, James. S. Proctor, is permitted to prioritize his own counsel's fees, then the practical result that most if not all of the remaining assets of Samuel S. Jaksick, Jr. Family Trust ("Family Trust") will be transferred to the Temporary Trustee's counsel leaving nothing for the beneficiaries and nothing to satisfy the attorney's fees owed to the prior trustees. Ans. Br. 24 (stating the Temporary Trustee is holding "\$590,000 in cash, which, in the exercise of his prudent financial discretion, he is reserving for future obligations of administration"); Ans. Br. 23 (totaling fees incurred by the Temporary Trustee's counsel as at \$549,666.42 although indicating that \$469,774.09 of these fees have been paid). Yet in support of the favorable position in which he finds himself, the Temporary Trustee does not present a single authority or example where attorney's fees awarded to a former trustee were paid *after* attorney's fees owed to a current trustee. Nor does the Temporary Trustee cite any authority permitting such prioritization within the same category of trust expenses.

Regardless, there is certainly no justification for the District Court reversing course long after its initial decisions and subsequently determining that Stanley Jaksick and the other co-trustees should be punished retroactively. The Temporary Trustee claims a basis in law for this prioritization based on the general powers of a trustee as well as a basis in fact due to the district court's previous finding under NRS 163.115(2)(b) that there had been a lack of cooperation between the co-trustees leading to their replacement by the Temporary Trustee. However, the timing of the items relied upon by the Temporary Trustee is crucial and dispositive.

In its Order Appointing Temporary Trustee, the district court explicitly stated that it was not making a finding that Stanley Jaksick committed a breach of trust and stated specifically that its finding under NRS 163.115(2)(b) was "not intended to disrupt . . . the payment of legal fees or other professional expenses for Todd and Stanley Jaksick that were incurred prior to February 18, 2021." I AA 138. As Stanley Jaksick stopped serving a trustee as of the date of that order, the only factual basis for retroactively altering the priority of payment of these legal fees would have been prior to that date. In effect, the district

court's decision punished Stanley Jaksick for his individual litigation positions by diminishing the previous award of attorney's fees. And it made this decision in direct contradiction to its previous order that was "not intended to disrupt" the payment of attorney's fees.

There is no dispute that Stanley Jaksick is entitled to receive the payment of the attorney's fees from the Trust. This was conclusively determined by the Court and the Temporary Trustee withdrew any objection, ultimately stipulating to confirming payment of the attorney's fees owed to Stanley Jaksick. IV RA 786-790. There is also no dispute about the amount of these fees. *Id.* The only question is whether these fees, accrued largely during the 2019 trial, should have been retroactively deprioritized in favor of the attorney's fees incurred by the Temporary Trustee since 2021.

None of the other orders in the record that the Temporary Trustee attempts to introduce prevents Stanley Jaksick from challenging this error. In a fairly significant overreach, the Temporary Trustee claims that Stanley Jaksick has not been candid by failing to mention that the district court entered a Stipulated Fee Order which the Temporary Trustee describes as providing that the balance of fees

owed “to Stan’s lawyers will be paid in *Proctor’s discretion* and at a time when *Proctor determines the Trust has sufficient assets.*” Ans. Br. 5 (emphasis in original). The Stipulated Fee Order provides in actuality: “In 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 RA 788. This does not authorize prioritization and does not provide the Temporary Trustee with unlimited discretion. Instead, the clear import and language of the stipulation is that the Temporary Trustee “will remit” payment when “funds become available.” Even taking the Temporary Trustee’s extreme reading of this stipulation as accurate – i.e. that the Stipulation imbued the Temporary Trustee with unlimited discretion – Stanley Jaksick is not precluded from challenging whether the Temporary Trustee’s exercise of that discretion is appropriate. In fact, a trustee’s discretion is discussed frequently within Nevada’s statutes, which do not create an absolute bar to challenging the exercise of this discretion. *See, e.g.*, NRS 164.710(2) (authorizing a trustee to exercise a “discretionary power of administration”); Bogert’s The Law of

Trusts and Trustees § 543 (“The grant of absolute discretion to a trustee regarding investments does not permit the trustee to take part in this disloyal transaction.”).

The sole issue is whether the district court erred by permitting the Temporary Trustee to determine that its counsel deserves payment before counsel for the former trustees. The Temporary Trustee now claims prioritization is warranted because this Court could find that Stanley Jaksick committed a breach of trust as a matter of law, Ans. Br. 36, even though the district court unequivocally held that it made no finding that Stanley Jaksick “committed or threatened to commit a breach of trust or a breach of fiduciary duties.” I AA 137. This Court should not affirm by relying upon the opposite of the conclusion reached by the district court. There is still no basis in law or in the record for the favoritism shown to the Temporary Trustee’s counsel and so reversal of the Order¹ is warranted.

¹ Order Granting Third Application for Approval and Payment of Compensation to Fletcher & Lee, II AA 336-337.

ARGUMENT

I. Nevada Law and the Family Trust Do Not Authorize Arbitrary Favoritism Among Categories of Creditors.

The Temporary Trustee claims that the “Trust provisions and Nevada law permit the District Court to order priority payment of Proctor’s attorneys’ fees” but then the Temporary Trustee recites generic provision after generic provision without ever supporting his claim. Ans. Br. 29-31 (even admitting the provisions “are not directly related to the Third Fee Order”); Ans. Br. 34-35 (citing generic provisions from NRS Chapter 153 affording the district court with authority to supervise the payment of trustee expenses and compensation). The Temporary Trustee’s position would be correct only if the Temporary Trustee enjoys absolute power without any check or balance. Yet both Nevada law and the Family Trust limit the Temporary Trustee’s authority to arbitrarily favor one creditor over another.

The Temporary Trustee cites, *inter alia*, to the Prudent Investor Rule and to his authority to “minimize taxes.” Ans. Br. 30-31. Similarly beside the point, the Temporary Trustee points to his obligations to reserve a “cash balance for future obligations of administering the

Family Trust.” Ans. Br. 31. These provisions are irrelevant as the issue is not whether the Temporary Trustee should immediately pay the attorney’s fees but whether – when there are sufficient funds to pay these fees – the Temporary Trustee may pick and choose which law firms receive preferential payments.

In fact, the Temporary Trustee does not rebut any of the cases or authorities on impartiality referenced in the Opening Brief. *See, e.g.* Family Trust Provisions at I AA 29-31; NRS 164.720 (providing that a trustee “shall administer a trust or estate impartially, based on what is fair and reasonable to all the beneficiaries . . .”); Restatement (Third) of Trusts § 79 (2007) (noting 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.”); *Matter of W.N. Connell & Marjorie T. Connell Living Tr.*, 133 Nev. 137, 141, 393 P.3d 1090, 1094 (2017). The only attempt to distinguish these authorities is in a footnote where the Temporary Trustee apparently contends that impartiality is only required with respect to beneficiaries. Ans. Br. 21 n. 5. This is a misstatement of law. Bogert's The Law of Trusts and

Trustees § 543 (“For example, the trustee, while engaged in a business transaction for the trust, may attempt at the same time to secure a personal financial advantage.”).

Thus, because there are limits on the Temporary Trustee’s authority and discretion, the question becomes whether Nevada law and the Family Trust permitted the prioritization of attorney’s fees. First, the Temporary Trustee cites to NRS 163.115 and NRS 163.190. While the district court relied upon NRS 163.115(2)(b) by making a finding that there was a “[l]ack of cooperation between cotrustees,” the only remedy specified in this subsection is the removal of a trustee. In contrast, NRS 163.115(3) provides a range of remedies when a trustee “commits or threatens to commit a breach of trust” including reducing or denying “compensation of the trustee.” As the district court did not make any such finding, no remedy but removal under NRS 163.115(2)(b) would be appropriate.

NRS 163.190 is also not helpful to the Temporary Trustee who illogically claims that this statute mandates a finding that Stanley Jaksick committed a breach of trust despite the district court’s clear holding otherwise. NRS 163.190 is a permissive statute – the “trustee

may be removed and denied compensation in whole or in part” and a trustee “may treat the violation as a breach of trust.” As the district court determined that there was not a breach of trust and specifically that its finding under NRS 163.115(2)(b) was “not intended to disrupt . . . the payment of legal fees or other professional expenses for Todd and Stanley Jaksick that were incurred prior to February 18, 2021.” I AA 138. Thus, the “lack of cooperation” was already found by the district court prior to February 18, 2021 and was not determined to warrant any further sanction under NRS 163.190. There is also considerable doubt that the removal as a trustee under NRS 163.115(2)(b) would constitute violating that provision as a “[l]ack of cooperation” that obstructs the administration of the trust could be unilateral or bilateral in nature. Finally, NRS 163.190 refers to a reduction or denial of compensation of the trustee, *e.g.* trustee fees, but not to any reduction or denial of professional expenses.

Second, the Temporary Trustee cites to a number of authorities where a district court has equitable powers to “protect the interests of the beneficiaries as a result of Stan’s deemed breach, including prioritization.” Ans. Br. 33. None of these authorities is relevant

because neither the district court nor the jury found that Stanley Jaksick committed a breach of trust. The Temporary Trustee argues that Stanley Jaksick misread the “Appointment Order . . . and 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.” Ans. Br. 33. Not only is this position wrong legally as shown above, it is entirely contrary to the record. The Temporary Trustee is attempting to rewrite the Order Appointing Temporary Trustee so that the district court *did* find a breach of trust. I AA 138. The Temporary Trustee is not able procedurally to ask this Court to sua sponte, and contrary to the district court, find that Stanley Jaksick committed a breach of trust. And so because his position relies on the existence of a breach of trust, reversal is warranted.

II. The Temporary Trustee’s Attempt to Find Supporting Facts in the Record Fails.

The Order plainly lacks factual findings and states only that the “Court finds 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.” II AA 343. To salvage this facially deficient Order, the Temporary Trustee extracts

portions from hearings and filings over the lengthy history of this case and then incorrectly labels these as “factual findings.” Ans. Br. 37-39. These purported findings cited by the Temporary Trustee include “pleadings” and “testimony” by witnesses. Ans. Br. 39 (“the pleadings, documents and testimony constituted the evidence that the District Court . . . might accept as adequate to support a conclusion”). There are two equally compelling reasons why the Temporary Trustee’s arguments fail. First, when the district court replaced the co-trustees of the Family Trust with the Temporary Trustee, it explicitly held that it was not making any negative findings of fact concerning Stanley Jaksick. I AA 138. Thereafter, Stanley Jaksick ceased serving as a co-trustee of the Family Trust and so any conduct thereafter could not possibly affect the nature of the fees owed to Stanley Jaksick while he was serving as a co-trustee. Second, the purported findings cited by the Temporary Trustee as justifying the Order are procedurally and substantively inconsistent with the Temporary Trustee’s representations. The Temporary Trustee does not even attempt to detail or explain these findings in context, but only hurriedly cites to them in a single footnote. Ans. Br. 37 n. 13.

A. The Timing Of The District Court's Decisions Compels the Rejection of the Temporary Trustee's Position.

The Temporary Trustee argues that sufficient factual findings were created “[b]etween August 2020 and February 2021 when the Court entered the Appointment Order, the Court engaged in a lengthy, deliberate and evidence-driven process.” Ans. Br. 6. That process did not culminate in a finding that Stanley Jaksick committed a breach of trust or that any sanction was warranted but removal. For the district court to find after this “lengthy, deliberate and evidence-drive process” that Stanley Jaksick was still entitled to payment for all of his professional expenses is dispositive of any later attempts to rewrite this process and change the outcome.

Stanley Jaksick served as co-trustee of the Family Trust from 2013 to 2021. 1 AA 138. After the jury and bench trial, Stanley Jaksick was exonerated from each and every legal claim and was not found to have committed any breach of trust. I AA 112-119; I AA 111. Between these judgments and February 2021, Stanley Jaksick continued to serve as co-trustee of the Family Trust and was involved in post-judgment proceedings. Although he was removed as trustee, along with Todd Jaksick, in February 2021, 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. Further, the district court held that its orders were “not intended to disrupt . . . the payment of legal fees or other professional expenses for Todd and Stanley Jaksick that were incurred prior to February 18, 2021.” I AA 138.

The Temporary Trustee does not cite to any conduct post-February 2021 that would warrant deprioritizing Stanley Jaksick’s professional expenses. Even the district court just noted that these professional expenses were somehow distinguishable from the expenses incurred by the Temporary Trustee. II AA 343.

B. The Temporary Trustee’s Purported Factual Findings are Neither Findings Nor Relevant.

While the Temporary Trustee does not enumerate the findings in detail, Stanley Jaksick will still endeavor to respond to each of the citations. In fact, as will be shown, the Temporary Trustee’s attempt to call the following citations “findings” underscores the overall weakness of their position.

1. Order to Set I RA 0008-9.

The Temporary Trustee first cites to an Order to Set entered by the district court on September 22, 2020 that requested oral arguments on “each of the unresolved questions in the preceding paragraph.” 1 RA 1-9. Obviously this Order to Set does not contain any conclusive factual findings and the Temporary Trustee cites to the very paragraph that the district court describes as containing “unresolved questions.” 1 RA 9. Even if the Order to Set could somehow possibly be construed as containing a factual finding, it would have been rendered nugatory as a result of the ultimate Order Appointing Trustee that concluded this series of motions and arguments and found no breach by Stanley Jaksick.

2. Hearing Transcript from Motion to Partially Enforce Settlement Agreement - I RA 54-55 and I RA 87.

The Temporary Trustee cites to a transcript from an October 14, 2020 hearing on Stanley Jaksick’s motion to enforce a settlement agreement. I RA 54-55. Nowhere in the cited pages does the district court make factual findings. Instead, the district court comments on the matter at hand and states “[i]n my most reactive moment, grounded in frustration, I thought I would [consider] an order directing the trustees

to show cause why they should not be removed from their trusteeship.” IA RA 53-55 (noting the “vicious tone in Todd’s individual response” and thinking about how to “preempt the next chapter having lived the last chapter” and discussing Todd’s allegations and considering how to “entertain and respond to new allegations”). The district court specifically expresses frustration at the parties “fierce advocacy” and that even though the “continuing inclination of the court” was just to “remove Todd and Stan,” the district court was “not going to make that order now [and] not even going to set a place to create that order.” I RA 87.

The Temporary Trustee’s citations are off-topic, but even if they were relevant a “district court’s oral pronouncement is not final and can be modified before a written order is filed.” *Miller v. Hayes*, 95 Nev. 927, 929, 604 P.2d 117, 118 (1979). Further, if “there are differences between the findings and conclusions issued during the hearing and those recorded in the order, the written order controls.” *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (explaining that oral pronouncements from the bench are ineffective and only a written judgment has legal effect). As the ultimate order

specifically made “no finding that Todd or Stanley Jaksick committed or threatened to commit a breach of trust or a breach of fiduciary duties,” then the Temporary Trustee’s attempt to identify such a finding in the preliminary oral transcripts fails at the outset. I AA 137.

3. Hearing Transcript from Petition for Instructions Regarding Settlement Agreement - I RA 119; I RA 169-174.

For all of the same reasons that the previous hearing transcript is not a factual finding, the Temporary Trustee’s attempt to cite the hearing on the Petition for Instructions Regarding Settlement Agreement is unavailing. I RA 119. Further the first citation is to a page that does not contain a single pronouncement from the district court but instead exclusively contains argument from Todd Jaksick’s counsel along with questions from the district court to counsel. The second citation is to a portion of the transcript containing testimony from another party, Mr. Kimmel. I RA 169-174. In this transcript, the district court makes various observations but then invites Mr. Kimmel to comment on whether these observations are “erroneous” and invites Mr. Kimmel to “push back” against this observation.

Certainly this oral discussion does not contain factual findings that would be implicitly imported into an order months later. For the Temporary Trustee to claim otherwise is a wild stretch. And even if the district court made various observations about the dynamic between Todd Jaksick and Stanley Jaksick, as shown below these observations would only warrant removal and they would not permit further sanction or punishment. NRS 163.115(2)(3).

4. Continued Hearing on Removal of Trustees II RA 271-274

The Temporary Trustee cites to the hearing transcript containing an oral pronouncement that matches the findings that were put into the Order Appointing Temporary Trustee. RA 271-272 (“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 . . . Both Todd and Stan have approached the trusteeship with intent to vindicate the office of trustee but also with their own interests in mind. I am specifically not finding that either trustee has committed or threatened to commit a breach of trust or a breach of fiduciary duties.”).

5. Order Finding Violation of NRS 163.115 and Ordering Additional Briefing to Determine Timing of the Removal of Trustees - II RA 286

In the Order Appointing Trustee, the district court expressly addresses this previous order and writes: “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, this citation by the Temporary Trustee is immaterial.

6. Letter from Michael Kimmel - II RA 299-306

This citation is from a letter from a prior trustee, Michael Kimmel, that does not appear to have ever been entered into evidence. In any event, this letter does not constitute a factual finding by the district court.

7. Order Appointing Temporary Trustee - I AA 137-138

This is the critical citation as the Order Appointing Temporary Trustee contains the express language that the district court was not making a “finding that Todd or Stanley Jaksick committed or threatened to commit a breach of trust or a breach of fiduciary duties.”

III. No Other Order Prevents Stanley Jaksick From Challenging the Priority of Payment.

The Temporary Trustee did not claim at the district court that Stanley Jaksick was judicially estopped challenging the Order or that his position was a collateral attack on other orders and therefore these arguments should be considered waived. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”). The arguments are completely meritless though. The Temporary Trustee’s position simply strains credibility as he argues that the “timing and payment of Stan’s attorney’s fees was conclusively resolved in the Appointment Order: it would be upon ‘further order’ of the Court.” Ans. Br. 48 (citing I AA 138). The issue was conclusively resolved by a further order?

In order to be estopped or bound by anything contrary in the prior orders referenced by the Temporary Trustee, Stanley Jaksick must have taken two positions and these “two positions [must be] totally inconsistent.” *In re Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017). Stanley Jaksick timely objected to the Temporary Trustee’s attempt to prioritize counsel’s fees. I AA 211-213.

The district court did not hold that prioritization had already been established, but instead made findings in support of this new approach. II AA 336-337. At no point and in no stipulation did Stanley Jaksick ever agree that the fees of the Temporary Trustee's counsel could be paid first. The Temporary Trustee's arguments otherwise are a complete mischaracterization.

First, the Temporary Trustee claims that the Order Appointing Temporary Trustee resolves this appeal. Ans. Br. 46 (stating that the order "plainly and unequivocally held that Stan's attorney's fees" were only going to be paid on "further order of this Court"). The Temporary Trustee claims that this was therefore a final order in which the Court "held that payment of Stan's attorney's fees would be subject to 'further order of this Court.'" This argument is bewildering. Nothing in the Order Appointing Temporary Trustee authorized the prioritization of professional expenses and there was nothing for Stanley Jaksick to either challenge or accept as binding.

Second, the Temporary Trustee claims that the First and Second Fee Orders established the prioritization and were not challenged on appeal. Ans. Br. 52-53. Even the Temporary Trustee elsewhere

recognizes that this position is incorrect as the Temporary Trustee requested in the First Fee Order that his lawyers should be paid “*in pari passu* with other counsel for the trust” and this approach was adopted by the Court. II RA 583-584; Ans. Br. 16. Again, there was nothing for Stanley Jaksick to challenge or accept when payment was not being made on a prioritization basis. This approach was effectively continued in the Second Fee Order as there was no holding that the fees incurred by the professionals representing Stanley Jaksick were not to be paid on a priority basis. I AA 144-145 (not indicating that it was deviating from the *pari passu* approach). Even in the First and Second Fee Orders, the only language is that the Temporary Trustee’s professional expenses are to be paid as a “first priority obligation” but this sentence is more or less meaningless as there is no description of what priority is assigned to any other obligation. For example, the Temporary Trustee would not possibly claim that these professional expenses had to be paid prior to any taxes owed by the Family Trust. Thus, the holding that the Temporary Trustee’s professional expenses were a “first priority” obligation did not aggrieve Stanley Jaksick until

his expenses were treated as a lower priority obligation and until it became clear that his expenses may not be paid at all.

It was not until the Third Fee Order that the district court held that the Temporary Trustee's professional fees were to be paid "prior to payment of fees incurred on behalf of the co-trustees prior to the appointment of the Temporary Trustee." II AA 343. As this Order was timely appealed, the issue is ripe for determination by the Court. Any other conclusion would encourage superfluous appeals of orders that did not resolve issues of priority before the Third Fee Order or subsequent orders that will be altered by a decision on the Third Fee Order.

Third, the Temporary Trustee claims that the Stipulated Fee Order is binding and resolves Stanley Jaksick's claims. This position is preposterous. The objection to the Third Fee Order had already been made by Stanley Jaksick and resolved by the district court while preparations were underway to appeal this Third Fee Order. Nothing was exchanged or traded with respect to the Third Fee Order in order to obtain the Stipulated Fee Order. But in short, there is nothing inconsistent about this appeal and the Stipulated Fee Order.

In challenging the Third Fee Order, Stanley Jaksick takes the position that the district court may not favor one category of professional expenses over another. In the Stipulated Fee Order, Stanley Jaksick agreed that: “In 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.” There is no reference to prioritization in the Stipulated Fee Order and there is not even a reference to the fees of the Temporary Trustee.

The Temporary Trustee takes a stipulation requiring payment of the fees when there are sufficient funds to pay these fees and tries to turn it into a stipulation where Stanley Jaksick agreed to wait until after there were sufficient funds available *and after all payments had been made to the Temporary Trustee’s counsel*. That language is not in the Stipulated Fee Order and the Temporary Trustee’s attempt to bind Stanley Jaksick to this nonexistent portion of the Stipulated Fee Order is in error. Stanley Jaksick did not agree to the unlimited discretion of the Temporary Trustee, otherwise that stipulation would be illusory.

Instead, the Temporary Trustee had to exercise “prudent business judgment and discretion” and was expected to make payment when funds were available. The stipulated language neither explicitly nor implicitly authorizes the prioritization of fee payments. In fact, the Temporary Trustee argues that he already had discretion to authorize payments – and in fact this is generally true – so Stanley Jaksick’s stipulation was not a concession in any respect from this perspective. Even if it were, this still does not prevent Stanley Jaksick’s challenge to the exercise of discretion by the Temporary Trustee as even a trustee’s discretion can be abused. Thus, there were not two positions taken by Stanley Jaksick and they certainly were not inconsistent.

In sum, Stanley Jaksick challenged and appealed the first order from the district court that held that his professional fees were to be paid at a lower priority than the professional fees of the Temporary Trustee. This issue was never conclusively resolved before the Third Fee Order and Stanley Jaksick never consented to the prioritization of fees.

IV. Stanley Jaksick Has Standing to Challenge Prioritization.

The Temporary Trustee did not object at the district court to Stanley Jaksick's standing to challenge the Order. *Old Aztec Mine, Inc.* 97 Nev. at 52. Therefore, the Temporary Trustee waived the issue of standing. I AA 214-216. The argument is without merit regardless.

The Temporary Trustee does not challenge standing in the sense of Stanley Jaksick's entitlement to attorney's fees. In any event, the award of attorney's fees was made in favor of Stanley Jaksick and not to his law firms. I AA 138 (affirming "the payment of legal fees or other professional expenses for Todd and Stanley Jaksick that were incurred prior to February 18, 2021"). The relevant party, here Stanley Jaksick, has standing to pursue an appeal related to the award of attorney's fees. *See Logan v. Abe*, 131 Nev. 260, 263, 350 P.3d 1139, 1141 (2015) ("Here, Abe, Abe Properties, and Martinson made claims for attorney fees and costs on their own behalf and not on behalf of another entity. Therefore, they have standing to pursue their claim for attorney fees and costs."). This is in contrast to cases where an attorney's fee issue is collateral to the litigation or imposed directly in favor of or against an attorney. *Watson Rounds v. Eighth Jud. Dist. Ct.*, 131 Nev. 783, 786,

358 P.3d 228, 231 (2015). If this were the basis of the Temporary Trustee's standing argument, then the Temporary Trustee's counsel would have had to appear and file an Answering Brief and not the Temporary Trustee.

The Temporary Trustee's standing argument appears to be predicated again on a misinterpretation of the Stipulated Fee Order. Ans. Br. 54-55. The Temporary Trustee contends that the reversal of the Order would not result in any benefit to Stanley Jaksick because of the Stipulated Fee Order. *Id.* First, the Stipulated Fee Order does not authorize the Temporary Trustee to pay his counsel before paying other attorney's fees. IV RA 788 ("In 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."). This language neither explicitly nor implicitly authorizes the prioritization of fee payments. The parties involved would not have entered into the Stipulated Fee Order if the Temporary Trustee could still favor or disfavor their respective payments. The Temporary Trustee argues that he "has discretion in satisfying the balance of

Stan's attorneys' fees as funds become available as determined to be sufficient by Proctor." Ans. Br. 55. As those determinations have not yet been made, then Stanley Jaksick has not waived any challenge to the propriety of those determinations or to whether the Temporary Trustee has actually used his "prudent business judgment and discretion." Second, even if the Stipulated Fee Order were construed as expansively as the Temporary Trustee wishes, then this appeal and the reversal of the Order would still provide a benefit to Stanley Jaksick as it would cabin the Temporary Trustee's discretion by preventing favoritism and discrimination.

V. CONCLUSION

Counsel for the Temporary Trustee should still receive payment as should the other law firms involved in this case according to the district court's unchallenged decisions. But if the Temporary Trustee has no incentive to manage expenses due to priority of payment, then the incentives will remain misaligned. The Temporary Trustee was tasked with winding down the Family Trust in April 2021 and yet the Family Trust continues to pay monthly for the Temporary Trustee's

services. The favoritism for the Temporary Trustee's expenses is unwarranted and reversal is warranted for all of the above reasons.

DATED: September 19, 2023.

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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 5,374 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 September 19, 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 September 19, 2023, a true and correct copy of the foregoing **REPLY 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