

**RPLY**

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*Attorney for Respondent Jacqueline Utkin*

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

In the Matter of  
THE CHRISTIAN FAMILY TRUST u.a.d,  
10/11/16

**Supreme Court No: 79167**  
District Court Case. No: P-17-092512-T

SUSAN CHRISTIAN-PAYNE.  
ROSEMARY KEACH AND  
RAYMOND CHRISTIAN  
Petitioners,  
-vs  
JACQUELINE UTKIN and  
MONTE REASON,  
Respondents.

**REPLY TO APPELLANTS' OPPOSITION TO MOTION TO DISMISS**

COMES NOW, Respondent JACQUELINE UTKIN ("Respondent") by and through her counsel of record, JERIMY KIRSCHNER, ESQ., of the law firm JERIMY KIRSCHNER & ASSOCIATES, PLLC., and files this Reply to Appellant's Opposition to Motion to Dismiss ("Reply").

This Reply is made based on the following Memorandum of Points and Authorities, the exhibits thereto, the papers and pleadings already on file herein and any oral argument the Court may permit at a hearing of this matter.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. ARGUMENT**

Appellants’ Susan Christian-Payne, Rosemary Keach and Raymond Christian (“Appellants”) opposition to the motion to dismiss (“Opposition”) incorrectly states foundational information for this matter and the parties involved, yet confirm they would have no opposition to naming the real party in interest, Trustee Frederick Waid, Esq. (“Trustee Waid”) as the respondent. However, Appellants start their Opposition by arguing that Respondent’s motion is untimely, and as such Respondent first addresses that point.

**A. NEV. R. APP. P. 14(F) DOES NOT IMPOSE A SEVEN DAY DEADLINE ON  
MOTIONS TO DISMISS**

NRAP 14(f) provides:

Respondent, within 7 days after service of the docketing statement, may file an original and 1 copy of a single-page response, together with proof of service on all parties, if respondent strongly disagrees with appellant's statement of the case or issues on appeal. If respondent believes there is a jurisdictional defect, respondent should file a motion to dismiss.

The rule is describing two different types of filings. First, to challenge the language in the docketing statement a respondent must file a single page document within seven days. The second event is for a far more serious jurisdiction defect, to which the rule directs the party to file a motion to dismiss, which is governed by Nevada Appellate Rule, “RULE 27 MOTIONS.” If we were to follow Appellants’ logic and the seven-day filing requirement was applied from the first sentence, then so too would the requirement to provide a one-page response, hardly appropriate for a motion to dismiss. More worrisome, Appellants understanding of the correct reading for the rule is undeniable considering that in a related appeal involving the Trust they filed to strike a respondent as an improper party eleven months after the appeal began. *See*, Nev. Sup. Ct. Case No. 75750, April 10, 2019 entry.

Appellants appear to be arguing that Respondent waived the right to challenge the jurisdictional defect, which is wrong. First, this not a scenario where a party was involved in the operative facts and waived personal jurisdiction. As noted in the *Mona* case cited in the Motion,

“Respondent the representative” and “Respondent the individual” are legally distinct. “Respondent the individual” has never been a party of the District Court matter, *i.e.* there has never been personal jurisdiction over Respondent.

As to subject matter jurisdiction, it cannot be waived, and can even be raised for the first time on appeal. *See, Colwell v. State*, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002). “Respondent the individual” has never made a decision related to Trust and did not file the motion which is the subject of this appeal. All of the complained of actions were completed as trustee, a representative of the Trust. There is not a single decision, action or subject matter involving “Respondent the individual” before this Court, nor was there one before the District Court.

#### **B. APPELLANTS MISSTATEMENT THE PARTIES AND POSTURE OF THE DISTRICT COURT MATTER**

As discussed above, Appellants misstate the parties involved in the District Court. Respondent was only involved as trustee for the Trust when she was involved, which is made absolutely clear in the notice of substitution of parties. *See*, Motion, Pg. 2, Ln. 21-25. Trustee Waid became trustee prior to this appeal being filed, thus Respondents role as trustee ceased and Trustee Waid supplanted her as the real party in interest. *See*, NRCP 17(a).

Appellants Opposition then states that Respondent must “defend her own actions,” but Respondent would not be defending any actions as an individual. Instead she would be defending the Trust and the exercise of discretion to pay Trust professionals as provided for under the express terms of the Trust. The duty to defend the Trust, its provisions, and exercise of granted authority falls upon its representative, Trustee Waid.<sup>1</sup> Trustee Waid was the only representative for the Trust at the time this appeal was made.<sup>2</sup>

Appellants states that Respondent admitted she was not acting as a trustee in her motion, but no such admission is contained in her Motion nor does Appellant cite to a specific statement. *See*,

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<sup>1</sup> Trustee Waid never filed an opposition to Respondent’s Motion for Payment despite being trustee for months prior to the Order Granting Payment.

<sup>2</sup> Appellants state that Trustee Waid was appointed on May 28, 2019, but this is incorrect. As seen in the exhibit, it was “an order reaffirming his authority as trustee” which was entered after a challenge by a bank over the spelling of his name. Regardless, Trustee Waid was the real party in interest at the time of the appeal.

Opposition, Pg. 4. To the contrary, Respondent noted in the Motion Request Payment that she received monthly invoices while she was trustee and they were approved by her as trustee. *See*, Motion Exhibit C, Pg. 2, ¶5. At worst, she stated that she filed the Motion for Payment while she was temporarily suspended.

**C. APPELLANTS MISREPRESENT THE DISTRICT COURT ORDER  
APPOINTING TRUSTEE WAID**

There has never been a hint in any finding that Respondent was removed “for cause, in breaching her fiduciary duty with her conflict of interest.” *See*, Opposition, Pg. 6. Moreover, that statement conflicts with the very attachments to Appellants’ Opposition. The District Court removed Respondent because of an “apparent[] hostility....towards the [Appellants].” *See*, Opposition, Exhibit B, Pg. 2. The *sole* source of this “apparent hostility” was a *declaration in support of the then surviving settlor*, Nancy Christian (“Settlor”), who had motioned the District Court to recover Trust assets from the Appellants (the “Declaration”) after she had removed them as trustees<sup>3</sup>. *See*, Opposition, Exhibit C. The Settlor, then living, was also upset that Appellants had used Trust funds to take themselves on Disneyland vacation while ignoring Settlor’s request for distributions. The Declaration was filed with the District Court on November 13, 2017, and pre-dated Respondent’s tenure as trustee for the Trust and pre-dated the District Court’s order confirming her a trustee. *Id.*; *See Also*, Motion, Exhibit B.

The specific finding from the order removing Respondent and appointing Trustee Waid as trustee stated:

“Given the clear overall intent of [Respondent]’s position in her Declaration against the primary beneficiaries of the Trust, [Respondent] cannot be impartial and has conflicts of interest, and grounds exist to remove [Respondent] as Trustee”

*See*, Opposition, Exhibit C, Pg. 5. There was never any finding that Respondent breached a fiduciary duty to any beneficiary during her time as trustee and to say so is misleading.

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<sup>3</sup> The District Court later confirmed that Nancy Christian was authorized to remove Appellants as trustees under the express terms of the trust. *See*, Motion, Exhibit B. Unfortunately, Nancy Christian passed away prior to the District Court’s decision, unable to access money in her Trust to pay her expenses.

1           **II.       CONCLUSIONS**

2           Respondent has not appeared in the District Court action as an individual and is no longer  
3 trustee of the Trust with standing to defend this appeal. As a result, the matter should be dismissed  
4 as to her, or alternatively it should be dismissed unless Appellants name the real party in interest to  
5 this appeal, Trustee Waid.

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8 Dated this 22nd Day of August 2019.

9 JERIMY KIRSCHNER & ASSOCIATES, PLLC

10  
11 /s/ Jerimy L. Kirschner, Esq.  
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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Jerimy Kirschner & Associates, PLLC, and on August 22, 2019, I caused a copy of the REPLY TO APPELLANTS' OPPOSITION TO MOTION TO DISMISS to be served through the electronic court filing system or via first class, US mail, postage prepaid upon the following persons/entities:

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