

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

2                                   \*\*\*\*\*

3 NOLA HARBER, as Distribution Trustee  
4 of the ERIC L. NELSON NEVADA  
5 TRUST dated May 30, 2001

6                                   Petitioners,

7 vs.

8 EIGHTH JUDICIAL DISTRICT COURT  
9 OF THE STATE OF NEVADA, CLARK  
10 COUNTY, and THE HONORABLE  
11 FRANK P. SULLIVAN, DISTRICT  
12 JUDGE

13                                   Respondents,

14 and

15 ERIC L. NELSON and LYNITA S.  
16 NELSON, individually, and LSN  
17 NEVADA TRUST dated May 30, 2001,  
18 LARRY BERTSCH

                                  Real Parties in Interest.

Electronically Filed  
Jun 21 2013 10:20 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**CASE NO.**

19                                   **PETITION FOR WRIT OF PROHIBITION**

20  
21                                   MARK A. SOLOMON, ESQ., NSB #0418  
22                                   E-mail: [msolomon@sdfnvlaw.com](mailto:msolomon@sdfnvlaw.com)  
23                                   JEFFREY P. LUSZECK, ESQ., NSB #9619  
24                                   E-mail: [jluszeck@sdfnvlaw.com](mailto:jluszeck@sdfnvlaw.com)  
25                                   **SOLOMON DWIGGINS & FREER, LTD.**  
26                                   9060 W. Cheyenne Avenue  
27                                   Las Vegas, Nevada 89129  
28                                   Telephone: (702) 853-5483  
                                  Attorneys for Petitioner, Nola Harber as  
                                  Distribution Trustee of the ELN Nevada Trust

**TABLE OF CONTENTS**

1

2

3 TABLE OF CONTENTS ..... i

4 TABLE OF AUTHORITIES..... ii, iii, iv

5

6 I. INTRODUCTION..... 1

7

8 II. STATEMENT OF FACTS AND PROCEDURAL HISTORY ..... 2

9

10 III. ISSUES PRESENTED AND RELIEF REQUESTED..... 8

11

12 IV. PROPRIETY OF WRIT RELIEF ..... 9

13

14 V. REASONS WHY RELIEF SHOULD ISSUE..... 10

15

16

17

18

19

20

21

22

23

24

25

26

27

28 VI. CONCLUSION..... 21

1 **TABLE OF AUTHORITIES**

2 **Cases** **Page**

3 *City of N. Las Vegas v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark* ..... 9

4 122 Nev. 1197, 1202, 147 P.3d 1109, 1113 (2006); NRS 34.320

5 *Garvin v. Dist. Ct.* ..... 19

6 118 Nev. 749, 59 P.3d 1180, 1191 (2002)

7 *Gilbert v. Gilbert*..... 17

8 447 So.2d 299

9 *Glover v. Concerned Citizens for Fuji Park*..... 18

10 118 Nev. 488, 50 P.3d 546, 548 (2002)

11 *Harris Associates v. Clark Cnty. Sch. Dist.* ..... 18

12 119 Nev. 638, 642, 81 P.3d 532, 534 (2003)

13 *In re Johnston’s Estate*..... 20

14 252 Cal.App.2d 923, 60 Cal. Rptr. 852 (1967)

15 *Lippincott v. Lippincott* ..... 20

16 37 A.2d 741 (Pa.1944)

17 *State v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark* ..... 9

18 118 Nev. 140, 147, 42 P.3d 233, 237-38 (2002)

19 *State v. Quinn*..... 18

20 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001)

21 *Title Insurance & Trust Co. v. Commissioner of Internal Revenue* ..... 12

22 100 F.2d 482, 485 (9th Cir. 1938)

23

24

25

26

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Statutes, Rules and Regulations**

**Page(s)**

NRAP 4(a) ..... 10

NRAP 4(a) (4) ..... 10

NRAP 4(a) (6) ..... 10

NRCP 53(e) ..... 10

NRCP 59 ..... 10

NRCP 59(e) ..... 10, 11

NRCP 62 ..... 11

NRS Chapter 21 ..... 2, 4, 11, 16

NRS Chapter 153 ..... 14

NRS 21.080 ..... 16

NRS 21.090 ..... 16

NRS 34.320 ..... 9

NRS 163.417 ..... 15

NRS 163.417(1) ..... 15

NRS 163.417(2) ..... 15

NRS 164.010 ..... 15

NRS 166.020 ..... 2, 12, 15

NRS 166.050 ..... 12

1 NRS 166.120 ..... 4, 11, 14  
2  
3 NRS 166.120(4) ..... 16  
4  
5 NRS 166.130 ..... 14  
6  
7 South Dakota Codified Law §55-16-9 to 55-16-15 ..... 17  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28 Wyoming Statutes Annotated §4-10-503(b) ..... 17

1 **PETITION FOR WRIT OF PROHIBITION; POINTS AND AUTHORITIES;**  
2 **VERIFICATION BY AFFIDAVIT**

3 TO: The Supreme Court of the State of Nevada:  
4

5 Petitioner, Nola Harber, Distribution Trustee of the Eric L. Nelson Nevada  
6 Trust dated May 30, 2001 (“the ELN Trust”) by and through her undersigned  
7 counsel, Solomon Dwiggins & Freer, hereby petitions this Honorable Court to  
8 issue an extraordinary writ of prohibition, commanding the Eighth Judicial  
9 District Court, Honorable Frank P. Sullivan, to vacate and reverse the Order  
10 entered on June 19, 2013, and portions of the Divorce Decree in which the District  
11 Court orders the ELN Trust to pay Lynita Nelson (“Lynita”) or her attorneys the  
12 sum of \$1,032,742.00 and also pay the sum of \$35,258.00 to Larry Bertsch to  
13 satisfy the personal obligations of Eric Nelson (“Eric”), a beneficiary of the ELN  
14 Trust.  
15  
16  
17  
18  
19

20 In support of this Petition, the ELN Trust states as follows:

21 **I.**

22 **INTRODUCTION**

23  
24 The District Court, in contravention of Nevada law, exceeded its  
25 jurisdiction by ordering the ELN Trust to distribute assets in the approximate  
26 amount of \$1,075,000.00 to pay Eric’s *personal obligations* to Lynita, and the  
27 court-appointed special master Larry Bertsch. In making such findings, the  
28

1 District Court ignored NRS Chapter 21, Nevada's self-settled spendthrift trust  
2 statutes, and erroneously relied upon statutes from South Dakota and Wyoming  
3 and case law from Florida, all of which contradict Nevada law and expressly  
4 allow a self-settled spendthrift trust to pay child-support or alimony obligations of  
5 a beneficiary, to support his erroneous findings.  
6  
7

8 For these reasons, the instant Petition for Writ of Prohibition should be  
9 granted and the June 19, 2013, Order and portions of the Divorce Decree in which  
10 the District Court orders the ELN Trust to make the aforementioned payments  
11 should be vacated and reversed.  
12  
13

## 14 II.

### 15 STATEMENT OF FACTS AND PROCEDURAL HISTORY

16 The instant Writ stems from a divorce that was initiated by Eric against  
17 Lynita on May 6, 2009. *See* Divorce Decree dated June 3, 2013 at 2:17, attached  
18 as Exhibit 1 to the Appendix.  
19  
20

21 On August 9, 2011, Eric and Lynita stipulated and agreed that the ELN  
22 Trust<sup>1</sup> and the LSN Nevada Trust dated May 30, 2001 ("LSN Trust")<sup>2</sup> should be  
23 joined as a necessary party:  
24  
25  
26

---

27 <sup>1</sup> Eric is designated as the Investment Trustee of the ELN Trust and, initially,  
28 Lana Martin, was designated as the Distribution Trustee.

1 . . . as complete relief cannot be accorded among the parties without  
2 the [ELN Trust and LSN Trust] being named a party and the  
3 disposition of the action in the absence of the [ELN Trust and LSN  
4 Trust] will impair or impede its ability to protect its interests and add  
5 risk of incurring double, multiple, or otherwise inconsistent  
6 obligations. *See* Stipulation and Order dated August 9, 2011 at 2:23-  
7 3:9, attached as Exhibit 2 to the Appendix.

8 On June 3, 2013, the District Court issued the Divorce Decree, wherein it  
9 found that both the ELN Trust and LSN Trust were “established as a self-settled  
10 spendthrift trust in accordance with NRS 166.020,” *see* Appx. 1 at 4:25, and that  
11 the ELN Trust was funded with assets that were previously owned by a separate  
12 property trust that had been established by Eric in or around 1993, *see* Appx. 1 at  
13 4:16-17, and the LSN Trust was funded with assets that were previously owned by  
14 a separate property trust that had been established by Lynita in or around 1993.  
15 *See* Appx. 1 at 5:2-3.

16  
17  
18 Despite the fact that the District Court recognized that the Nevada State  
19 Legislature “approved the creation of spendthrift trusts in 1999 and it is certainly  
20 not the purpose of this Court to challenge the merits of spendthrift trusts,” *see*  
21 Appx. 1 at 5:13-14, and ordered that the ELN Trust and LSN Trust would remain  
22 intact, Appx. 1 at 44: 9-17, the District Court ordered the ELN Trust to distribute  
23  
24  
25  
26  
27

---

28 <sup>2</sup> Lynita is designated as the Investment Trustee of the LSN Trust and, initially, Lana Martin, was designated as the Distribution Trustee.



1 some of its assets to pay Eric's personal obligations to Lynita, her Counsel Bob  
2 Dickerson, Esq., and the court-appointed special master Larry Bertsch:  
3

4 IT IS FURTHER ORDERED that Mrs. Nelson is awarded child  
5 support arrears in the amount of \$87,775 and that the ELN Trust shall  
6 use the distribution of the \$1,568,000, herein awarded to the ELN  
7 Trust, to pay off the child support arrears awarded to Mrs. Nelson via  
8 a lump sum payment within 30 days of issuance of this Decree.

9 IT IS FURTHER ORDERED that the ELN Trust shall use the  
10 distribution of the \$1,568,000, herein awarded to the ELN Trust, to  
11 pay Mr. Bertsch's outstanding fees in the amount of \$35,258 within  
12 30 days of issuance of this Decree.

13 IT IS FURTHER ORDERED that the ELN Trust shall use the  
14 distribution of the \$1,568,000, herein awarded to the ELN Trust, to  
15 reimburse Mrs. Nelson for attorneys' fees paid to Attorney Dickerson  
16 in the amount of \$144,967 in payment of fees resulting from Mr.  
17 Nelson's unreasonable and unnecessary extension and protraction of  
18 this litigation. Said payment shall be remitted to Mrs. Nelson within  
19 30 days of the date of this Decree. *See Appx. 1 at 48:14 – 49:3.*

20 In making such findings, the District Court exceeded its jurisdiction by  
21 ignoring NRS Chapter 21, NRS 166.120 and other provisions of Nevada's self-  
22 settled spendthrift trust statutes, and erroneously relying upon statutes from South  
23 Dakota and Wyoming, which specifically allow or obligate a self-settled  
24 spendthrift trust to pay child-support or alimony obligations of a beneficiary, to  
25 support his erroneous findings. *See Appx. 1 at 40:2-23.*

26 Although the Divorce Decree purports to be a final judgment, the District  
27 Court admittedly failed to dispose of all of the assets at issue, including, but not  
28

1 limited to, whether Lynita has an interest in the ELN Trust's ownership interest in  
2 Wyoming Downs:  
3

4 THE COURT FURTHER FINDS that as to the repurchase of  
5 Wyoming Downs by the ELN Trust via the Dynasty Development  
6 Group, this Court is without sufficient information regarding the  
7 details of the repurchase of the property, the value of the property and  
8 the encumbrances on the property to make a determination as to the  
9 disposition of the property, and, accordingly, is not making any  
findings or decisions as to the disposition of the Wyoming Downs  
property at this time. *See* Appx. 1 at 45:23 – 46: 2.

10 Pursuant to the Divorce Decree, the \$1,568,000.00 that was previously  
11 being held in an enjoined blocked account was released to the ELN Trust, as the  
12 Divorce Decree confirmed that the funds belonged to the ELN Trust. *See* Appx. 1  
13 at 48:6-9. Indeed, the funds were the sale proceeds of an asset that was wholly  
14 owned by the ELN Trust.  
15  
16

17 On June 5, 2013, Lynita filed a Motion for Payment of Funds Belonging to  
18 Defendant Pursuant to Court's Decree to Ensure Receipt of Same and For  
19 Immediate Payment of Court Appointed Expert ("Motion for Payment of Funds")  
20 requesting an order demanding immediate payment to herself and Mr. Bertsh as  
21 opposed to within 30 days as contemplated by Judge Sullivan in the Divorce  
22 Decree. *See* Motion for Payment of Funds at 8:7-10, attached as Exhibit 3 to the  
23 Appendix.  
24  
25  
26  
27  
28

1           On June 17, 2013, Lynita filed a Motion to Amend or Alter Judgment, for  
2 Declaratory and Related Relief (“Motion to Amend or Alter Judgment”), wherein  
3 she requested in part:  
4

5           That the Court Amend or Alter its June 3, 2013 Decree of Divorce and  
6 enter an Order for Declaratory Relief, specifically declaring that Eric  
7 and Lynita, through their respective trusts, each holds a 50%  
8 membership interest in Dynasty Development Management, LLC, and  
9 all of its holdings, including the horse racing track and RV park which  
10 was purchased by the ELN Trust through Dynasty Development  
11 Management, LLC during the course of this divorce action from  
12 Wyoming Racing, LLC for \$440,000.00, OR ALTERNATIVELY, to  
13 re-open this case and permit discovery concerning the transaction  
14 involving Dynasty Development Management, LLC, Wyoming  
15 Racing, LLC, and the purchase an interest in Wyoming Racing, LLC,  
16 LLC a horse track and RV park for \$440,000.00 which occurred in or  
17 about January 2013, as well as the current status of this asset, so that a  
18 separate trial date can be set to make a determination as to the  
19 disposition of the asset. *See* Motion to Amend or Alter Judgment at  
20 4:1-12, attached as Exhibit 4 to the Appendix.

21           On June 18, 2013, the ELN Trust opposed the Motion for Payment of Funds  
22 and filed a counter-motion to stay any and all payments and transfers of property  
23 pending appeal and/or resolution of an extraordinary writ that the ELN Trust  
24 intended to file with the Nevada Supreme Court (“Counter-Motion”). In short, the  
25 ELN Trust contended that a stay pending appeal and/or writ was appropriate  
26 because the District Court had no jurisdiction to order the ELN Trust to pay  
27 alimony, child support and suit money on behalf of its beneficiary and the ELN  
28

1 Trust would suffer irreparable harm if a stay was not granted. *See* Counter-  
2 Motion at 3: 4-5, attached as Exhibit 5 to the Appendix.  
3

4 At the June 19, 2013, hearing on Lynita's Motion for Payment of Funds and  
5 the ELN Trust's Counter-Motion, the District Court was advised that the  
6 \$1,568,000.00 that was subject to the prior injunction had been released to the  
7 ELN Trust.<sup>3</sup> Although that was exactly what the Divorce Decree provided for, the  
8 District Court ordered that:  
9  
10

11 . . . the ELN Trust and Eric shall pay to Lynita or her attorneys the  
12 sum of \$1,032,742.00, and shall pay to Larry Bertsch the sum of  
13 \$35,258.00, within [forty-eight (48)] hours of presentation of this  
14 Order upon Eric's and the ELN Trust's counsel of record in this  
15 matter. *See* Notice of Entry of Order for Payment of Funds Pursuant  
16 to June 3, 2013, Divorce Decree at 4:1-6, attached as Exhibit 6 to the  
17 Appendix.

18 The District Court's ruling was based in part on its mistaken belief that if  
19 the ELN Trust's extraordinary writ was successful it could always order the LST  
20 Trust to repay any funds that the ELN Trust had paid to Lynita for the personal  
21 obligations of Eric. As set forth herein, the District Court's stated remedy exceeds  
22 its jurisdiction because it cannot order a Nevada self-settled spendthrift trusts to  
23 repay the debts of a beneficiary.  
24  
25

---

26 <sup>3</sup> In light of the fact that the hearing on the Motion for Payment of Funds and  
27 Counter-Motion was heard at 2:00 p.m. on June 19, 2013, Petitioners are unable to  
28 submit a copy of the hearing transcript contemporaneously with the Writ.

1 At the same time, Judge Sullivan denied the ELN Trust's Counter-Motion  
2 for Stay.<sup>4</sup>  
3

4 As it stands, the ELN Trust is currently unable to comply with the June 19,  
5 2013, Order because the current Distribution Trustee, Nola Harber, is not a  
6 signator on the ELN Trust account, and the Investment Trustee, Eric, is out of the  
7 country, a fact which Lynita knew when she noticed her Motion for Payment of  
8 Funds and Judge Sullivan knew when he entered his June 19, 2013, Order.  
9  
10

### 11 III.

#### 12 ISSUES PRESENTED AND RELIEF REQUESTED

13  
14 The issue presented to this Court is:

15 1. Whether the District Court erred as a matter of law and exceeded its  
16 jurisdiction by ordering the ELN Trust to pay Eric's spousal support obligation  
17 and child support arrearages based upon statutes from other jurisdictions and in  
18 contravention of Nevada law.  
19  
20

21 The ELN Trust seeks an extraordinary writ of prohibition that this Court  
22 prohibit enforcement of the portions of the June 19, 2013, Order which requires  
23 the ELN Trust to pay Lynita or her attorneys the sum of \$1,032,742.00 and  
24 Mr. Bertsch the sum of \$35,258.00, within forty-eight (48) hours, and the Divorce  
25  
26

27 <sup>4</sup> As the hearing was held on June 19, 2013, an order denying the Counter-  
28 Motion has not yet been executed by Judge Sullivan.

1 Decree, which requires the ELN Trust to pay the aforementioned amounts within  
2 thirty (30) days of the entry of the Divorce Decree, until this Court can address  
3 whether the District Court exceeded its jurisdiction by ordering that the ELN Trust  
4 pay's Eric's personal obligation.  
5

#### 6 7 IV

#### 8 PROPRIETY OF WRIT RELIEF

9  
10 NRS 34.320 provides: “[t]he writ of prohibition is the counterpart of the  
11 writ of mandate. It arrests the proceedings of any tribunal, corporation, board or  
12 person exercising judicial functions, when such proceedings are without or in  
13 excess of the jurisdiction of such tribunal, corporation, board or person.” *See also*  
14 *State v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 118 Nev. 140, 146-47,  
15 42 P.3d 233, 237 (2002) (A writ of prohibition is the counterpart of the writ of  
16 mandamus and is available to “arrest[ ] the proceedings of any tribunal ... when  
17 such proceedings are without or in excess of the jurisdiction of such tribunal.”);  
18 *City of N. Las Vegas v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 122  
19 Nev. 1197, 1202, 147 P.3d 1109, 1113 (2006) (a writ of prohibition is available  
20 when a district court acts without or in excess of its jurisdiction). Writ relief can  
21 be proper when the lower court abuses its discretion. *See State v. Eighth Judicial*  
22 *Dist. Court ex rel. Cnty. of Clark*, 118 Nev. 140, 147, 42 P.3d 233, 237-38 (2002)  
23  
24  
25  
26  
27  
28

1 ([w]rit relief is not proper to control the judicial discretion of the district court,  
2 unless discretion is manifestly abused or is exercised arbitrarily or capriciously).  
3

4 V.

5 **REASONS WHY RELIEF SHOULD ISSUE**  
6

7 **1. The ELN Trust has no other plain, speedy and adequate remedy**  
8 **because Lynita has filed a Motion to Amend Judgment or Alter**  
9 **Judgment, which preclude the ELN Trust from filing an appeal.**

10 The ELN Trust has no other remedy than a writ because Lynita filed a  
11 Motion to Amend or Alter Judgment pursuant to NRCP 53(e), which precludes  
12 the ELN Trust from filing an appeal. Indeed, NRAP 4(a) makes it clear that the  
13 filing of a motion under Rule 59 to alter or amend a judgment tolls the deadline to  
14 file an appeal, and that filing an appeal prior to the resolution of a motion under  
15 Rule 59 will be dismissed as “premature.” Specifically, NRAP 4(a)(6) provides:  
16  
17

18 **Premature Notice of Appeal.** A premature notice of appeal does  
19 not divest the district court of jurisdiction. The Supreme Court may  
20 dismiss as premature a notice of appeal filed after the oral  
21 pronouncement of a decision or order but before entry of the written  
22 judgment or order, or before entry of the written disposition of the  
23 last-remaining timely motion listed in Rule 4(a)(4). If, however, a  
24 written order or judgment, or a written disposition of the last-  
25 remaining timely motion listed in Rule 4(a)(4), is entered before  
26 dismissal of the premature appeal, the notice of appeal shall be  
27 considered filed on the date of and after entry of the order, judgment  
28 or written disposition of the last-remaining timely motion.

As indicated *supra*, the ELN Trust previously sought a motion to stay  
pending appeal and pending the Motion to Alter or Amend the Judgment, pursuant

1 to NRCP 62, which was denied by the District Court on June 19, 2013. Due to the  
2 pending NRCP 59(e) Motion to Amend or Alter the Judgment, the ELN Trust has  
3 no other remedy other than the instant Writ for Prohibition.  
4

5 **2. The Divorce Decree and June 19, 2013, Order exceeded the District**  
6 **Court's jurisdiction because it substitutes the District Court's judgment**  
7 **for that of the Distribution Trustee, and violates NRS 166.120 and NRS**  
8 **Chapter 21.**

9 Despite the District Court's determination not to invalidate the ELN Trust,  
10 it nonetheless, in contravention of Nevada law, orders the ELN Trust to distribute  
11 assets in the approximate amount of \$1,075,000.00 to pay Eric's *personal*  
12 *obligations* to Lynita and the court-appointed special master Mr. Bertsch. In  
13 making such findings, the District Court ignored NRS Chapter 21, Nevada's self-  
14 settled spendthrift trust statutes, and erroneously relied upon statutes from South  
15 Dakota and Wyoming and case law from Florida, all of which contradict Nevada  
16 law and expressly allow a self-settled spendthrift trust to pay child-support or  
17 alimony obligations of a beneficiary, to support its erroneous findings. *See Appx.*  
18 *1 at 40:2-23.*

19 The District Court determined that the ELN Trust is a Nevada spendthrift  
20 trust created under statute and that, based on the evidence presented by the parties,  
21 the ELN Trust would remain intact. *Appx. 1 at 44: 9-17.* Specifically, the District  
22 Court held:

24 **THE COURT FURTHER FINDS that the ELN Trust was established as a**  
25 **self-settled spendthrift trust in accordance with NRS 166.020.**

26 **THE COURT FURTHER FINDS that all of the assets and interest held by**  
27 **the Eric L. Nelson Separate Property Trust were transferred to assigned to**  
28 **the ELN Trust.**



1 THE COURT FURTHER FINDS that while the parties may differ as to the  
2 reason why the trusts were created, the effect of a spendthrift trust is to  
3 prevent creditors from reaching the principle or corpus of the trust unless  
4 said creditor is known at the time in which an asset is transferred to the trust  
5 and the creditor brings an action no more than two years after the transfer  
6 occurs or no more than 6 months after the creditor discovers or reasonably  
7 should have discovered the transfer, whichever occurs latest.

8 THE COURT FURTHER FINDS that while spendthrift trusts have been  
9 utilized for decades; Nevada is one of the few states that recognize self-  
10 settled spendthrift trusts. **The legislature approved the creation of  
11 spendthrift trusts in 1999 and it is certainly not the purpose of this  
12 Court to challenge the merits of spendthrift trusts.** (Emphasis added).

13 Under Nevada law, a spendthrift trust is defined as “a trust in which by the  
14 terms thereof a valid restraint on the voluntary and involuntary transfer of the  
15 interest of the beneficiary is imposed.” *See* N.R.S. 166.020. Moreover, under  
16 N.R.S. 166.050, no specific language is necessary for the creation of a valid  
17 spendthrift trust. Rather, it is sufficient by the terms of the writing the creator of  
18 the trust manifests an intent to create a spendthrift trust. *Title Insurance & Trust*  
19 *Co. v. Commissioner of Internal Revenue*, 100 F.2d 482, 485 (9th Cir. 1938) (the  
20 purpose of a trust will be determined by the instrument which created it, and the  
21 parties cannot claim that the trust has a purpose different or narrower than that  
22 disclosed by the instrument).

23 The ELN Trust is a valid spendthrift trust created under the laws of the  
24 State of Nevada by Eric, as grantor. Specifically, Section 13.2 of the ELN Trust  
25 provides in pertinent part (“Spendthrift Provisions”):  
26  
27  
28

1 No property (income or principal) distributable under this Trust Agreement,  
2 whether pursuant to Article III, IV or Article V or otherwise, shall be  
3 subject to anticipation or assignment by any beneficiary, or to attachment  
4 by or of the interference or control of any creditor or assignee of any  
5 beneficiary, or be taken or reached by any legal or equitable process in  
6 satisfaction of any debt or liability of any beneficiary, and any attempted  
7 transfer or encumbrance or any interest in such property by any beneficiary  
8 hereunder shall be absolutely and wholly void. No beneficiary or  
9 remainderman of any Trust shall have any right or power to sell, transfer,  
10 assign, pledge, mortgage, alienate, or hypothecate his or her interest in the  
11 principal or income of the Trust estate in any manner whatsoever. **To the**  
12 **fullest extent of the law, the interest of each beneficiary and**  
13 **remainderman shall not be subject to the claim of any creditors or**  
14 **liable to attachment, execution, bankruptcy proceedings, or any other**  
15 **legal process.** No beneficiary of any Trust created hereunder shall have  
16 any right or power to anticipate, pledge, assign, sell, transfer, alienate or  
17 encumber his or her interest in the Trust, in any way; nor shall any such  
18 interest in any manner beneficiary liable for or subject to the debts,  
19 liabilities, taxes or obligations of such beneficiary or claims of any sort  
20 against such beneficiary. . . . All Trusts created by this Trust Agreement  
21 **shall beneficiary spendthrift Trusts as provided by the law of the State**  
22 **of Nevada and shall beneficiary interpreted and operated so as to**  
23 **maintain such trusts as spendthrift trusts. . . .** (Emphasis added). See  
24 ELN Trust, attached as Exhibit 7 to the Appendix.

19 Pursuant to Section 12.2, the Distribution Trustee has complete  
20 discretionary authority to make “distributions of principal and/or income to the  
21 beneficiaries hereunder at times and in amounts as determined in the sole  
22 discretion of the Distribution Trustee, subject only to the veto power vested in the  
23 Trustor, according to the standards set forth in Section 3.1 above.” Section III  
24 further provides that distributions are to be made in the Trustees “sole and  
25 absolute discretion” to or for the benefit of one or beneficiary under the terms of  
26 the ELN Trust.<sup>5</sup>

27  
28 <sup>5</sup> Section VI of the ELN Trust further authorizes the Distribution Trustee to  
delay distributions to any beneficiary or otherwise consider the fact that a

1 Nevada law, similar to the law of the majority of jurisdictions, protects the  
2 interests of a beneficiary in a spendthrift trust from all creditors of the beneficiary.  
3 Indeed, N.R.S. 166.130 expressly provides that "[a] beneficiary of a spendthrift  
4 trust has no legal estate in the capital, principal or corpus of the trust unless under  
5 the terms of the trust the beneficiary or one deriving title from him or her is  
6 entitled to have it conveyed or transferred to him or her immediately, . . ."

7  
8 Similarly, N.R.S. 166.120 provides:

9  
10 2. Payments by the trustee to the beneficiary, whether such  
11 payments are mandatory or discretionary, must be made only to or for  
12 the benefit of the beneficiary and not by way of acceleration or  
13 anticipation, nor to any assignee of the beneficiary, nor to or upon any  
14 order, written or oral, given by the beneficiary, whether such  
15 assignment or order be the voluntary contractual act of the beneficiary  
16 or be made **pursuant to or by virtue of any legal process in**  
17 **judgment, execution, attachment, garnishment, bankruptcy or**  
18 **otherwise, or whether it be in connection with any contract, tort**  
19 **or duty.** Any action to enforce the beneficiary's rights, to determine if  
20 the beneficiary's rights are subject to execution, to levy an attachment  
21 or for any other remedy must be made only in a proceeding  
22 commenced pursuant to chapter 153 of NRS, if against a testamentary

23  
24  
25  
26  
27  
28  
beneficiary is involved in divorce proceedings. Indeed, the ELN Trust authorizes  
the Distribution Trustee to:

- 29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100
- (a) If, upon any of the dates described herein, the Trustee for any reason described below determines, in the Trustee's sole discretion, that it would not be in the best interest of the beneficiary that a distribution take place, then in that event the said distribution shall be totally or partially postponed until the reason for the postponement has been eliminated.
  - (b). . . (1) The current involvement of the beneficiary in a divorce proceeding or a bankruptcy or other insolvency proceedings.

1 trust, or NRS 164.010, if against a nontestamentary trust. A court has  
2 exclusive jurisdiction over any proceeding pursuant to this section.

3 3. The beneficiary shall have no power or capacity to make any  
4 disposition whatever of any of the income by his or her order,  
5 voluntary or involuntary, and whether made upon the order or  
6 direction of any court or courts, whether of bankruptcy or otherwise;  
7 **nor shall the interest of the beneficiary be subject to any process**  
8 **of attachment issued against the beneficiary, or to be taken in**  
9 **execution under any form of legal process directed against the**  
10 **beneficiary or against the trustee,** or the trust estate, or any part of  
11 the income thereof, but the whole of the trust estate and the income of  
12 the trust estate shall go to and be applied by the trustee solely for the  
benefit of the beneficiary, free, clear, and discharged of and from any  
and all obligations of the beneficiary whatsoever and of all  
responsibility therefor. (Emphasis added).

13 Therefore, pursuant to Nevada law, Eric has no legal interest or ownership  
14 interest in the ELN Trust and the Divorce Decree and June 19, 2013, Order  
15 directing the ELN Trust to make payment of an obligation of Eric, individually, is  
16 improper. Eric has no "right" to receive any distribution from the ELN Trust and  
17 neither he, his creditors nor the District Court can compel distributions therefrom  
18 to or for his benefit. Indeed, N.R.S. 163.417 provides that a "**court may not**  
19 **order the exercise of: . . . (c) A trustee's discretion to: (1) Distribute any**  
20 **discretionary interest;** (2) Distribute any mandatory interest which is past due  
21 directly to a creditor; or (3) Take any other authorized action in a specific way; or  
22 . . ." (Emphasis added).<sup>6</sup> As such, there is no interest to execute upon. *See also*  
23

24 <sup>6</sup> The fact that Eric is the Investment Trustee of the ELN Trust does not alter  
25 or otherwise change the fact that the ELN Trust is a valid Nevada spendthrift trust  
26 specifically designed to preclude distribution of assets of the trust to the creditors  
27 of a beneficiary thereunder. Indeed, N.R.S. 163.417(1) provides that "a creditor  
28 may not exercise, and a court may not order the exercise of: (d) a power to  
distribute a beneficial interest of a trustee solely because the beneficiary is a  
trustee." Similarly, N.R.S. 163.417(2) provides that "trust property is not subject

1 N.R.S. 21.080 which provides, “[t]his chapter does not authorize the seizure of, or  
2 other interference with, any money, thing in action, lands or other property held in  
3 spendthrift trust or in a discretionary or support trust governed by chapter 163 of  
4 NRS for a judgment debtor, or held in such trust for any beneficiary, pursuant to  
5 any judgment, order or process of any bankruptcy or other court directed against  
6 any such beneficiary or trustee of the beneficiary;” N.R.S. 21.090, which  
7 identifies property that is exempt under Nevada law from execution, including a  
8 beneficial interest in spendthrift trust prior to distribution.  
9

10 Notwithstanding that the ELN Trust is a spendthrift trust and the District  
11 Court has no authority under Nevada law to order the Distribution Trustee to  
12 exercise discretionary authority to distribute assets to Eric as a beneficiary in order  
13 to satisfy a judgment against him personally, the District Court improperly found  
14 that the ELN Trust was responsible for the back child support, alimony and  
15 attorney’s fees determined by the court to be owed to Lynita. In making such  
16 findings, the District Court ignored NRS Chapter 21, Nevada’s self-settled  
17 spendthrift trust statutes, and erroneously relied upon statutes from South Dakota  
18 and Wyoming and case law from Florida, all of which contradict Nevada law and  
19 expressly allow recovery against a self-settled spendthrift trust to pay child-  
20 support or alimony obligations of a beneficiary, to support his erroneous findings.  
21 *See* Appx. 1 at 40:2-23. Specifically, the District Court found:  
22  
23  
24

---

25 to the personal obligations of a trustee, even if the trustee is insolvent or  
26 bankrupt.” Additionally, pursuant to N.R.S. 166.120(4), “[t]he trustee of a  
27 spendthrift trust is required to disregard and defeat every assignment or other act,  
28 voluntary or involuntary, that is attempted contrary to the provisions of this  
chapter.”

1 THE COURT FURTHER FINDS that various statutes and other  
2 sources suggest that the interest of a spendthrift trust beneficiary can  
3 be reached to satisfy support of a child or a former spouse.  
4 Specifically, South Dakota, which also recognizes self-settled  
5 spendthrift trust, has addressed the issue in South Dakota Codified  
6 Law § 55-16-15 which states:

7 Notwithstanding the provisions of §§ 55-16-9 to 55-16-14,  
8 inclusive, this chapter does not apply in any respect to any  
9 person to whom the transferor is indebted on account of an  
10 agreement or *order of court* for the payment of *support* or  
11 *alimony* in favor of such transferor's spouse, *former spouse*, or  
12 children, or for a *division or distribution of property* in favor of  
13 such transferor's spouse or former spouse, to the extent of such  
14 debt (emphasis added).

15 Wyoming, which also allows self-settled spendthrift trust, has also  
16 addressed the matter through Wyoming Statutes Annotated § 4-10-  
17 503(b):

18 (b) Even if a trust contains a spendthrift provision, a person  
19 who has a judgment or court order against the beneficiary for  
20 child support or maintenance may obtain from a court an order  
21 attaching present or future distributions to, or for the benefit of,  
22 the beneficiary.

23 THE COURT FURTHER FINDS that, while not binding on this  
24 Court, these statutes clearly demonstrate that spouses entitled to  
25 alimony or maintenance are to be treated differently than a creditor by  
26 providing that the interest of a spendthrift trust beneficiary can be  
27 reached to satisfy support of a child or a former spouse.

28 THE COURT FURTHER FINDS that in *Gilbert v. Gilbert*, 447 So.2d  
29 299, the Florida Court of Appeals affirmed the district court's order  
30 that allowed the wife to garnish the husband's beneficiary interest in a  
31 spendthrift trust to satisfy the divorce judgment regarding alimony  
32 payments.

1 THE COURT FURTHER FINDS that the *Gilbert* court found that  
2 while “the cardinal rule of construction in trusts is to determine the  
3 intention of the settlor and give effect to his wishes...there is a strong  
4 public policy argument which favors subjecting the interest of the  
5 beneficiary of a trust to a claim for alimony.” The Court went on to  
6 state that the dependents of the beneficiary should not be deemed to  
7 be creditors as such a view would “permit the beneficiary to have the  
8 enjoyment of the income from the trust while he refuses to support his  
9 dependents whom it is his duty to support.” The *Gilbert* court went on  
10 to state that a party’s responsibility to pay alimony “is a duty, not a  
11 debt.” *See* Appx. 1 at 40:5-41:15.

12 The statutes of other jurisdictions relied on by the District Court contradict  
13 the clear and unequivocal language of Nevada’s spendthrift trust statutes. Unlike  
14 the statutes in South Dakota and Wyoming that expressly authorize the payment  
15 of orders of the court for support and alimony of a beneficiary from a spendthrift  
16 trust, Nevada spendthrift trust statutes are completely devoid of any such  
17 exception.

18 When “the words of the statute have a definite and ordinary meaning, this  
19 court will not look beyond the plain language of the statute, unless it is clear that  
20 this meaning was not intended.” *Harris Associates v. Clark Cnty. Sch. Dist.*, 119  
21 Nev. 638, 642, 81 P.3d 532, 534 (2003) (*citing State v. Quinn*, 117 Nev. 709, 713,  
22 30 P.3d 1117, 1120 (2001); *see also Glover v. Concerned Citizens for Fuji Park*,  
23 118 Nev. 488, 50 P.3d 546, 548 (2002) (stating that “[i]t is well established that  
24 when the language of a statute is unambiguous, a court should give that language  
25  
26  
27  
28

1 its ordinary meaning”), *overruled in part by Garvin v. Dist. Ct.*, 118 Nev. 749, 59  
2 P.3d 1180, 1191 (2002).  
3

4       Indeed, when recently faced with a proposal to allow such exceptions, the  
5 Nevada Legislation expressly declined to amend the spendthrift trust to provide  
6 for such exceptions. Interestingly, Mr. Dickerson, counsel for Lynita in the instant  
7 matter was the proponent of such amendment. In a Memorandum prepared by  
8 Mr. Dickerson to the Senate Committee on Judiciary, he acknowledged that  
9 Nevada “has no statutory language allowing for a spouse or child to be an  
10 exception creditor of the [spendthrift] trust” and that “there has never been an  
11 effort to address the effect of this type of trust on domestic support obligations.”  
12  
13 *See* document entitled “Memorandum from Robert P. Dickerson in Support of  
14 AB378 dated May 7, 2013, attached as Exhibit 8 to the Appendix. The  
15 amendment proposed, namely Section 1.3 of AB378, sought to “creat[e] a creditor  
16 exception for a settlor’s child, spouse or domestic partner, or former spouse or  
17 domestic partner which would allow such persons the ability to obtain a judgment  
18 enforceable against the trust estate.” *Id.* The proposed amendments to Chapter  
19 166; however, did not pass and, as a result, the Nevada spendthrift trust statutes  
20 were not amended by the Legislative to allow for an exception for support order  
21 creditors of a beneficiary to be enforced against a spendthrift trust.  
22  
23  
24  
25  
26  
27  
28



1           Notwithstanding, courts of other jurisdictions, relying upon the absence of  
2 exceptions in their statutes, have held that a beneficiary's interest in a spendthrift  
3 trust is not subject to an alimony and or support order. Indeed, in *In re*  
4 *Johnston's Estate*, 252 Cal.App.2d 923, 60 Cal. Rptr. 852 (1967), the California  
5 court was confronted with the issue as to whether a child support obligation of a  
6 beneficiary created a "special exception" to the *statutory authority* that allowed a  
7 creditor to reach a beneficiary's interest in a spendthrift trust. Although  
8 California recognizes spendthrift trusts, "California, by statute, has imposed a  
9 restriction upon the power of a trustor to create a spendthrift trust in which the  
10 beneficiary's interest in entirely immune from the claims of a beneficiary's  
11 creditors." Such restriction allows a creditor of a beneficiary of a spendthrift trust  
12 to reach any income of the trust which is excess of the amount needed by the  
13 beneficiary for support and education. Although the court declined to create an  
14 exception that was not authorized by statute, the court recognized the distinctions  
15 made by some courts relative to child support and alimony claims. Specifically, it  
16 noted that "when the marriage bonds are severed and the wife obtains a judgment  
17 for support and maintenance, her relationship with her husband is no different  
18 from that of any other judgment creditor." *Id.* at 928. A parent's obligation to  
19 support their child, however, exists because of the relationship between a parent  
20 and child that does not severe as a result of divorce. *Id.*; *see also Lippincott v.*

1 *Lippincott*, 37 A.2d 741 (Pa. 1944) (holding that, although public policy requires a  
2 husband to provide for and protect his wife during marriage, once that marriage  
3 terminates public policy no longer allows a beneficiary's interest to be seized;  
4 therefore, the court held that an alimony order cannot be enforced against the  
5 interest of a beneficiary under a spendthrift trust, as a divorced wife has no status  
6 different from that of other judgment creditors). Consequently, the court declined  
7 to allow the beneficiary's interest to be used to satisfy the obligation because a  
8 person is free to dispose of his property as he sees fit.

9  
10  
11  
12 Although the District Court acknowledged that the statutory authority from  
13 other jurisdictions was not binding, it nonetheless erred in finding an exception  
14 that does not otherwise exist under the law thereby exceeding its jurisdiction.  
15 Accordingly, Judge Sullivan's order directing the ELN Trust to pay almost  
16 \$1,075,000.00 to Lynita and the special master for a support obligation  
17 determined by the Court to exist *by Eric* is a clear error of the law, and he had no  
18 jurisdiction to enter such an order.  
19  
20  
21

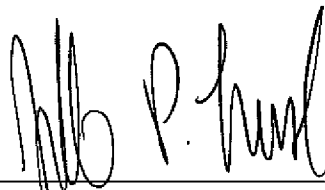
## 22 VI.

### 23 CONCLUSION

24  
25 For these reasons, Petitioner respectfully requests that this Court prohibit  
26 enforcement of the portions of the June 19, 2013, Order which requires the ELN  
27 Trust to pay Lynita or her attorneys the sum of \$1,032,742.00 and Mr. Bertsch the  
28

1 sum of \$35,258.00, before 5:00 p.m. on June 21, 2013, and the Divorce Decree,  
2 which requires the ELN Trust to pay the aforementioned amounts within thirty  
3 (30) days of the entry of the Divorce Decree, until this Court can address whether  
4 the District Court exceeded its jurisdiction by ordering that the ELN Trust pay's  
5 Eric's personal obligation.  
6  
7

8 Respectfully submitted this 21<sup>st</sup> day of June, 2013.  
9

10  
11  
12 

13 MARK A. SOLOMON, ESQ., NSB 0418

14 E-mail: [msolomon@sdfnvlaw.com](mailto:msolomon@sdfnvlaw.com)

15 JEFFREY P. LUSZECK, ESQ., NSB 9619

16 E-mail: [jluszeck@sdfnvlaw.com](mailto:jluszeck@sdfnvlaw.com)

17 **SOLOMON DWIGGINS & FREER, LTD.**

18 9060 W. Cheyenne Avenue

19 Las Vegas, Nevada 89129

20 Telephone: (702) 853-5483

21 Attorneys for Petitioner, Nola Harber as

22 Distribution Trustee of the ELN Nevada Trust  
23  
24  
25  
26  
27  
28

**VERIFICATION BY AFFIDAVIT**

1  
2 STATE OF NEVADA )  
3 ) SS:  
4 COUNTY OF CLARK )

5 Jeffrey P. Luszeck, Esq. hereby deposes and states under penalty of perjury:

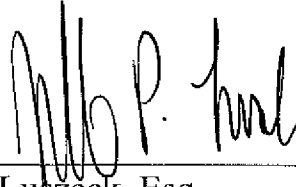
6  
7 1. I am an associate attorney at the law firm of Solomon Dwiggin &  
8 Freer, Ltd., Counsel for Petitioner. I am over the age of 18 years and have  
9 personal knowledge of the facts stated herein, except for those stated upon  
10 information and belief, and as to those facts, I believe them to be true.  
11

12 2. This Petition for Writ of Prohibition addresses the issue of whether  
13 the District Court erred as a matter of law and exceeded its jurisdiction by  
14 ordering the ELN Trust to pay Eric’s spousal support obligation and child support  
15 arrearages based upon statutes from other jurisdictions and in contravention of  
16 Nevada law.  
17  
18

19 3. Since there is a NRCP 59(e) motion pending, an appeal is premature  
20 thereby leaving no other plain, adequate, and speedy remedy available to  
21 Petitioner.  
22  
23  
24  
25  
26  
27  
28

1           4.     I certify and affirm that this Petition for Writ of Prohibition is made  
2 in good faith and not for purposes of delay.  
3

4           Dated this 21<sup>st</sup> day of June, 2013.



\_\_\_\_\_  
7 Jeffrey P. Luszeck, Esq.

8  
9 SUBSCRIBED and SWORN to before me  
10 this 21<sup>st</sup> day of June, 2013.

11 \_\_\_\_\_  
12 NOTARY PUBLIC in and for said County  
13 and State  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1                   **CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)**

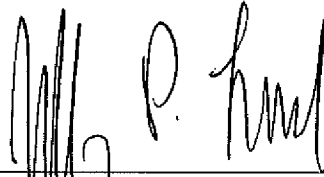
2  
3           1.    I hereby certify that this brief complies with the formatting  
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and  
5 the type style requirements of NRAP 32(a)(6) because this brief has been prepared  
6 in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point  
7 Times New Roman type style.  
8

9  
10          2.    I further certify that this brief complies with the page or type-volume  
11 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted  
12 by NRAP 32(a)(7)(C), it is not proportionately spaced, has a typeface of 14 points,  
13 and contains 6,593 words.  
14

15          3.    Finally, I hereby certify that I have read this Petition for Writ of  
16 Prohibition, and to the best of my knowledge, information and belief, it is not  
17 frivolous or interposed for any improper purpose. I further certify that this  
18 Petition for Writ of Prohibition complies with all applicable Nevada Rules of  
19 Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion  
20 in the brief regarding matters in the record to be supported by appropriate  
21 references to page and volume number, if any, of the transcript or appendix where  
22 the matter relied on is to be found. I understand that I may be subject to sanctions  
23  
24  
25  
26  
27  
28

1 in the event that the accompanying brief is not in conformity with the  
2 requirements of the Nevada Rules of Appellate Procedure.  
3

4 Dated this 21<sup>st</sup> day of June, 2013.



---

6 MARK A. SOLOMON, ESQ., NSB 0418  
7 JEFFREY P. LUSZECK, ESQ., NSB 9619  
8 **SOLOMON DWIGGINS & FREER, LTD.**  
9 9060 W. Cheyenne Avenue  
10 Las Vegas, Nevada 89129  
11 Telephone: (702) 853-5483  
12 Attorneys for Petitioner, Nola Harber as  
13 Distribution Trustee of the ELN Nevada Trust  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 CERTIFICATE OF SERVICE

2 Pursuant to Nev.R.App.P. 5(b), I hereby certify that I am an employee of the  
3 law firm of Solomon Dwiggin & Freer, Ltd., and that on June 21, 2013, I filed a  
4 true and correct copy of the foregoing *Petition for Writ of Prohibition*, with the  
5 Clerk of the Court through the Court's eFlex electronic filing system and notice  
6 will be sent electronically by the Court to the following:  
7  
8

9  
10 Robert P. Dickerson, Esq.  
11 Katherine L. Provost, Esq. Counsel for Lynita S. Nelson, defendant  
12 THE DICKERSON LAW GROUP in District Court  
13 1745 Village Center Circle  
Las Vegas, Nevada 89134

14 Radford J. Smith, Chartered  
15 Rhonda K. Forsberg, Esq. Counsel for Eric L. Nelson, real party in  
16 64 N. Pecos Road, Suite 700 interest  
Henderson, Nevada 89074

17 Larry L. Bertsch, CPA, CFF  
18 Larry L. Bertsch, CPA & Associates Real Party in Interest  
19 265 E. Warm Springs Road, #104  
20 Las Vegas, NV 89119

21  
22 Dated: June 21, 2013.

23  
24   
25 \_\_\_\_\_  
26 An employee of SOLOMON DWIGGINS &  
27 FREER, LTD.  
28