

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

2
3 NOLA HARBER, as Distribution Trustee
4 of the ERIC L. NELSON NEVADA
TRUST dated May 30, 2001,

5 Petitioners,

6 vs.

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

10 Respondents,

11 and

12 ERIC L. NELSON and LYNITA S.
13 NELSON, individually, and LSN
NEVADA TRUST dated May 30, 2001,
14 LARRY BERTSCH,

15 Real Parties in Interest.

Electronically Filed
Jul 09 2013 09:43 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No. 63432

16 **ANSWER TO PETITION FOR WRIT OF PROHIBITION**

17
18 **THE DICKERSON LAW GROUP**
19 ROBERT P. DICKERSON, ESQ.
Nevada Bar No. 000945
20 JOSEF M. KARACSONYI, ESQ.
Nevada Bar No. 010634
21 KATHERINE L. PROVOST, ESQ.
Nevada Bar No. 008414
22 1745 Village Center Circle
Las Vegas, NV 89134
23 Telephone: (702) 388-8600
Attorneys for Real Parties in Interest
24 LYNITA NELSON and the LSN NEVADA
TRUST dated May 30, 2001
25
26
27
28

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii-iii
I. INTRODUCTION	1
II. STATEMENT OF FACTS AND PROCEDURAL HISTORY	2-17
III. LEGAL ANALYSIS	17-27
A. Nola Harber Lacks Standing To Maintain The Petition For Writ Of Prohibition And The Petition Must Therefore Be Denied	17
B. Even If Petitioner Had Standing To Maintain The Petition For Writ Of Prohibition, Petitioner Has Not Satisfied The Requirements For Issuance Of A Writ	18
C. Eric And The ELN Trust Are Not Entitled To Post-Judgment Relief Because They Have Accepted Certain Benefits Of The Decree Without Accepting Certain Responsibilities In Order To Gain An Unfair Advantage	21
D. The Petition for Writ of Prohibition Should Also Be Barred Under The Doctrines Of Collateral And Judicial Estoppel	23
E. The District Court Did Not Error In Its Order Directing That Certain Sums Be Paid From The Monies Previously Enjoined In David Stephens, Esq.'s Trust Account	26
IV. CONCLUSION	28

TABLE OF AUTHORITIES

Cases	Page
<i>Bohl v. Bohl</i> 72 S.D. 257, 32 N.W.2d 690 (S.D. 1948)	22
<i>Bowler v. First Judicial Dist. Ct.</i> 68 Nev. 445, 234 P.2d 593 (1951)	20
<i>Castle v. Simmons</i> 120 Nev. 98, 86 P.3d 1042 (2004)	12
<i>Causey v. Carpenters So. Nev. Vacation Trust</i> 95 Nev. 609, 600 P.2d 244 (1979)	17
<i>Connelly v. Connelly</i> 374 N.W.2d 633 (S.D. 1985)	21, 22
<i>Daane v. Dist. Ct.</i> 127 Nev. Adv. Op. 59, 261 P.3d 1086 (2011)	18, 19
<i>Exec. Mgmt., Ltd. v. Ticor Title Ins.</i> 118 Nev. 46, 38 P.3d 872 (2002)	18
<i>Ford v. Ford</i> 105 Nev. 672, 782 P.2d 1304 (1989)	21
<i>Hilbrands v. Far East Trading Co.</i> 509 F.2d 1321 (9 th Cir. 1975)	18
<i>Kahn v. Morse & Mowbray</i> 121 Nev. 464, 117 P.3d 227 (2005)	23
<i>Karow v. Mitchell</i> 110 Nev. 959, 878 P.2d 978 (1994)	20
<i>Marcuse v. Del Webb Communities</i> 123 Nev. 278, 163 P.3d 462, 469 (2007)	24
<i>Pan v. Dist. Ct.</i> 120 Nev. 222, 88 P.3d 840 (2004)	20, 21
<i>So. Cal. Edison v. Dist. Ct.</i> 255 P.3d 231, 127 Nev. Adv. Op. 22 (2011)	24
<i>Sterling Builders, Inc. v. Fuhrman</i> 80 Nev. 543, 396 P.2d 850 (1964)	24

...

1	Constitution, Statutes, Rules and Regulations	Page
2	31 C.J.S. Estoppel § 121	24
3	FRCP 25(c)	18
4	Nevada Constitution, Art. 6, § 4	18
5	NRAP 3A(b)(1)	21
6	NRCP 25(c)	17, 18
7	NRCP 61	27
8	NRS Chapter 166	26
9	NRS 34.320	18
10	NRS 34.330	18
11	NRS 166.040	26

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2 **ANSWER TO PETITION FOR WRIT OF PROHIBITION**

3 **I. INTRODUCTION**

4 The Petition for Writ of Prohibition (“Petition”) presented by Nola Harber, as
5 purported Distribution Trustee of the Eric L. Nelson Nevada Trust dated May 30,
6 2001 (“ELN Trust”),¹ is just one legal maneuver, in a long line of legal maneuvers
7 dating back several years, directed by Real Party In Interest, Eric Nelson (“Eric”), to
8 attempt to defeat the efficacy of the legal system, and ensure that his wife of nearly
9 thirty (30) years, Real Party in Interest, Lynita Nelson (“Lynita”),² receives nothing
10 from the underlying divorce action. As was argued and categorically rejected in the
11 District Court, Eric and the ELN Trust assert that monies awarded to Lynita are
12 protected by Nevada’s self-settled spendthrift trust laws, despite the fact that the
13 District Court found that the provisions for maintenance of a valid self-settled
14 spendthrift trust and the actual formalities of the ELN Trust were never followed prior
15 to and during the Parties’ divorce action.

16 On June 3, 2013, the Eighth Judicial District Court, Honorable Frank P.
17 Sullivan, issued a fifty (50) page decision and Decree of Divorce (“Decree”)
18 following a trial that spanned nearly two (2) years from beginning to end (with
19 approximately fifteen (15) days of trial conducted during such time). The Decree
20 brought to conclusion a highly litigious divorce action initiated more than four (4)
21 years prior. In the extremely detailed Decree, the District Court outlined the
22

23
24 ¹ As will be discussed below, at all times prior to the divorce issued by the
25 District Court, Lana Martin, as Distribution Trustee of the ELN Trust, was the named
26 party for the ELN Trust in this action, and Nola Harber has never been substituted
27 into this action as required by Nevada Rules of Civil Procedure, Rule 25(c) (2013).

28 ² Lynita and Eric are collectively referred to as the “Parties” herein.

1 egregious and “deplorable” behavior perpetrated by Eric throughout the Parties’
2 divorce to prevent the administration of justice, and the numerous breaches of his
3 fiduciary duties to Lynita prior to the Parties’ divorce action. See, e.g., Petitioner’s
4 Appendix (“PA”), Volume 1 at 26:16 to 28:16; 41:1 to 42:16; 45:1 to 46:8; 44:1-17.
5 It is respectfully requested that the Court review the Decree in its entirety (despite the
6 fact that significant portions are quoted herein), as a reading of same clearly shows
7 the abusive litigation tactics employed by Eric and the ELN Trust throughout the
8 underlying divorce action, and the injustice that was sought in the underlying action.
9 Having failed at preventing the administration of justice in the District Court, Eric
10 now attempts to obtain the injustice he unsuccessfully attempted to obtain from the
11 District Court by requesting the unauthorized application of the extraordinary remedy
12 of a Writ of Prohibition. As will be shown below, the relief requested in the Petition
13 is both factually and legally unsupportable, and should be denied by this Court.

14 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

15 On May 6, 2009, Eric initiated the underlying divorce proceeding in the Eighth
16 Judicial District Court. PA1 at 5:17. Lynita and Eric were married for nearly thirty
17 (30) years and amassed a substantial amount of wealth (approximately \$17,500,000)
18 prior to the termination of their marriage. PA1 at 6:2-3; 50: 4-26. Five (5) children
19 were born during the Parties’ marriage. PA1 at 5:12. While Eric became a
20 formidable and accomplished businessman and investor during the marriage, Lynita
21 gave up pursuit of a career outside the home to become a stay at home mother to the
22 couple’s five children. PA1 at 37:25 to 38:7.

23 In August, 2010, the Parties’ divorce trial began. PA1 at 9:10-11. Although
24 the majority of the Parties’ assets were held in the ELN Trust and LSN Nevada Trust
25 dated May 30, 2001 (“LSN Trust”) (the purported self-settled, spendthrift trusts),
26 such trusts were not previously made parties to the divorce action. Instead, during
27
28

1 the first phase of trial, Eric, individually, and as Trustor and Investment Trustee of
2 the ELN Trust, testified repeatedly that the assets held by ELN and LST Trusts were
3 community property and should be divided by the Court, as detailed by the District
4 Court in its Decree:³

5 THE COURT FURTHER FINDS that, due to [Lynita's] complete faith
6 in and total support of her husband, [Eric] had unfettered access to the
7 LSN Trust to regularly transfer assets from the LSN Trust to the ELN
Trust to infuse cash and other assets to fund its gaming and other risky
ventures.

8 THE COURT FURTHER FINDS that on numerous occasions during
9 these proceedings, [Eric] indicated that the ELN Trust and LSN Trust
both held assets that were indeed considered by the parties to be
community property.

10 THE COURT FURTHER FINDS that during the first phase of trial held
11 in August 2010, [Eric] was questioned ad nauseum by both his former
12

13 ³ Eric was at all times during the District Court proceedings the Investment
14 Trustee of the ELN Trust. The Investment Trustee is the only person authorized by
15 the terms of the ELN Trust to represent and bind the trust in legal proceedings, and
16 does so to the same extent as any absolute owner of property could bind himself or
herself in such legal proceedings:

17 12.1 Trustee's Powers.

18 ...

19 The Investment Trustee shall have the following powers, all of which
20 are to be exercised in a fiduciary capacity:

21 ...

22 (h) To institute, compromise, and defend any actions and
23 proceedings.

24 ...

25 (s) The enumeration of certain powers of the Trustee shall not limit
26 his general powers, subject always to the discharge of his
27 fiduciary obligations, and being vested with and having all the
28 rights, powers, and privileges which an absolute owner of the
same property would have.

PA1 at 163-165.

1 attorney, Mr. James Jimmerson, and by [Lynita's] attorney, Mr.
2 Dickerson, about his role as primary wage earner for the family.

3 THE COURT FURTHER FINDS that on direct examination, when
4 asked what he had done to earn a living following obtaining his real
5 estate license in 1990, [Eric's] lengthy response included:

6 "So that's my primary focus is managing all my assets and
7 Lynita's assets so we manage our *community assets*, and
8 that's where my primary revenue is driven (emphasis
9 added)."

10 THE COURT FURTHER FINDS that upon further direct examination,
11 when asked why the ELN and LSN Trusts were created, [Eric]
12 responded:

13 "In the event that something happened to me, I didn't have
14 to carry life insurance. I would put safe assets into her
15 property in her assets for her and the kids. My assets were
16 much more volatile, much more - - I would say daring;
17 casino properties, zoning properties, partners properties, so
18 we maintained this and these — all these trusts were
19 designed and set up by Jeff Burr. Jeff Burr is an excellent
20 attorney and so I felt comfortable. This protected Lynita
21 and her children and it gave me the flexibility because I do
22 a lot of tax scenarios, to protect her and the kids and me
23 and we could level off yearly by putting assets in her
24 trust or my trust depending on the transaction and
25 protect - - the basic bottom line is to protect her
26 (emphasis added)."

27 THE COURT FURTHER FINDS that upon further examination by
28 Attorney Jimmerson inquiring about the status of a rental property
located on Lindell Road, [Eric's] response was:

"Well, we don't pay rent because we're managing all the
assets, so I don't pay myself to pay Lynita because we —
it's all *community* (emphasis added)."

THE COURT FURTHER FINDS that during cross-examination on
October 19, 2010, [Eric] was questioned as to why he closed his
auctioning company and his response was:

"I was under water these businesses. And for business
purposes and to - - to set - - to save as much in our
community estate, I was forced to lay people off, generate
cash flow so Lynita would have the cash flow from these
properties in the future (emphasis added)."

THE COURT FURTHER FINDS that throughout [Eric's]
aforementioned testimony, he either expressly stated that his actions
were intended to benefit his and [Lynita's] community estate or made
reference to the community.

1 THE COURT FURTHER FINDS that it heard testimony from [Eric]
2 over several days during the months of August 2010, September 2010
3 and October 2010, in which [Eric's] testimony clearly categorized the
4 ELN Trust and LSN Trust's property as community property.

5 THE COURT FURTHER FINDS that [Eric's] sworn testimony
6 corroborates [Lynita's] claim that [Eric] informed her throughout the
7 marriage that the assets accumulated in both the ELN Trust and LSN
8 Trust were for the betterment of their family unit, and, thus, community.

9 PA1 at 9:2 to 10:23.

10 As the District Court further found, it was not until after six (6) days of trial
11 that Eric sought to have the ELN and LSN Trusts joined to the divorce action, not
12 satisfied with the way the proceedings were heading, and in a legal tactic intended to
13 give him a second chance of denying Lynita a large share of the Parties' community
14 assets:

15 THE COURT FURTHER FINDS that [Eric], as the Investment Trustee
16 for the ELN Trust, was the person authorized to institute legal action on
17 behalf of the Trust.

18 THE COURT FURTHER FINDS that [Eric] did not request that the
19 ELN Trust move to be added as a necessary party to these proceedings
20 until almost two years after initiating this action and following the initial
21 six days of trial. It is apparent to this Court that [Eric] was not satisfied
22 with the tenor of the courts preliminary "findings" in that it was not
23 inclined to grant his requested relief, and, consequently, decided to
24 pursue a "second bite at the apple" by requesting that the ELN Trust
25 pursue being added as a necessary party.

26 THE COURT FURTHER FINDS that adding the ELN Trust as a
27 necessary party at this rather late stage of the proceedings, resulted in
28 extended and protracted litigation including the re-opening of
Discovery, the recalling of witnesses who had testified at the initial six
days of trial, and several additional days of trial.

THE COURT FURTHER FINDS that [Eric's] position that he had a
conflict of interest which prevented him from exercising his authority to
institute legal action on behalf of the ELN Trust was not credible as he
had appeared before this Court on numerous occasions regarding
community waste issues and the transfer of assets from the ELN Trust
and the LSN Trust and had never raised an issue as to a conflict of
interest.

THE COURT FURTHER FINDS that while both parties were aware of
the existence of the ELN and LSN Trusts from the onset of this
litigation, and, as such, [Lynita] could have moved to add the ELN Trust
as a necessary party, [Eric] had consistently maintained throughout his
initial testimony that the assets held in the ELN Trust and the LSN

1 Trusts were property of the community.

2 PA1 at 45:2-26.

3 On June 24, 2011, Eric filed his Motion to Join Necessary Party; or in the
4 Alternative; to Dismiss Claims Against the Eric L. Nelson Nevada Trust Dated May
5 30, 2011, suggesting for the first time that the Parties had no legal interest in the
6 properties purportedly held by the ELN Trust despite days of sworn testimony to the
7 contrary. Respondent, Lynita Sue Nelson's Appendix ("LSNA"), Volume 1 at 5-59.
8 On August 9, 2011, a Stipulation and Order was entered into between Eric and Lynita
9 to join the ELN and LSN Trusts as parties to this action. PA1 at 54-59. On August
10 19, 2011, Lana Martin, as Distribution Trustee of the ELN Trust, voluntarily appeared
11 in this action by filing an Answer to [Eric's] Complaint for Divorce and
12 Counterclaims and Crossclaim, submitting to the jurisdiction of the divorce Court,
13 asserting causes of action against Lynita, and requesting affirmative relief.⁴ LSNA1
14 at 61-65. Specifically, the ELN Trust requested a declaratory judgment as to the
15 status of its (the Parties') property, and monetary damages. LSNA1 at 64:6-9.
16 Nonetheless, when Lynita subsequently asserted causes of action against the ELN
17 Trust, it (like Eric) reversed course, and baselessly argued that the Court did not have
18 jurisdiction over the trust and its affairs, despite the fact that it was the ELN Trust that
19 had invoked the jurisdiction of the Court. LSNA1 68:7-73:9.

20 Following the addition of the ELN and LSN Trusts to the divorce action,
21 numerous additional months of discovery and litigation ensued, and trial did not
22

23 ⁴ As previously stated in the District Court's findings quoted above, although
24 Eric as Investment Trustee of the ELN Trust was the only person authorized to
25 "institute, compromise, and defend any actions and proceedings" for the ELN Trust,
26 Eric represented to the Court that he delegated such authority to Lana Martin,
27 Distribution Trustee, because of an alleged conflict of interest prior to the August 19,
28 2011, Answer to [Eric's] Complaint for Divorce and Counterclaims and Crossclaim.
PA1 at 45:2-26.

1 recommence until July, 2012. PA1 at 4:23-23. As previously stated, on June 3, 2013,
2 following fifteen (15) days of trial, the District Court entered its Decree. In addition
3 to the findings discussed above, the District Court made, in part, the following
4 additional findings concerning the Parties and the ELN and LSN Trusts in its fifty
5 (50) page Decree:

6 (1) In 2001 Eric and Lynita, upon the advice and counsel of Jeffrey Burr,
7 Esq., created the ELN Trust and LSN Trust. PA1 at 7:12-15, 20-23. The Parties'
8 testimony "clearly established that the intent of creating the spendthrift trusts was to
9 provide maximum protection from creditors and was not intended to be a property
10 settlement in the event that the parties divorced." PA1 at 8:16-18. In addition, the
11 testimony of Jeffrey Burr, Esq., the attorney who prepared the trusts, corroborated the
12 fact that the purpose of creating the trusts was to "supercharge" the protection
13 afforded against creditors and was not intended to be a property settlement between
14 spouses. PA1 at 10:24-27.

15 (2) Attorney Burr suggested that the Parties periodically level off or equalize
16 the property in the ELN and LSN Trusts. PA1 11:2-4. The Parties intended to
17 maintain an equal allocation of assets between the trusts as reflected in Minutes from
18 a Trust Meeting, dated November 20, 2004, wherein it was stated that property was
19 transferred from the ELN Trust to the LSN Trust, in part, to "level off the trusts."
20 PA1 11:9-16.

21 (3) That on "numerous occasions, [Eric] requested that [Lynita] sign
22 documentation relating to the transfer of LSN Trust assets to the ELN Trust." PA1 at
23 12:2-4. Lynita "rarely questioned [Eric] regarding these matters for two reasons: (1)
24 [Eric] would become upset if she asked questions due to his controlling nature
25 concerning business and property transactions; and (2) she trusted him as her husband
26 and adviser." PA1 at 12:4-8. "[T]hat [Eric's] behavior during the course of [the]
27 extended proceedings . . . corroborate[d] [Lynita's] assertions that [Eric] exercises
28

1 unquestioned authority over property and other business ventures and loses control
2 of his emotions when someone questions his authority.” PA1 at 12:9-12.

3 (4) That Eric violated his fiduciary duties to Lynita as both Investment
4 Trustee and Trust Adviser to the LSN Trust, and as Lynita’s husband, by failing to
5 discuss the factors relating to the numerous transfers from the LSN Trust to the ELN
6 Trust. PA1 at 12:14-17; 14:22-27; 15:2-4. That Eric was able to exercise control over
7 properties in the LSN Trust and ELN Trusts, and freely transfer same, under the
8 “guise that [such] property transfers benefitted the community,” and because he
9 “assured [Lynita] that he managed the assets in the trusts for the benefit of the
10 community.” PA1 at 18:4-9; 17:19-21. That Lynita “was not advised [by Eric] that
11 she was not entitled to the benefit of assets transferred from the LSN Trust to the
12 ELN Trust under the direction of [Eric] until the ELN Trust joined the case as a
13 necessary party.” PA1 at 17:27 to 18:3.

14 (5) That prior to the Parties’ divorce action, millions of dollars worth of
15 properties were taken by Eric from the LSN Trust and transferred to the ELN Trust
16 without compensation, and the retention of same by Eric and the ELN Trust would
17 result in unjust enrichment and injustice. PA1 at 15-23.

18 (6) That Eric failed to follow the formalities of the ELN and LSN Trusts,
19 and had complete and unfettered access to the properties contained within such trusts:

20 THE COURT FURTHER FINDS that the formalities outlined within the
21 ELN Trust and the LSN Trust were not sufficiently and consistently
22 followed. Article eleven, section 11.3, of both trusts provides that
23 Attorney Burr, as Trust Consultant, shall have the right to remove any
24 trustee, with the exception of [Eric] and [Lynita], provided that he gives
25 the current trustee ten days written notice of their removal.

26 THE COURT FURTHER FINDS that Attorney Burr testified that on
27 February 22, 2007, at [Eric’s] request, he removed [Eric’s] employee,
28 Lana Martin, as Distribution Trustee of both the ELN Trust and the LSN
Trust and appointed [Eric’s] sister, Nola Harber, as the new Distribution
Trustee for both trusts. Attorney Burr further testified that he did not
provide Ms. Martin with ten days notice as specified in the trusts
documents. In June 2011, at [Eric’s] request, Attorney Burr once again
replaced the Distribution Trustee for the ELN Trust, without providing
ten days notice, by replacing Nola Harber with Lana Martin.

1 THE COURT FURTHER FINDS that the ELN Trust and LSN Trust
2 documents require that a meeting of the majority of the trustees be held
3 prior to any distribution of trust income or principal. During the
4 meetings, the trustees must discuss the advisability of making
distributions to the ELN Trust Trustor, [Eric], and the LSN Trust
Trustor, [Lynita]. At that time, a vote must take place and the
Distribution Trustee must provide an affirmative vote.

5 THE COURT FURTHER FINDS that the testimony of Lana Martin and
6 Nola Harber indicate that neither one of them ever entered a negative
7 vote in regards to distributions to [Eric] or [Lynita]. The testimony also
reflected that neither one of them ever advised [Eric] or [Lynita] on the
feasibility of making such distributions.

8 THE COURT FURTHER FINDS that while Ms. Martin and Ms. Harber
9 testified that they had the authority to approve or deny the distributions
10 to [Eric] under the ELN Trust and to [Lynita] under the LSN Trust, that
11 despite literally hundreds of distributions requests, they never denied
even a single distribution request. Therefore, Ms. Martin and Ms.
Harber were no more than a "rubber stamp" for [Eric's] directions as to
distributions to [Eric] and [Lynita].

12 THE COURT FURTHER FINDS that while the ELN Trust produced
13 multiple Minutes of alleged meetings; this Court seriously questions the
14 authenticity of the submitted documentation. Specifically, several of the
15 Minutes were unsigned, the authenticity of the signatures reflected on
16 some of the Minutes were questionable, and several of the Minutes
17 reflected that the meetings were held at the office of Attorney Burr while
18 the testimony clearly established that no such meetings ever occurred at
his law office.

19 THE COURT FURTHER FINDS that Daniel Gerety testified that he had
20 to make numerous adjustments to correct bookkeeping and accounting
21 errors regarding the two trusts by utilizing the entries "Due To" and
"Due From" to correctly reflect the assets in each trust.

22 THE COURT FURTHER FINDS that the numerous bookkeeping and
23 accounting errors, in conjunction with the corresponding need to correct
the entries to accurately reflect the assets in each trust, raises serious
questions as to whether the assets of each trust were truly being
separately maintained and managed.

24 THE COURT FURTHER FINDS that the lack of formalities further
25 emphasizes the amount of control that [Eric] exerted over both trusts and
26 that he did indeed manage both trust[s] for the benefit of the community.

27 PA1 at 30:15 to 32:12. The District Court essentially found that the ELN and LSN
28 Trusts were Eric's alter egos.

It should be noted that although not specifically mentioned by the District
Court, Section 11.3 of the ELN Trust also provides that any Successor Trustee must

1 be "either (1) an individual who is an "independent" Trustee pursuant to Internal
2 Revenue Code Section 674, as amended, or (2) a Nevada bank or Trust company . .
3 . ." PA1 at 160-61. Neither Ms. Martin, as Eric's employee, nor Ms. Harber, Eric's
4 sister, meets such definitions.

5 (7) That Eric lacked credibility, and during the divorce proceedings: (a)
6 "failed to answer questions in a direct and forthright manner," (b) violated the District
7 Court's injunction; and (c) "misstated the ELN Trust's financial position, or at the
8 very least was less than truthful with [the District Court]." In fact, the District Court
9 referenced Eric's lack of credibility, violation of Orders, and deplorable behavior
10 during the divorce action throughout its Decree, and even included a whole
11 subsection concerning his lack of credibility. Such findings warrant repeating herein:

12 ***Credibility***

13 THE COURT FURTHER FINDS that during the first six days of trial
14 held in 2010, [Eric] repeatedly testified that the actions he took were on
15 behalf of the community and that the ELN Trust and LSN Trust were
16 part of the community.

17 THE COURT FURTHER FINDS that during the last several weeks of
18 trial in 2012, [Eric] changed his testimony to reflect his new position
19 that the ELN Trust and the LSN Trust were not part of the community
20 and were the separate property of the respective trusts.

21 THE COURT FURTHER FINDS that [Eric] failed to answer questions
22 in a direct and forthright manner throughout the course of the
23 proceedings.

24 THE COURT FURTHER FINDS that [Eric] argued in the Motion to
25 Dissolve Injunction requesting the release of \$1,568,000, which the
26 Court had ordered be placed in a blocked trust account and enjoined
27 from being released, that the ELN Trust "has an opportunity to purchase
28 Wyoming Racing, LLC, a horse racing track and RV park for
\$440,000.00; however the ELN Trust will be unable to do so unless the
Injunction is dissolved."

THE COURT FURTHER FINDS that despite the Court's denial of the
request to dissolve the injunction, the ELN Trust via Dynasty
Development Group, LLC, completed the transaction and reacquired
Wyoming Downs at a purchase price of \$440,000. The completion of
the purchase, without the dissolution of the injunction, evidenced that
[Eric] misstated the ELN Trust's financial position, or at the very least
was less than truthful with this Court.

1 THE COURT FURTHER FINDS that it should be noted that in an
2 attempt to circumvent this Court's injunction regarding the \$1,568,000,
3 [Eric] had a Bankruptcy Petition filed in the United States Bankruptcy
4 Court, District of Nevada, on behalf of the Dynasty Development Group,
5 LLC, requesting that the \$1,568,000 be deemed property of the Debtor's
6 bankruptcy estate; however, the bankruptcy court found that this Court
7 had exclusive jurisdiction over the \$1,568,000 and could make whatever
8 disposition of the funds without regard to the Debtor's bankruptcy
9 filing.⁵

10 THE COURT FURTHER FINDS that based upon [Eric's] change of
11 testimony under oath, his repeated failure to answer questions in a direct
12 and forthright manner, his less than candid testimony regarding the
13 necessity of dissolving the injunction in order to purchase the Wyoming
14 race track and RV park, and his attempt to circumvent the injunction
15 issued by this Court clearly reflect that [Eric] lacks credibility.

16 THE COURT FURTHER FINDS that the United States Bankruptcy
17 Judge, Neil P. Olack, of the Southern District of Mississippi, cited
18 similar concerns as to [Eric's] credibility during a bankruptcy
19 proceeding held on June 24, 2011, regarding Dynasty Development
20 Group, LLC. Specifically, Judge Olack noted that as a witness, [Eric]
21 simply lacked credibility in that he failed to provide direct answers to
22 straight forward questions, which gave the clear impression that he was
23 being less than forthcoming in his responses.

24 THE COURT FURTHER FINDS that Bankruptcy Judge Olack found
25 that the evidence showed that [Eric] depleted the assets of Dynasty on
26 the eve of its bankruptcy filing in three separate transfers, and,
27 subsequently, dismissed the Bankruptcy Petition.

28 THE COURT FURTHER FINDS that [Eric's] behavior and conduct
during the course of these proceedings has been deplorable. This Court
has observed [Eric] angrily bursting from the courtroom following
hearings.

THE COURT FURTHER FINDS that [Eric] has repeatedly exhibited
inappropriate conduct towards opposing counsel, Mr. Dickerson,
including, cursing at him, leaving vulgar voice messages on his office
phone and challenging him to a fight in the parking lot of his office.

THE COURT FURTHER FINDS that [Eric's] deplorable behavior also
included an open and deliberate violation of the Joint Preliminary
Injunction that has been in place since May 18, 2009.

PA1 at 26:9 to 28:16. In fact, the District Court also found that Eric's purported
expert witness, Daniel Gerety (with whom Eric had maintained a financially

⁵ Emphasis added. These are the monies at issue in the instant writ proceeding
before this Court.

1 beneficial relationship dating back to 1998), and Eric's employee, Rochelle
2 McGowan, lacked credibility. PA1 at 29:7 to 30:13.⁶

3 (8) That while Eric and the ELN Trust claimed they were subject to
4 numerous liabilities, in an effort to reduce the value of property adjudicated by the
5 District Court, that almost none of such liabilities existed. PA1 at 32:19 to 33:20.
6 In fact, the District Court appointed a neutral expert, Larry Bertsch, to independently
7 trace and value the Parties' property held in the ELN and LSN Trusts, and Mr.
8 Bertsch could not confirm any of the indebtedness claimed by Eric and the ELN
9 Trust. PA1 at 33:2-9.

10 Based upon the findings set forth in the Decree and above, the District Court
11 Ordered an approximately equal division of the properties held in the ELN and LSN
12 Trusts. As pointed out in the Petition, the District Court's division of property was
13 accomplished by Ordering properties transferred between the two (2) trusts, and
14 imposing constructive trusts, without specifically invalidating the trusts. What the
15 Petition omits (presumably intentionally), however, is that the District Court also
16 found that the ELN and LSN Trusts were sham trusts and essentially Eric's alter egos
17 (based on the findings cited above), and that it would have been wholly justified in
18 invalidating such trusts:

19 THE COURT FURTHER FINDS that while the Court could invalidate
20 both Trusts based upon the lack of Trust formalities, this Court is not
21 inclined to do so since invalidation of the Trusts could have serious
22 implications for both parties in that it could expose the assets to the
23 claims of creditors, thereby, defeating the intent of the parties to
24 "supercharge" the protection of assets from creditors.

25 PA1 at 32:13-18.

26 THE COURT FURTHER FINDS that while the Court could invalidate

27 ⁶ The District Court's determinations of the credibility of Eric, Mr. Gerety and
28 Ms. McGowan are significant, as it is well settled that this Court "will not reweigh
the credibility of witnesses on appeal; that duty rests within the trier of facts sound
discretion." *Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042, 1046 (2004).

1 the Trusts based upon Mr. Nelson's testimony as to the community
2 nature of the assets held by each Trust, the breach of his fiduciary duty
3 as a spouse, the breach of his fiduciary duty as an investment trustee, the
4 lack of Trust formalities, under the principles of constructive trust, and
5 under the doctrine of unjust enrichment, the Court feels that keeping the
Trusts intact, while transferring assets between the Trusts to "level off
the Trusts", would effectuate the parties clear intentions of
"supercharging" the protection of the assets from creditors while
ensuring that the respective values of the Trusts remained equal.

6 PA1 at 47:9-17.

7 The only reason the District Court presumably did not invalidate the trusts was
8 that it believed it could afford justice to the Parties by transferring property between
9 each trust to accomplish an equal division of property, and award Lynita lump sum
10 alimony, child support arrears and attorneys' fees (discussed more fully below) from
11 the \$1,568,000 that was enjoined in Eric's former counsel's, David Stephens, Esq.'s
12 trust account.⁷ Said monies were first enjoined by the District Court at a hearing held
13 April 4, 2011, LSNA1 at 3:1-5, and remained in said account until sometime shortly
14 after the District Court issued its Decree on June 3, 2013. Undoubtedly, if the District
15 Court did not believe it could afford the relief it Ordered without invalidating the
16 trusts, it would have simply invalidated the trusts based on its findings warranting
17 same, rather than changing the relief it afforded to the Parties.

18 In addition to dividing the Parties' property, the District Court in its Decree
19 also awarded Lynita \$800,000 for lump sum alimony, \$87,775 in child support arrears
20 and \$144,967 for attorneys' fees and costs. PA1 at 51-52. Regarding the lump sum
21 alimony, the Court found that same was necessary, in part, as a result of Eric's actions
22 during the course of litigation, which clearly evidenced that absent a lump sum award
23 Eric would possibly "liquidate, interfere, hypothecate or give away assets" to avoid

24
25 ⁷ It should be noted, once again, this \$1,568,000 that is the subject matter of this writ
26 proceeding, is the same \$1,568,000 the Bankruptcy Court determined the District Court "had
27 exclusive jurisdiction over the \$1,568,000 and could make whatever disposition of the funds without
28 regard to the Debtor's bankruptcy filing." PA1 at 24:9-11. Eric and the ELN Trust never appealed
the Bankruptcy Court's decision, and thus are collaterally estopped from asserting the claims they
now assert in this writ proceeding before this Court.

1 alimony. PA1 at 42:11-16. The attorneys' fees that were awarded to Lynita resulted
2 from Eric's and ELN Trusts' unreasonable and unnecessary extension and protraction
3 of litigation, as set forth above. PA1 at 44:21 to 46:8; 51:25 to 52:2. Finally, the
4 District Court Ordered the ELN Trust to pay the remaining balance of \$35,258 owed
5 to Mr. Bertsch.

6 To ensure that Lynita received her alimony, child support arrears and attorneys'
7 fees, and that Mr. Bertsch was paid his remaining balance, the District Court Ordered
8 that such payments be made by the ELN Trust within thirty (30) days from the date
9 of Decree from the monies previously enjoined in Mr. Stephens' trust account. PA1
10 at 51:10 to 52:3. To allow the ELN Trust and Eric to access the \$1,568,000 and make
11 the aforementioned payments, the District Court also dissolved the prior injunction
12 freezing the \$1,568,000 in Mr. Stephens' trust account. PA1 at 51:6-9. The District
13 Court Ordered that the remaining approximately \$500,000 from the previously
14 enjoined funds would be distributed to Eric within thirty (30) days. PA1 at 52:4-9.

15 Based on the history of the underlying litigation, and Eric's never ending
16 attempts to defeat the efficacy of Court Orders and take advantage of the legal
17 system, Lynita and her counsel knew that Eric and the ELN Trust would immediately
18 accept the benefit of the dissolved injunction by withdrawing the \$1,568,000
19 previously enjoined in Mr. Stephens' trust account, and then refuse to pay Lynita the
20 portion of said funds awarded to her in the Decree. Accordingly, on June 5, 2013
21 (only two (2) days after the Decree was entered), Lynita filed her Motion for
22 Immediate Payment of Funds Belonging to Defendant Pursuant to Court's Decree to
23 Ensure Receipt of Same, and for Immediate Payment of Court Appointed Expert
24 ("Motion"). PA1 at 60-72. In such Motion, Lynita requested that the Court Order
25 that the alimony, child support arrears, and attorneys' fees totaling \$1,032,742, and
26 Mr. Bertsch's fees, be paid directly from the \$1,568,000 held in Mr. Stephens'
27 account, or in the alternative, if the \$1,568,000 had already been withdrawn and
28

1 transferred to Eric or Ms. Martin and the ELN Trust, that Lynita's and Mr. Bertsch's
2 portions of same be paid to them immediately. PA1 at 68:4-10. In making her
3 request, Lynita informed the District Court that she had only approximately \$19,000
4 in her bank account, but had outstanding credit card balances of \$53,674, current
5 household bills of \$3,130, and outstanding attorneys fees of \$140,000.⁸ PA1 at
6 66:10-12. Lynita's counsel submitted that if the District Court did not direct the
7 \$1,032,742 which was ordered to be paid to Lynita within 30 days to be paid to her
8 immediately, "it is likely that Eric and the ELN Trust will attempt to withhold or
9 dissipate the same, thereby attempting to defeat the Court's Orders and intent and
10 further delaying Lynita's desperately needed monies." PA1 at 66:20-24.

11 On June 19, 2013, the District Court conducted a hearing on Lynita's Motion.
12 LSNA1 at 164-197. During the hearing, the District Court confirmed that its intent
13 in Ordering in the Decree that the \$1,568,000 be used to pay Lynita's alimony, child
14 support, and attorneys' fees was to ensure payment of such obligations directly to
15 Lynita, as a direct distribution from the enjoined funds. LSNA1 at 170:6-10. It was
16 never the District Court's intent for the ELN Trust to take the enjoined funds, or for
17 Lynita not to have access to the monies immediately. LSNA1 at 170:6-10. In fact,
18 the District Court was very concerned when it found out that the ELN Trust had
19 already accessed the funds in Mr. Stephens' trust account without paying Lynita as
20 it had intended:

21 [] [Eric] has been controlling the estate essentially since day one. Now
22 he's losing control of the estate. And no disrespect to him. I expect a
23 lot of problems trying to get payment. That's why I did lump sum with
my findings, because I can see this going on til the world ended to be
honest. . . .

24 LSNA1 at 182:19-24. Accordingly, the District Court granted Lynita's Motion, and
25

26 ⁸ The District Court specifically found in the Decree that during the marriage
27 Lynita had become accustomed to a lifestyle which required \$20,000 per month to
28 maintain. PA1 at 39:16-19.

1 Ordered the ELN Trust and/or Eric to pay Lynita and Mr. Bertsch within forty-eight
2 (48) hours. LSNA1 at 183:22 - 184:2.

3 Before the forty-eight (48) hours expired, Nola Harber, as purported
4 Distribution Trustee of the ELN Trust, filed the instant Petition, and a Motion for
5 Stay (which will be addressed in a separate opposition). As previously stated, the
6 Distribution Trustee for the ELN Trust at all times during the District Court
7 proceedings was Lana Martin. It was not until the June 19, 2013 hearing, that it was
8 mentioned for the very first time by Ms. Martin's counsel that the Distribution
9 Trustee of the ELN Trust may have changed: "Secondly, it's my understanding Lana
10 Martin has resigned as distribution trustee for health reasons and Nola Harber is the
11 current distribution trustee." LSNA1 at 181:8-11. No request was made to substitute
12 Ms. Harber in Ms. Martin's stead, however, and Ms. Martin remains the named real
13 party in interest. Of course, a change from Ms. Martin to Ms. Harber as Distribution
14 Trustee would again violate the express terms of the ELN Trust.

15 Finally, it should be noted that at the June 19, 2013 hearing, counsel for Ms.
16 Martin argued to the Court that the monies awarded to Lynita could not be transferred
17 by the Distribution Trustee without the approval of Eric - who was out of the country.
18 LSNA1 at 180:10-12.⁹ This argument was advanced to the District Court even
19 though Eric had specifically delegated his ability to "institute, compromise, and
20 defend any actions and proceedings" for the ELN Trust to Lana Martin because of an
21 alleged conflict of interest (as detailed in the Decree). LSNA1 at 60. Of course, there
22 was no allegation or showing that such a delegation was made to Ms. Harber,
23 authorizing her to substitute in the stead of Ms. Martin if substitution was granted.
24 Even more egregiously, in the NRCP 27(e) Certificate declaration attached to Ms.

25
26 ⁹ While Lynita remained in Las Vegas with no monies to support herself,
27 immediately after withdrawing the \$1,568,000, Eric took three (3) of the Parties' five
28 (5) children on a multi-week vacation to Thailand. LSNA1 at 171:22-24.

1 Harber's Emergency Motion Under NRAP 27(e) for Stay to Issue by 2:00 P.M. on
2 June 21, 2013, Pending Resolution of Writ Proceedings, filed June 21, 2013, Ms.
3 Harber's counsel declares that a stay is necessary because "the newly appointed
4 Distribution Trustee is not a signator on any ELN Trust account." Apparently,
5 although the Distribution Trustee must approve and can deny any distributions from
6 the ELN Trust, she does not have access to any of its accounts. This is just a further
7 example of the gamesmanship and legal tactics employed by Eric and the ELN Trust
8 to avoid Court Orders and justice.

9 III. LEGAL ANALYSIS

10 A. Nola Harber Lacks Standing To Maintain The Petition For Writ Of Prohibition 11 And The Petition Must Therefore Be Denied

12 As set forth in the Statement of Facts and Procedural History ("Statement of
13 Facts"), at all times during the Parties' divorce action, Lana Martin was the named
14 party as Trustee of the ELN Trust, authorized to defend and maintain the District
15 Court proceedings on behalf of the ELN Trust. The instant Petition, however, was
16 filed by Nola Harber as purported Distribution Trustee of the ELN Trust. Ms. Harber
17 was never substituted in the place and stead of Ms. Martin, nor has there been any
18 showing that (1) Ms. Harber is the actual Distribution Trustee of the ELN Trust, and
19 (2) is authorized to maintain these proceedings and defend this action despite such
20 functions being afforded to the Investment Trustee under the terms of the ELN Trust.

21 It is well-settled that "a party to a litigation is either a natural or an artificial
22 person." *Causey v. Carpenters So. Nev. Vacation Trust*, 95 Nev. 609, 610, 600 P.2d
23 244, 245 (1979). Accordingly, "it is the trustee, or trustees, rather than the trust itself
24 that is entitled to bring suit." *Id.* NRCP 25(c) provides:

25 (c) Transfer of Interest. In case of any transfer of interest, the action
26 may be continued by or against the original party, **unless the court**
27 **upon motion** directs the person to whom the interest is transferred to be
28 substituted in the action or joined with the original party. Service of the
motion shall be made as provided in subdivision (a) of this rule.

(Emphasis added). Under NRCP 25(c), “the original party continues the action unless the new party in interest is substituted on motion.” *Hilbrands v. Far East Trading Co.*, 509 F.2d 1321, 1323 (9th Cir. 1975) (interpreting Federal Rules of Civil Procedure, Rule 25(c), the federal counterpart to NRCP 25(c)).¹⁰ Without the provisions of NRCP 25(c), allowing for the continued prosecution of an action against an original party even after transfer of such party’s interest in the litigation, a party could transfer its interests to avoid compliance with a court’s orders. In theory, Eric could have the Distribution Trustee of the ELN Trust changed continuously to avoid compliance with the District Court’s Decree. NRCP 25(c) prevents a party from having to litigate against such a moving target, and only allows for the substitution of a successor in interest upon motion. There has never been any motion to substitute Ms. Harber in the place of Ms. Martin. Accordingly, Ms. Harber does not have standing to maintain the instant Petition.

B. Even If Petitioner Had Standing To Maintain The Petition For Writ Of Prohibition, Petitioner Has Not Satisfied The Requirements For Issuance Of A Writ

This Court has original jurisdiction to issue writs of prohibition. Nevada Constitution, Art. 6, § 4. “[The writ of prohibition] arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.” Nevada Revised Statutes, § 34.320 (2013). “A writ of prohibition is an extraordinary remedy” *Daane v. Dist. Ct.*, 127 Nev. Adv. Op. 59, 261 P.3d 1086, 1087 (2011). “The writ may be issued . . . in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.” NRS 34.330; *see*

¹⁰ “Federal cases interpreting the Federal Rules of Civil Procedure ‘are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.’” *Exec. Mgmt., Ltd. v. Ticor Title Ins.*, 118 Nev. 46, 38 P.3d 872, 876 (2002).

1 *also, Daane*, 261 P.3d at 1087. Petitioner bears the burden of demonstrating that
2 extraordinary relief is warranted. *Id.*

3 Petitioner has failed to demonstrate that the District Court exercised judicial
4 functions “in excess” of its jurisdiction. The Petitioner has not claimed that the
5 District Court lacked subject matter jurisdiction over the case, or personal jurisdiction
6 over Ms. Martin to enter the relief contained in the Decree. Instead, Petitioner argues
7 that the District Court exceeded its jurisdiction by Ordering that certain payments to
8 Lynita and Mr. Bertsch be made from funds previously held by the ELN Trust,
9 because the assets of a self-settled spendthrift trust are not subject to execution by
10 creditors of the trust’s beneficiaries. In making such argument, Petitioner wholly
11 ignores the detailed findings of the District Court concluding that the ELN Trust is
12 a sham trust, and that Eric did not comply with trust formalities or Nevada law in his
13 management and dealings with the ELN Trust. Furthermore, such allegation is more
14 properly categorized as an argument that the District Court erred in its application of
15 law, than an argument that the District Court exceeded its jurisdiction.

16 There can be no doubt that the District Court had jurisdiction to enter Orders
17 concerning the properties held in the ELN and LSN Trusts. The District Court’s
18 jurisdiction was admitted by Ms. Martin when she voluntarily appeared in the District
19 Court action by filing an Answer to [Eric’s] Complaint for Divorce and Counterclaims
20 and Crossclaim, requesting affirmative relief from the District Court, and more
21 specifically, decisions regarding the status of properties held by the ELN Trust.
22 Additionally, Petitioner has not alleged, nor could she allege, that the District Court
23 did not have jurisdiction to make the other property orders concerning property held
24 in the ELN and LSN Trusts made in the Decree. Petitioner also has not challenged
25 the District Court’s “jurisdiction” to Order the ELN Trust to pay to Eric
26 approximately \$500,000 from the \$1,568,000 previously enjoined in Mr. Stephens’
27 trust account, instead only attacking the Order for monies to be paid to Lynita.

1 Certainly if the Court had jurisdiction to make other property distributions concerning
2 properties purportedly held in trust, and to Order the ELN Trust to pay to Eric a
3 certain sum from the monies previously enjoined by the District Court, it had
4 jurisdiction to Order that a certain sum be paid to Lynita from the same source.

5 Moreover, it is indisputable that the Petitioner has a plain, speedy and adequate
6 remedy in the ordinary course of law: an appeal.¹¹ This Court has “consistently held,
7 ‘on several occasions, that the right to appeal is generally an adequate legal remedy
8 that precludes writ relief.’” *Id.* (quoting *Pan v. Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d
9 840, 841 (2004)); *see also*, *Bowler v. Dist. Ct.*, 68 Nev. 445, 453-54, 234 P.2d 593,
10 598 (1951) (“In *Walcott v. Wells* [citation omitted], this court said: ‘It is a principle
11 which lies at the very foundation of the law of prohibition that the jurisdiction is
12 strictly confined to cases where no other remedy exists; and it has always been held
13 to be a sufficient reason to refuse to issue the writ where it clearly appears that the
14 petitioner therefor has another plain, speedy, and adequate remedy at law.’”); *see*
15 *also*, *Karow v. Mitchell*, 110 Nev. 959, 962, 878 P.2d 978, 981 (1994) (“In this case,
16 [Petitioner’s] appeal from the district court’s order denying his motion to vacate
17 judgment is an adequate remedy in the ordinary course of the law.”). On June 3,
18 2013, the District Court entered its Decree, or final judgment. Petitioner has the right
19 to appeal that final judgment in the ordinary course of law.

20 Petitioner does not deny that a right to appeal exists, but instead asserts that no
21 “plain, speedy, and adequate remedy at law” presently exists because Petitioner
22 cannot purportedly file an appeal due to a pending motion to amend judgment in the
23 District Court. This argument has already been analyzed and rejected by this Court,
24 and regardless of when Petitioner’s right to appeal begins, Petitioner still has an
25 adequate legal remedy that precludes entry of an extraordinary writ:

26
27 ¹¹ Assuming purely for the sake of argument that Petitioner has standing to
28 maintain this proceeding and future proceedings.

1 This court has previously pointed out, on several occasions, that the
2 right to appeal is generally an adequate legal remedy that precludes writ
3 relief. . . . And we have determined that even if an appeal is not
4 immediately available because the challenged order is interlocutory in
5 nature, the fact that the order may ultimately be challenged on appeal
6 from the final judgment generally precludes writ relief. Because this
7 petition challenges a district court order that dismissed petitioners'
8 complaint, which is a final, appealable judgment under NRAP 3A(b)(1),
9 writ relief is inappropriate.

10 *Pan*, 120 Nev at 224, 88 P.3d at 841. Accordingly, it is clear that Petitioner's right
11 to appeal, whether presently available or available after disposition of the pending
12 motion to amend judgment, is an adequate remedy in the ordinary course of the law
13 which precludes the granting of the Petition for Writ of Prohibition.

14 C. Eric And The ELN Trust Are Not Entitled To Post-Judgment Relief Because
15 They Have Accepted Certain Benefits Of The Decree Without Accepting
16 Certain Responsibilities In Order To Gain An Unfair Advantage

17 At the June 19, 2013 hearing, and in the requests for stay made to this Court,
18 Petitioner admits that the ELN Trust accepted the benefit of the District Court's Order
19 in the Decree dissolving the injunction and took possession of the \$1,568,000 (plus
20 accrued interest) previously frozen in Mr. Stephens' trust account. While Eric and
21 the ELN Trust took advantage of the Decree by immediately taking possession of
22 such funds, they refuse to comply with the other portions of the Decree which provide
23 that a certain portion of said funds belongs, and is to be transferred to, Lynita and Mr.
24 Bertsch.

25 In general, the acceptance of benefits from a judgment bars an appeal
26 therefrom because a party may not follow two legally inconsistent
27 courses of action. *Connelly v. Connelly*, 374 N.W.2d 633, 634 (S.D.
28 1985). However, an exception arises when a reversal of the judgment
on appeal would not affect an appellant's right to the benefit already
secured. *Id.*

29 *Ford v. Ford*, 105 Nev. 672, 682, 782 P.2d 1304, 1311, n.1 (1989). The exception
30 was more fully explained in *Connelly*, the case adopted by this Court in *Ford*:

31 "The general rule is subject to an exception which has been recognized
32 and allowed in specific instances . . . that where the reversal of a
33 judgment cannot possibly affect an appellant's right to the benefit
34 secured under a judgment, then an appeal may be taken, and will be

1 sustained, despite the fact that the appellant has sought and secured such
2 benefit. Thus, it is possible for the appellant to obtain a more favorable
3 judgment in the appellate court without the risk of a less favorable
4 judgment from a new trial of the whole case there or in the lower court,
then the acceptance of what the judgment gives him is not inconsistent
with an appeal for the sole purpose of securing without a retrial of the
whole case, a decision more advantageous to him.”

5 *Connelly*, 374 N.W.2d at 634 (quoting *Bohl v. Bohl*, 72 S.D. 257, 260, 32 N.W.2d 690
6 (S.D. 1948)). In *Bohl*, the South Dakota Supreme Court held that a spouse who
7 accepted personal property awarded to her in a decree of divorce did nothing
8 inconsistent with her position on appeal where she requested additional property than
9 that awarded to her. *Bohl*, 72 S.D. at 260.

10 The exception to the general rule clearly does not apply in the instant case.
11 Here, Eric and the ELN Trust have not only accepted the benefit of the District
12 Court’s dissolution of the injunction freezing the \$1,568,000 in Mr. Stephens’ trust
13 account to access the approximately \$500,000 awarded to Eric, but they have also
14 accepted the benefit of such Order to gain possession of the monies which are to be
15 paid to Lynita and Mr. Bertsch, and to which they have no right or title under the
16 Decree. Eric and the ELN Trust cannot accept the benefit of the Decree to access
17 monies belonging to Lynita and Mr. Bertsch, and at the same time challenge the
18 Decree to avoid complying with the Order requiring them to distribute such monies
19 (the predicate for the benefit accepted). Such positions are entirely inconsistent, and
20 should bar the ELN Trust and Eric from post-judgment relief. Interestingly, and as
21 previously stated, while the ELN Trust challenges the District Court’s award of
22 monies to Lynita and Mr. Bertsch from the previously enjoined funds, it does not
23 challenge the award of monies to Eric from the same funds. This omission proves
24 once again that the ELN Trust and its Distribution Trustees are not independent of
25 Eric, and act solely at Eric’s direction as found by the District Court. The challenge
26 of the award to Lynita and Mr. Bertsch, but not to Eric, are inconsistent positions that
27 also should bar any challenges to the relief Ordered in the Decree.
28

1 D. The Petition for Writ of Prohibition Should Also Be Barred Under The
2 Doctrines Of Collateral And Judicial Estoppel

3 As set forth in the Statement of Facts, the District Court in its Decree found:

4 [I]n an attempt to circumvent this Court's injunction regarding the
5 \$1,568,000, [Eric] had a Bankruptcy Petition filed in the United States
6 Bankruptcy Court, District of Nevada, on behalf of the Dynasty
7 Development Group, LLC, requesting that the \$1,568,000 be deemed
property of the Debtor's bankruptcy estate; however, the bankruptcy
court found that this Court had exclusive jurisdiction over the
\$1,568,000 and could make whatever disposition of the funds without
regard to the Debtor's bankruptcy filing.

8 PA1 at 27:4-11 (emphasis added). Eric and the ELN Trust did not appeal this finding
9 by the Bankruptcy Court, District of Nevada ("Bankruptcy Court"), and are
10 collaterally estopped from challenging such findings in this writ proceeding.

11 The following three elements must be met to preclude a party from
12 litigating issues previously addressed: "(1) the issue decided in the prior
13 litigation must be identical to the issue presented in the current action;
14 (2) the initial ruling must have been on the merits and have become
final; and (3) the party against whom the judgment is asserted must have
been a party in privity with a party to the prior litigation."

15 *Kahn v. Morse & Mowbray*, 121 Nev. 464, 117 P.3d 227, 235 (2005). As shown by
16 the District Court's findings, the Bankruptcy Court specifically addressed the issue
17 of the District Court's jurisdiction over the \$1,568,000, and ability to make
18 disposition of such funds. This is the identical issue presented by Petitioner in the
19 instant writ proceeding. The ruling by the Bankruptcy Court that the \$1,568,000 was
20 not property of Dynasty Development Group, LLC, and should not be deemed
21 property of the bankruptcy estate as opposed to property within the jurisdiction of the
22 District Court, became final without an appeal. In fact, as indicated in the August 28,
23 2012 Order by the Bankruptcy Court, the Debtor stipulated to the lifting of the
24 automatic stay as to the \$1,568,000 as requested by Lynita. LSNA1 at 100-101. Eric,
25 as Investment Trustee of the ELN Trust, was in privity with Dynasty Development
26 Group, and Eric and the ELN Trust are bound by the Bankruptcy Court's findings.
27 Accordingly, Eric and the ELN Trust should be collaterally estopped from
28

1 challenging the District Court's jurisdiction over the \$1,568,000, and authority to
2 dispose of same, in this action.

3 Eric and the ELN Trust should also be judicially estopped from obtaining the
4 relief requested in the Petition for Writ of Prohibition.

5 Under the doctrine of judicial estoppel a party may be estopped merely
6 by the fact of having alleged or admitted in his pleadings in a former
7 proceeding the contrary of the assertion sought to be made. The courts
8 recognize that this doctrine applies with particular force to admissions
9 or statements made in the pleadings under the sanction of an oath, and
10 it has been held that the statement in the prior proceeding must have
11 been made under oath. In accordance with this requirement, it is stated
12 that under the doctrine of judicial estoppel a party who has stated on
13 oath in former litigation, as in a pleading, a given fact a[s] true, will not
14 be permitted to deny that fact in subsequent litigation.

15 It has been said that the purpose of the doctrine of judicial estoppel is to
16 suppress fraud, and to prohibit the deliberate shifting of position to suit
17 exigencies of each particular case that may arise concerning the subject
18 matter in controversy; but at least in so far as this doctrine is applied to
19 statements under oath, its distinctive feature has been said to be the
20 expressed purpose of the court, on broad grounds of public policy, to
21 uphold the sanctity of an oath, and to eliminate the prejudice that would
22 result to the administration of justice if a litigant were to swear one way
23 one time and a different way another time.

24 *Sterling Builders, Inc. v. Fuhrman*, 80 Nev. 543, 549-50, 396 P.2d 850 (1964)
25 (quoting and adopting the definition contained in 31 C.J.S. Estoppel § 121); *So. Cal.*
26 *Edison v. Dist. Ct.*, 255 P.3d 231, 237, 127 Nev. Adv. Op. 22 (2011) ("Judicial
27 estoppel applies to protect the judiciary's integrity and prevents a party from taking
28 inconsistent positions by 'intentional wrongdoing or an attempt to obtain an unfair
29 advantage.'"). The Court may invoke the doctrine at its discretion "to guard the
30 judiciary's integrity." *Marcuse v. Del Webb Communities*, 123 Nev. 278, 163 P.3d
31 462, 469 (2007).

32 ...

33 ...

34 ...

35 ...

1 The application of judicial estoppel is a question of law which this
2 [C]ourt reviews de novo. Judicial estoppel applies when the following
3 five criteria are met: “(1) the same party has taken two positions; (2) the
4 positions were taken in judicial or quasi-judicial administrative
5 proceedings; (3) the party was successful in asserting the first position
6 (i.e., the tribunal adopted the position or accepted it as true); (4) the two
7 positions are totally inconsistent; and (5) the first position was not taken
8 as a result of ignorance, fraud, or mistake.”

9 *Id.*, 163 P.3d at 468-69.

10 It is hard to imagine a more appropriate case for the application of judicial
11 estoppel than the instant case. As the District Court found, during the first phase of
12 trial, Eric, individually, and as Trustor and Investment Trustee of the ELN Trust,
13 successfully testified repeatedly that the assets held by ELN and LST Trusts were
14 community property and should be divided by the Court. PA1 at 9:2 to 10:23.
15 “[D]uring the last several weeks of trial in 2012, [Eric] changed his testimony to
16 reflect his new position that the ELN Trust and the LSN Trust were not part of the
17 community and were the separate property of the respective trusts.” PA1 at 26:12-15.
18 Eric’s first position was not taken as a result of ignorance, fraud, or mistake, and was
19 totally inconsistent with his later testimony. In fact, Eric’s testimony changed
20 because he did not like the tenor of the District Court’s preliminary findings, and
21 sought to obtain an unfair advantage in the litigation. PA1 at 45:4-10.

22 Lynita asserted that judicial estoppel should be invoked by the District Court,
23 LSNA1 at 134-136, but the District Court did not specifically apply the doctrine in
24 its Decree despite making sufficient findings to completely warrant the application
25 of the doctrine. This Court should apply the doctrine of judicial estoppel to preclude
26 Eric and the ELN Trust from asserting that the Parties have no interest in the property
27 purportedly held by the ELN Trust, in order to guard the judicial integrity of the
28 Court.

...

...

...

1 E. The District Court Did Not Err In Its Order Directing That Certain Sums Be
2 Paid From The Monies Previously Enjoined In David Stephens, Esq.'s Trust
3 Account

4 As has been discussed above, Petitioner does not have standing to maintain the
5 instant Petition, and even if she did, has not met the requirements for issuance of a
6 Writ of Prohibition and should be estopped from seeking and obtaining post-
7 judgment relief from this Court. Although any further discussion of the issues raised
8 in the Petition is probably unnecessary, a brief discussion of the application of
9 Chapter 166 of Nevada Revised Statutes, pertaining to self-settled spendthrift trusts,
10 to the instant matter is warranted.

11 In the Petition, the ELN Trust argues that Nevada's self-settled spendthrift trust
12 laws do not allow for the District Court to Order a distribution of assets held in the
13 ELN Trust to Lynita to satisfy Eric's obligations for alimony and child support, and
14 that the District Court erred in entering such an Order. In support of such argument,
15 the ELN Trust points out that the District Court did not specifically invalidate the
16 ELN Trust in its Decree. As set forth in the Statement of Facts, the ELN Trust does
17 not mention in its Petition the District Court's detailed findings concerning Eric's
18 failure to follow the formalities of the ELN and LSN Trusts, and Eric's complete and
19 unfettered access to distributions from such trusts in contravention of the express
20 terms of the ELN Trust and Nevada law for the maintenance of a valid, self-settled
21 spendthrift trust. *See* NRS 166.040. The Petition also does not mention that the
22 District Court found that it would have been wholly justified in invalidating the ELN
23 and LSN Trusts, but decided not to do so because it believed substantial justice could
24 be afforded to the Parties without invalidating such trusts. The District Court
25 essentially found that the ELN and LSN Trusts were Eric's alter egos, and any
26 argument that the ELN Trust should be granted protections afforded by law to valid,
27 self-settled spendthrift trusts should be rejected by the Court.

28 ...

1 Furthermore, the District Court, in finding that the ELN Trust was Eric's alter
2 ego (albeit without specifically referencing the term "alter ego"), was completely
3 justified in its refusal to provide any protections to the ELN Trust. To the extent that
4 the District Court's specific reasoning for distributing trust assets, and reference to
5 foreign statutes, was in error, such errors would be clearly harmless and should not
6 provide a basis for relief to Petitioner, either in the instant writ proceeding or in a
7 subsequent appeal. NRCP 61 provides:

8 No error in either the admission or the exclusion of evidence and no
9 error or defect in any ruling or order or in anything done or omitted by
10 the court or by any of the parties is ground for granting a new trial or for
11 setting aside a verdict or for vacating, modifying or otherwise disturbing
12 a judgment or order, unless refusal to take such action appears to the
13 court inconsistent with substantial justice. The court at every stage of
14 the proceeding must disregard any error or defect in the proceeding
15 which does not affect the substantial rights of the parties.

16 (Emphasis added). The District Court's Decree affords the Parties' substantial justice
17 based on the facts presented to the District Court during fifteen (15) days of trial, and
18 any errors by the District Court, if any are found to exist, did not affect the substantial
19 rights of the Parties.

20 ...

21 ...

22 ...

23 ...

24 ...

25 ...

26 ...

27 ...

28 ...

1 **V. CONCLUSION**

2 As has been set forth throughout, the instant Petition and contemporaneously
3 filed motions seeking to stay the judgment entered by the District Court is Eric's
4 latest, and most desperate effort to abuse judicial process, and to utilize his sham trust
5 to avoid his obligations to his ex-wife of nearly thirty (30) years. For the reasons
6 discussed above, Eric and his sister are legally and factually not entitled to the relief
7 requested in the Petition for Writ of Prohibition, and such Petition should be denied
8 in its entirety.

9 DATED this 8th day of July, 2013.

10 THE DICKERSON LAW GROUP

11
12 
13 ~~ROBERT P. DICKERSON, ESQ.~~

14 Nevada Bar No. 000945

15 JOSEF M. KARACSONYI, ESQ.

16 Nevada Bar No. 010634

17 KATHERINE L. PROVOST, ESQ.

18 Nevada Bar No. 008414

19 1745 Village Center Circle

20 Las Vegas, NV 89134

21 Telephone: (702) 388-8600

22 Attorneys for Real Parties in Interest

23 LYNITA NELSON and the LSN NEVADA

24 TRUST dated May 30, 2001

CERTIFICATE OF COMPLIANCE

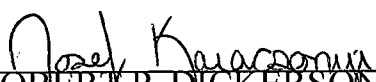
1
2 1. I hereby certify that this brief complies with the formatting requirements
3 of NRAP 32(a)(4), the typeface requirements of NRAP 3 (a)(5) and the type style
4 requirements of NRAP 32(a)(6) because this brief has been prepared in a
5 proportionally spaced typeface using WordPerfect X5, in 14 point Times New Roman
6 type style.

7 2. I further certify that this brief complies with the page- and type-volume
8 limitations of NRAP 32(a)(7) because, excluding the parties of the brief exempted by
9 NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more,
10 and contains 10,020 words, and does not exceed thirty (30) pages.

11 3. Finally, I hereby certify that I have read this appellate brief, and to the
12 best of my knowledge, information, and belief, it is not frivolous or interposed for any
13 improper purpose. I further certify that this brief complies with all applicable Nevada
14 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every
15 assertion in the brief regarding matters in the record to be supported by a reference
16 to the page and volume number, if any, of the transcript or appendix where the matter
17 relied on is to be found. I understand that I may be subject to sanctions in the event
18 that the accompanying brief is not in conformity with the requirements of the Nevada
19 Rules of Appellate Procedure.

20 Dated this 8th day of July, 2013.

21 THE DICKERSON LAW GROUP

22
23 
24 ROBERT P. DICKERSON, ESQ.
25 Nevada Bar No. 000945
26 JOSEF M. KARACSONYI, ESQ.
27 Nevada Bar No. 010634
28 KATHERINE L. PROVOST, ESQ.
Nevada Bar No. 008414
1745 Village Center Circle
Las Vegas, NV 89134
Telephone: (702) 388-8600

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

CERTIFICATE OF SERVICE

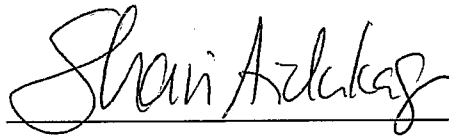
I hereby certify that I am an employee of The Dickerson Law Group, and that,
on the 8th day of July, 2013, I served a true and correct copies of **ANSWER TO
PETITION FOR WRIT OF PROHIBITION** via United States Mail, with postage
fully prepaid, to:

RHONDA K. FORSBERG, ESQ.
RADFORD J. SMITH, CHARTERED
64 North Pecos Road, Ste. 700
Henderson, Nevada 89074
Attorneys for Plaintiff

MARK A. SOLOMON, ESQ.
SOLOMON, DWIGGINS, FREER & MORSE, LTD.
9060 W. Cheyenne Avenue
Las Vegas, Nevada 89129
Attorneys for Third-Party Defendants

THE HONORABLE FRANK P. SULLIVAN
Eighth Judicial District Court, Department O
Family Court and Services Building
601 N. Pecos Road
Las Vegas, Nevada 89101
Respondent

LARRY L. BERTSCH
Larry L. Bertsch, CPA & Associates
265 E. Warm Springs Road #104
Las Vegas, Nevada 89119
Real Party in Interest



An employee of The Dickerson Law Group