

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                                   Real Parties in Interest.

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CASE NO.

19                                   **PETITION FOR WRIT OF PROHIBITION**

20  
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1 **PETITION FOR WRIT OF PROHIBITION; POINTS AND AUTHORITIES;**  
2 **VERIFICATION BY AFFIDAVIT**

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

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 Judge, the Honorable Frank P. Sullivan, to vacate portions of the  
10 Divorce Decree in which the District Court exceeded its jurisdiction by ordering  
11 that certain assets be transferred from the ELN Trust to the LSN Nevada Trust  
12 dated May 30, 2001 (“LSN Trust”).<sup>1</sup>

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

17  
18 **I.**

19 **INTRODUCTION**

20  
21 The District Court, in contravention of Nevada law, exceeded its  
22 jurisdiction by ordering the ELN Trust, a Nevada self-settled spendthrift trust, to  
23 transfer assets worth millions of dollars based upon Eric Nelson (“Eric”) and  
24 Lynita Nelson’s (“Lynita”) purported intent to “equalize” and/or “level off” the  
25  
26

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



1 ELN Trust and LSN Trust. In making such findings, the District Court ignored  
2 NRS Chapter 21, Nevada's self-settled spendthrift trust statutes, and erroneously  
3 relied upon the principles of a constructive trust and unjust enrichment.  
4

5 For these reasons, the instant Petition for Writ of Prohibition should be  
6 granted and portions of the Divorce Decree in which the District Court orders the  
7 ELN Trust to transfer its 50% interest in the Russell Road Property and its 100%  
8 interest in the Joan Ramos Promissory Note, Lindell Property and the rental  
9 properties owned by Banone, LLC to the LSN Trust, should be vacated.  
10  
11

## 12 II.

### 13 STATEMENT OF FACTS AND PROCEDURAL HISTORY

#### 14 A. **Creation and Implementation of Estate Plan.**

15 On July 13, 1993, Eric, who was represented by Jeffrey Burr, Esq., and  
16 Lynita, who was represented by Richard Koch, Esq., entered into a Separate  
17 Property Agreement, which comported with NRS 123.080 and NRS 123.220(1).  
18 The District Court found that the Separate Property Agreement was valid. *See See*  
19 Divorce Decree dated June 3, 2013 at 3:5-11, attached as Exhibit 1 to the  
20 Appendix. Contemporaneous with the establishment of the Separate Property  
21 Agreement, Eric created the Eric L. Nelson Separate Property Trust and Lynita  
22 established the Lynita S. Nelson Separate Property Trust. *See Appx. Ex. 1 at*  
23  
24  
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1 3:12-4:11. Both separate property trusts were funded with assets identified on the  
2 Separate Property Agreement. *See id.*  
3

4 Prior to the execution of the Separate Property Agreement and separate  
5 property trusts, both Eric and Lynita were advised of the legal consequences of  
6 such documents, including, but not limited to the benefits, detriments and risks,  
7 one of which was divorce. Indeed, the "Attorney Certification," which was  
8 executed by Mr. Koch and accompanied the Separate Property Agreement,  
9 specifically provides:  
10  
11

12 The undersigned hereby certifies that he is an attorney at law, duly  
13 licensed and admitted to practice in the State of Nevada; that he has  
14 been employed by RICHARD KOCH, ESQ. and that he has advised  
15 LYNITA SUE NELSON with respect to this Agreement and has  
16 explained to her the legal effect of it; that LYNITA SUE NELSON  
17 has acknowledged her full and complete understanding of the  
18 Agreement and its legal consequences, and has freely and voluntarily  
19 executed the agreement in the undersigned's presence. Emphasis  
20 Added). *See* Separate Property Agreement, admitted as Intervenor's  
21 Trial Exhibit No. 4 on July 18, 2012, attached as Exhibit 13 to the  
22 Appendix.

23 Said certification is consistent both with Lynita's testimony wherein she  
24 confirmed that Koch asked her if she had any questions and understood it and she  
25 said yes, and with recital 1 to the Separate Property Agreement, which she  
26 executed that states:

27 The Parties declare that each has retained independent counsel and  
28 they fully understand the facts and has been fully informed of all legal  
rights and liabilities; that after such advice and knowledge, each

1 believes this AGREEMENT to be fair, just and reasonable, and that  
2 each signs this AGREEMENT freely and voluntarily. *See id.*

3 Eric and Lynita were also advised that if they wanted to avoid the  
4 possibility of possessing unequal assets and liabilities at any point in time, they  
5 should voluntarily gift their separate property as they deemed appropriate. To  
6 effectuate such balancing Eric or Lynita would need to make the decision to gift  
7 their separate property to the other party and/or their separate property trust.  
8 Indeed, Mr. Burr made it clear that any intent of Eric or Lynita to make equalizing  
9 gifts in the future was in their sole discretion as they had no binding agreement to  
10 do so. In fact, the testimony at trial confirmed that any agreement may have  
11 rendered the Separate Property Agreement and separate property trusts illegal  
12 and/or fraudulent. Notwithstanding, since the separate property trusts were  
13 revocable, and Eric and Lynita served as the trustees of their respective trusts,  
14 they could freely make gifts without the approval of a third-party. In fact, either  
15 Eric or Lynita could have terminated their respective separate property trust  
16 and/or distributed any and all assets owned by the same to each other.  
17  
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23 On May 30, 2001, under the advice and counsel of Mr. Burr, Eric created  
24 the ELN Trust and Lynita created the LSN Trust. *See Appx. 1 at 4:16-25.* Both  
25 the ELN Trust and LSN trust were established as self-settled spendthrift trusts in  
26 accordance with NRS 166.020, *see id.*, and were intended to ““supercharge” the  
27  
28

1 protection afforded against creditors” afforded under the separate property trusts.

2 *See* Appx. 1 at 7:24-27.

3  
4 As confirmed by the Divorce Decree, from 1993 through 2001, the assets  
5 owned and liabilities owed by the ELN Separate Property Trust and the LSN  
6 Separate Property Trust were kept separate, and the assets of the ELN Separate  
7 Property Trust funded the ELN Trust, and the assets of the LSN Separate Property  
8 Trust funded the LSN Trust:  
9  
10

11 THE COURT FURTHER FINDS that all of the assets and interest  
12 held by the Eric L. Nelson Separate Property Trust were transferred or  
13 assigned to the ELN Trust. *See* Appx. Ex. 1 at 4:18-19.

14 THE COURT FURTHER FINDS that all of the assets and interest  
15 held by the Lynita S. Nelson Separate Property Trust were transferred  
16 or assigned to the LSN Trust. *See* Appx. Ex. 1 at 5:1-2.

17 There are two significant distinctions between the separate property trusts  
18 and the self-settled spendthrift trust. First, the ELN Trust and LSN Trust are  
19 irrevocable. Second, any distributions made by the ELN Trust or LSN Trust must  
20 be approved by the Distribution Trustee. Consequently, the purported intent of  
21 Eric and Lynita to “equalize” and/or “level-off” the ELN Trust and LSN Trust  
22 must be approved by the Distribution Trustees.  
23  
24

25 **B. Initiation of Divorce Proceedings and Entry of Divorce Decree.**

26 The instant Writ stems from a divorce that was initiated by Eric against  
27 Lynita on May 6, 2009. *See* Appx. Ex. 1 at 2:17.  
28

1 On August 9, 2011, Eric and Lynita stipulated and agreed that the ELN  
2 Trust<sup>2</sup> and the LSN Trust<sup>3</sup> should be joined as a necessary party:  
3

4 . . . as complete relief cannot be accorded among the parties without  
5 the [ELN Trust and LSN Trust] being named a party and the  
6 disposition of the action in the absence of the [ELN Trust and LSN  
7 Trust] will impair or impede its ability to protect its interests and add  
8 risk of incurring double, multiple, or otherwise inconsistent  
9 obligations. *See* Stipulation and Order dated August 9, 2011 at 2:23-  
10 3:9, attached as Exhibit 2 to the Appendix.

11 As indicated *supra*, on June 3, 2013, the District Court issued the Divorce  
12 Decree, wherein it found that both the ELN Trust and LSN Trust were  
13 “established as a self-settled spendthrift trust in accordance with NRS 166.020,”  
14 *see* Appx. 1 at 4:25, and that the ELN Trust was funded with assets that were  
15 previously owned by a separate property trust that had been established by Eric in  
16 or around 1993, *see* Appx. 1 at 4:16-17, and the LSN Trust was funded with assets  
17 that were previously owned by a separate property trust that had been established  
18 by Lynita in or around 1993. *See* Appx. 1 at 5:2-3.  
19  
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21 Despite the fact that the District Court recognized that the Nevada State  
22 Legislature “approved the creation of spendthrift trusts in 1999 and it is certainly  
23 not the purpose of this Court to challenge the merits of spendthrift trusts,” *see*  
24

25  
26 <sup>2</sup> Eric is designated as the Investment Trustee of the ELN Trust and, initially,  
27 Lana Martin, was designated as the Distribution Trustee.

28 <sup>3</sup> Lynita is designated as the Investment Trustee of the LSN Trust and,  
initially, Lana Martin, was designated as the Distribution Trustee.

1 Appx. 1 at 5:13-14, and ordered that the ELN Trust and LSN Trust would remain  
2 intact, Appx. 1 at 44: 9-17, the District Court ultimately treated the assets owned  
3 by the ELN Trust and LSN Trust as community property (even though each trust  
4 was funded with the respective party's separate property and none of the trusts'  
5 assets are now Eric or Lynita's community or separate property), by "equalizing"  
6 and/or "leveling off" the trusts:  
7  
8

9  
10 THE COURT FURTHER FINDS . . . that keeping the Trusts intact,  
11 while transferring assets between the Trusts to "level off the Trusts",  
12 would effectuate the parties clear intentions of "supercharging" the  
13 protection of the assets from creditors while ensuring that the  
14 respective values of the Trusts remained equal.

15 THE COURT FURTHER FINDS that in lieu of transferring assets  
16 between the Trusts to level of the Trust and to achieve an equitable  
17 allocation of assets between the Trusts as envisioned by the parties,  
18 the Court could award a sizeable monetary judgment against Mr.  
19 Nelson for the extensive property and monies that were transferred  
20 from the LSN Trust to the ELN Trust, at his direction, and issue a  
21 corresponding charging order against any distributions to Mr. Nelson  
22 until such judgment was fully satisfied. *See* Appx. 1 at 44:9-28.

23 . . .

24 IT IS FURTHER ORDERED that the 66.67% interest in the Russell  
25 Road property (\$4,333,550) and the 66.67% interest in the \$295,000  
26 note/deed for rents and taxes (\$196,677) currently held by the ELN  
27 Trust, shall be equally divided between the ELN Trust and the LSN  
28 Trust. *See* Appx. 1 at 46:16-19.

. . .

IT IS FURTHER ORDERED that the following properties shall  
remain in or be transferred into the ELN Trust:

<u>Property Awarded</u>	<u>Value</u>
Cash	\$80,000
Arizona Gateway Lots	\$139,500
Family Gifts	\$35,000
Gifts from Nikki C.	\$200,000
Bella Kathryn Property	\$1,839,495
Mississippi Property (121.23 acres)	\$607,775
Notes Receivable	\$642,761
Banone AZ Properties	\$913,343
Dynasty Buyout	\$1,568,000
½ of Brianhead Cabin	\$492,500
1/3 of Russell Road (+note for rents)	\$2,265,113.50
<b>Total</b>	<b>\$8,783,487.50</b>

IT IS FURTHER ORDERED that the following properties shall remain in or be transferred into the LSN Trust:

<u>Property Awarded</u>	<u>Value</u>
Cash	\$200,000
Palmyra Property	\$750,000
Pebble Beach Property	\$75,000
Arizona Gateway Lots	\$139,500
Wyoming Property (200 acres)	\$405,000
Arnold Property in Miss.	\$40,000
Mississippi RV Park	\$559,042
Mississippi Property	\$870,193
Grotta 16.67% Interest	\$21,204
Emerald Bay Miss. Prop.	\$560,900
Lindell Property	\$1,145,000
Banone, LLC	\$1,184,236
JB Ramos Trust Note Receivable	\$78,000
½ of Brianhead Cabin	\$492,500
1/3 of Russell Road (+note for rents)	\$2,265,113.50
<b>Total</b>	<b>\$8,785,988.50</b>

IT IS FURTHER ORDERED that due to the difference in the value between the ELN Trust and the LSN Trust in the amount of \$153,499,

1 the Trusts shall be equalized by transferring the JB Ramos Trust Note  
2 from the Notes Receivable of the ELN Trust, valued at \$78,000, to the  
3 LSN Trust as already reflected on the preceding page. *See* Appx. 1 at  
4 47:1 - 48:5.

5 In making such findings, the District Court exceeded its jurisdiction by  
6 among other things, ignoring NRS Chapter 21, NRS 166.120 and other provisions  
7 of Nevada's self-settled spendthrift trust statutes. The District Court justified its  
8 position by relying upon testimony that Eric and Lynita intended to occasionally  
9 "level off" by gifts the ELN Trust and LSN Trust. *See* Appx. Ex. 1 at 6:23-28 and  
10 8:2-4. As will be shown below, the intent of Eric and Lynita is inconsequential as  
11 their purported intent is not a legally enforceable obligation, and the assets at issue  
12 do not even belong to either of them as such assets were transferred to the ELN  
13 Trust and LSN Trust in 2001.

14 Although the District Court's stated intent was to "equalize" and/or "level  
15 off" the ELN Trust and LSN Trust, it also stated that it could impose a  
16 constructive trust and/or transfer property from the ELN Trust to the LSN Trust  
17 under the theory of unjust enrichment:

18 THE COURT FURTHER FINDS that, as addressed in detail below,  
19 the Court will impose a constructive trust on the following assets: (1)  
20 5220 East Russell Road Property; (2) 3611 Lindell Road. *See* Appx. 1  
21 at 15:10-12.

22 THE COURT FURTHER FINDS that equity and justice demands that  
23 the LSN Trust receive just compensation in the amount of \$1,200,000  
24 for the sale of the High Country Inn in order to avoid the ELN Trust  
25



1 from being unjustly enriched, and, therefore, the LSN Trust should be  
2 awarded Banone, LLC, properties held by the ELN Trust, with a  
3 comparable value of \$1,184,236. *See* Appx. 1 at 20:2-9.

4 As will be shown below, the District Court's reliance upon unjust  
5 enrichment was improper as it had previously dismissed Lynita's claim for unjust  
6 enrichment. *See* Notice of Entry of Order from February 23, 2012 Hearing  
7 Partially Granting ELN Trust's Motion to Dismiss Third-Party Complaint Without  
8 Prejudice at 6:13-20, attached as Exhibit 3 to the Appendix.  
9  
10

11 **C. The Divorce Decree is not a final judgment.**

12 Although the Divorce Decree purports to be a final judgment, the District  
13 Court admittedly failed to dispose of all of the assets at issue, including, but not  
14 limited to, whether Lynita has an interest in the ELN Trust's ownership interest in  
15 Wyoming Downs:  
16  
17

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

26 **D. Lynita is enforcing the Divorce Decree against Third-Parties and**  
27 **properties titled in the Name of the ELN Trust.**

28 Shortly after the Divorce Decree was entered on June 3, 2013, Lynita began  
to enforce the Divorce Decree with respect to the following that the District Court

1 purportedly transferred from the ELN Trust to the LSN Trust: (1) Joan Ramos  
2 Promissory Note; (2) rental properties owned by Banone, LLC; and (3) Lindell  
3 Property. On June 7, 2013, Counsel for Lynita and the LSN Trust advised Joan  
4 Ramos that the Promissory Note dated February 23, 2010, and corresponding  
5 Deed of Trust with Assignment of Rents had been assigned and transferred to the  
6 LSN Trust pursuant to the Divorce Decree. *See* Correspondence from Katherine  
7 L. Provost, Esq. dated June 7, 2013, to Joan Ramos, attached as Exhibit 4 to the  
8 Appendix. Such correspondence also purportedly invalidates an August 25, 2011,  
9 Memorandum of Understanding that was entered into between Banone, LLC, an  
10 asset wholly owned by the ELN Trust, and Ms. Ramos. *See id.*

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15 On June 7, 2013, Counsel for Lynita and the LSN Trust also contacted  
16 some or all of the tenants of certain real property owned by Banone, LLC, which  
17 was transferred to the LSN Trust pursuant to the Divorce Decree, advising said  
18 tenants to make all future rental payments directly to her, and to possibly enter  
19 into a new lease with the LSN Trust. *See* Correspondence from Katherine L.  
20 Provost, Esq. dated June 7, 2013, to the current tenant of 2209 Farmouth Circle,  
21 attached as Exhibit 5 to the Appendix.

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25 More importantly however, on June 10, 2013, Counsel for Lynita and the  
26 LSN Trust served the ELN Trust, a fifteen year tenant of the real property located  
27 at 3611 S. Lindell Road, Suite 201, Las Vegas, Nevada 89103 (“Lindell  
28

1 Property”), with a “Thirty (30) Day Notice of Termination of Tenancy,” which  
2 requires the ELN Trust to vacate the Lindell Property on or before July 10, 2013,  
3 unless the ELN Trust enters into a “binding lease agreement” with the LSN Trust.  
4 See Correspondence from Robert P. Dickerson, Esq. dated June 10, 2013, and  
5 Thirty Day Notice of Termination of Tenancy, attached as Exhibit 6 to the  
6 Appendix. Once again, the ELN Trust’s interest in the Lindell Property was  
7 transferred to the LSN Trust pursuant to the Divorce Decree. The Lindell  
8 Property is where the ELN Trust conducts business and would be irreparably  
9 harmed if it is forced to move its office location pending the resolution of the  
10 instant Petition for Writ of Prohibition.  
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15 **E. Motion to Amend or Alter Judgment**

16 On June 17, 2013, Lynita filed a Motion to Amend or Alter Judgment, for  
17 Declaratory and Related Relief (“Motion to Amend or Alter Judgment”), wherein  
18 she requested in part:  
19  
20

21 That the Court Amend or Alter its June 3, 2013 Decree of Divorce and  
22 enter an Order for Declaratory Relief, specifically declaring that Eric  
23 and Lynita, through their respective trusts, each holds a 50%  
24 membership interest in Dynasty Development Management, LLC, and  
25 all of its holdings, including the horse racing track and RV park which  
26 was purchased by the ELN Trust through Dynasty Development  
27 Management, LLC during the course of this divorce action from  
28 Wyoming Racing, LLC for \$440,000.00, OR ALTERNATIVELY, to  
re-open this case and permit discovery concerning the transaction  
involving Dynasty Development Management, LLC, Wyoming  
Racing, LLC, and the purchase an interest in Wyoming Racing, LLC,



1 support obligation and child support arrearages based upon statutes from other  
2 jurisdictions and in contravention of Nevada law. In conjunction with said  
3  
4 Petition the ELN Trust filed two emergency motions staying a June 19, 2013,  
5 Order and portions of a Divorce Decree which purportedly required the ELN Trust  
6  
7 to pay Lynita or her attorneys the sum of \$1,032,742.00 and Mr. Bertsch the sum  
8  
9 of \$35,258.00 pending resolution of the Petition for Writ of Prohibition, both of  
10  
11 which were granted by this Court on June 21, 2013, and June 26, 2013,  
12  
13 respectively. *See* Exhibits 9 and 10 to the Appendix.

### 14 **III.**

#### 15 **ISSUES PRESENTED AND RELIEF REQUESTED**

16 The issues presented to this Court are:

17 1. Whether the District Court exceeded its jurisdiction and erred as a  
18 matter of law by ordering the ELN Trust to transfer certain assets to “equalize”  
19  
20 and/or “level off” the ELN Trust and LSN Trust.

21 2. Whether the District Court exceeded its jurisdiction and erred as a  
22 matter of law by enforcing the purported intent of Eric and Lynita to “equalize”  
23  
24 the assets owned by the ELN Trust and LSN Trust despite the fact that there is no  
25  
26 legally enforceable agreement and neither Eric nor Lynita possess a community or  
27  
28 separate property interest in the assets owned by such trusts.



1 *Dist. Court ex rel. Cnty. of Clark*, 118 Nev. 140, 147, 42 P.3d 233, 237-38 (2002)  
2 ([w]rit relief is not proper to control the judicial discretion of the district court,  
3 unless discretion is manifestly abused or is exercised arbitrarily or capriciously).  
4

5  
6 V.

7 **REASONS WHY RELIEF SHOULD ISSUE**

8 **1. The ELN Trust has no other plain, speedy and adequate remedy**  
9 **because the Divorce Decree does not dispose of all issues and Lynita**  
10 **has filed a Motion to Amend Judgment or Alter Judgment, which**  
11 **preclude the ELN Trust from filing an appeal.**

12 The ELN Trust has no other remedy than a writ because Lynita filed a  
13 Motion to Amend or Alter Judgment pursuant to NRCP 53(e), which precludes  
14 the ELN Trust from filing an appeal. Indeed, NRAP 4(a) makes it clear that the  
15 filing of a motion under Rule 59 to alter or amend a judgment tolls the deadline to  
16 file an appeal, and that filing an appeal prior to the resolution of a motion under  
17 Rule 59 will be dismissed as “premature.” Specifically, NRAP 4(a)(6) provides:  
18  
19

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

1 As indicated *supra*, the ELN Trust previously sought a motion to stay  
2 pending appeal and pending the Motion to Alter or Amend the Judgment, pursuant  
3 to NRC 62, which was denied by the District Court on June 19, 2013. Due to the  
4 pending NRC 59(e) Motion to Amend or Alter the Judgment, the ELN Trust has  
5 no other remedy other than the instant Writ for Prohibition.  
6  
7

8 **2. The Divorce Decree exceeded the District Court’s jurisdiction because it**  
9 **substitutes the District Court’s judgment for that of the Distribution**  
10 **Trustee, in violation of NRS 166.120 and NRS Chapter 21.**

11 Despite the District Court’s determination not to invalidate the ELN Trust,  
12 it nonetheless, in contravention of Nevada law, orders the ELN Trust to transfer  
13 certain assets to the LSN Trusts to “equalize” and/or “level off the trusts” based  
14 upon the purported intent of Eric and/or Lynita, and acts that Eric purportedly  
15 undertook as the “delegated investment trustee for the LSN Trust.”<sup>5</sup> See Appx. 1  
16 at 12:7-10 and 44: 10-17. In making such findings, the District Court ignored  
17 NRS Chapter 21 and Nevada’s self-settled spendthrift trust statutes, to support its  
18 findings. *See id.*

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

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

27 <sup>5</sup> As indicated *supra*, Lynita, not Eric, is designated as the Investment  
28 Trustee of the LSN Trust.



1  
2 THE COURT FURTHER FINDS that all of the assets and interest  
3 held by the Eric L. Nelson Separate Property Trust were transferred to  
4 assigned to the ELN Trust.

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

13 THE COURT FURTHER FINDS that while spendthrift trusts have  
14 been utilized for decades; Nevada is one of the few states that  
15 recognize self-settled spendthrift trusts. **The legislature approved  
16 the creation of spendthrift trusts in 1999 and it is certainly not the  
17 purpose of this Court to challenge the merits of spendthrift trusts.**  
18 (Emphasis added). See Appx. 1 at 4:24-5:15.

19 Under Nevada law, a spendthrift trust is defined as “a trust in which by the  
20 terms thereof a valid restraint on the voluntary and involuntary transfer of the  
21 interest of the beneficiary is imposed.” See N.R.S. 166.020. Moreover, under  
22 N.R.S. 166.050, no specific language is necessary for the creation of a valid  
23 spendthrift trust. Rather, it is sufficient by the terms of the writing the creator of  
24 the trust manifests an intent to create a spendthrift trust. *Title Insurance & Trust*  
25 *Co. v. Commissioner of Internal Revenue*, 100 F.2d 482, 485 (9th Cir. 1938) (the  
26 purpose of a trust will be determined by the instrument which created it, and the  
27  
28

1 parties cannot claim that the trust has a purpose different or narrower than that  
2 disclosed by the instrument).

3  
4 As recognized by the District Court, the ELN Trust is a valid spendthrift  
5 trust created under the laws of the State of Nevada by Eric, as grantor.  
6 Specifically, Section 13.2 of the ELN Trust provides in pertinent part  
7 (“Spendthrift Provisions”):  
8

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

1 Pursuant to Section 12.2, the Distribution Trustee has complete  
2 discretionary authority to make “distributions of principal and/or income to the  
3 beneficiaries hereunder at times and in amounts as determined in the sole  
4 discretion of the Distribution Trustee, subject only to the veto power vested in the  
5 Trustor, according to the standards set forth in Section 3.1 above.” Section III  
6 further provides that distributions are to be made in the Trustees “sole and  
7 absolute discretion” to or for the benefit of one or beneficiary under the terms of  
8 the ELN Trust.<sup>6</sup>  
9

10 Nevada law, similar to the law of the majority of jurisdictions, protects the  
11 interests of a beneficiary in a spendthrift trust from all creditors of the beneficiary.  
12 Indeed, N.R.S. 166.130 expressly provides that “[a] beneficiary of a spendthrift  
13 trust has no legal estate in the capital, principal or corpus of the trust unless under  
14 the terms of the trust the beneficiary or one deriving title from him or her is  
15 entitled to have it conveyed or transferred to him or her immediately, . . .”  
16

17 Similarly, N.R.S. 166.120 provides:

18 <sup>6</sup> Section VI of the ELN Trust further authorizes the Distribution Trustee to  
19 delay distributions to any beneficiary or otherwise consider the fact that a  
20 beneficiary is involved in divorce proceedings. Indeed, the ELN Trust authorizes  
21 the Distribution Trustee to:

22 (a) If, upon any of the dates described herein, the Trustee for any reason  
23 described below determines, in the Trustee’s sole discretion, that it  
24 would not be in the best interest of the beneficiary that a distribution  
25 take place, then in that event the said distribution shall be totally or  
26 partially postponed until the reason for the postponement has been  
27 eliminated.

28 (b) . . . (1) The current involvement of the beneficiary in a divorce  
proceeding or a bankruptcy or other insolvency proceedings.

1  
2 2. Payments by the trustee to the beneficiary, whether such  
3 payments are mandatory or discretionary, must be made only to or for  
4 the benefit of the beneficiary and not by way of acceleration or  
5 anticipation, nor to any assignee of the beneficiary, nor to or upon any  
6 order, written or oral, given by the beneficiary, whether such  
7 assignment or order be the voluntary contractual act of the beneficiary  
8 or be made pursuant to or by virtue of any legal process in  
9 judgment, execution, attachment, garnishment, bankruptcy or  
10 otherwise, or whether it be in connection with any contract, tort  
11 or duty. Any action to enforce the beneficiary's rights, to determine if  
12 the beneficiary's rights are subject to execution, to levy an attachment  
13 or for any other remedy must be made only in a proceeding  
14 commenced pursuant to chapter 153 of NRS, if against a testamentary  
15 trust, or NRS 164.010, if against a nontestamentary trust. A court has  
16 exclusive jurisdiction over any proceeding pursuant to this section.

17 3. The beneficiary shall have no power or capacity to make any  
18 disposition whatever of any of the income by his or her order,  
19 voluntary or involuntary, and whether made upon the order or  
20 direction of any court or courts, whether of bankruptcy or otherwise;  
21 **nor shall the interest of the beneficiary be subject to any process**  
22 **of attachment issued against the beneficiary, or to be taken in**  
23 **execution under any form of legal process directed against the**  
24 **beneficiary or against the trustee, or the trust estate, or any part of**  
25 **the income thereof, but the whole of the trust estate and the income of**  
26 **the trust estate shall go to and be applied by the trustee solely for the**  
27 **benefit of the beneficiary, free, clear, and discharged of and from any**  
28 **and all obligations of the beneficiary whatsoever and of all**  
**responsibility therefor. (Emphasis added).**

Therefore, pursuant to Nevada law, Eric has no legal interest or ownership  
interest in the ELN Trust and the District Court exceeded its jurisdiction by  
directing the ELN Trust to transfer its assets to the LSN to "level off the trusts."  
Eric has no "right" to receive any distribution from the ELN Trust and neither he,  
his creditors nor the District Court can compel the ELN Trust to transfer assets to  
satisfy a judgment against Eric. Indeed, N.R.S. 163.417 provides that a "court

1 **may not order the exercise of:** . . . (c) A trustee's discretion to: (1) **Distribute**  
2 **any discretionary interest;** (2) Distribute any mandatory interest which is past  
3 due directly to a creditor; or (3) Take any other authorized action in a specific  
4 way; or . . ." (Emphasis added).<sup>7</sup> As such, there is no interest to execute upon.  
5 *See also* N.R.S. 21.080 which provides, "[t]his chapter does not authorize the  
6 seizure of, or other interference with, any money, thing in action, lands or other  
7 property held in spendthrift trust or in a discretionary or support trust governed by  
8 chapter 163 of NRS for a judgment debtor, or held in such trust for any  
9 beneficiary, pursuant to any judgment, order or process of any bankruptcy or other  
10 court directed against any such beneficiary or trustee of the beneficiary;" N.R.S.  
11 21.090, which identifies property that is exempt under Nevada law from  
12 execution, including a beneficial interest in spendthrift trust prior to distribution.  
13

14 Notwithstanding that the ELN Trust is a spendthrift trust and the District  
15 Court has no authority under Nevada law to order the Distribution Trustee to  
16 exercise discretionary authority to distribute assets to Eric, Lynita or the LSN  
17 Trust, the District Court improperly found that the ELN Trust must transfer its  
18 50% interest in the Russell Road Property and its 100% interest in the Joan Ramos  
19

20 <sup>7</sup> The fact that Eric is the Investment Trustee of the ELN Trust does not alter  
21 or otherwise change the fact that the ELN Trust is a valid Nevada spendthrift trust  
22 specifically designed to preclude distribution of assets of the trust to the creditors  
23 of a beneficiary thereunder. Indeed, N.R.S. 163.417(1) provides that "a creditor  
24 may not exercise, and a court may not order the exercise of: (d) a power to  
25 distribute a beneficial interest of a trustee solely because the beneficiary is a  
26 trustee." Similarly, N.R.S. 163.417(2) provides that "trust property is not subject  
27 to the personal obligations of a trustee, even if the trustee is insolvent or  
28 bankrupt." Additionally, pursuant to N.R.S. 166.120(4), "[t]he trustee of a  
spendthrift trust is required to disregard and defeat every assignment or other act,  
voluntary or involuntary, that is attempted contrary to the provisions of this  
chapter."

1 Promissory Note, Lindell Property and the rental properties owned by Banone,  
2 LLC to the LSN Trust. In making such findings, the District Court ignored NRS  
3 Chapter 21, Nevada’s self-settled spendthrift trust statutes,<sup>8</sup> and relied upon  
4 inadmissible testimony and evidence that Eric and Lynita purportedly intended to  
5 “equalize” and/or “level off” the ELN Trust and LSN Trust.  
6

7 A. The District Court exceeded its jurisdiction by enforcing the ELN  
8 Trust and LSN Trust for some purposes and then repudiating such  
9 trusts for other purposes.

10 In Nevada, it “is well settled that a person shall not be allowed at once to  
11 benefit by and repudiate an instrument, but, if he chooses to take the benefit which  
12 it confers, he shall likewise take the obligations or bear the onus which it  
13 imposes.”<sup>9</sup> This well-reasoned rule of law has been applied in two factually  
14  
15

16 <sup>8</sup> The District Court’s Divorce Decree contradicts the clear and unequivocal  
17 language of Nevada’s spendthrift trust statutes. When “the words of the statute  
18 have a definite and ordinary meaning, this court will not look beyond the plain  
19 language of the statute, unless it is clear that this meaning was not intended.”  
20 *Harris Associates v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534  
21 (2003) (citing *State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001); see  
22 also *Glover v. Concerned Citizens for Fuji Park*, 118 Nev. 488, 50 P.3d 546, 548  
23 (2002) (stating that “[i]t is well established that when the language of a statute is  
unambiguous, a court should give that language its ordinary meaning”), *overruled*  
*in part by Garvin v. Dist. Ct.*, 118 Nev. 749, 59 P.3d 1180, 1191 (2002).

24 <sup>9</sup> *Fed. Mining & Engr. Co. v. Pollak*, 59 Nev. 145, 85 P.2d 1008, 1012 (Nev.  
25 1939) (“as a general rule, if a corporation, with knowledge of the facts, accepts or  
26 retains the benefit of an unauthorized contract or other transaction by its officers or  
27 agents, as where it receives and uses or retains money or property paid by the other  
28 party, or accepts the benefits of services, etc., it thereby ratified the contract or  
other transaction, or will be estopped to deny ratification.”) (citations omitted).  
*See also Schmidt v. Horton*, 52 Nev. 302, 287 P. 274, 280 (Nev. 1930).

1 similar cases: *Marriage of Holtemann*, 166 Cal. App. 4<sup>th</sup> 1166, 83 Cal. Rptr. 3d  
2 385 (Cal. App. 4<sup>th</sup> 2008) and *Marriage of Lund*, 174 Cal. App. 4<sup>th</sup> 40, 94 Cal.  
3 Rptr. 3d 84 (Cal. App. 4<sup>th</sup> 2009).

4  
5 In *Marriage of Holtemann*, 166 Cal. App. 4<sup>th</sup> 1166, 83 Cal. Rptr. 3d 385  
6 (Cal. App. 4<sup>th</sup> 2008), a husband and wife entered into a transmutation agreement  
7 and trust that established the husband's express intent to transmute his separate  
8 property to community property so as to eliminate the need for probate and  
9 minimize taxes in the event of either spouse's death. Both the transmutation  
10 agreement and trust<sup>10</sup> made it clear that they were not "not made in contemplation  
11 of a separation or marital dissolution [but] solely for the purpose of interpreting  
12 how property shall be disposed of on the deaths of the parties."<sup>11</sup> The trust also  
13  
14  
15  
16  
17

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18 <sup>10</sup> Article 1.3 of the trust provided: "*Statement of Intent*. This is a joint trust  
19 established by the settlors in order to hold community property of the settlors,  
20 which community property was created by the transmutation of separate property  
21 of settlor Frank G. Holtemann concurrently with the execution of this trust  
22 instrument. The parties each acknowledge that the transmutation of Frank  
23 Holtemann's separate property into community property was undertaken upon the  
24 condition of and with this trust instrument in mind, in particular with the  
25 disposition of the trust estate upon the death of the settlors as provided for herein  
26 in mind; and but for such agreed disposition, settlor Frank Holtemann would not  
27 have effected the transmutation of his separate property into community property,  
28 with which this trust was funded."

<sup>11</sup> See *id.* at 1169-1170. The wife acknowledged in Article 2.3 of the  
transmutation agreement that the "transmutation of Husband's separate property  
into community property herewith was undertaken upon the express condition that  
the disposition of the trust estate of said Trust, upon the death of husband and wife

1 provided that it “may be revoked or terminated, in whole or in part, by either  
2 settlor as to any separate or quasi-community property of that settlor and any  
3 community property of the settlors.” *See id.* at 1171.

4  
5 The wife filed a petition to dissolve marriage on August 1, 2006, and on  
6  
7 October 19, 2006, the husband issued notice that he had exercised his right to  
8 revoke the trust.

9  
10 At trial, the court rejected the husband’s arguments that: (1) the  
11 transmutation was rendered ambiguous by the statement in the transmutation  
12 agreement that: “this agreement is not made in contemplation of a separation or  
13 marital dissolution and is made solely for the purpose of interpreting how property  
14 shall be disposed of on the deaths of the parties,” *see id.* at 1173, 391, and (2) he  
15 was not fully informed of the legal consequences of his actions because he had  
16 failed to secure separate counsel to represent him regarding the transmutation  
17 agreement and trust. *See id.* at 1174, 392. In so doing, the court found that  
18 “[r]egardless of the motivations underlying the documents, they contain the  
19 requisite express, unequivocal declarations of a present transmutation . . . and  
20 reflect that [the husband] was fully informed of the legal consequences of his  
21 . . . will pass as provided in said Declaration of Trust.” The wife further  
22 acknowledged that “but for such agreed disposition of the subject property, settlor  
23 Frank Holtemann would not have effected the within transmutation of his separate  
24 property into community property.”  
25  
26  
27  
28



1 actions.” *Id.* In rejecting the husband’s claim that the assets identified in the  
2 transmutation agreement and trust were his separate property, the court found:  
3

4 In any event, we are not aware of any authority for the proposition  
5 that a transmutation, once effected, can be limited in purpose or  
6 otherwise rendered conditional or temporary. Once the character of  
7 the property has been changed, a “retransmutation” can be achieved  
8 only by an express agreement to that effect that independently  
9 satisfies the requirements of subdivision (a) of section 852. As the  
10 trial judge stated: “Husband argues that the transmutation was limited  
11 to estate purposes only. In other words, Frank wishes to have his cake  
12 and eat it too. He argues that, in the event of either his or Barbara’s  
13 death, the survivor would be able to use the Transmutation Agreement  
14 to claim the property as community property, thus obtaining a full step  
15 up in basis to the fair market value of the property at date of death,  
16 while at the same time denying the validity of the Transmutation  
17 Agreement as an instrument which created community property. Thus,  
18 when it would benefit either Frank or his estate, Frank wishes to  
19 characterize the property as community. However, when it would be  
20 detrimental to Frank, he wishes to ignore the transmutation and call  
21 the property separate.” *Id.* at 1173, 391-392.

18 Simply put, the court would not allow the husband to transmute his  
19 separate property for conditional or limited purposes, especially since the  
20 transmutation “allowed him to characterize all income and distributions of  
21 principal as community property during the marriage, a tax benefit he otherwise  
22 would not have enjoyed.” *Id.*

24 Similarly, in *Marriage of Lund*, 174 Cal. App. 4<sup>th</sup> 40, 94 Cal. Rptr. 3d 84  
25 (Cal. App. 4<sup>th</sup> 2009), the court found that a husband could not selectively use a  
26 transmutation agreement that unambiguously transmuted all of his property to  
27  
28

1 community property. Specifically, in *Lund* the transmutation agreement provided  
2 that all of the property, real and personal, held in the name of the husband is  
3 hereby converted to community property of husband and wife “for estate planning  
4 purposes to the extent necessary to conform the record ownership of the properties  
5 of the parties.” *Id.* at 45, 89. The husband amended and restated his trust  
6 contemporaneously with executing the transmutation agreement to specifically  
7 provide that said agreement was null and void in the event of divorce:  
8  
9

10  
11 Upon the filing of a petition for the dissolution of the marriage and/or  
12 separation by either Settlor, this Agreement is automatically  
13 terminated without further notice to third parties and either Trustee  
14 shall return to each Settlor the separate property they contributed to  
15 this Agreement not previously disposed of, together with each  
16 Settlor’s share of the Trust Estate which is community property.  
17 Upon the automatic termination, all dispositive provisions of this  
18 Trust Agreement shall be null and void other than returning the assets  
19 to the rightful owners and each Settlor shall be deemed to have  
predeceased the other Settlor if the assets or property have not been  
returned to the proper owner prior to that Settlor’s demise. *Id.* at 48,  
91.

20 In May 2006, the court commenced proceedings to determine whether the  
21 agreement transmuted the husband’s separate property to community property. In  
22 short, the husband sought to have the court “interpret the agreement as effecting a  
23 transmutation of his separate property to community property only if he or [his  
24 wife] died while married,” despite the fact that “language of the agreement clearly  
25 disclaims the notion of a conditional future transmutation.” *Id.* at 53-54, 96. The  
26  
27  
28

1 question addressed by the court was whether “[i]f it’s his separate property, can  
2 they for estate planning purposes . . . [and] for stepped-up [tax] basis, . . . say the  
3 magic words, ‘for community property,’ then it’s community property, but for all  
4 other purposes it’s not?” *Id.* at 49, 92. Ultimately, the court relying upon  
5 *Holtemann*, rejected “the notion that parties may execute a “conditional”  
6 transmutation (or, as colorfully described by the court, cross their fingers while  
7 signing the agreement),” *id.* at 54, 96, in holding that it would not “assume the  
8 parties intended to execute the agreement for the sole purpose of providing  
9 documentary support to a future materially false representation to the IRS.” *Id.*  
10  
11  
12  
13

14 Here, despite the fact that the District Court found that the Separate  
15 Property Agreement, the ELN Trust and LSN were valid, the District Court has  
16 essentially ignored said documents due to its belief that Eric and Lynita intended  
17 to “equalize” and “level off” the trusts, and that the creation of the ELN Trusts  
18 and LSN Trust was to ““supercharge” the protection afforded against creditors  
19 and was not intended to be a property settlement.” *See* Appx. Ex. 1 at 7:24-27.  
20  
21

22 As correctly stated in *Holtemann*, “the motivations underlying the  
23 documents” are irrelevant; the relevant question is whether “they contain the  
24 requisite express, unequivocal declarations of a present transmutation.”  
25 *Holtemann*, 166 Cal. App. 4<sup>th</sup> at 1173, 83 Cal. Rptr. 3d at 385. Indeed, *Holtemann*  
26  
27 rejected the notion that a husband and wife can invalidate a transmutation  
28

1 agreement because it was not made in “contemplation of a separation or marital  
2 dissolution.” Further, both *Holtemann* and *Lund* specifically held that a spouse  
3 cannot have a “conditional” transmutation of property, which is exactly what the  
4 District Court has done by ordering that certain property be transferred from the  
5 ELN Trust to the LSN Trust to “equalize” and/or “level off” the trusts because the  
6 trusts were not intended “to be a property settlement.” Accordingly, the Divorce  
7 Decree directing the ELN Trust to transfer properties to the LSN Trust is a clear  
8 error of the law, as the District Court had no jurisdiction to enter such an order.  
9  
10  
11

12 B. Testimony and/or evidence regarding the intent of Eric and Lynita is  
13 inadmissible to contradict the plain language of the ELN Trust and  
14 LSN Trust.

15 As a matter of law, courts strictly determine a settlor’s intent from the  
16 language contained in the trust document and not the settlor’s undeclared or  
17 subsequent intentions.<sup>12</sup> Like contract law, courts only consider extrinsic  
18  
19

20  
21 <sup>12</sup> See, e.g., *Taylor v. Taylor*, 978 A.2d 538, 542-43 (Conn. Ct. App. 2009)  
22 (“The issue of intent as it relates to the interpretation of a trust instrument ... is to  
23 be determined by examination of the language of the trust instrument itself and  
24 not by extrinsic evidence of actual intent . . . . The construction of a trust  
25 instrument presents a question of law. . . .”); *Soeffje v. Jones*, 270 S.W.3d 617, 628  
26 (Tex. Ct. App. 2008) (“Construction of an unambiguous trust is a matter of law  
27 for the court. In construing a trust, we are to ascertain the intent of the grantor  
28 from the language in the four corners of the instrument.”); *Kimberlin v. Dull*, 218  
S.W.3d 613, 616 (Mo. Ct. App. 2007) (“[A]bsent ambiguity, the intent of the  
settlor is determined from the four corners of the trust instrument. It is not this  
court's function to rewrite a trust in order to effectuate a more equitable  
distribution or to impart an intent to the testatrix that is not expressed in the

1 evidence if the trust document is ambiguous.<sup>13</sup> Moreover, “extrinsic evidence is  
2 not admissible to contradict the plain language of the trust” and “[a] trustor’s  
3

4  
5 trust”); *Keisling v. Landrum*, 218 S.W.3d 737, 741 (Tex. Ct. App. 2007) (“The  
6 construction of a will or trust instrument is a question of law for the trial court.  
7 Courts construe trusts to determine the intent of the maker. The intent of the  
8 maker must be ascertained from the language used within the four corners of the  
9 instrument.”) (Citations omitted); *Blue Ridge Bank and Trust Co. v. McFall*, 207  
10 S.W.3d 149, 156-57, 161 (Mo. Ct. App. 2006) (“As a starting point in any  
11 analysis of a testamentary document, we note that the paramount rule of will or  
12 trust construction is to discern the intent of the settlor. Such intention must be  
13 ascertained from the instrument as a whole, and must be adhered to unless it  
14 conflicts with some positive rule of law. . . . [I]n interpreting the trust, the court  
15 must look to the language of the instrument and not to the results to be achieved. .  
16 . . . Courts are to ascertain what the testator meant from the words actually used.”)  
17 (Citations omitted); *Sherard v. Sherard*, 142 P.3d 673, 677 (Wyo. 2006) (“The  
18 intent is determined from the trust document itself. [T]he interpretation of the  
19 language of a trust instrument constitutes a question of law”); *Estate of Edwards*,  
20 203 Cal. App.3d 1366, 1371 (1988) (Citing *Estate of Stokley*, 108 Cal. App. 3d  
21 461, 467 (1980) (“The testator's intent is determined from the language of the will  
22 itself. The intention which an interpretation of a will seeks to ascertain is the  
23 testator's intention as expressed in the words of the will, not some undeclared  
24 intention which may have been in his mind.”)).

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28 <sup>13</sup> See, e.g., *Jones*, 270 S.W.3d at 628 (“If the words in the trust are  
unambiguous, we do not go beyond them to find the grantor’s intent. Our focus is  
not what the grantor may have intended to write, but what words are actually used  
in the trust instrument. If the words are unambiguous, extrinsic evidence is not  
admissible to show that the grantor had some other intent than that expressed in  
the clear words of the trust.”); *Carmody v. Betts*, 104 Ark. App. 84, 88, 289  
S.W.3d 174, 178 (Ark. Ct. App. 2008) (“Extrinsic evidence may be received on  
the issue of the testator's intent only if the terms of the will are ambiguous. Absent  
a finding of ambiguity by the court, testimony about the settlor's intent should not  
be considered. When the terms of a trust are unambiguous, it is the court’s duty to  
construe the written agreement according to the plain meaning of the language  
employed.”); *Sherard*, 142 P.3d at 677 (“The intent is determined from the trust  
document itself. [T]he interpretation of the language of a trust instrument

1 intention must be determined in view of the circumstances existing at the time of  
2 the creation of the trust.” *In re Estate of Zilles*, 200 P.3d 1024, 1028 (Ariz. Ct.  
3 App. 2008). As the court observed in *Edwards*:

5           It is not the business of the court to say, in examining the terms of a  
6 will, what the testator intended, but what is the meaning to be given to  
7 the language which he used. Where the terms of a will are free from  
8 ambiguity, the language used must be interpreted according to its  
9 ordinary meaning and legal import and the intention of the testator  
10 ascertained thereby. *Id.*, quoting *Estate of Avila*, 85 Cal. App. 2d 38,  
39 (1948).

11           Courts limit their inquiry to the four corners of the trust document because  
12 “the language of the trust deed itself is the best and controlling evidence of such  
13 intent.” *In re Estate of Devine*, 910 A.2d 699, 703 (Pa. Super. 2006).

14           Accordingly, courts regularly exclude evidence from parties and/or the settlor  
15 concerning the intention of trust terms. The terms of the trust agreement are  
16  
17

18  
19           \_\_\_\_\_ constitutes a question of law. . . . Where the language used in the trust is  
20 unambiguous, the plain provisions of the trust determine its construction and  
21 interpretation does not require consideration of evidence.”); *Goodwine v.*  
22 *Goodwine*, 819 N.E.2d 824, 829 (Ind. Ct. App. 2004) (“To determine the settlor’s  
23 intent, courts look first to the language used in the trust document. If the terms of  
24 the trust instrument are not ambiguous, a court may examine only the document  
25 itself to determine the settlor’s intent.”) (Citations omitted); *In re Reid*, 46 P.3d  
26 188, 190 (Okla. Ct. App. 2002) (“As a general rule, the interpretation of the  
27 language of a trust instrument constitutes a question of law. . . . The courts strive  
28 to ascertain and effect the intent of the settlor, but parole evidence may not be  
considered where there is no ambiguity and the language of a declaration of trust  
is clear and plainly susceptible of only one construction: the plain provisions of  
the trust instrument ... determine its construction.”) (Citations omitted).

1 conclusive of the testator's intent. *See, e.g., Taylor, 978 A.2d at 542-43* ("The  
2 issue of intent as it relates to the interpretation of a trust instrument ... is to be  
3 determined by examination of the language of the trust instrument itself and not  
4 by extrinsic evidence of actual intent.").

5  
6  
7 Here, the terms of the ELN Trust and LSN Trust are clear, definite and  
8 unambiguous. Notwithstanding, in lieu of following the terms of the ELN Trust  
9 and LSN Trust the District Court has based its Divorce Decree on the purported  
10 intent of Eric and Lynita:  
11

12 THE COURT FURTHER FINDS . . . that keeping the Trusts intact,  
13 while transferring assets between the Trusts to "level off the Trusts",  
14 would effectuate the parties clear intentions of "supercharging" the  
15 protection of the assets from creditors while ensuring that the  
16 respective values of the Trusts remained equal. *See Appx. Ex. 1 at*  
17 *44:13-17.*

18 The District Court's reliance upon the aforementioned testimony and other  
19 extrinsic evidence is an error of law. As such, this Court should enter a writ  
20 prohibiting enforcement of the portions of the Divorce Decree transferring  
21 properties from the ELN Trust to the LSN Trust.  
22

23 **3. The District Court exceeded its jurisdiction by imposing a constructive**  
24 **trust.**

25 The Divorce Decree purported imposition of a constructive trust is  
26 inconsistent and confusing. Page 15 of the Divorce Decree states that the District  
27 Court is imposing a constructive trust on the Russell Road Property and Lindell  
28

1 Property, *see* Appx. Ex. 15: 10-13; however, page 44 specifically states that the  
2 District Court is merely going to “transfer[] assets between the Trusts to “level off  
3 the Trusts.” Appx. Ex. 1 at 44:13-17. Irrespective, the District Court exceeded its  
4 jurisdiction by imposing a constructive trust.  
5

6  
7 A constructive trust may be imposed “when the consideration for the  
8 property is provided by one party, but title is taken by another, and the  
9 circumstances negate the possibility of the consideration being a gift.” *Cummings*  
10 *v. Tinkle*, 91 Nev. 548, 550, 539 P.2d 1213, 1214 (1975). “The proceeds of the  
11 alleged wrongful conduct must exist as an identifiable fund traceable to that  
12 conduct, such that it can become the res of the proposed trust.” *Eychaner v.*  
13 *Gross*, 779 N.E.2d 1115, 1143 (Ill. 2002) (holding that constructive claim failed  
14 because there was no evidence of an identifiable fund traceable to any wrongful  
15 conduct in this case). *See also Brown v. Federal Savings and Loan Insurance*  
16 *Corp.*, 105 Nev. 409, 777 P.2d 361 (1989) (district court imposed constructive  
17 trust over \$1,300,000.00 which could be traced over improper transaction); *Estate*  
18 *of Cowling v. Estate of Cowling*, 847 N.E.2d 405 (Ohio 2006) (holding “before a  
19 constructive trust can be imposed, there must be adequate tracing from the time of  
20 the wrongful deprivation of the relevant assets to the specific property over which  
21 the constructive trust should be placed.”).  
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1 Further, since a constructive trust is an equitable remedy sounding in tort, a  
2 party is precluded from seeking a constructive trust if the party has an adequate  
3 remedy at law for damages. *Matter of Bevill, Bresler & Schulman Asset Mgmt.*  
4 *Corp.*, 896 F.2d 54, 58 (3<sup>rd</sup> Cir. 1990) (“The proper remedy for breach of contract,  
5 however, is an award of damages at law, not the equitable remedy of constructive  
6 trust.”); *Pearson's Pharmacy, Inc. v. Express Scripts, Inc.*, 505 F. Supp. 2d 1272,  
7 1278 (M.D. Ala. 2007) (“The presence of an adequate remedy at law precludes the  
8 enforcement of a constructive trust. . . The court finds that plaintiffs have an  
9 adequate remedy at law for damages under a theory of breach of contract.”);  
10 *Gimbel v. Feldman*, 1996 WL 342006 (E.D.N.Y. 1996) (“Constructive trusts are  
11 equitable remedies sounding in tort to recovery money or property acquired  
12 through fraud or undue influence”).  
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18 Here, the District Court exceeded its jurisdiction by imposing a constructive  
19 trust over assets owned by the ELN Trust that did not originate with the LSN  
20 Trust. For example, the District Court imposed a constructive trust over 50% of  
21 the ELN Trust’s 66.67% ownership interest in the Russell Road property, which  
22 the ELN Trust acquired with its own assets in 2010. Indeed, as recognized by the  
23 District Court, on November 11, 1999, the LSN Trust purchased the Russell Road  
24 Property for \$855,945. *See* Appx. Ex. 1 at 15:15-22. Eric’s brother, Cal Nelson,  
25 made a down payment of \$20,000.00 and became a 50% owner of the Russell  
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28

1 Road Property. *See id.* Lynita and Cal later formed CJE & L, LLC, which rented  
2 the Russell Road Property to Cal's Blue Water Marine. *See id.* Shortly thereafter,  
3 CJE&L, LLC obtained a \$3,100,000 loan for the purpose of constructing a  
4 building for Cal's Blue Water Marine. *See id.* In 2004, Lynita executed a  
5 guarantee on the flooring contract for Cal's Blue Water Marine, and shortly  
6 thereafter, the LSN Trust forfeited its interest in CJE&L, LLC and the Russell  
7 Road Property to be released as a guarantor. *See Appx. Ex. 1 at 15:23-16:6.*  
8 Although Lynita, as opposed to Eric, executed the documents forfeiting the LSN  
9 Trust's interest in CJE&L, LLC, the District Court seeks to punish the ELN Trust  
10 for such transaction.  
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15 The District Court further found that the ELN Trust purchased a 65%  
16 interest in the Russell Road Property in February 2010, over 5 years after the LSN  
17 Trust forfeited its interest. Although omitted from the Divorce Decree, the court-  
18 appointed Special Master, Larry Bertsch, found that the ELN Trust paid nearly  
19 \$4,000,000.00 for its 65% interest in the Russell Road Property, which is  
20 comprised of the following amounts:  
21  
22  
23

- 24 1) In 2009, Eric purchased an FDIC note on a property in Phoenix  
25 commonly known as "Sugar Daddy's" for approximately  
26 \$520,000. The source of these funds came from the Line of  
27 Credit. The property was sold with proceeds amounting to  
28 \$1,520,597.88. Since this was designate as a 1031 exchange,  
the proceeds were used in 2010 to purchase Eric's interest in  
the Russell Road Property.

- 1
- 2) As indicated above, Eric had previously paid \$300,000 to pay  
 2 down the Bank Loan which was secured by property in Utah.  
 3 In addition, Eric paid off the mortgage on Cal's house  
 4 amounting to \$400,000. Both amounts were paid from Eric's  
 5 Line of Credit. These two amounts aggregating \$700,000 were  
 6 then used as a credit towards the purchase price for Eric's  
 7 interest.
- 3) Eric gave a credit amounting to \$522,138.47 which represented  
 8 future agreements with Cal and the termination of any present  
 9 verbal partnership agreements. This also included money on  
 10 rental payments given to Cal.
- 4) The remaining amount to fulfill the obligation of the purchase  
 11 price was to borrow \$1,257,263.67 from the Line of Credit in  
 12 2010.

13

14 Therefore the purchase of Eric's interest is comprised of the  
 15 following:

16	Pay down of Bank Loan	\$300,000.00
17	Pay off of personal residence of Cal Nelson	400,000.00
18	Credit to Cal Nelson for prior payments	522,138.45
19	Amount to pay Bank Note from Sugar Daddy's	1,520,597.88
20	Amount to pay Bank Loan from Line of Credit	<u>1,257,263.67</u>
		\$4,000,000.00 <sup>14</sup>

21 Since the ELN Trust's interest in the Russell Road Property was paid for by  
 22 with own assets and proceeds, as opposed to Lynita or the LSN Trust, the District  
 23 Court exceeded its jurisdiction by imposing a constructive trust over such  
 24

25

26

27

28 <sup>14</sup> See Notice of Filing Asset Schedule and Notes to Asset Schedule at 5,  
 attached as Exhibit 12 to the Appendix.

1 property. Indeed, as evidenced by Mr. Bertsch's report, the ELN Trust paid  
2 \$4,000,000.00 for its 65% interest in Russell Road.  
3

4 Even if the Russell Road Property or Lindell Property was purchased with  
5 assets from the LSN Trust, the District Court still exceeded its jurisdiction by  
6 holding the ELN Trust liable for acts that Eric purportedly took in his individual  
7 capacity, or as the *de facto* Investment Trustee of the LSN Trust. Since a  
8 constructive trust is an equitable remedy sounding in tort, Lynita is precluded  
9 from seeking a constructive trust against the ELN Trust because it has an adequate  
10 remedy at law for damages against Eric. For these reasons, the District Court  
11 exceeded its jurisdiction by imposing a constructive trust over the ELN Trust's  
12 interest in the Russell Road Property.  
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16  
17 **4. The District Court exceeded its jurisdiction by awarding property to**  
18 **the LSN Trust under the theory of unjust enrichment because it**  
19 **previously dismissed Lynita's unjust enrichment claim.**

20 The District Court statement that it could award the Banone, LLC rental  
21 properties to Lynita under the theory of unjust enrichment is perplexing as it  
22 previously dismissed Lynita's unjust enrichment claim, which was her Ninth  
23 Claim for Relief. Indeed, at a February 23, 2012, hearing on the ELN Trust's  
24 Motion to Dismiss the District Court ordered:  
25

26  
27 IT IS FURTHER ORDERED that the Court DECLINES to exercise  
28 its jurisdiction over the Third, Fourth, Fifth, Sixth, Seventh, Eighth,  
Ninth, Tenth, Eleventh, Twelfth, and Thirteenth claims for relief in

1 Defendant's First Amended Claims for Relief Against Eric L. Nelson,  
2 et. al, filed December 20, 2011, without making any specific findings  
3 or orders regarding the merits of such claims, and whether such claims  
4 state a cause of action, which issues the Court has not analyzed or  
5 addressed, and as such, said claims are hereby DISMISSED  
6 WITHOUT PREJUDICE so that same can be brought in another  
7 tribunal. *See App. Ex. 2.*

8 Since the District Court declined to exercise its jurisdiction over the unjust  
9 enrichment claim and recommended that it be brought in another tribunal, it erred  
10 as a matter of law and exceeded its jurisdiction if the property was awarded to the  
11 LSN Trust on the basis of unjust enrichment as opposed to "equalizing" and/or  
12 "leveling off" the trusts.

13  
14 Further, the District Court erred by invoking the doctrine of unjust  
15 enrichment because the ELN Trust was not unjustly enriched as the evidence  
16 presented at trial confirmed that the ELN Trust took on a large liability in  
17 exchange for the sale proceeds from the High Country Inn, and such liability was  
18 ignored by the District Court. "Unjust enrichment exists when the plaintiff  
19 confers a benefit on the defendant, the defendant appreciates such benefit, and  
20 there is "acceptance and retention by the defendant of such benefit under  
21 circumstances such that it would be inequitable for him to retain the benefit  
22 without payment of the value thereof.'" *Certified Fire Prot. Inc. v. Precision*  
23 *Constr.*, 283 P.3d 250, 257 (Nev. 2012). Since the liability taken by the ELN  
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1 Trust was equal to the sales price of the High Country Inn, there was no benefit  
2 conferred upon the ELN Trust.  
3

4 Finally, there was no evidence introduced at trial that the proceeds from the  
5 High Country Inn were utilized to purchase the rental properties owned by  
6 Banone, LLC. To the contrary, the District Court merely chose an asset of  
7 comparable value to transfer from the ELN Trust to the LSN Trust. For the  
8 reasons set forth herein, such act exceeded the District Court's jurisdiction.  
9  
10

11 **VI.**

12 **CONCLUSION**

13  
14 For these reasons, Petitioner respectfully requests that this Court prohibit  
15 enforcement of portions of the Divorce Decree that purport to transfer the ELN  
16 Trust's 100% interest in the Lindell Property, Banone, LLC, and JB Ramos Trust  
17 Note Receivable, and 50% interest in the Russell Road Property, to the LSN Trust.  
18

19 Respectfully submitted this 9<sup>th</sup> day of July, 2013.  
20

21 

22  
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1                   **CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)**

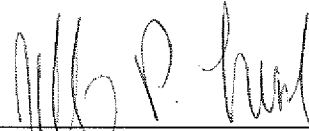
2                   1.     I hereby certify that this brief complies with the formatting  
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and  
4 the type style requirements of NRAP 32(a)(6) because this brief has been prepared  
5 in a proportionally spaced typeface using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

8  
9                   2.     I further certify that this brief complies with the page or type-volume  
10 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted  
11 by NRAP 32(a)(7)(C), it is not proportionately spaced, has a typeface of 14 points,  
12 and contains 10,608 words.  
13

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 9<sup>th</sup> day of July, 2013.



---

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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 July 9, 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  
18 I also hereby certify that the foregoing document will be hand-delivered on  
19 this date to the following:  
20

21 Hon. Frank P. Sullivan, Department O  
22 Robert P. Dickerson, Esq.  
23 Rhonda K. Forsberg, Esq.

24 Dated: July 9, 2013.

25   
26 An employee of SOLOMON DWIGGINS &  
27 FREER, LTD.  
28