

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.

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Case No. 63545

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

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TRUST dated May 30, 2001

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

2 **I. INTRODUCTION**

3 This is the second proceeding initiated by Nola Harber (“Ms. Harber”), as
4 purported Distribution Trustee of the Eric L. Nelson Nevada Trust dated May 30,
5 2001 (“ELN Trust”),¹ in this Court in less than three (3) *weeks*. On June 21, 2013,
6 Ms. Harber filed a Petition for Writ of Prohibition and purported “emergency motion”
7 for stay pending resolution of that writ proceeding in this Court, Case/Docket
8 Number 63432, addressing the same Decree of Divorce it now challenges in the
9 instant proceeding. The instant Petition for Writ of Prohibition (“Petition”) is simply
10 a continuation of the vexatious and abusive litigation tactics that were perpetrated by
11 Real Party in Interest, ERIC L. NELSON (“Eric”), individually, and by and through
12 his sham trust, the ELN Trust, in the District Court proceedings. Such actions have
13 been perpetrated, and continue to be perpetrated, in an attempt to deprive Real Party
14 in Interest, LYNITA S. NELSON (“Lynita”), individually, and as Trustee of the LSN
15 NEVADA TRUST dated May 30, 2001 (“LSN Trust”), of property and income the
16 District Court found was wrongfully taken by Eric during Eric and Lynita’s marriage
17 (Eric and Lynita are collectively referred to herein as the “Parties”), and to starve
18 Lynita out of being able to support herself and pursue justice.

19 Having failed at preventing the administration of justice in the District Court,
20 Eric now attempts to obtain the injustice he unsuccessfully attempted to obtain from
21 the District Court by requesting the unauthorized application of the extraordinary
22 remedy of a Writ of Prohibition. As will be shown below, the relief requested in the

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 Ms. Harber is the sister of Real Party in Interest, Eric Nelson.

1 Petition is both factually and legally unsupportable, and should be denied by this
2 Court.

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

4 Eric and Lynita Nelson married in 1983. During their nearly thirty (30) year
5 marriage the parties have amassed a substantial amount of wealth as a result of Eric's
6 business acumen. Petitioner's Appendix ("PA")², Volume 1 at 5:11; 6:2-3. While
7 Eric became a competent businessman, Lynita gave up the pursuit of a career outside
8 of the home to become a stay at home mother to the couple's five children. PA1 at
9 37:25-38:7.

10 As part of their overall estate plan, the parties entered into a Separate Property
11 Agreement on July 13, 1993, with Eric being advised and counseled with respect to
12 the legal effects of the Agreement by attorney Jeffrey L. Burr and Lynita being
13 advised and counseled as its legal effects by attorney Richard Koch. PA1 at 6:4-8.
14 They also contemporaneously created individual revocable separate property trusts.
15 PA1 at 6:12-15, 25-28. On May 30, 2001, the Eric L. Nelson Nevada Trust
16 (hereinafter "ELN Trust") and LSN Nevada Trust (hereinafter "LSN Trust") were
17 created under the advice and counsel of Jeffrey L. Burr, Esq., who prepared the trust
18 documents. PA1 at 7:12-15, 24-25. While the ELN and LSN Trusts may have been
19 established as self-settled spendthrift trusts in accordance with NRS 166.020, the
20 District Court's detailed findings concerning Eric's failure to follow the formalities
21 of the ELN and LSN Trusts, and Eric's complete and unfettered access to
22 distributions from such trusts in contravention of the express terms of the ELN Trust
23 and Nevada law for the maintenance of a valid, self-settled spendthrift trust, confirm
24 that by the time of trial this did not remain the case. *See* NRS 166.040. The District
25 Court found that it would have been wholly justified in invalidating the ELN and
26 LSN Trusts, but decided not to do so because it believed substantial justice could be

27
28 ² All references to Petitioner's Appendix refer to the appendix filed in Case 63432.

1 afforded to the Parties without invalidating such trusts. PA1 at 32:13-18. Without
2 using the specific term, the District Court's decision found that the ELN and LSN
3 Trusts were Eric's alter egos, and the ELN Trust should be barred from utilizing the
4 protections afforded by law to valid, self-settled spendthrift trusts.

5 Eric initiated the underlying divorce with the filing of his Complaint for
6 Divorce in May 2009. Petitioner's Appendix ("PA"), Volume 1 at 5:17. On June 3,
7 2013, the Eighth Judicial District Court, Honorable Frank P. Sullivan, issued a fifty
8 (50) page decision and Decree of Divorce ("Decree") following a trial that spanned
9 nearly two (2) years from beginning to end (with approximately fifteen (15) days of
10 trial conducted during such time). PA1 1-52. The Decree brought to conclusion a
11 highly litigious divorce action initiated more than four (4) years prior. In the
12 extremely detailed Decree, the District Court outlined the egregious and "deplorable"
13 behavior perpetrated by Eric throughout the Parties' divorce to prevent the
14 administration of justice, and the numerous breaches of his fiduciary duties to Lynita
15 prior to the Parties' divorce action. PA 1 at 26:16 to 28:16; 41:1 to 42:16; 45:1 to
16 46:8; 44:1-17.

17 During the 2010 trial proceedings Eric testified for several days that the ELN
18 Trust and LSN Trust's property was community property. Eric's sworn testimony
19 corroborates Lynita's claim that Eric informed her throughout the marriage that the
20 assets accumulated in both the ELN and LSN Trusts were for the betterment of their
21 family unit, and thus, community. Attorney Burr, who prepared the ELN and LSN
22 Trusts, corroborated that the purpose of creating the spendthrift trusts was to
23 "supercharge" the protection afforded against creditors and was not intended to be a
24 property settlement. PA1 at 10:15-27.

25 On June 24, 2011, Eric filed his Motion to Join Necessary Party; or in the
26 Alternative; to Dismiss Claims Against the Eric L. Nelson Nevada Trust Dated May
27 30, 2011, suggesting for the first time that the Parties had no legal interest in the
28 properties purportedly held by the ELN Trust despite days of sworn testimony to the

1 contrary. Respondent, Lynita Sue Nelson's Appendix³ ("LSNA"), Volume 1 at 5-59.
2 On August 9, 2011, a Stipulation and Order was entered into between Eric and Lynita
3 to join the ELN and LSN Trusts as parties to this action. PA1 at 55-59. On August
4 19, 2011, Lana Martin, as Distribution Trustee of the ELN Trust, voluntarily appeared
5 in this action by filing an Answer to [Eric's] Complaint for Divorce and
6 Counterclaims and Crossclaim, submitting to the jurisdiction of the divorce Court,
7 asserting causes of action against Lynita, and requesting affirmative relief.⁴ LSNA1
8 at 61-65. Specifically, the ELN Trust requested a declaratory judgment as to the
9 status of its (the Parties') property, and monetary damages. LSNA1 at 64.
10 Nonetheless, when Lynita subsequently asserted causes of action against the ELN
11 Trust, it (like Eric) reversed course, and baselessly argued that the Court did not have
12 jurisdiction over the trust and its affairs, despite the fact that it was the ELN Trust that
13 had invoked the jurisdiction of the Court. LSNA1 at 66-99.

14 Following the addition of the ELN and LSN Trusts to the divorce action,
15 numerous additional months of discovery and litigation ensued. Trial recommenced
16 in July, 2012 and concluded on August 22, 2012. PA1 at 4:23-23. On June 3, 2013,
17 the District Court entered its Decree of Divorce. In the Decree, the District Court, in
18 part, made the following relevant findings:

19 (1) During the first phase of trial, Eric, individually, and as Trustor and
20 Investment Trustee of the ELN Trust, testified repeatedly that the assets held by ELN
21 ...

23 ³ All references to Lynita Sue Nelson's Appendix refer to the appendix filed in Case 63432.

24
25 ⁴ Although the specific provisions of the ELN Trust confirm that Eric, as Investment Trustee
26 of the ELN Trust, was the only person authorized to "institute, compromise, and defend any actions
27 and proceedings" for the ELN Trust, Eric represented to the Court that he delegated such authority
28 to Lana Martin, Distribution Trustee, because of an alleged conflict of interest prior to the August
19, 2011, Answer to [Eric's] Complaint for Divorce and Counterclaims and Crossclaim. PA1 at
45:2-26. Eric has now allegedly delegated such authority to Nola Harber.

1 and LSN Trusts were community property and should be divided by the Court. PA1
2 at 9:7-10, 24.

3 (2) After six (6) days of trial, Eric sought to have the ELN and LSN Trusts
4 joined to the divorce action, not satisfied with the way the proceedings were heading,
5 and in a legal tactic intended to give him a second chance of denying Lynita a large
6 share of the Parties' community assets. PA1 at 45:2-26.

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

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

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

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 (6) 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 (8) That on “numerous occasions, [Eric] requested that [Lynita] sign
15 documentation relating to the transfer of LSN Trust assets to the ELN Trust.” PA1 at
16 12:2-4. That Eric violated his fiduciary duties to Lynita as both Investment Trustee
17 and Trust Adviser to the LSN Trust, and as Lynita’s husband, by failing to discuss the
18 factors relating to the numerous transfers from the LSN Trust to the ELN Trust. PA1
19 at 12:14-17; 14:22-27; 15:2-4. That Eric was able to exercise control over properties
20 in the LSN Trust and ELN Trust, and freely transfer same, under the “guise that
21 [such] property transfers benefitted the community,” and because he “assured [Lynita]
22 that he managed the assets in the trusts for the benefit of the community.” PA1 at
23 17:19-21,18:19-21.

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

26 THE COURT FURTHER FINDS that the formalities outlined within the
27 ELN Trust and the LSN Trust were not sufficiently and consistently
28 followed. Article eleven, section 11.3, of both trusts provides that
Attorney Burr, as Trust Consultant, shall have the right to remove any

1 trustee, with the exception of [Eric] and [Lynita], provided that he gives
2 the current trustee ten days written notice of their removal.

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

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

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

24 THE COURT FURTHER FINDS that while Ms. Martin and Ms. Harber
25 testified that they had the authority to approve or deny the distributions
26 to [Eric] under the ELN Trust and to [Lynita] under the LSN Trust, that
27 despite literally hundreds of distributions requests, they never denied
28 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].

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

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

THE COURT FURTHER FINDS that the numerous bookkeeping and
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.

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

4 PA1 at 30:15 to 32:12.

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

9 (11) That Eric lacked credibility, and during the divorce proceedings: (a)
10 "failed to answer questions in a direct and forthright manner," (b) violated the District
11 Court's injunction; and (c) "misstated the ELN Trust's financial position, or at the
12 very least was less than truthful with [the District Court]." In fact, the District Court
13 referenced Eric's lack of credibility, violation of Orders, and deplorable behavior
14 during the divorce action throughout its Decree, and even included a whole
15 subsection concerning his lack of credibility. PA1 at 26:16-17, 24-26; 27:1-3; 41:12-
16 16.

17 (12) That Eric's open and deliberate violation of the Joint Preliminary
18 Injunction evidences his attitude of disregard for court orders. Eric has been found
19 to have attempted to deplete the assets of Dynasty Development Group on the eve of
20 the bankruptcy filing, raising the concern that he may deplete assets of the ELN Trust
21 precluding Lynita from receiving alimony. PA1 at 41:2-8.

22 (13) That Eric has been less than forthcoming as to the nature and extent of the
23 assets of the ELN Trust which raises another possible deterrent from Lynita receiving
24 periodic alimony payments. PA1 at 41:12-16.

25 (14) That Eric's practice of regularly transferring property and assets to family
26 members, as highlighted in the transactions involving the High Country Inn and
27 Russell Road properties, contributes to this Court's concern that Eric may deplete the
28 assets of the ELN Trust via such family transfers, and, thereby, effectively preclude
Lynita from receiving periodic alimony. PA1 at 42:5-10.

1 (15) That Eric's overall attitude throughout the course of these proceedings
2 illustrates the possibility that he might attempt to liquidate, interfere, hypothecate or
3 give away assets out of the ELN Trust to avoid payment of his support obligations to
4 Lynita. PA1 at 42:11-16.

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

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

20 PA1 at 32:13-18.

21 THE COURT FURTHER FINDS that while the Court could invalidate
22 the Trusts based upon Mr. Nelson's testimony as to the community
23 nature of the assets held by each Trust, the breach of his fiduciary duty
24 as a spouse, the breach of his fiduciary duty as an investment trustee, the
25 lack of Trust formalities, under the principles of constructive trust, and
26 under the doctrine of unjust enrichment, the Court feels that keeping the
27 Trusts intact, while transferring assets between the Trusts to "level off
28 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.

PA1 at 47:9-17.

The only reason the District Court presumably did not invalidate the trusts was
that it believed it could afford justice to the Parties by transferring property between
each trust to accomplish an equal division of property, and award Lynita lump sum
alimony, child support arrears and attorneys' fees from the \$1,568,000 that was

1 enjoined in Eric's former counsel's, David Stephens, Esq.'s trust account. Said
2 monies were first enjoined by the District Court at a hearing held April 4, 2011,
3 LSNA1 at 3:1-5, and remained in said account until sometime shortly after the
4 District Court issued its Decree on June 3, 2013. Undoubtedly, if the District Court
5 did not believe it could afford the relief it Ordered without invalidating the trusts, it
6 would have simply invalidated the trusts based on its findings warranting same, rather
7 than changing the relief it afforded to the Parties.

8 In addition to dividing the Parties' property, the District Court in its Decree
9 also awarded Lynita \$800,000 for lump sum alimony, \$87,775 in child support arrears
10 and \$144,967 for attorneys' fees and costs. PA1 at 51-52.

11 There can be no doubt from Eric's actions in this matter, inclusive of
12 authorizing the ELN Trust to file two (2) petitions for writ relief and three (3)
13 separate emergency motions for stay, as well as his unwillingness to share community
14 income and assets, that Eric's strategy is to starve Lynita out and prevent her from
15 receiving the benefits of the District Court's June 3, 2013 judgment.

16 At the start of the divorce litigation, Lynita had access to approximately \$2
17 million dollars, by August 2012 she has less than \$200,000 remaining at her disposal;
18 she was forced to deplete every dollar she had on professional fees (which were
19 exponentially increased by Eric's vexatious litigation tactics) and living expenses,
20 without ever being able to replenish same with the large amounts of community
21 income that was received by Eric during the same period of time. LSNA1 at 105:9-13.
22 Specifically from January 1, 2009 through March 31, 2013, Lynita supported
23 \$1,984,289.55 in expenses incurred for her support, for the support of the parties'
24 minor children, and for the defense of the divorce litigation through the liquidation
25 of \$1,828,534.65 of her assets. PA, Volume 2 at 8. By June 5, 2013, Lynita's
26 available cash had dwindled to \$19,000 in her bank accounts, with current household
27 bills of \$3,130.00, and an outstanding balance for attorneys' fees and costs of over
28 \$140,000. LSNA, Volume 2 at 32:10-12.

1 Unlike the assets titled and/or held in the name of the ELN Trust, the assets
2 titled and/or held in the ELN Trust do not produce income for Lynita. LSNA2 at 1-
3 22. Rather, since 2009, Lynita has been living off of and maintaining payment of her
4 expenses by the sale of her investments. PA2 at 8. At this juncture however, Lynita
5 no longer has the ability to sell investments to support her expenses, as she has
6 liquidated all of her investment holdings.

7 On December 23, 2011, Larry Bertsch filed a Corrected Asset Schedule by
8 Ownership confirming the holdings of each party's trust as of March 31, 2012.
9 LSNA2 at 23-26. Of the \$3,905,974 in assets identified to be held in the name of the
10 LSN Trust, \$1,052,035 in cash has been exhausted as explained above. This leaves
11 \$2,853,939 in assets accessible to the LSN Trust, none of which are easily saleable
12 or produce income from which Lynita can continue to support herself and the parties'
13 remaining minor child.

14 Since June 3, 2013, Lynita has not received any of the benefits of the District
15 Court's judgment. Specifically, upon the emergency request of the ELN Trust, this
16 Court, and on less than twenty-four (24) hours notice to Lynita or her counsel,
17 granted a temporary stay of the June 19, 2013 order requiring the ELN Trust pay
18 Lynita alimony, child support arrears, and attorneys' fees totaling \$1,032,742, from
19 the \$1,568,000 held in Mr. Stephens' account within forty-eight (48) hours of
20 presentation. PA1 92-93. An extension of the temporary stay, to include a stay of the
21 District Court's judgment in the Decree requiring the ELN Trust pay Lynita alimony,
22 child support arrears, and attorneys' fees totaling \$1,032,742, from the \$1,568,000
23 held in Mr. Stephens' account within thirty (30) days of entry of the Decree was also
24 granted on less than twenty-four (24) hours notice to Lynita or her counsel. PA1 94-
25 95. In addition to the harm the two (2) temporary stay orders have caused Lynita,
26 Lynita was required to file a motion for order to show cause and seek contempt
27 against Eric to obtain payment of court ordered child support. LSNA2 at 36-59.

28 . . .

1 On July 16, 2013, some three (3) plus weeks after filing its first petition for
2 writ relief with this Court, and only after having been challenged on not less than
3 three (3) occasions that Nola Harber is not the Distribution Trustee for the ELN Trust
4 and has no standing in this action, the ELN Trust filed a document with the District
5 Court entitled "Notice of Substitution of Distribution Trustee". PA2 at 15-27. Such
6 document cannot be accepted as anything more than an improper effort to cure the
7 standing problem which continues to exist as the ELN Trust has not motioned the
8 Court to allow a substitution of any party in the action.

9 On July 22, 2013 the District Court held a hearing on Lynita's Motion to
10 Amend and Alter the June 3, 2013 Decree of Divorce. During said proceedings the
11 District Court confirmed the June 3, 2013 Decree as a final order, electing to treat the
12 yet to be resolved issue of the Wyoming Downs transaction as a post-divorce issue
13 under Amie v. Amie, 106 Nev. 541, 796 P.2d. 233 (1990). Counsel is preparing
14 the Order from the July 22, 2013 hearing.

15 **III. LEGAL ANALYSIS**

16 **A. Nola Harber Lacks Standing To Maintain The Petition For Writ Of Prohibition** 17 **And The Petition Must Therefore Be Denied**

18 As set forth in the Statement of Facts and Procedural History ("Statement of
19 Facts"), at all times during the Parties' divorce action, Lana Martin was the named
20 party as Distribution Trustee of the ELN Trust, authorized to defend and maintain the
21 District Court proceedings on behalf of the ELN Trust. The instant Petition, however,
22 was filed by Nola Harber as Distribution Trustee of the ELN Trust. On July 16, 2013,
23 one (1) week after filing this Petition and one (1) week after Lynita's counsel raised
24 the standing issue in response to the ELN Trust's first petition for writ relief (Case
25 No. 63432), the ELN Trust filed a "Notice of Substitution of Distribution Trustee"
26 in the District Court. The "Notice of Substitution of Distribution Trustee" represents
27 that on June 10, 2013, as a result of Ms. Martin's "resignation", Ms. Harber became
28 the Distribution Trustee of the ELN Trust in the place and stead of Ms. Martin.

1 Additionally, said Notice includes an undated delegation to Ms. Harber, signed by
2 Eric as the Investment Trustee of the ELN Trust, of the authority to maintain these
3 proceedings on behalf of the ELN Trust, despite such functions being afforded solely
4 to the Investment Trustee under the terms of the ELN Trust. Specifically, the ELN
5 Trust provides at Section 12.1, as follows:

6 12.1 Trustee's Powers.

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

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

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

15 It is well-settled that "a party to a litigation is either a natural or an artificial
16 person." *Causey v. Carpenters So. Nev. Vacation Trust*, 95 Nev. 609, 610, 600 P.2d
17 244, 245 (1979). Accordingly, "it is the trustee, or trustees, rather than the trust itself
18 that is entitled to bring suit." *Id.* Ms. Martin was the Distribution Trustee for the
19 ELN Trust and the person designated by Eric to bring and maintain suit on behalf of
20 the ELN Trust when these proceedings began. No motion to substitute Ms. Harber
21 or any other individual in the place and stead of Ms. Martin has ever been filed.

22 NRCPC 25(c) provides:

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

28 (Emphasis added). Under NRCPC 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

1 Procedure, Rule 25(c), the federal counterpart to NRCP 25(c)).⁵ Without the
2 provisions of NRCP 25(c), allowing for the continued prosecution of an action
3 against an original party even after transfer of such party's interest in the litigation,
4 a party could transfer its interests to avoid compliance with a court's orders.

5 In its Reply to Answer to Petition for Writ of Prohibition filed in the first writ
6 proceeding (Case No. 63432) the ELN Trust argues that as a result of Ms. Martin's
7 resignation, Ms. Harber, as the successor Distribution Trustee, "is the only one
8 authorized to bring the Petition for Writ of Prohibition as she is the real party in
9 interest" and that "a motion for substitution pursuant to NRCP 25(c) is unnecessary
10 in the context of a trust because there has been no "transfer of interest" because the
11 Distribution Trustee of the ELN Trust, is still the party to the litigation, albeit the
12 person serving in the capacity of Distribution Trustee has changed." The ELN Trust
13 likens this situation to that of the resignation of a public official, arguing that the
14 automatic substitution which applies in the case of public officers as found in NRCP
15 25(d)(1), should extend to the instant case. Neither Ms. Martin nor Ms. Harber are
16 public officers therefore NRCP 25(d)(1) does not apply in the instant case.

17 In all instances where there is to be a substitution of a party pursuant to any
18 section of NRCP 25, save and except the legislatively created exception for public
19 officials as found in NRCP 25(d), a motion for substitution of party is required.
20 NRCP 25(c) and its federal counterpart FRCP 25(c) exist to prevent a party from
21 having to litigate against a moving target, and only allows for the substitution of a
22 successor in interest upon motion. The instant situation, wherein for reasons
23 unknown and not within the record Ms. Martin has chosen to "resign" as Distribution
24 Trustee for the ELN Trust, is more closely aligned with the death and subsequent

25
26 ⁵ "Federal cases interpreting the Federal Rules of Civil Procedure 'are strong
27 persuasive authority, because the Nevada Rules of Civil Procedure are based in large
28 part upon their federal counterparts.'" *Exec. Mgmt., Ltd. v. Ticor Title Ins.*, 118 Nev.
46, 38 P.3d 872, 876 (2002).

1 substitution of a personal representative for the deceased party (which requires
2 substitution of a party within 90 days of a suggestion of death being placed upon the
3 record) upon motion pursuant to NRCP 25(a) , than that of automatic substitution of
4 a party as found to exist for public officers in NRCP 25(d).

5 Unlike the legislatively created basis for the automatic substitution of a public
6 officer, there is no such automatic substitution which applies to successor trustees
7 involved in litigation. "Where a trustee commences a lawsuit in his fiduciary capacity
8 and later resigns from office, a successor trustee will normally be allowed to step into
9 the plaintiff's shoes and take over the prosecution of the action; the resignation of the
10 original trustee is not deemed to abate the lawsuit without possibility of revival."
11 *Corbin v. Blankenburg*, 39 F.3d 650 (C.A.6 (Mich.), 1994) In this ERISA case the
12 United States Court of Appeals Sixth Circuit overturned a lower court holding
13 dismissing the case following resignation of the original trustee, where "the motion
14 to substitute the successor trustee as plaintiff was filed only three working days after
15 defendant's objection to the predecessor trustee's standing". Thus, while a successor
16 trustee will normally be allowed to step into the plaintiff's shoes and take over the
17 prosecution of the action, it cannot be said that this is an automatic occurrence.

18 Already once in the lower court proceedings the ELN Trust has sought to avoid
19 an order of the District Court, claiming that a change in the trust's Distribution
20 Trustee coupled with the fact that the newly appointed Distribution Trustee had no
21 signatory rights on the trust's bank account made it impossible to comply with the
22 same. LSNA1 at 181:8-16.

23 It should not be Lynita's burden to chase a moving target. This has been
24 confirmed by the United States District Court for the District of Nevada in *United*
25 *States v. Walker River Irrigation Dist.* (2012 WL 1424178 (D.Nev.), April 23, 2012)
26 wherein the court held in a water rights action that after litigation has been
27 commenced, the substitution or joinder of a successor-in-interest following an inter-
28 vivos transfer is governed by Federal Rule of Civil Procedure 25 ("Fed. R. Civ. P.

1 25"). *Hilbrands v. Far East Trading Co.*, 509 F.2d 1321, 1323 (9th Cir. 1975);
2 *Fischer Bros. Aviation, Inc. v. NWA, Inc.*, 117 F.R.D. 144, 146 (D. Minn. 1987)
3 (citing *Froning's, Inc. v. Johnston Feed Serv.*, 568 F.2d 108, 110 (8th Cir. 1978)); *P*
4 *P Inc. v. McGuire*, 509 F. Supp. 1079, 1083 (D.C.N.J. 1981) (citing 7A Charles Alan
5 Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1958 (1972)). “Once
6 a defendant has been served in a subproceeding, the burden of keeping track of inter
7 vivos transfers of the defendant's water rights in that subproceeding and substituting
8 the defendant's successors-in-interest properly is born by the defendant and its
9 successor(s)-in-interest. The action will continue in the name of the served defendant
10 until such time as the served defendant and any successor(s)-in-interest file an
11 agreement and motion seeking the substitution of the successor(s)-in-interest for the
12 served defendant and the Court approves that substitution.” *Id.*

13 There has never been any motion brought pursuant to NRCP 25(c) to substitute
14 Ms. Harber in the place of Ms. Martin in this action nor has the District Court
15 approved substitution of Ms. Harber as the successor Distribution Trustee for the
16 ELN Trust as a party to this action. Accordingly, Ms. Harber does not have standing
17 to maintain the instant Petition.

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

21 This Court has original jurisdiction to issue writs of prohibition. Nevada
22 Constitution, Art. 6, § 4. “[The writ of prohibition] arrests the proceedings of any
23 tribunal, corporation, board or person exercising judicial functions, when such
24 proceedings are without or in excess of the jurisdiction of such tribunal, corporation,
25 board or person.” Nevada Revised Statutes, § 34.320 (2013). “A writ of prohibition
26 is an extraordinary remedy” *Daane v. Dist. Ct.*, 127 Nev. Adv. Op. 59, 261 P.3d
27 1086, 1087 (2011). “The writ may be issued . . . in all cases where there is not a
28 plain, speedy and adequate remedy in the ordinary course of law.” NRS 34.330; *see*

1 *also, Daane*, 261 P.3d at 1087. Petitioner bears the burden of demonstrating that
2 extraordinary relief is warranted. *Id.* The right to appeal is generally considered an
3 adequate legal remedy that precludes extraordinary relief. *Int'l Game Tech.*, 124 Nev.
4 At 197, 179 P.3d at 558. A divorce decree is appealable as a final judgment when it
5 finally resolves all issues pertaining to the dissolution of the parties' marriage,
6 including the division of property. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996
7 P.2d. 416, 417 (2000) (recognizing that a final judgment is one that disposes of all
8 issues presented and leaves nothing for the court's future consideration, except for
9 certain post-judgment issues).

10 The ELN Trust has failed to demonstrate a basis for extraordinary relief even
11 after being granted the opportunity to supplement its Petition for writ relief. As
12 recognized by this Court in its July 10, 2013 Order Directing Supplement to Petition
13 and Directing Answer, an appeal from the final divorce decree in this action, once
14 entered, is an adequate remedy in the ordinary course of law.

15 On July 22, 2013 the District Court held a hearing on Lynita's Motion to
16 Amend and Alter the June 3, 2013 Decree of Divorce. During said proceedings the
17 District Court confirmed the June 3, 2013 Decree as a final order, electing to treat the
18 yet to be resolved issue of the Wyoming Downs transaction as a post-divorce issue
19 under *Amie*. Counsel is preparing the Order from the July 22, 2013 hearing.
20 However, even if the yet to be resolved issue of the Wyoming Downs transaction
21 remained, this does not change the fact that the ELN Trust's ability to appeal from the
22 final divorce decree, once it is ultimately determined to have been entered, remains
23 an adequate remedy in the ordinary course of law.

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

1 *Pan v. Eighth Judicial Dist. Court*, 120 Nev 222, 224, 88 P.3d 840; 841 (2004).

2 Accordingly, it is clear that Ms. Harber's right to appeal is an adequate remedy in the
3 ordinary course of the law which precludes the granting of the Petition for Writ of
4 Prohibition regardless of if an appeal can be filed immediately or at a later date.

5 Ms. Harber does not deny that a right to appeal exists, but instead asserts that
6 *Milchem v. Third Judicial Dist. Court In & For Lander Cnty.*, 84 Nev. 541, 544, 445
7 P.2d 148, 149 (1968) provides authority to find that in all situations where real
8 property is at issue, writ relief is appropriate because the ability to encumber, grant
9 and enter into leases and/or sell the real property before an appeal could be filed or
10 adjudicated would result in irreparable harm. The ELN Trust's reliance upon *Milchem*
11 as a basis for extraordinary writ relief is misplaced. In *Milchem*, this Court was faced
12 with a writ petition questioning the constitutionality of a statute upon which the
13 Respondents in that case relied when continuing to mine land titled to and owned by
14 Appellant and filing an action for eminent domain. Respondents were in possession
15 of the land, despite Appellant holding title. This Court granted a writ of prohibition
16 denying the District Court from holding further proceedings in the eminent domain
17 action finding that "the slow process of appeal would not provide an adequate remedy
18 under such circumstances." *Milchem* is not akin to the facts of the instant case. In
19 this case, the District Court has already conducted trial proceedings resulting in a
20 final judgment. This final judgment can be appealed following entry of the Order
21 resulting from the July 22, 2013 hearing, which counsel is preparing. As this Court
22 has previously addressed appeals which deal with the transfer of real property, and
23 will undoubtedly do so again, it cannot be the case that simply because there is real
24 property involved in this appeal that write relief should issue.

25 For several reasons, explained in great detail in the fifty (50) page Decree, the
26 final judgment awards to the LSN Trust certain real property parcels as well as the
27 right to collect the rents and note payments resulting from the same to ensure her
28

1 continuing support. The ELN Trust is effectively requesting this Court grant it a pass,
2 to allow it to stay the judgment, and remain in control of the assets at issue in the
3 divorce proceedings without demonstrating that actual harm will result from the
4 fulfillment of the judgment. Speculation should not be considered a legitimate basis
5 for extraordinary relief. Further, the need for Lynita to receive the property due to her
6 by the District Court's judgment, and to collect the rents and note payments resulting
7 from the same to ensure her continued ability to meet her expenses, is well
8 documented.

9 To grant the ELN Trust's request for writ relief would allow the trust to
10 continue to remain in possession of property that the District Court found was
11 wrongfully obtained by the ELN Trust. Such a ruling would cause Lynita irreparable
12 harm as she will continue to be without a source of support for the duration of these
13 proceedings. The ELN Trust has the right to appeal the District Court's judgment and
14 to seek a stay of the District Court's judgment. Such a stay would be improper absent
15 the imposition of a supersedeas bond. NRC 62(c) provides that "[w]hen an appeal
16 is taken the appellant by giving a supersedeas bond may obtain a stay subject to the
17 exceptions contained in subdivision (a) of this rule. The bond may be given at or
18 after the time of filing the notice of appeal. The stay is effective when the
19 supersedeas bond is filed. This Court may condition a party's request for a stay of a
20 judgment on the party's filing of a bond or other appropriate security in the district
21 court. NRAP 8(a)(2)(E).

22 The District Court, in the Decree and at a hearing conducted June 19, 2013, has
23 consistently expressed its concerns about whether Eric and the ELN Trust will
24 comply with future orders. PA1 at 45:2-6; LSNA1 at 182:19-24. Absent a bond, it
25 is likely that Lynita will never be able to recover the judgment awarded to her by the
26 Decree of Divorce regardless of the outcome of this writ proceeding or any
27 subsequent appeal. The ELN Trust's attempt to short change the appellate process
28 should not be tolerated.

1 Not only has the ELN Trust failed to demonstrate that they do not have an
2 adequate remedy in the ordinary course of law, writ relief should not issue because
3 the arguments raised by the ELN Trust are not ones of whether the District Court
4 exceeded its jurisdiction, but are more properly categorized as argument that the
5 District Court erred in its application of law.

6
7 1. The District Court Did Not Exceed Its Jurisdiction In Ordering the
8 Transfer of Assets Between the ELN Trust and LSN Trust

9 There can be no doubt that the District Court had jurisdiction to enter Orders
10 concerning the properties held in the ELN and LSN Trusts. The District Court's
11 jurisdiction was admitted by Ms. Martin when she voluntarily appeared in the District
12 Court action by filing an Answer to [Eric's] Complaint for Divorce and Counterclaims
13 and Crossclaim, requesting affirmative relief from the District Court, and more
14 specifically, decisions regarding the status of properties held by the ELN Trust.

15 Ms. Harber has not claimed that the District Court lacked subject matter
16 jurisdiction over the case, or personal jurisdiction over the ELN Trust to enter the
17 relief contained in the Decree, nor could she. The crux of the Petition argument is
18 that the District Court exercised judicial functions “in excess” of its jurisdiction when
19 it ignored the protections afforded to valid spendthrift trusts under Nevada law. In
20 making such argument, Ms. Harber wholly ignores the detailed findings of the
21 District Court concluding that the ELN Trust is a sham trust, and that Eric did not
22 comply with trust formalities or Nevada law in his management and dealings with the
23 ELN Trust. The ELN Trust cannot rely upon the protections afforded to valid
24 spendthrift trusts under the facts and findings of this case. Furthermore, such
25 allegation is more properly categorized as an argument that the District Court erred
26 in its application of law, than an argument that the District Court exceeded its
27 jurisdiction.

28 The ELN Trust, in its own filing acknowledged that writ relief is improper to
control the judicial discretion of the court unless such discretion is manifestly abused

1 or is exercised arbitrarily or capriciously. *State v. Eighth Judicial District Court ex*
2 *rel. Cnty of Clark*, 118 Nev. 140, 147 42 P.3d 233, 237-38 (2002). An arbitrary
3 decision is one made without regard for the facts and circumstances presented, and
4 it connotes a disregard of the evidence. Similarly, a capricious decision is one which
5 can be characterized as being impulsive, unpredictable, or subject to whim. Clearly,
6 in explaining the basis for its judgment in great detail over more than forty pages of
7 decision, including making specific findings as to the evidence which exists to
8 support its decision, the District Court in this action neither acted arbitrarily or
9 capriciously in deciding the divorce action. As the District Court had jurisdiction to
10 enter Orders concerning the properties held in the ELN and LSN Trusts and the
11 District Court did not act arbitrarily or capriciously in rendering its decision in the
12 divorce action, there is no basis for a writ to issue in this proceeding.

13
14 2. The District Court Did Not Exceed Its Jurisdiction By Finding It Could
15 Invalidate the ELN Trust To Satisfy the Parties' Intent to Equalize Their
Respective Trusts When It Upheld the 1993 Separate Property
Agreement

16 The ELN Trust asserts that the District Court cannot find the 1993 Separate
17 Property Agreement to be valid, yet ignore the document due to a belief that Eric an
18 Lynita intended to “equalize” and “level off” the trusts, and that the creation of the
19 ELN and LSN Trusts was to “supercharge” the protection afforded against creditors
20 and was not intended to be a property settlement. In support of this position, the ELN
21 Trust cites to the California cases of *In re Marriage of Holtemann*, 166 Cal. App. 4th
22 1166, 83 Cal. Rptr. 3d 385 (Cal. App. 4th 2008), and *In re Marriage of Lund*, 174
23 Cal. App. 4th 40, 94 Cal. Rptr. 3d 84 (Cal. App. 4th 2009) for the proposal that a
24 spouse cannot have a “conditional” transmutation of property, which the ELN Trust
25 alleged is the outcome of the court ordered transfer of property in the June 3, 2013
26 Decree.

27 Notwithstanding the fact that *Holtemann* and *Lund* were decided under
28 California law, by California courts, and do not establish precedence in this Court,

1 both cases are factually and legally distinguishable from the instant case. In both
2 *Holtemann* and *Lund* the California appellate court specifically found, and relied
3 upon in rendering its holdings, that the party challenging the agreement of
4 transmutation understood the full legal effect of such agreement and was not misled
5 or misinformed. In *Holtemann*, the court reached such conclusion based on the
6 admissions of the parties, and the correspondence sent to husband by attorney
7 confirming the advice given to husband that the Transmutation Agreement had
8 "irreversible consequences." *Holtemann*, 166 Cal. App. 4th at 1170, 1173-74. In
9 *Lund*, the court reached such conclusion based on a lack of evidence and testimony
10 to the contrary. *Lund*, 174 Cal. App. 4th at 98.

11 Unlike in *Holtemann* and *Lund*, the evidence and testimony presented at trial
12 in the instant matter clearly established that Lynita was not advised of the full legal
13 effects of the creation of the ELN and LSN Trusts. To the contrary, Lynita was
14 specifically led to believe that the intent of creating the spendthrift trusts was to
15 provide maximum protection from creditors and was not intended to be a property
16 settlement in the event that the parties divorced. Such misrepresentations were the
17 basis for Lynita's faith in and total support of her husband, granting to Eric
18 unfettered access to the LSN Trust to regularly transfer assets from the LSN Trust to
19 the ELN Trust to infuse cash and other assets to fund its investment ventures. The
20 District Court's findings concerning the validity of both the 1993 Separate Property
21 Agreement and the 2001 self-settled spendthrift trusts are questions of abuse of
22 discretion, not error of law. As explained earlier in this brief, writ relief is improper
23 to control the judicial discretion of the court unless such discretion is manifestly
24 abused or is exercised arbitrarily or capriciously. *State v. Eighth Judicial District*
25 *Court ex rel. Cnty of Clark*, 118 Nev. at 147.

26 ...

27 ...

28 ...

1 C. The District Court Acted Property In Considering Evidence Of The Parties'
2 Intent For The Creation of The 2001 Trusts

3 The ELN Trust argues that the District Court's reliance upon testimony and
4 other evidence concerning the parties' intent when entering into their 2001 self settled
5 spendthrift trusts is an error of law and upon this basis this Court should enter a writ
6 prohibiting enforcement of the portions of the Decree of Divorce transferring
7 properties from the ELN Trust to the LSN Trust. The ELN Trust made this same
8 argument to the District Court who disagreed. Again, this is a question of abuse of
9 discretion, not error of law.

10 Even if this were a question of error of law, there is no error as the parol
11 evidence rule does not apply to bar the evidence presented at trial. First, neither the
12 ELN Trust nor Eric made any objection to presentation of such evidence at trial. As
13 the evidence at issue was admitted without objection, neither the ELN Trust nor Eric
14 can now seek to challenge same. Additionally, the parol evidence rule does not
15 apply to preclude evidence of the facts and circumstances surrounding the execution
16 of an agreement when the validity of such agreement has been challenged. *Havas v.*
17 *Alger*, 85 Nev. 627, 632, 461 P.2d 857, 860 (1969). If the parol evidence rule
18 operated in such a manner, then no court could examine whether an agreement was
19 entered into as a result of misrepresentation, undue influence, duress, fraud, or any
20 other reason not permitted by law. Furthermore, no court would be able to analyze
21 whether an agreement between spouses complied with the law governing such
22 agreements as set forth in NRS 123.270 (providing that a husband and wife can make
23 contracts respecting property subject to "the general rules which control the actions
24 of persons occupying relations of confidence and trust toward each other").

25 Furthermore, while parol evidence generally may not be admitted to vary or
26 contradict the terms of an unambiguous contract, parol evidence of intent is
27 admissible to explain and clarify a contract which is ambiguous on its face. The
28 evidence regarding the intention of the parties with respect to the ELN and LSN

1 Trusts, was introduced by Eric during his case-in-chief and was provided due in part
2 to the ambiguity of the testimony concerning these trusts. Where a party introduces
3 otherwise inadmissible evidence without objection, such evidence should be
4 considered by the Court, and an opposing party is permitted to introduce similar
5 evidence to rebut or clarify such evidence:

6 Even if evidence is inadmissible, a party may "open the door" to
7 admission of that evidence. A party opens the door to evidence when
8 that party "introduces evidence or takes some action that makes
9 admissible evidence that would have previously been inadmissible." 21
Charles Alan Wright et al., *Federal Practice & Procedure Evidence* §
5039 (2d ed. 1987).

10 *Tennessee v. Gomez*, No. M2008-02737-SC-R11-CD, filed April 24, 2012; *Hayward*
11 *v. Florida*, 59 So. 3d 303, 306 (Fla. 2d Dist. 2011) ("The concept of 'opening the
12 door' permits admission of inadmissible evidence for the purpose of qualifying,
13 explaining or limiting testimony previously admitted."). The Nevada Supreme Court
14 addressed this issue in *Canfield v. Gill*, 101 Nev. 170, 697 P.2d 476 (1985):

15 The contract in this case does not appear to be ambiguous on its face.
16 Therefore, parol evidence on the intent of the parties should not have
17 been admitted at trial. [Citation omitted]. The trial transcript, however,
18 reveals that parol evidence regarding intent was offered and admitted by
both parties without objection. The failure to object to this evidence
constitutes a waiver.

19 *Id.*, 101 Nev. at 172, 697 P.2d at 477, n.2 (1985). Thus, the evidence offered by Eric
20 regarding the intent of entering into the ELN and LSN Trusts, was properly
21 considered.

22 D. The District Court Did Not Exceed Its Jurisdiction By Imposing A Constructive
23 Trust Over the Russell Road and Lindell Properties

24 Ms. Harber has failed to demonstrate that the District Court exercised judicial
25 functions "in excess" of its jurisdiction. Ms. Harber has not claimed that the District
26 Court lacked subject matter jurisdiction over the case, or personal jurisdiction over
27 the ELN Trust to enter the relief contained in the Decree. Instead, Ms. Harber argues
28 that the District Court exceeded its jurisdiction by imposing the equitable remedy of

1 constructive trust against the Russell Road Property and Lindell Property. Such
2 allegation is once more properly categorized as an argument that the District Court
3 erred in its application of law, than an argument that the District Court exceeded its
4 jurisdiction.

5 There can be no doubt that the District Court had jurisdiction to impose a
6 constructive trust or any other remedies which are not outside of its authority in
7 divorce proceedings. In fact, this Court has previously been called upon to determine
8 whether a constructive trust could be imposed to prevent an injustice growing out of
9 a divorce, because of which the party who should have received property was
10 deprived of it, and in each of those cases, it found the remedy proper in the service
11 of equity. *See Cummings v. Tinkle*, 91 Nev. 548, 539 P.2d 1213 (1975) (constructive
12 and resulting trusts are similar in that their basic objectives are the recognition and
13 protection of property rights that have arisen in an innocent party. The vital tenet is
14 one of equity); *Locken v. Locken*, 369, 372, 650 P.2d 803, 804-05 (1982), (A
15 constructive trust is a remedial device by which the holder of legal title to property
16 is held to be a trustee of that property for the benefit of another who in good
17 conscience is entitled to it).

18 Most recently in *Bemis v. Estate of Bemis*, 114 Nev. 1021, 967 P.2d 437
19 (1998), this Court held:

20 Constructive and resulting trusts are similar in that their basic objectives
21 are the recognition and protection of property rights that have arisen in
22 an innocent party. The vital tenet is one of equity. Where the
23 consideration for the property is provided by one party, but title is taken
24 by another, and the circumstances negate the possibility of the
25 consideration being a gift, equity will intervene to protect the rights of
26 the first party.

24 *Cummings v. Tinkle*, 91 Nev. 548, 550, 539 P.2d 1213, 1214 (1975). "The
25 constructive trust is no longer limited to [fraud and] misconduct cases; it redresses
26 unjust enrichment, not wrongdoing." Dobbs, *Law of Remedies* § 4.3(2) (2d ed.1993);
27 *DeLee v. Roggen*, 111 Nev. 1453, 1457, 907 P.2d 168, 170 (1995); "[A] resulting
28 trust may be imposed when parties' actions or expressions indicate that they intended

1 to create a trust relationship.” *Waldman v. Maini*, 124 Nev. 1121, 195 P.3d 850, 858
2 (2008).

3 In *Locken*, supra, this Court had set out three criteria for when "the holder of
4 legal title to property is held to be a trustee of that property for the benefit of another
5 who in good conscience is entitled to it," stating that a constructive trust will arise
6 and affect property acquisitions under circumstances where: (1) a confidential
7 relationship exists between the parties; (2) retention of legal title by the holder thereof
8 against another would be inequitable; and (3) the existence of such a trust is essential
9 to the effectuation of justice. *Id.*, citing *Schmidt v. Merriweather*, 82 Nev. 372, 375,
10 418 P.2d 991 (1966). Here, each of the elements are met. First, a confidential
11 relationship existed between Eric and Lynita as found by the District Court. PA1 at
12 11:18-21. Next, retention of legal title to the property that is the res of the
13 constructive trust will result in Eric’s continuation to receive 100% of the rental
14 income for the Lindell office building and a portion of the income received under the
15 note held against the Russell Road property. Such a result would be inequitable, as
16 the district court has found that Lynita requires such income for her monthly support.
17 And finally, the creation of the constructive trust is essential to the effectuation of
18 justice.

19 As set forth in the Decree of Divorce, the District Court found that the evidence
20 presented at trial confirmed that on numerous occasions during these proceedings,
21 Eric indicated that the ELN Trust and LSN Trust both held assets that were indeed
22 considered by the parties to be community property. PA1 at 10:15-23. In fact,
23 throughout Eric’s testimony, he either expressly stated that his actions were intended
24 to benefit his and Mrs. Nelson's community estate or made reference to the
25 community. PA1 at 9:15-10:19. Eric’s sworn testimony corroborates Lynita’s claim
26 that Eric informed her throughout the marriage that the assets accumulated in both the
27 ELN Trust and LSN Trust were for the betterment of their family unit, and, thus, the
28 community. PA1 at 10:20-23. The evidence clearly established that Eric exhibited

1 a course of conduct in which he had significant property transferred, including loans,
2 from the LSN Trust to the ELN Trust which benefitted the ELN Trust to the detriment
3 of the LSN Trust, and, as such, justice and equity demands that the LSN Trust receive
4 compensation to avoid such unjust enrichment on the part of the ELN Trust. PA1 at
5 26:2-7.

6 The ELN Trust argues, relying upon cases from Illinois and Ohio, that before
7 a constructive trust can be imposed there must be a tracing performed which results
8 in linking the wrongful conduct to the property which will become the res of the
9 constructive trust. There is no such requirement in Nevada. Rather, this Court has
10 recognized that a constructive trust is an equitable remedy appropriately imposed
11 where unjust enrichment is found to exist. *Id.* at 1027, 967 P.2d at 441. Even if such
12 a requirement did exist, the evidence submitted to the District Court was sufficient
13 to support a finding of constructive trust as by 2010, the property held in the ELN
14 Trust included assets and cash wrongfully obtained from the LSN Trust without
15 consideration, which preceded the ELN Trust's 2010 acquisition of the Russell Road
16 property. Additionally, with respect to the Lindell Road property, the District
17 Court's review of the Grant, Bargain, Sale Deed allegedly executed Lynita on said
18 date clearly reflects a signature not consistent with Lynita's signature when compared
19 to the numerous documents signed by Lynita and submitted at trial. As such, the
20 validity of the transfer of the 50% interest of the LSN Trust to the ELN Trust was
21 questioned by the District Court and ultimately returned to the LSN Trust.

22 Finally, the ELN Trust's attempt to argue that the imposition of the equitable
23 remedy of constructive trust is improper where there is an adequate legal remedy also
24 fails. There can be no adequate legal remedy where a settlor of a trust wrongfully
25 takes property belonging to another, places same into his trust, then claims that he is
26 without sufficient assets to satisfy any judgment which would be entered against him
27 as all of his assets are owned in the name of his trust. In such a situation, which are
28 ...

1 the facts as argued by the ELN Trust argues, only equitable remedies will be
2 sufficient to prevent injustice.

3
4 E. The District Court Did Not Exceed Its Jurisdiction By Awarding Property to
the LSN Trust Under The Theory of Unjust Enrichment

5 The District Court's reliance upon the theory of unjust enrichment in awarding
6 property to the LSN Trust is yet again a question of abuse of discretion, not error of
7 law. As explained earlier in this brief, writ relief is improper to control the judicial
8 discretion of the court unless such discretion is manifestly abused or is exercised
9 arbitrarily or capriciously. *State v. Eighth Judicial District Court ex rel. Cnty of*
10 *Clark*, 118 Nev. 140, 147 42 P.3d 233, 237-38 (2002).

11 It is well settled that pleadings can conform to the evidence. NRCP 15(b)
12 provides that "[w]hen issues not raised by the pleadings are tried by express or
13 implied consent of the parties, they shall be treated in all respects as if they had been
14 raised in the pleadings. Such amendment of the pleadings as may be necessary to
15 cause them to conform to the evidence and to raise these issues may be made upon
16 motion of any party at any time, even after judgment; but failure so to amend does not
17 affect the result of the trial of these issues. . ." Contemporaneously with this
18 Answering brief, Lynita intends to file a NRCP 15(b) motion to the District Court
19 requesting amendment of the pleadings to include the previously dismissed unjust
20 enrichment claims which the evidence presented during trial supports. While this will
21 ensure compliance with Nevada law, the absence of filing of an NRCP 15(b) motion
22 to so amend does not affect the result of the trial of these issues.

23 As the unjust enrichment claim was raised during the trial proceedings without
24 objection, there are no circumstances where dismissal of this claim without prejudice,
25 precludes the District Court from consideration of evidence which supports its
26 judgment. In this action, Lynita's counsel specifically referred to unjust enrichment
27 being a potential avenue for relief during its opening statement to the Court on July
28 16, 2012. During trial, counsel presented documents and testimony which became

1 the basis for and supported the District Court's nearly four (4) page findings and
2 holding concerning unjust enrichment. PA1 at 18:14-23:7. Despite being present
3 and active at trial, neither the ELN Trust nor Eric's counsel objected to the
4 presentation of evidence which would support a finding of unjust enrichment.

5 This Court has repeatedly found that "when issues not raised by the pleadings
6 are tried by express or implied consent of the parties, they shall be treated in all
7 respects as if they had been raised in the pleadings and that, though the pleadings may
8 be amended to conform to the evidence, failure to amend does not affect the result of
9 the trial of these issues. *Johnson v. Johnson*, 76 Nev. 318, 353 P.2d 449. We have
10 also given effect on many occasions to NRCP Rule 61 (a repetition of earlier statutes)
11 prohibiting the disturbance of a judgment for sundry errors of the trial court, unless
12 such errors appeared to this court inconsistent with substantial justice, and this court
13 must disregard any error or defect in the proceeding which does not affect the
14 substantial rights of the parties." *United Tungsten v. Corp. Svc.*, 76 Nev. 329, 353
15 P.2d 452 (1960); *Gershenhorn v. Stutz*, 72 Nev. 293, 304 P.2d 395 (1956).

16 This court has repeatedly given effect to the provisions of NRCP
17 Rule 15(b) to the effect that when issues not raised by the pleadings are
18 treated by express or implied consent of the parties, they shall be treated
19 in all respects as if they had been raised in the pleadings and that,
20 though the pleadings may be amended to conform to the evidence,
21 failure to amend does not affect the result of the trial of such issues.
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substantial justice, and that this court must disregard any error or defect
in the proceeding which does not affect the substantial rights of the
parties.

23 *United Tungsten v. Corp. Svc.*, 76 Nev. 329, 353 P.2d 452 (1960)

24 In *Poe v. La Metropolitana Company*, 76 Nev. 306, 353 P.2d 454 (1960), for
25 instance, this Court found that the defense of fraud in the application for an insurance
26 policy had been tried by implied consent. The Court noted that counsel for the
27 defendant had raised the issue in his opening argument, that counsel for plaintiff had
28 specifically referred to the matter as an issue in the case, that the factual issue had

1 been explored in discovery, that no objection had been raised at trial to the admission
2 of evidence relevant to the issue. See also *Young Elec. v. Last Frontier*, 78 Nev. 457,
3 375 P.2d 859 (1962) (issue virtually the "sole subject" of testimony); *Whiteman v.*
4 *Brandis*, 78 Nev. 320, 372 P.2d 468 (1962) (evidence received without objection);
5 *United Tungsten v. Corp. Svc.*, supra. (appellant's counsel agreed with court's
6 characterization of the matter as the major issue in the case); *Choate v. Ransom*, 74
7 Nev. 100, 323 P.2d 700 (1958) (no objection raised to evidence or request for
8 opportunity to refute).

9 **V. CONCLUSION**

10 As has been set forth throughout, the repeated filings for extraordinary relief,
11 including the instant Petition and serial motions seeking to stay the judgment entered
12 by the District Court is Eric's latest, and most desperate effort to abuse judicial
13 process, and to utilize his sham trust to avoid his obligations to his ex-wife of nearly
14 thirty (30) years. For the reasons discussed above, Eric and his sister (Ms. Harber)
15 are legally and factually not entitled to the relief requested in the Petition for Writ of
16 Prohibition, and such Petition should be denied in its entirety.

17 DATED this 26th day of July, 2013.

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1 CERTIFICATE OF COMPLIANCE

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 10,898 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 20th day of July, 2013.

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2 CERTIFICATE OF SERVICE

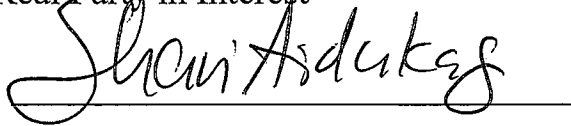
3 I hereby certify that I am an employee of The Dickerson Law Group, and that,
4 on the 26th day of July, 2013, I served a true and correct copies of **ANSWER TO**
5 **PETITION FOR WRIT OF PROHIBITION** via United States Mail, with postage
6 fully prepaid, to:

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