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Attorneys for Appellants

Electronically Filed
Sep 26 2013 09:08 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

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

IN THE MATTER OF: ESTATE OF LEROY G. BLACK, DECEASED,)	SUPREME COURT NO. 63960
)	
<hr/> WILLIAM FINK A/K/A BILL FINK,)	
Appellant,)	District Case No. P074745
vs.)	
)	
PHILLIP MARKOWITZ AS EXECUTOR OF)	DOCKETING STATEMENT
THE ESTATE OF LEROY G. BLACK,)	CIVIL APPEALS
<hr/> Respondent.)	

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department 26 County Clark
Judge Gloria Sturman District Ct. Docket No. P-12-074745-E

2. **Attorney filing this docket statement:**

Attorney R. Duane Frizell, Esq. Telephone (702) 657-6000
Firm CALLISTER & FRIZELL
Address 8275 S. Eastern Ave., Ste. 200, Las Vegas, Nevada 89123
Client(s) William Fink a/k/a Bill Fink

If this is a joint statement completed on behalf of multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. **Attorney(s) representing respondent(s):**

Attorney Jonathan W. Barlow, Jordan M. Flake
Telephone (702) 476-5900
Firm Barlow Flake LLP
Address 50 S. Stephanie St. Suite 101, Henderson, Nevada 89012
Client(s) Phillip Markowitz as Executor of Estate of Leroy G. Black

Attorney _____
Telephone _____
Firm _____
Address _____
Client(s) _____

4. **Nature of disposition below (check all that apply):**

<input type="checkbox"/> Judgment after bench trial	<input type="checkbox"/> Grant/Denial of NRCP 60(b) relief
<input type="checkbox"/> Judgment after jury verdict	<input type="checkbox"/> Grant/Denial of injunction
<input type="checkbox"/> Summary Judgment	<input type="checkbox"/> Grant/Denial of declaratory relief
<input type="checkbox"/> Default Judgment	<input type="checkbox"/> Review of agency determination
<input checked="" type="checkbox"/> Dismissal	<input type="checkbox"/> Divorce decree:
<input type="checkbox"/> Lack of jurisdiction	<input type="checkbox"/> Original <input type="checkbox"/> Modification
<input type="checkbox"/> Failure to state a claim	<input type="checkbox"/> Other disposition (specify)
<input type="checkbox"/> Failure to prosecute _____	
<input type="checkbox"/> Other (specify) _____	

5. **Does this appeal raise issues concerning any of the following: N/A**

☐ Child custody
☐ Venue
☐ Adoption

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are

related to this appeal: N/A

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition: N/A

8. **Nature of the action.** Briefly describe the nature of the action and the result below:

Nature of Action: In the District Court, Appellant (Contestant) filed a petition objecting to the admission of a will, which resulted in a will contest. Contestant also petitioned to enlarge time to have the citations for the petition issued and served. On limitations grounds, the Respondent (Personal Representative) filed an objection to the petition to enlarge time as well as a counter-petition to dismiss the will contest. In a report and recommendation, the Probate Commissioner granted Contestant's petition to enlarge time and denied the Personal Representative's objection and counter-petition.

The Personal Representative filed an objection to the Probate Commissioner's report and recommendation.

Result: The District Court sustained and granted the Personal Representative's objection. In addition, the District Court dismissed the Contestant's petition objecting to the admission of the will.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal:

Whether the District Court erred in dismissing Appellant's objection to the admission of the will.

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised: **None.**

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130? N/A X Yes _____ No _____

If not, explain N/A

12. **Other issues.** Does this appeal involve any of the following issues? N/A

- ف Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))
- ف An issue arising under the United States and/or Nevada Constitutions
- ف A substantial issue of first-impression
- ف An issue of public policy

ف An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

ف A ballot question

If so, explain: N/A

13. **Trial.** If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? N/A

14. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal. **NO** If so, which Justice? N/A

TIMELINESS OF NOTICE OF APPEAL

15. **Date of entry of written judgment or order appealed from:**

Order Granting Objection to Report and Recommendation (filed Aug. 1, 2013, notice of entry dated Aug. 2, 2013). See *Exhibit 1*, attached hereto.

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review: N/A

16. **Date written notice of entry of judgment or order served:**

Notice of Entry of Order Granting Objection to Report and Recommendation (dated and served Aug 2, 2013). See *Exhibit 2*, attached hereto.

(a) Was service by delivery _____ or by mail X (specify).

17. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59).**

(a) **Specify the type of motion, and the date and method of service of the motion, and date of filing:** N/A

Attach copies of all post-trial tolling motions.

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration do not toll the time for filing a notice of appeal.

(b) Date of entry of written order resolving tolling motion n/a.

(c) Date written notice of entry of order resolving motion served n/a.

(i) Was service by delivery n/a or by mail n/a (specify).

18. **Date notice of appeal was filed** Aug. 29, 2013.

(a) If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A

19. **Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a), NRS 155.190, or other:** NRAP 4(a) and NRS 155.190

SUBSTANTIVE APPEALABILITY

20. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

NRAP 3A(b)(1) _____ NRS 155.190 X (specify subsection) 155.190(1)(b)
NRAP 3A(b)(2) _____ NRS 38.205 _____ (specify subsection) _____
NRAP 3A(b)(3) _____ NRS 703.376 _____
Other (specify) _____

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The District Court dismissed appellant's petition objecting to the admission of the will to Probate, concluding that Probate is conclusive.

21. **List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

William Fink a/k/a Bill Fink

Phillip Markowitz as Executor of the Estate of Leroy G. Black

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other: N/A

22. **Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims or third-party claims, and the trial court's disposition of each claim, and how each claim was resolved (i.e., order, judgment, stipulation), and the date of disposition of each claim. Attach a copy of each disposition.**

Contestant's Claims:

1. Objection to Admission of Will. See Objection to the Admission of the Last Will and Testament of Leroy G. Black, for the Revocation of Letters Testamentary and for Appointment of special Administrator pending the conclusion of will contest (filed Nov 27, 2012) attached hereto as *Exhibit 3*.

2. Petition to Enlarge Time. See Petition to Enlarge Time Pursuant to NRCP 6(b) (filed Jan 23, 2013) attached hereto as *Exhibit 4*.

Disposition: Probate Commissioner recommended the District Court grant Contestant's petition for an Order to Enlarge Time. See Report and Recommendation (filed Apr 11, 2013, notice of entry filed Apr 19 2013) attached hereto as *Exhibit 5*.

Personal Representative's Counterclaims:

Personal Representative objected to the Commissioner's Report and Recommendation. See Objection to Report and Recommendation (filed Apr 29 2013) attached hereto as *Exhibit 6*.

Disposition:

The District Court sustained Personal Representative's objection to the Probate Commissioner's Report and Recommendation. Further, the Court dismissed Contestant's objection to the Admission of Decedent's Will. See Order Granting Objection to Report and Recommendation (filed Aug 1, 2013) *Exhibit 1*.

23. **Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

Yes X No

24. **If you answered "No" to question 23, complete the following:** N/A

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

Yes No **If "Yes," attach a copy of the certification or order, including any notice of entry and proof of service.** N/A

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment? N/A

Yes No

25. **If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):** N/A

26. **Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)

- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order
- See attached Exhibits 1-6

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

William Fink a/k/a Bill Fink

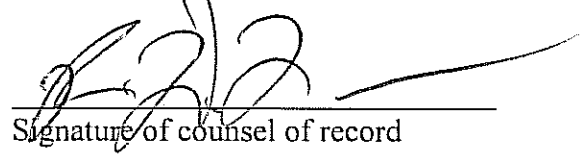
Name of appellant

9-25-13

Date

R. Duane Frizell

Name of counsel of record



Signature of counsel of record

Nevada, Clark County

State and county where signed

CERTIFICATE OF MAILING

I certify that on the 25 day of September 2013, I served a copy of this completed ***DOCKETING STATEMENT*** together with all exhibits, and sufficient postage prepaid to the following counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it via first class mail with postage fully prepaid to the following addresses:

Jonathan W. Barlow
Jordan M. Flake
BARLOW FLAKE LLP
50 S. Stephanie St., Ste. 101
Henderson, Nevada 89012
Attorneys for the Estate

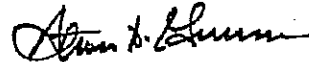
Rose Markowitz
2201 Hercules Dr.
Los Angeles, CA 90046

Michael A. Olsen
Thomas R. Grover
Goodsell & Olsen, LLP
10155 W. Twain Ave., Ste 100
Las Vegas, NV 89147


An employee of CALLISTER & FRIZELL

EXHIBIT 1

EXHIBIT 1



CLERK OF THE COURT

ORDR

JONATHAN W. BARLOW

Nevada Bar No. 9964

JORDAN M. FLAKE

Nevada Bar No. 10583

BARLOW FLAKE LLP

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jonathan@barlowflake.com

Attorneys for the Estate

**DISTRICT COURT
CLARK COUNTY, NEVADA**

In the Matter of the Estate of

LEROY G. BLACK,

Deceased.

Case No. P-12-074745-E

Dept. No. 26

ORDER GRANTING OBJECTION TO REPORT AND RECOMMENDATION

Date of Hearing: July 9, 2013

Time of Hearing: 9:00 a.m.

The *Objection to Report and Recommendation* filed by Phillip Markowitz as Executor of the Estate of Leroy G. Black came on for hearing on July 9, 2013. Jonathan W. Barlow, of Barlow Flake LLP, appeared for Phillip Markowitz as Executor of the Estate of Leroy G. Black, and Jonathan C. Callister, of Callister & Frizell, appeared for William Fink. The Court having reviewed all pleadings and papers on file, having considered the arguments of counsel, and other good cause showing, enters the following findings and order granting the Objection:

FINDINGS OF FACT:

1. Leroy G. Black ("Decedent") died on April 4, 2012.
2. On July 18, 2012, Phillip Markowitz ("Markowitz") filed a Petition for Probate of Will, Petition for Appointment of Personal Representative and for Issuance of Letters

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1 Testamentary (the "Petition to Probate Will"). In the Petition to Probate Will, Markowitz
2 petitioned the Court to enter a will dated March 7, 2012, to probate as Decedent's last will and
3 testament.

4 3. On July 27, 2012, Markowitz provided Notice of Hearing on the Petition to
5 Probate Will to William Fink ("Fink").
6

7 4. This Court held its hearing on the Petition to Probate Will on August 31, 2012.
8 Fink neither filed a written objection to the Petition to Probate Will, nor did Fink appear at the
9 hearing to object to the Petition to Probate Will.

10 5. This Court entered its Order admitting the March 7, 2012, will to probate on
11 August 31, 2012. Notice of Entry of the Order was served on Fink on August 31, 2012.
12

13 6. On November 27, 2012, Fink filed an Objection to the Admission of the Last
14 Will and Testament of Leroy G. Black, for the Revocation of Letters Testamentary and for
15 Appointment of Special Administrator Pending the Conclusion of Will Contest (the "Objection
16 to Admission of Will").
17

18 7. On January 3, 2013, Fink caused a Citation to Plea to Contest to be issued by the
19 Clerk of Court.

20 8. On January 23, 2013, Fink filed a Petition to Enlarge Time Pursuant to NRC
21 6(b).

22 CONCLUSIONS OF LAW:
23

24 1. An interested person who wishes to revoke an order admitting a will to probate
25 must file a petition "containing the allegations of the contestant against the validity of the will
26 or against the sufficiency of the proof, and requesting that the probate be revoked." NRS
27
28

1 137.080. The petition to revoke the probate must be filed "at any time within 3 months after the
2 order is entered admitting the will to probate." NRS 137.080.

3 2. In addition to the requirements of NRS 137.080, an interested person who wishes
4 to revoke an order admitting a will to probate must comply with the requirements of NRS
5 137.090, which states, "Upon filing the petition, and within the time allowed for filing the
6 petition, a citation must be issued, directed to the personal representative and to all the devisees
7 mentioned in the will, and the heirs, so far as known to the petitioner, including minors and
8 incapacitated persons, or the personal representative of any such person who is dead, directing
9 them to plead to the contest within 30 days after service of the citation."
10

11 3. The plain language rule of statutory interpretation requires that NRS 137.080-
12 .090 must be given their plain and unambiguous meaning. The phrase, "a citation must be
13 issued," in NRS 137.090 is given its plain meaning as a mandatory, not permissive, requirement
14 that must be performed within three months after entry of the order admitting a will to probate.
15

16 4. Because Fink failed to cause a citation to be issued within three months of
17 August 31, 2012, Fink is time-barred by the statute of limitations to pursue a will contest of the
18 March 7, 2012, will. Pursuant to NRS 137.120, the probate of Decedent's March 7, 2012, will is
19 conclusive.
20

21 5. The statute of limitations in this case is not tolled based on extrinsic fraud. Fink
22 did not provide any evidence of extrinsic fraud or any proof of any action by Markowitz that
23 would have prevented Fink from knowing his rights in this matter or acting to protect his rights.
24

25 6. Rule 6 of the Nevada Rules of Civil Procedure is not applicable to enlarge the
26 time to issue the citation required by NRS 137.090.
27
28

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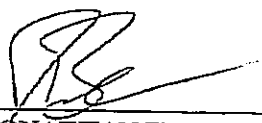
1 IT IS THEREFORE ORDERED that the *Objection to Report and Recommendation* filed
2 by Phillip Markowitz as Executor of the Estate of Leroy G. Black is granted. The Court does
3 not adopt or approve of the Report and Recommendation entered by Probate Commissioner
4 Wesley Yamashita on April 11, 2013.

5 IT IS FURTHER ORDERED that William Fink's Objection to Admission of Will is
6 denied. Fink's purported will contest of the admission of Decedent's March 7, 2012, will to
7 probate is time-barred by his failure to comply with the requirements of NRS 137.090 and is,
8 therefore, dismissed. The probate of Decedent's March 7, 2012, will is conclusive.
9

10 DATED this 31st day of July, 2013.

11
12
13 
14 DISTRICT COURT JUDGE *pon*

15 Prepared and submitted by:
16 BARLOW FLAKE LLP

17 
18 JONATHAN W. BARLOW
19 Nevada Bar No. 9964
20 Attorneys for the Estate

21 Reviewed as to form and content:
22 CALLISTER & FRIZELL

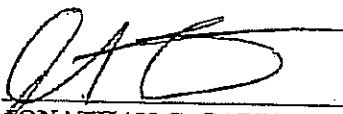
23 
24 JONATHAN C. CALLISTER
25 Nevada Bar No. 8011
26 Attorney for William Fink
27
28

EXHIBIT 2

EXHIBIT 2

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NEO
JORDAN M. FLAKE
Nevada Bar No. 9964
JONATHAN W. BARLOW
Nevada Bar No. 9964
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jonathan@barlowflake.law.com
Attorneys for the Estate

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Estate of

Case No. P-12-074745-E
Dept. No. 26

LEROY G. BLACK,

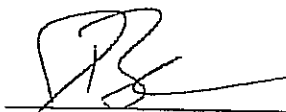
Deceased.

NOTICE OF ENTRY OF ORDER GRANTING OBJECTION TO REPORT AND
RECOMMENDATION

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the *Order Granting
Objection to Report and Recommendation* was entered in the above entitled matter on August
1, 2013, a copy of which is attached hereto.

DATED this 2nd day of August, 2013.

BARLOW FLAKE LLP



JONATHAN W. BARLOW
Nevada Bar No. 9964
Attorneys for the Estate

BARLOW FLAKE LLP
60 S. Stephanie St., Ste. 101
Henderson, NV 89013
(702) 476-5800

CERTIFICATE OF MAILING

I hereby certify that on August 2, 2013, a true and correct copy of the original *Notice of Entry of Order Granting Objection to Report and Recommendation* was sent via U.S. Mail, first class postage prepaid, to the following at their last known address:

Rose E. Markowitz
318 North California St.
Burbank CA 91505

Phillip Markowitz
2201 Hercules Drive
Los Angeles CA 90046

Jonathan C. Callister
Callister & Frizell
8275 S. Eastern Ave., Ste. 200
Las Vegas NV 89123

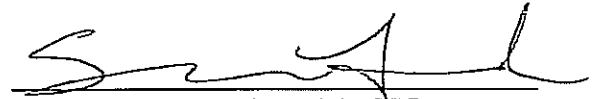

An employee of Barlow Flake LLP

EXHIBIT 3

EXHIBIT 3


CLERK OF THE COURT

DOUGLAS J. GARDNER, ESQUIRE
Nevada Bar No. 4609
RANDS, SOUTH & GARDNER
1055 Whitney Ranch Drive #220
Henderson, NV 89014
702 940 2222
tassyw@gmail.com

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of)
)
 LEROY G. BLACK)
) Case No. P-12-074745-E
 Deceased.)
)

OBJECTION TO THE ADMISSION OF THE LAST WILL AND TESTAMENT OF LEROY G. BLACK, FOR THE REVOCATION OF LETTERS TESTAMENTARY AND FOR APPOINTMENT OF SPECIAL ADMINISTRATOR PENDING THE CONCLUSION OF WILL CONTEST

Hearing Date: December 21, 2012
Hearing Time: 9:30 a.m.

WILLIAM FINK, aka BILL FINK [hereinafter Contestant], by and through his attorney, DOUGLAS J. GARDNER, ESQUIRE of the law firm of RANDS, SOUTH & GARDNER, hereby objects to the admission of the will dated March 7, 2012. In support thereof, Contestant shows the court as follows:

1. Contestant brings this action pursuant to the provisions of NRS 137.080. The will purported to be the Last Will and Testament of Leroy G. Black was admitted to probate on August 31, 2012. Pursuant to NRS 137.080, Contestant has until November 30, 2012 in which to contest the validity of the will.

2. Contestant alleges that the subject will was obtained through fraud and undue influence as will be proved at the time of the trial of this matter. Furthermore, Contestant

1 believes that the decedent lacked the requisite testamentary capacity at the time it is alleged
2 that said will was executed.

3 3. Contestant requests that Phillip I. Markowitz, the personal representative of
4 decedent's estate, be removed as Personal Representative and his letters vacated. He has
5 acted in bad faith and without integrity in his administration of the estate. Contestant has been
6 advised and upon such information and belief alleges that the said Phillip I. Markowitz has filed
7 a false and fraudulent insurance claim for personal property removed from decedent's
8 residence at 1600 Becke Circle, Las Vegas, NV. Said property is owned by the LeRoy G.
9 Black 1992 Living Trust of which Contestant is the beneficiary and trustee. Said property is not
10 subject to this probate. Mr. Markowitz has no authority whatsoever to file any claim on behalf
11 of the trust.
12

13
14 4. In addition, the trust owns several pieces of vacant land which CenturyLink rents for
15 signage. Contestant has been informed by CenturyLink that they were contacted by Mr.
16 Markowitz and instructed to transfer the lease payments to him. They have not done so;
17 however, Contestant is concerned that Mr. Markowitz, as long as he has authority over the
18 probate estate, will utilize that authority to interfere with the trust and/or administer the estate
19 assets to his own use and benefit.
20

21 5. Contestant believes it is in the best interests of the estate that Barbara Stewart be
22 named Special Administrator pending the conclusion of the will contest.
23

24 . . .

25 . . .

26 . . .

27 . . .

1 6. Contestant is in the process of issuing a Citation to all heirs of the decedent pursuant
2 to the provisions of NRS 137.090.

3 DATED this 27th day of November, 2012.

4 RANDS, SOUTH & GARDNER

5
6 /s/Douglas J. Gardner
7 DOUGLAS J. GARDNER, ESQUIRE
8 Nevada Bar No. 4609
9 1055 Whitney Ranch Drive #220
 Henderson, NV 89014
 702 940 2222

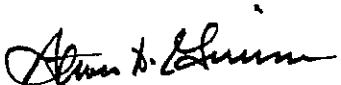
10 **VERIFICATION**

11
12 Under penalties of perjury, the undersigned state as follows: That I am the Contestant
13 in the foregoing action; that I have read the above and foregoing; and that the same is true of
14 my own knowledge, except for matters stated therein on information and belief, and as for
15 those matters, I believe it to be true.
16

17
18 /s/Bill Fink
 BILL FINK

EXHIBIT 4

EXHIBIT 4


CLERK OF THE COURT

RICHARD A. KOCH, ESQUIRE
Nevada Bar No. 1596
KOCH & BRIM
4520 South Pecos #4
Las Vegas, NV 89121
702 451 3900 Telephone
702 451-1448 Facsimile
tassyw@gmail.com
Attorney for William Fink

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Estate of)
)
 LEROY G. BLACK)
) Case No. P-12-074745-E
 Deceased.)

PETITION TO ENLARGE TIME PURSUANT TO NRCP 6(b)

Hearing Date: February 8, 2013
Hearing Time: 9:30 a.m.

WILLIAM FINK, aka BILL FINK, by and through his attorney, RICHARD A. KOCH,
ESQUIRE of the law firm of KOCH & BRIM hereby moves this Honorable Court for an Order
enlarging the time for the issuance of a Citation required by NRS 137.090. In support thereof,
it is respectfully submitted as follows:

I. Factual Background

On or about August 21, 1992 Leroy G. Black, decedent herein, created the Leroy G.
Black 1992 Living Trust. Said trust was totally amended and restated on October 27, 2009.
Petitioner was the named beneficiary of Mr. Black's trust. A pour-over will was executed at
the same time the trust was executed. Petitioner had been the beneficiary of decedent's prior
wills.

1 On March 7, 2012, under suspect conditions¹, Mr. Black executed a new will which did
2 not pour into decedent's trust. Instead, the new will named Phil and Rose Markowitz as the
3 beneficiaries of Mr. Black's estate.

4 Subsequent to the decedent's death, Phil Markowitz submitted the will for probate. No
5 contest was filed prior to the admission of the will and the March 7, 2012 will was admitted to
6 probate. Phil Markowitz was appointed as the Personal Representative of decedent's estate.
7 The order admitting the will was entered by the court on August 31, 2012. The period of
8 contesting the will ended on November 30, 2012.

10 On November 25, 2012 Petitioner met with Douglas J. Gardner, Esquire concerning an
11 action to contest the March 7, 2012 will. Mr. Gardner outlined the procedures inherent in a will
12 contest and discussed with Petitioner the Nevada requirements of successfully invalidating a
13 will. Petitioner decided he would think about the situation and advise Mr. Gardner if he wanted
14 to contest the will. Mr. Gardner advised Petitioner that the time was very short before a
15 contest must be filed and informed him of the date after which a contest would not be
16 accepted. On November 27, 2012 Petitioner advised Mr. Gardner to go forward and object to
17 the will.

19 Understanding the urgency of the situation, Mr. Gardner immediately instructed his
20 paralegal to file the necessary petition [objection] to contest the admission of the will. Said
21 objection was filed with the court on November 27, 2012. Under Mr. Gardner's supervision
22 and while perusing NRS 137.100, the attorney and paralegal misread that the proceedings in a
23 will contest after probate are conducted in the same manner as in a will contest before
24 probate. Based on NRS 137.100, both the paralegal and counsel anticipated that the issuance

28 ¹ The exact nature of the suspect conditions will be discussed hereafter.

1 of the citation and other proceedings in this action would be conducted as in a contest before
2 probate. Neither counsel nor the paralegal had been involved in an after-probate will contest
3 but had done many before-probate contests. Based upon their inexperience, they did not
4 notice NRS 137.090 which requires the Citation to be issued at the same time as the contest is
5 filed. Based upon their prior experience, they proceeded as in a contest before probate and
6 did not issue the Citation before the end of the three-month contest period.
7

8 Subsequent to the filing of the will contest and unrelated to the issue involving the
9 issuance of the Citation, Petitioner obtained new counsel to represent him. Richard A. Koch,
10 Esquire notified Jonathan Barlow, Esquire² of his representation of Petitioner. Shortly
11 thereafter Mr. Koch received notification from Mr. Barlow that the Citation had not been issued
12 timely. The Citation was immediately issued and filed in an effort to demonstrate promptness
13 in resolving the delay. This petition follows in an effort to enlarge the time required to issue the
14 Citation to and including January 7, 2013.
15

16 II. Applicable Law

17 NRS 137.090 provides:
18

19 "Issuance of Citation. Upon filing the petition and within the time allowed for filing
20 the petition, a citation must be issued directed to the personal representative
21 and to all devisees mentioned in the will, and the heirs, so far as known to
22 the petition including minors and incapacitated persons, or the personal
representative of any person who is dead, directing them to plead to the
contest within 30 days after service of the citation."

23 NRCP 6(b) provides as follows:
24

25 "Enlargement. When by these rules or by a notice given thereunder or by
26 order of court an act is required or allowed to be done at or within a
27 specified time, the parties, by written stipulation of counsel filed in the
action, may enlarge the period or the court for cause shown may, at any
time, in its discretion: (1) with or without motion or notice order the
28

² Mr. Barlow substituted as counsel for the estate in place of Christopher Phillips, Esquire.

1 period enlarged if request therefore is made before the expiration of
2 the period originally prescribed or as extended by a previous order
3 or (2) upon motion made after the expiration of the specified period
4 permit the act to be done where the failure to act was the result of
5 excusable neglect . . ."

6 **III. Argument**

7 NRCP 6(b) allows time to be enlarged in which to perform any certain function. The rule
8 allows three ways to enlarge the time, i.e.:

- 9 1. By stipulation of the parties
- 10 2. By ex parte order submitted to the court before the time required has expired
- 11 3. By motion before the court after the time has expired if the failure to perform the
12 action was due to excusable neglect.

13 The case of Hotel Last Frontier Corporation v. Frontier Properties, Inc., 79 Nev. 150,
14 380 P.2d 293 (1963) sets forth the guidelines necessary to determine excusable neglect. They
15 are as follows:

- 16 a) A showing of mistake, inadvertence, surprise or excusable neglect, singly or in
17 combination;
- 18 b) Prompt application to remove the [situation];
- 19 c) The absence of an intent to delay the proceedings;
- 20 d) Lack of knowledge of the party or his counsel as to procedural requirements
- 21 e) Good faith
- 22 f) That a meritorious claim exists

23 By applying each of these guidelines in turn Petitioner will show that the failure to timely
24 file the Citation was the result of excusable neglect.
25
26
27
28

1 a) The failure to file the Citation on time was a mistake on the part of counsel and his
2 paralegal as they were relying on the requirements of a will contest filed before probate;

3 b) The Citation was immediately issued and filed as soon as the mistake was realized.
4 Counsel Richard A. Koch, Esquire was leaving the country the day after he received
5 notification of the mistake. He immediately instructed his paralegal to hand carry the Citation
6 to the District Court Clerk's Office and have the same issued. Tassy Wolfe then hand carried
7 the Citation to the Clerk and the same was issued one calendar day later.
8

9 c) There was no intent to delay the proceedings because as soon as the petition
10 initiating the will contest was filed, the same was scheduled for hearing and notice mailed to all
11 interested persons. At the request of the personal representative's prior counsel, the initial
12 hearing was rescheduled.
13

14 d) In this instance, there was lack of procedural knowledge on the part of Petitioner's
15 counsel in the requirements of a will contest after probate. Counsel was well versed in the
16 requirements of a will contest before probate and anticipated that the issuance of the Citation
17 would take place after the initial hearing on the objection to the will.
18

19 e) Petitioner has demonstrated good faith by immediately issuing the Citation upon
20 notification that the same had not been issued timely.

21 f) Petitioner has a meritorious claim in this action. Petitioner asserts that the subject
22 will was obtained by fraud. The decedent did not have a relationship with Phil and Rose
23 Markowitz for many years. He told Petitioner, on many occasions, that he did not trust them
24 and that they had preyed on the elderly in order to obtain their assets. Petitioner had a close
25 relationship with the decedent for the majority of his life and was the beneficiary of his estate in
26 all previous wills. Phil and Rose Markowitz re-established a relationship with the decedent
27
28

1 immediately before his death. Mr. Markowitz prepared the subject will within a month of
2 decedent's death. The decedent was in a depressed state of mind due to the loss in value of
3 his many real properties. He was on various medications which affected his cognitive ability.
4 He committed suicide three weeks after executing the will. Furthermore, based upon
5 exemplars in the possession of Petitioner, it is distinctly possible that the subject will was
6 forged.
7

8 Petitioner is prepared to pursue all issues involved in the making and execution of the
9 subject will.

10 Lastly, in Hotel Last Frontier Corp, supra, we find the following language:

11 "Finally, we mention the basic underlying policy to have each case decided upon
12 its merits. In the normal course of events, justice is best served by such a
13 policy. Because of this policy, the general observation may be made that an
14 appellate court is more likely to affirm a lower-court ruling setting aside a default
15 than it is to affirm a refusal to do so. In the former case, a trial on the merits is
16 assured whereas in the latter it is denied forever. "

17 This court has wide discretion in permitting the enlargement of time allowed by NRCP
18 6(b). See Blakeney v. Fremont Hotel, Inc., 77 Nev. 191, 360 P.2d 1039; Anderson v. Havas,
19 77 Nev. 223, 361 P.2d 536.

20 In the case of Fullerton v. Rogers, 101 Nev. 306, 701 P.2d 1020 (1985), it states that
21 extrinsic fraud is used to toll statutory time limits in filing an after-probate will contest. While
22 extrinsic fraud is not present in causing the mistake in the issuance of the citation, Petitioner
23 asserts that extrinsic fraud is present in the making of the March 7 will.

24 Finally, while the purpose of any citation issued in a will contest action is to give notice
25 to the interested parties of the objection to the making of the subject will, in this case notice of
26 the hearing on the objection to the will was mailed to all interested parties on December 5,
27 2012 – just five days after the expiration of the contest period.
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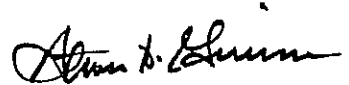
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VERIFICATION

/s/William Fink
WILLIAM FINK

EXHIBIT 5

EXHIBIT 5


CLERK OF THE COURT

1 NOTC
2 JONATHAN C. CALLISTER, ESQ.
3 Nevada Bar No. 8011
4 **CALLISTER & FRIZELL**
5 8275 S. Eastern Ave., Suite 200
6 Las Vegas, Nevada 89123
7 Telephone: (702) 657-6000
8 Facsimile: (702) 657-0065
9 *Attorneys for the Contestant*

DISTRICT COURT
CLARK COUNTY, NEVADA

10 In the Matter of the Estate of
11 LEROY G. BLACK,
12 Deceased.

Case No.: P-12-074745-E

NOTICE OF ENTRY OF REPORT AND RECOMMENDATION

13 PLEASE TAKE NOTICE that on the 11th day of April, 2013, a Report and Recommendation
14 was entered by the Court in the above-captioned matter. A true and correct copy of which is
15 attached hereto.

16 DATED this 19 day of April 2013.

20 CALLISTER & FRIZELL

21 By: 
22 JONATHAN C. CALLISTER ESQ.
23 *Attorneys for Contestant*
24
25
26
27
28

1
2 CERTIFICATE OF MAILING

3 I certify that I am an employee of CALLISTER & FRIZELL, and that on this 19 day of
4 April, 2013 the NOTICE OF ENTRY OF REPORT AND RECOMMENDATION was served
5 by depositing a true and correct copy of the same in the United States mail, postage prepaid and by
6 electronic transmission to the following:
7

8 Jonathan W. Barlow
9 Jordan M. Flake
10 BARLOW FLAKE LLP
11 701 N. Green Valley Pkwy., Ste. 200
Henderson, Nevada 89074
Attorneys for the Estate

Rose Markowitz
2201 Hercules Dr.
Los Angeles, CA 90046

12
13
14 
15 An Employee of CALLISTER & FRIZELL
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RAR

JONATHAN C. CALLISTER, ESQ.

Nevada Bar No. 8011

CALLISTER & FRIZELL

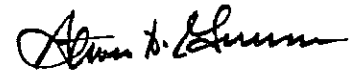
8275 S. Eastern Ave., Suite 200

Las Vegas, Nevada 89123

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Attorneys for the Contestant



CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

Case No.: P-12-074745-E

In the Matter of the Estate of

LEROY G. BLACK,

Deceased.

Date of Hearing: Feb. 8, 2013

Time of Hearing: 9:30 a.m.

REPORT AND RECOMMENDATION

This matter came before Commissioner Wesley Yamashita on February 8, 2013, at which time Jonathan W. Barlow, Esq., appearing on behalf of Phillip Markowitz (the "Personal Representative") and Jonathan C. Callister, counsel for William Fink (the "Contestant") presented argument. Having reviewed the parties' briefs, heard argument by counsel, being fully advised in the premises, and good cause appearing, the Probate Commissioner now makes the following Findings of Fact, Conclusions of Law and Recommendations:

GENERAL FACTS

Leroy G. Black died on or about April 4, 2012. On July 18, 2012, Personal Representative filed a petition for the probate of a will and for the appointment of a personal representative (the "Petition"). The hearing on Personal Representative's Petition was held on August 31, 2012. An order admitting a will to probate was entered on August 31, 2012.

1 On November 27, 2012, Contestant, through Douglas Gardner, his attorney at the time, filed an
2 objection to the admission of the will, thereby initiating a will contest. However, Contestant's attorney
3 was mistaken in his reading of the after-probate will contest statute which caused him to fail to timely
4 issue citations. Upon discovery of the mistake, citations were issued immediately. Contestant now
5 seeks to enlarge the time for the issuance of the citation, and has filed a Petition to Enlarge Time
6 Pursuant to NRCP 6(b) (filed on Jan. 23, 2013). The Personal Representative filed an Objection to the
7 Petition to Enlarge Time Pursuant to NRCP 6(b) and Counter-Petition to Dismiss Will Contest or, in
8 the Alternative, to Require a More Definite Statement Pursuant to NRCP 12(e) (the "Objection") on
9 February 4, 2013. Contestant has presented the opinion of a handwriting expert that the will offered by
10 the Personal Representative is a forgery.
11

12 FINDINGS OF FACTS AND CONCLUSIONS OF LAW

13 THE COMMISSIONER FINDS THAT the will contest is not barred by the failure to issue
14 citations within the three month requirement listed in NRS 137.080. The issue is whether the statutory
15 time period of three months for the issuance of citations is mandatory or permissive.
16

17 The period of limitation described in NRS 137.120 is only applicable to the filing of the will
18 contest, and not to the issuance of the citation. NRS 137.120 provides as follows:

19 If no person contests the validity of a will or of the probate thereof, within the
time specified in NRS 137.080, the probate of the will is conclusive.

20 (Emphasis added.) The issuance of citations is handled in a separate statute, i.e., NRS 137.090. The
21 period of limitation is only in reference to the filing of the will contest which is described in NRS
22 137.080 as follows:

23 After a will has been admitted to probate, any interested person . . . at any time
24 within 3 months after the order is entered admitting the will to probate, contest the
25 admission or the validity of the will. The contestant must file with the court in
which the will was proved a petition containing the allegations of the contestant
26 against the validity of the will or against the sufficiency of the proof, and
requesting that the probate be revoked.

27 (Emphasis added.) While the issuance of citations is not subject to the period of limitation of NRS
28 137.120, NRS 137.090 requires the issuance of citations within three months of the admission of the

1 will to probate. However, the extension of the time for the issuance of citations under NRS 137.090
2 may be extended based on the Court's discretion under NRCP 6(b) and EDCR 2.25.

3 There is no Nevada case law on point for this issue. Nevada courts have often looked to
4 California case law where the statutes at issue are similar to those in Nevada. *See e.g., John v. Douglas*
5 *County School Dist.*, 125 Nev. 746, 756, 219 P.3d 1276, 1283 (2009) ("we consider California caselaw
6 because California's . . . statute is similar in purpose and language to Nevada's . . . statute.") With
7 regard to will contests and the issuance of citations, California courts have provided as follows:

8 The jurisdiction of the court to entertain a proceeding for the revocation of the
9 will does not depend upon the issuance and service of a citation within a year
10 after the probate of the will. Jurisdiction of the court attaches on the filing of the
11 petition inaugurating the contest. The office of the citation is only that of a
12 summons—to give the court jurisdiction of the parties who would be affected by
13 its revocation. It is not essential to the jurisdiction of the court that the citation be
issued and served within a year. The only penalty for failure to have it issued
within that time is that the court may dismiss the contest. And even where there
has been a failure to have it issued within the year the court may nevertheless
relieve a contestant for his failure to do so and thereupon order a citation issued
and served.

14 *In re Logan's Estate*, 171 Cal. 357, 362-63, 153 P. 388, 390 (1915) (emphases added). *See also In re*
15 *Simmons' Estate*, 168 Cal. 390, 395, 143 P. 697 (1914) ("we think it must be held that the court has
16 power . . . to relieve a contestant, whose petition for revocation, duly filed, has not been dismissed,
17 from the failure to have citation issued and served within the year."); *In re Withenbury's Estate*, 188
18 Cal. 109, 110-11, 204 P. 385, 385 (1922) ("The issuance of the citation is not jurisdictional, and the
19 trial court had the power to relieve the petitioner from the failure to issue such citation within a year . .
20 . .") The statute at issue in these cases is substantially similar to, and in certain respects identical to
21 NRS 137.080 in both purpose and language. The Court finds that the California cases are persuasive on
22 the issue of whether the three month requirement of the issuance of citations is mandatory or
23 permissive. Accordingly, the Court finds that the three month period for issuance of the citations is not
24 mandatory and may be extended in the Court's discretion and pursuant to NRCP 6 and EDCR 2.25.
25

26 THE COMMISSIONER FURTHER FINDS that Contestant timely objected to the validity of the
27 will and complied with relevant statutes in that regard. Moreover, the untimely issuance of the citation
28

1 will not bar Contestant's claim because the extension of time is governed by NRCP 6(b), EDCR 2.25.

2 NRCP 6(b) and EDCR 2.25 govern the practice and procedure of contested procedures under
3 Title 12 of NRS. *See* NRCP 83; EDCR 2.01. With regard to the extension or enlargement of time,
4 EDCR 2.25 and NRCP 6 both require a showing of excusable neglect.

5 THE COMMISSIONER FURTHER FINDS it appropriate to adopt the factors for excusable
6 neglect applied by the Court in *Moseley v. Eighth Judicial Dist. Court ex rel. County of Clark*, 124
7 Nev. 654, 557-68, 188 P.3d 1136, 1146 (2008), and finds excusable neglect under NRCP 6(b) and
8 EDCR 2.25 because Contestant acted in good faith, exercised due diligence, had a reasonable basis for
9 not complying with the specified time, and that the non-moving party will not suffer prejudice.
10

11 THE COMMISSIONER FURTHER FINDS that Contestant acted in good faith and sought the
12 advice of an attorney in preparing and filing the will contest. The objection to the will was filed within
13 the required time limits, and in accordance with NRS 137. However, Contestant's former counsel
14 misread the statute and mistakenly thought that the issuance of the citation would be conducted as in a
15 contest before probate. Counsel mistakenly thought he had complied with the provisions of NRS 137
16 for the issuance of a citation. In addition, Contestant had a good faith basis for objecting to the will
17 based on the suspicious circumstances surrounding the will.
18

19 THE COMMISSIONER FURTHER FINDS with regard to the second and third factors, that
20 Contestant exercised due diligence and there was a reasonable basis for Contestant's failure to comply
21 with the specified time limit. The failure to comply was reasonable because Contestant relied on his
22 attorney, and his attorney put forth a good faith effort to read and adhere to the statutory provision and
23 relied on his past experience. Despite his efforts to comply with the rules, he overlooked an applicable
24 provision. Moreover, although several days passed from the passage of the deadline to the issuance of
25 the citation, Contestant was diligent because he understood from his attorney that he had complied
26 with the provisions of NRS 137 and proceeded accordingly. Shortly after the timely filing of the
27 objection, Contestant filed and served notices of hearing and proceeded based on the mistaken
28

1 understanding of his attorney. The Contestant should not to be deprived of his right to contest the will
2 because of the delay brought about by the neglect of his attorney. *See In re Withenbury's Estate*, 188
3 Cal. 109, 113, 204 P. 385, 386 (1922).

4 THE COMMISSIONER FURTHER FINDS with regard to the fourth factor above, that
5 Personal Representative will suffer no prejudice. Personal Representative and other interested parties
6 were quickly on notice of the will contest through Contestant's service of notices of hearing on
7 interested parties. Thereupon, Contestant acted promptly to correct the error and sought an extension
8 from the Court and issued citations. There is no damage or detriment to Personal Representative's
9 claims. Personal Representative has shown no evidence of a change in circumstances during the
10 relatively short time span from November 30, 2012 to the issuance of the citation that would harm his
11 claims.
12

13 THE COMMISSIONER FURTHER FINDS that the grant of the enlargement of time to issue
14 citations is appropriate in light of the judiciary's strong policy of hearing cases on their merits. *Hansen*
15 *v. Universal Health Servs.*, 112 Nev. 1245, 1247-48, 924 P.2d 1345, 1346 (1996) (noting the court's
16 preference that cases be decided on the merits).
17

18 THE COMMISSIONER FURTHER FINDS with regard to Contestant's motion to remove the
19 Personal Representative as representative of the estate, that the motion is denied. While the Personal
20 Representative still has authority to manage the property of the Estate, any transactions engaged in are
21 subject to this Court's oversight and approval, therefore minimizing any concern of that the Personal
22 Representative will be involved in inappropriate conduct.

23 THE COMMISSIONER FURTHER FINDS with regard to Personal Representative's Counter-
24 Petition to Dismiss Will Contest or, in the Alternative, to Require a More Definite Statement Pursuant
25 to NRCP 12(e), that the Counter-Petition is denied.
26
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28

RECOMMENDATIONS FOR ORDER

IT IS RECOMMENDED that the Court enter an Order as follows:

THE COURT FINDS AND ORDERS that the Report and Recommendation of the Probate Commissioner for the reasons stated therein be approved.

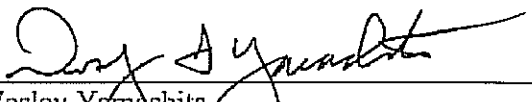
THE COURT FINDS AND ORDERS that Contestant's Petition to Enlarge Time Pursuant to NRCP 6(b) be granted.

THE COURT FURTHER FINDS AND ORDERS that Personal Representative's Objection and Counter-Petition be overruled and denied.

THE COURT FURTHER FINDS AND ORDERS that Contestant's request for the extension of time to issue citations be granted.

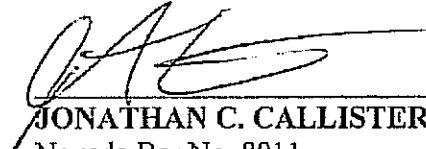
THE COURT FURTHER FINDS AND ORDERS that Contestant's motion to remove and replace Personal Representative as personal representative of the Estate be denied.

DATED this 9 day of ~~March~~^{April}, 2013.


Wesley Yamashita
PROBATE COMMISSIONER

Respectfully submitted,
CALLISTER & FRIZELL
8275 S. Eastern Ave., Ste. 200
Las Vegas, Nevada 89123
Telephone: (702) 657-6000
Facsimile: (702) 657-0065

By:


JONATHAN C. CALLISTER, ESQ.
Nevada Bar No. 8011
Attorney for William Fink

NOTICE

Pursuant to NRCP 53(e)(2), an objection must be filed and served within ten (10) days after being served with a copy of the Report and Recommendations. This Report and Recommendation is deemed received three days after mailing to a party of their counsel, or three (3) days after the Clerk of the Court deposits a copy of the Report in the file of a party's attorney in the Clerk's office.

CERTIFICATE OF MAILING

I certify that I am an employee of CALLISTER & FRIZELL, and that on this 11th day of ~~March~~ ^{April}, 2013, I caused **COMMISSIONER'S REPORT AND RECOMMENDATIONS** to be served by depositing a true and correct copy of the same (including all exhibits) with the United States Postal Service, with postage prepaid and addressed to the following:

Jonathan W. Barlow
Jordan M. Flake
BARLOW FLAKE LLP
701 N. Green Valley Pkwy., Ste. 200
Henderson, Nevada 89074
Attorneys for the Estate

Rose Markowitz
2201 Hercules Dr.
Los Angeles, CA 90046


An Employee of CALLISTER & FRIZELL

EXHIBIT 6

EXHIBIT 6

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OBJ

JONATHAN W. BARLOW

Nevada Bar No. 9964

JORDAN M. FLAKE

Nevada Bar No. 10583

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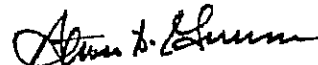
(702) 476-5900

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Attorneys for the Estate

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CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

In the Matter of the Estate of

LEROY G. BLACK,

Deceased.

Case No. P-12-074745-E

Dept. No. 26

OBJECTION TO REPORT AND RECOMMENDATION

Phillip Markowitz, Executor of the Estate of Leroy G. Black ("Markowitz"), by and through his attorneys of record of the law firm Barlow Flake LLP, hereby objects to the Report and Recommendation entered by Probate Commissioner Wesley Yamashita on April 11, 2013, as follows:

1. Markowitz incorporates into this Objection all arguments previously made in his *Opposition to Objection to the Admission of the Last Will and Testament of Leroy G. Black, for the Revocation of Letters Testamentary and for Appointment of Special Administrator Pending the Conclusion of Will Contest* filed on January 3, 2013, and in his *Objection to Petition to Enlarge Time Pursuant to NRCP 6(b) and Counter-Petition to Dismiss Will Contest or, in the Alternative, to Require a More Definite Statement Pursuant to NRCP 12(e)* filed on February 4, 2013. Markowitz reasserts each argument as if fully set forth in this Objection.

1 2. In addition to the arguments set forth earlier, Markowitz also objects to the
2 Report and Recommendation on the ground that it is contrary to rules of statutory interpretation
3 adopted by the Nevada Supreme Court.

4 3. In the Report and Recommendation, despite the fact that NRS 137.090 clearly
5 states that the action of issuing a citation "must" be accomplished within the three month period
6 set forth in NRS 137.080, Commissioner Yamashita recommends that the mandatory language
7 in NRS 137.090 should be read as permissive language. Commissioner Yamashita's
8 Recommendation disregards the plain language rule of statutory interpretation adopted by the
9 Nevada Supreme Court. "[I]f the language of the statute is plain and unambiguous and its
10 meaning clear and unmistakable there is not room for construction and the courts are not
11 permitted to search for its meaning beyond the statute itself." *Madera v. SIRS*, 114 Nev. 253,
12 257 (1998); see also *Rosequist v. Int'l Ass'n of Firefighters*, 118 Nev. 444, 448 (2002) ("If the
13 plain meaning of a statute is clear on its face, then this court will not go beyond the language of
14 the statute to determine its meaning.").

15 4. In repeatedly upholding the plain language rule, the Nevada Supreme Court has
16 stated that the District Court does not have equitable power to disregard mandatory language in
17 a statute. *Blaine Equip. Co. v. State of Nevada*, 138 P.3d 820, 122 Nev. 860 (2006). In fact, in
18 *Blaine Equipment*, the Court noted that it could find only two occasions where the Nevada
19 Supreme Court approved the District Court in using equitable power to grant relief contrary to
20 that mandated by plain statutory language. *Id.* at 824. Both situations were extraordinary and
21 neither of which remotely apply to the present case. *Id.* at 824-25.

22 5. Nevertheless, despite the plain language of NRS 137.090, Commissioner
23 Yamashita fashioned an equitable remedy through the use of NRCP 6(b) to allow the
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1 enlargement of time to issue the citation. The Recommendation cites to the inherently equitable
2 remedy of "hearing cases on their merits" as a way to avoid the harsh effects of a plain language
3 reading of NRS 137.090.

4 6. In fashioning an equitable remedy around the plain language of NRS 137.090,
5 Commissioner Yamashita relied on California case law that is nearly 100 years old.¹ In essence,
6 this Court has one of two choices. First, this Court may follow well-settled case law adopted by
7 the Nevada Supreme Court in applying the plain language rule to NRS 137.090 and enforce the
8 plain, unambiguous language of NRS 137.090. Second, this Court may disregard well-founded
9 and long-held rules of statutory interpretation adopted by the Nevada Supreme Court in favor of
10 100 year old case law from a neighboring state.

11 7. In determining whether to follow Nevada case law or California case law, it is
12 important to note that the Nevada Supreme Court has stated, "It is the prerogative of the
13 Legislature, not this court, to correct any injustice occasioned by a literal reading of the statute."
14 *Breen v. Caesars Palace*, 102 Nev. 79, 86-87 (1986). If Fink believes that a plain language
15 enforcement of NRS 137.090 is not just, his remedy is through the legislative process. This
16 Court should not exceed its prerogative by engaging in judicial legislation.

17 8. Even if this Court finds that the mandatory language of NRS 137.090 is capable
18 of more than one reasonable interpretation and that the plain language rule, therefore, should not
19 apply, the Court must then construe the multiple legislative provisions related to an after-
20 probate will contest as a whole "to give meaning to each of their parts, such that, when read in
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27 ¹ Commissioner Yamashita also noted in his comments at the hearing that many other sister
28 states in the western United States have enforced statutes requiring the dismissal of a will
contest for failure to issue a citation in a timely manner, though he chose not to follow these
sister states.

1 context, none of the statutory language is rendered mere surplusage.” *Stockmeier v.*
2 *Psychological Review Panel*, 135 P.3d 807, 810, 122 Nev. 534 (2006).

3 9. There is nothing in NRS 137.080-.140 that would permit a reading of NRS
4 137.090 any way other than to give effect to the mandatory language of NRS 137.090. Any
5 other reading of the after-probate statutory will contest scheme would render the mandatory
6 language of NRS 137.090 as “mere surplusage.” The reading of NRS 137.090 recommended by
7 Commissioner Yamashita reads out of the statute any time limit whatsoever on the issuance of
8 the citation.
9

10 10. Markowitz also reiterates the arguments made in his counter-petition to dismiss
11 the will contest not only for the failure to issue citations timely, but also because Fink’s
12 *Objection to the Admission of the Last Will and Testament of Leroy G. Black* in and of itself
13 fails to meet the statutory requirements for a will contest. Fink and the Probate Commissioner
14 have taken for granted the woefully inadequate pleading of the purported will contest, which
15 point Markowitz has raised in his Opposition filed on January 3, 2013, and in his Objection
16 filed on February 4, 2013. In addition, Fink never properly verified his Objection as required by
17
18

19 11. Commissioner Yamashita never specifically addressed the argument of the
20 inadequacy of Fink’s pleading. Markowitz now requests again that the Court specifically review
21 Fink’s initial *Objection to the Admission of the Last Will and Testament of Leroy G. Black* and
22 determine whether the Objection comports with the pleading requirements of Nevada law as
23 detailed by Markowitz in his Opposition filed on January 3, 2013, and in his Objection filed on
24 February 4, 2013.
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12. Markowitz requests that the Court enter its Order denying the Report and Recommendation for the following reasons set forth in this Objection and in Markowitz's previous filings:

A. Fink failed to issue a citation within three months of the Order admitting the will to probate;

B. NRCP 6(b) is not applicable to statutes of limitation set forth in the Nevada Revised Statutes;

C. Fink has failed to show excusable neglect and absence of prejudice, if NRCP 6(b) is determined to apply;

D. There is no basis to toll or extend the statute of limitations of NRS 137.080-.090;

E. Fink's *Objection to the Admission of the Last Will and Testament of Leroy G. Black* fails to meet the statutory requirements for a will contest; and,

F. Fink's *Objection* fails to plead fraud with particularity.

THEREFORE, Markowitz requests that the Court deny the Report and Recommendations and enter its Order dismissing the will contest.

DATED this 29th day of April, 2013.

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CERTIFICATE OF MAILING

I hereby certify that on April 29, 2013, a true and correct copy of the original *Objection to Report and Recommendation* was sent via U.S. Mail, first class postage prepaid, to the following at their last known address:

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