Case Nos. 66231; 67782; 68046 (consolidated)

In the Supreme Court of Nevada

IN THE MATTER OF: THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST, DATED MAY 18, 1972,

ELEANOR C. AHERN A/K/A ELEANOR CONNELL HARTMAN AHERN,

Appellant,

vs.

JACQUELINE M. MONTOYA; AND KATHRYN A. BOUVIER,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable GLORIA STURMAN
District Court Case No. P-09-066425-T

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner-respondent Jacqueline M. Montoya is an individual. Ms. Montoya has been represented throughout this matter by the RUSHFORTH FIRM, LTD.

Petitioner-respondent Kathryn A. Bouvier is an individual. Ms. Bouvier has been represented in this matter by the following law firms: (1) ALBRIGHT, STODDARD, WARNICK, & ALBRIGHT, and (2) the RUSHFORTH FIRM, LTD.

Respectfully submitted this 19th day of February 2016.

THE RUSHFORTH FIRM, LTD.
By: _____
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COUNTER-STATEMENT OF ISSUES PRESENTED

1. Did the trial court correctly hold as a matter of law that the proper sub-trust allocation of trust funds was 65/35 in favor of the respondents, *only after* (1) analyzing a clear and unambiguous trust provision requiring sub-trust allocation to maximize the marital deduction, (2) reviewing unrefuted tax evidence demonstrating that a 65/35 allocation achieved such maximization, and (3) ignoring all other extrinsic and inadmissible evidence?

2. Did the trial court correctly hold as a matter of law that the former trustee was barred by the doctrine of laches from claiming that the proper sub-trust allocation was not 65/35 after she had—for a period in excess of 33 years— (1) distributed trust assets in accordance with the 65/35 allocation, (2) accepted a 35% share of trust assets as a beneficiary, and (3) waited to bring any contrary claim until material witnesses had died?

3. Did the trial court correctly hold as a matter of law that the former trustee breached her fiduciary duty to the trust's beneficiaries by withholding millions of dollars in distributions based on a self-serving and false belief that she was entitled to 100% of trust distributions?

4. Did the trial court correctly award attorneys' fees to the beneficiaries pursuant to NRS 153.031(3) after ordering the former trustee to repay millions of dollars in wrongfully withheld distributions?

I. FACTUAL BACKGROUND

A. William and Marjorie Establish the Trust

W.N. Connell, also known as William N. Connell ("William"), and Marjorie T. Connell ("Marjorie") established "The W.N. Connell and Marjorie T. Connell Living Trust" (the "Trust") by executing a written trust document on May 18, 1972 (the "Trust Document"). (1 AA 64.) Pursuant to Article First of the Trust Document, the Trust was set up for the benefit of: (1) the settlors, William and Marjorie (the "Settlors"), (2) William's daughter, Eleanor C. Ahern ("the Former Trustee"), and (3) the issue of the Former Trustee. (1 AA 21.) At the time the Trust was established, the Former Trustee's issue were her two daughters, Jacqueline Montoya ("Jaqueline") and Kathryn Bouvier ("Kathryn"). (9 AA 1855.)

During their joint lifetimes, all Trust income and principal was to be administered for the benefit of the Settlors. (1 AA 21.) Upon the first death of one of the Settlors, the Trust allocated the assets between two sub-trusts, identified in the Trust Document as "Trust No. 2" ("Subtrust 2") and "Trust No. 3" ("Subtrust 3") (1 AA 66). The purpose of this allocation was to minimize federal estate taxes due upon the first death of one of the Settlors by maximizing the marital estate tax deduction as calculated on the Federal Estate Tax Return, commonly called a Form 706. (Trial Memo and Trial Brief).

Article Third of the Trust Document contains the following provision regarding proper Subtrust allocation:

> The Trustee shall allocate to Trust No. 3 from the Decedent's separate property the fractional share of the said assets which is equal to the maximum marital deduction allowed for federal estate tax purposes, reduced by the total of any other amounts allowed under the Internal Revenue Code as a Marital Deduction which are not a part of this trust estate.

(1 AA 22.)

B. William Dies

William died on November 24, 1979. (1 AA 67.) Upon his death, Subtrust 2 and Subtrust 3 were created. (16 AA 3420.) As the surviving Settlor, Marjorie became the beneficiary of Subtrust 3, and the Former Trustee became the beneficiary of Subtrust 2. (16 AA 3420.)

Subtrust 3 was a revocable trust, which provided Marjorie with complete control over its assets without restriction, including the right to withdraw all assets from the trust. (1 AA 67.) Subtrust 3 also provided Marjorie with the ability to exercise a testamentary power of appointment over trust assets in favor of anyone she desired. (1 AA 67.)

Conversely, Subtrust 2 was irrevocable and contained specific provisions and restrictions regarding the method and manner in which the Former Trustee could receive distributions. (1 AA 67.) Subtrust 2 distributes 100% of its income to the Former Trustee. (1 AA 67.)

After William's death, Marjorie acted as sole trustee of the Trust. (16 AA 3422.) However, on May 6, 1980, Marjorie and the Former Trustee executed a "Substitution of Trustee" which added the Former Trustee as a co-trustee of the Trust. (1 AA 68.)

C. Estate Tax Returns Are Filed for William and Accepted by the IRS, as Well as the State of Texas

In 1980, a federal estate tax return, form 706 (the "Federal Tax Return"), was prepared and filed with the Internal Revenue Service (the "IRS"). (16 AA 3422.) The IRS accepted the Federal Tax Return and issued a closing letter on October 30, 1981 (the "Cover Letter"). (8 AA 1798.)

On December 16, 1980, a document titled "Inheritance Tax Return – Non-Resident" was prepared and filed with the state of Texas (the "Texas Tax Return"). (1 AA 69.) The Texas Tax Return was required to use the same information relied on in the Federal Tax Return. (1 AA 109.) The state of Texas, via the State Comptroller, accepted the Texas Tax Return. (1 AA 69.)

Because the Federal Tax Return was filed over 35 years ago, the IRS no longer retains a copy. (16 AA 3421.) Jacqueline and Kathryn have made diligent efforts to locate a copy of the Form 706, but have been unsuccessful. (1 AA 69.) The Former Trustee, despite being a trustee of the Trust since 1980, did not retain a copy of the Federal Tax Return. (8 AA 1767.) Nevertheless, because the Texas Tax Return used

the same calculations as those employed in the Federal Tax Return, the relevant content of the Federal Tax Return is known. (16 AA 3421.)

D. The Texas Oil Property is Allocated 35% to Subtrust 2 and 65% to Subtrust 3

The Trust owns real property located in Upton County, Texas, along with the associated oil, gas, and mineral rights in such real property (the "Texas Oil Property"). (16 AA 3420.) In order to maximize the marital estate tax deduction as required by Article Third of the Trust Document, the Federal and Texas Tax Returns allocated approximately 65% of the Texas Oil Property income to Subtrust 3, and 35% to Subtrustrust. 2.[1] (8 AA 1782; 16 AA 3421; 1 RA 19.) In other words, the 65/35 allocation provided the larger portion to Marjorie (William's wife and the beneficiary of Subtrust 3), and the smaller portion to the Former Trustee, William's daughter (beneficiary of Subtrust. 2). (1 RA 7.)

Although both Subtrusts were allocated a pro rata interest in the Texas Oil Property (1 RA 6), it was never partitioned and deeded to the Subtrusts; instead the allocation was done on paper, as permitted by both the Trust Document and Nevada law. (3 AA 565.) To this day, the Texas Oil Property remains titled in the name of the Trust. (16 AA 3422.)

Over the next twenty-nine years—until Marjorie's death on May 1, 2009—the Texas Oil Property produced income which was allocated 65/35 in favor of

[1] As more fully detailed below, the precise split was 64.493%/35.507%.

Subtrust 3. (i.e. 65% to Marjorie via Subtrust 3, and 35% to the Former Trustee via Subtrust. 2). (16 AA 3422; 1 RA 8.) Marjorie and the Former Trustee each received a K-1 tax form every year during this period which showed receipt of the allocated Trust income; and each included their allocated portion of Trust income (65/35) on their respective annual federal income tax returns. (16 AA 3422.)

E. The Former Trustee Acknowledges the 65/35 Allocation

At no time during this twenty-nine-year period did any party dispute that the 65/35 allocation of Trust income produced by the Texas Oil Property as inappropriate or inaccurate. (16 AA 3423; 1 AA 70.) Significantly, the Former Trustee, was intimately involved in the administration and implementation of the Trust during this same period based on her fiduciary role as a co-trustee. (1 AA 70.)

During her 1984 divorce proceedings, the Former Trustee identified her beneficial interest in Trust income (by virtue of the Texas Oil Property) as her asset while acknowledging the 65/35 split between Subtrust 3 and Subtrust 2. (1 AA 70; 3 AA 578.) Importantly, the divorce court relied on the Former Trustee's representations (i.e. that she had a 35% beneficial interest) in determining the parties' respective support rights and obligations associated with the divorce. (16 AA 3424.)

The Former Trustee later met with an estate planning attorney, whom she informed of entitlement to 35% of the Trust income produced by the Texas Oil

Property, as well as Marjorie's entitlement to the remaining 65%. (16 AA 3424.) In short, during this twenty-nine-year period the Former Trustee's actions were all in in accordance with her 35% allocation of the Trust income produced by the Texas Oil Property. (16 AA 3424.) Relatedly, Marjorie also acted in accordance with her 65% allocation. (16 AA 3424.)

F. Marjorie Exercises Her Power of Appointment in Favor of the MTC Living Trust

On January 7, 2008, Marjorie executed a will (the "Will") in which she exercised her testamentary power of appointment over the assets of Subtrust 3 in favor of the MTC Living Trust (the "MTC Trust"). (16 AA 3422.) Specifically, Section 4.1 of the Will provides the following:

> In the W.N. Connell and Marjorie T. Connell Living Trust dated May 18, 1972, Article Fifth Trust No. 3 Paragraph B(2) of the Trust, I was granted a testamentary power of appointment. I hereby exercise that power of appointment and appoint the entire principal and the undistributed income in Trust No. 3, if any, on my death to JACQUELINE MONTOYA and KATHRYN ANNE BOUVIER to be distributed in trust in accordance with the provisions of the MTC LIVING TRUST dated December 6, 1995, as restated on January 7, 2008.

(1 AA 70.)

The beneficiaries of the MTC Trust are Marjorie's granddaughters Jacqueline and Kathryn (collectively the "Beneficiaries"). (1 AA 71; 16 AA 3423.) Jacqueline is the sole trustee of the MTC Trust. 1 AA 71.)

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G. Marjorie Dies

Marjorie died on May 1, 2009. (1 AA 70.) As a result of Marjorie's death, the Former Trustee became the sole trustee of the Trust. (16 AA 3422-23.) Importantly, Marjorie's exercise of her power of appointment became effective on her death, causing the MTC Trust to became the next beneficiary of the 65% interest in the Trust income produced by the Texas Oil Property. (i.e. this income is no longer distributed to Subtrust 3). (16 AA 3422-3423.)

Shortly after her death, Marjorie's estate planning attorney sent the Former Trustee a copy of the Will, while informing the Former Trustee that Marjorie had exercised her testamentary power of appointment in favor of the MTC Trust. (16 AA 3422 – 3423; 1 AA 71.) At that time, the Former Trustee voiced no objection or complaint regarding Marjorie's election. (16 AA 3422.)

Because Marjorie was deemed the owner of Subtrust 3 for tax purposes, her 65% beneficial interest in the Trust income generated by the Texas Oil Property was included in her federal estate tax return, form 706. (16 AA 3423.) By including the 65% allocation in, Marjorie's estate became subject to federal estate tax related to the same. (16 AA 3423)

From Marjorie's death until approximately June of 2013, the Beneficiaries (as beneficiaries of the MTC Trust) received 65% of the Trust income generated by the Texas Oil Property. (16 AA 3423.)

H. The Former Trustee Cuts Off the Beneficiaries' 65%

In June of 2013, after 33 years (which included twenty-nine years serving as co-trustee and four years serving as sole trustee) of providing 65/35 distributions, the Former Trustee, ceased making all distributions to the Beneficiaries. (16 AA 3423.) In support of her action, the Former Trustee claimed—for the first time in 33 years—that she was entitled to 100% of the Trust income created by the Texas Oil Property. (16 AA 3423.)

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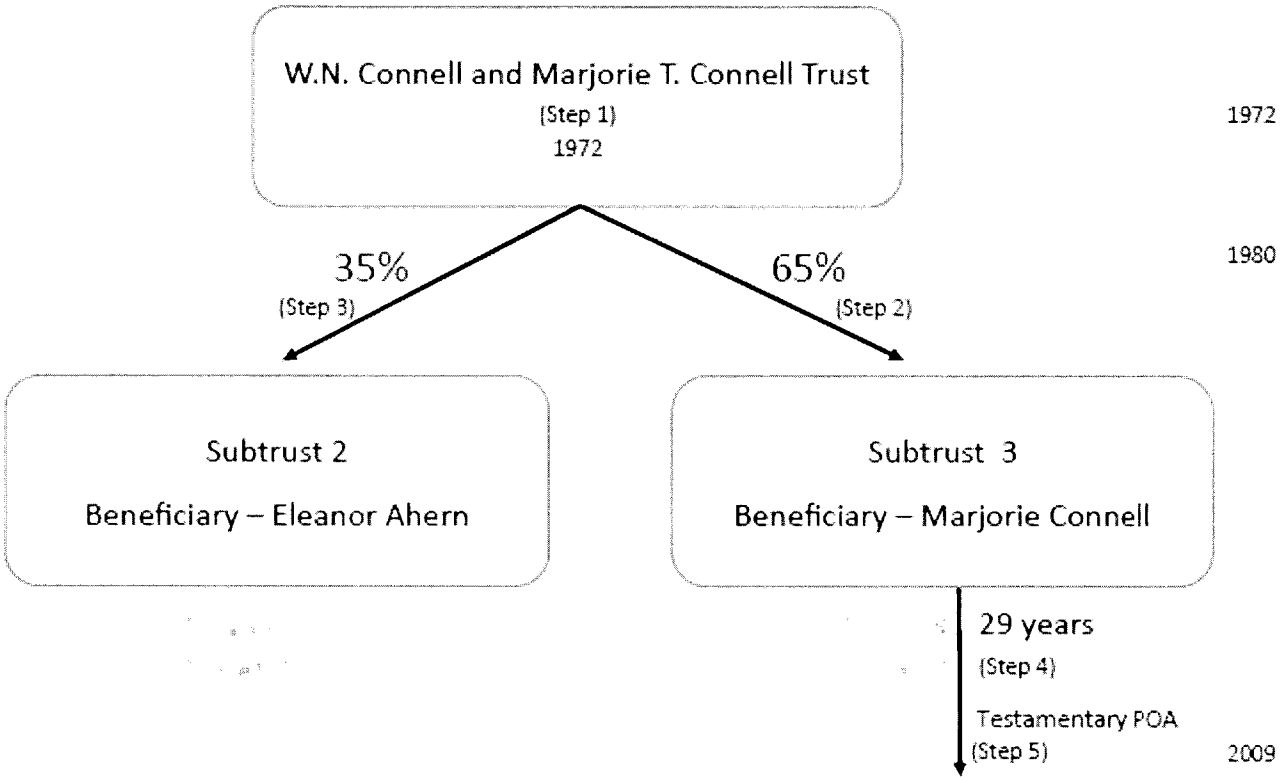
I. Trust and Subtrust Chart/Timeline

The following chart/timeline is based on the above information and is provided for the Court's convenience.



1. Creation of the Trust.
2. Allocate 65% of Texas Oil Property to Trust No. 3 to maximize the marital estate tax deduction.
3. Allocate remainder of Texas Oil Property (35%) to Trust No. 2.
4. Continuous 65/35 distributions for 29 years.
5. Marjorie dies May 1, 2009, and testamentary power of appointment becomes effective.
6. Continuous 65/35 distributions for 4 more years.
7. Former Trustee unilaterally cuts off all distributions to the Beneficiaries

II. STATEMENT OF THE CASE

Shortly after the Former Trustee abruptly ceased the required Trust distributions, the Beneficiaries[2] filed their petition seeking declaratory relief pursuant to NRS 30.040, NRS 153.031(1)(e), and NRS 164.033(1)(a) (the "Original Petition").[3] (1 AA 64 - 81.) At its core, the Original Petition sought enforcement of Article Third's clear and unambiguous provisions (i.e. maximization of the marital deduction by virtue of a 65/35 allocation between Subtrusts). (1 AA 64 - 81.) The Original Petition contained the following documents (as exhibits), which were provided in support of the declaratory relief requested: (1) the Trust Document, (2) the Texas Tax Return, (3) Marjorie's Will, (4) the letter from Marjorie's estate planning attorney to the Former Trustee, and (5) the MTC Trust document. (1 AA 64 - 81.) The authenticity of these documents has never been challenged.

After months of litigation, the trial court entered an order providing its preliminary interpretation of the Trust Document which required all Trust income generated by the Texas Oil Property to be split 65/35 between the Beneficiaries and

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[2] Technically, Kathryn was not a petitioner under the Original Petition (only Jaqueline). However, as the relief sought was beneficial to both Beneficiaries both are identified here.

[3] Although this case began in 2009, the events relevant to this appeal began when the Original Petition was filed.

the Former Trustee, retroactive to May 2014 (the "First Allocation Order"). (7 AA 1602.) The Former Trustee appealed the First Allocation Order. (7 AA 1615-16.)

While the First Allocation Order was on appeal, the parties briefed competing motions for summary judgment, which were heard by the trial court on January 30, 2015. (1 RA 29-224.) At, or before, the January 30th hearing, the parties agreed to waive an evidentiary hearing by allowing the trial court to summarily dispose of the parties' respective claims and defenses presented via countermotions for summary judgment. (16 AA 3419.)

Prior to entering it official ruling on the countermotions for summary judgment,[4] the trial court issued its April 1, 2015 order appointing a new temporary trustee (the "New Trustee Order"). (15 AA 3274 – 3275.) The New Trustee Order temporarily suspended the Former Trustee from her position as trustee of the Trust and appointed Fredrick P. Waid as her interim replacement (the "Interim Trustee") (15 AA 3275.) The Interim Trustee continues to serve at this time. The Former Trustee appealed the New Trustee Order. (16 AA 3411-17.)

Several weeks later, on April 16, 2015, the trial court entered its summary judgment order and findings (the "MSJ Order") (16 AA 3418 – 3434.) Specifically,

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[4] Although the hearing occurred on January 30, 2015, the MSJ Order was not entered by the trial court until April 16, 2015. Therefore, although the New Trustee Order was issued first, it was only addressed by the trial court after summary judgment was granted at the January 30, 2015 hearing. (1 RA 169-70).

the MSJ Order confirms the First Allocation Order by declaring the proper allocation of Trust income from the Texas Oil Property to be 65/35[5] in favor of the Beneficiaries. (16 AA 3431 – 3432.) The MSJ Order also required the Former Trustee to "provide to [the Beneficiaries] an accounting of the [applicable Trust income] received by the Trust from January 1, 2012, through entry of [the MSJ Order]." (16 AA 3432.) It further ordered the Former Trustee to "reimburse and pay to [the Beneficiaries] any portion of their 65% share of [applicable Trust income] which was not distributed to them during this period of time." (16 AA 3432.) The Former Trustee appealed the MSJ Order. (17 AA 3570-3601.)

Four days later, on April 20, 2015, the trial court entered its order regarding the accounting, breach of fiduciary duty claims and award of attorneys' fees (the "Accounting Order"), which clarified several items first addressed in the MSJ Order. (16 AA 3455 – 3459.) First, it explained that the Former Trustee had "cut off [the] 65% income stream" from the Trust to the Beneficiaries in June 2013. (16 AA 3457.) Second, it adopted the information provided in the Former Trustee's March 13, 2015 accounting, which demonstrated that the Former Trustee owes the Beneficiaries a *minimum* of $2,163,758.88[6] based on her failure to distribute Trust income between

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[5] The MSJ Order provides that the precise allocation is 64.493%/35.507%. These numbers are rounded to the nearest whole numbers (65%/35%) for convenience.

[6] This is the number provided by the Former Trustee in her March 13, 2015 accounting. The Beneficiaries anticipate that the Interim Trustee's investigation will

June 1, 2013 and January 31, 2015. (16 AA 3456.) In addition, the Accounting Order granted the Beneficiaries' request for summary judgment on their claim for breach of fiduciary duty. (16 AA 3458.) The Former Trustee appealed this order. (17 AA 3570-3601.)

Finally, on June 23, 2015, the trial court entered its judgment and order approving an award of attorneys' fees (the "Attorneys' Fees Order"), which awarded the Beneficiaries attorneys' fees in the total amount of $391,993.80,[7] with interest accruing at the legal rate from the date of entry. (17 AA 3609 – 3610.) Not surprisingly, the Former Trustee also appealed the Attorneys' Fees' Order. (17 AA 3570-3613.)

All of these appealed orders are based on one repeated finding from the trial court: despite the clear and unambiguous language of Article Third requiring a 65/35 allocation—an allocation which was followed for 33 years—the Former Trustee unjustifiably ceased making required distributions to the Beneficiaries.

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reveal a much larger deficiency. The Interim Trustee's investigation is not yet complete.

[7] The Judgment for Attorneys' Fees provides separate awards of attorneys' fees to each of the Beneficiaries. The award to Kathryn Bouvier totals $122,260 and the award to Jacqueline Montoya totals $269,733.80. For the sake of convenience, these awards have been combined to one value ($391,993.80) herein.

SUMMARY OF THE ARGUMENT

All of the Former Trustee's arguments on appeal are belied by her utter disregard for the parol evidence rule and its clear application to this case. Critically, the parole evidence rule prohibits the admission of extrinsic evidence which serves to "clarify" or "add" to an already unambiguous written agreement (like the Trust Document). In short, when a written document is clear and unambiguous on its face, review must be limited to the content within its four corners. Only if the document points to relevant outside information, may the fact finder consider such extrinsic facts.

Before issuing its MSJ Order, the trial court examined the Trust Document, including all relevant provisions and sub-provisions. Additionally, the court scrutinized evidence relating to the maximum marital deduction—the only extrinsic issue permitted by the Trust Document. Significantly, the Beneficiaries provided unrefuted evidence regarding the appropriate marital deduction, while the Former Trustee offered mere supposition and argument. In short, the trial court granted summary judgment not because the Beneficiaries' evidence outweighed the Former Trustee's, but because it stood wholly unopposed, leaving no genuine issues of fact. Such circumstances not only justify a grant of summary judgment, they require it.

The trial court found further support for its allocation holding in the doctrine of laches, which applies when an unreasonable lapse of time works a disadvantage

to the non-delaying party. It is undisputed that the Trust, while operating under the control of the Former Trustee (who acted first as a co-trustee and later as sole trustee) distributed Trust income at a 65/35 ratio. Not once during this period did the Former Trustee seek judicial clarification regarding her self-serving theory of 100% entitlement to Trust income. Instead, she unilaterally rejected the Beneficiaries' rights, while giving no thought to her fiduciary responsibilities. The doctrine of laches is designed to prevent the assertion of a farfetched claim that runs contrary to decades of established facts and can only benefit the tardy party. Calling the Former Trustee tardy would be an understatement.

Finally, when understood in the context of the trial court's numerous allocation determinations—i.e. the court repeatedly holding that Trust income must be distributed at a 65/35 ratio—the appropriateness of later holdings regarding attorneys' fees and breach of fiduciary duty become evident. In other words, if the Former Trustee brazenly withheld 100% of Trust income when she should have distributed 65%, she breached her fiduciary duty and is liable for attorneys' fees pursuant to NRS 153.031(3). It really is that simple.

III. LEGAL ARGUMENT

A. The Trial Court's Grant of Summary Judgment Was Appropriate

1. Standard of Review

This Court reviews a grant or denial of summary judgment *de novo*. *Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1308, 971

P.2d 1251, 1254 (1998). With that said, "a de novo standard of review does not trump the general rule that '[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.'" *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (quoting *Old Aztec Mine, Inc. v. Brown,*97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). Notably, even when equitable relief[8] is sought, this Court's review remains *de novo*. *See Shadow Wood HOA v. N.Y. Cmty. Bancorp, Inc.,* 132 Nev. Adv. Op. 5, --- P.3d ----, 2016 WL 347979, *3 (2016) (citing *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005)).

2. Summary Judgment Standard

This Court has long recognized that summary Judgment is an important mechanism used "to avoid a needless trial when an appropriate showing is made in advance." *Coray v. Hom*, 80 Nev. 39, 40–41, 389 P.2d 76, 77 (1964). An "appropriate showing" requires that "there are no ***genuine issues of material fact*** and the moving party is entitled to judgment as a matter of law." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 491 215 P.3d 709, 724 (2009) (*citing Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)) (emphasis added).

Whether an issue of fact is material or irrelevant is controlled by the

[8] "Laches is an ***equitable doctrine*** . . .." *Miller v. Burk*, 124 Nev. 579, 598, 188 P.3d 1112, 1125 (2008) (internal quotations omitted).

substantive law at issue in the case. *Wood*, 121 Nev. at 731, 121 P.3d at 1031. "A factual dispute is genuine if 'the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.'" *Delgado v. American Family Ins. Group*, 125 Nev. 564, 572, 217 P.3d 563, 568 (2009) (*quoting Wood,* 121 Nev. at 731, 121 P.3d at 1031).

Importantly, a declaratory relief action seeking interpretation of a written document presents an ideal question of law well suited for a summary judgment determination. *Insurance Corp. of America v. Rubin*, 107 Nev. 610, 818 P.2d 389 (1991); *Galardi v. Naples Polaris, LLC,* 129 Nev. Adv. Op. 33, 301 P.3d 364, 366 (2013).

3. The Trial Court's Grant of Summary Judgment for Declaratory Relief—i.e. Determining that the Trust Document Requires a 65/35 Allocation—Was Appropriate and Must Be Upheld

Despite the existence of the clear-cut, undisputed, and unambiguous Trust Document, the Former Trustee contends that summary judgment was inappropriately granted because the district court failed to consider all of her contrary evidence.[9] This argument blatantly ignores the longstanding parol evidence rule which prohibits the consideration of extrinsic and irrelevant facts, which cannot create a genuine issue of material fact. *In re Cay Clubs*, 130 Nev. Adv. Op. 92, 340

[9] Even if this "evidence" had not been excluded by the parol evidence rule, the Former Trustee's arguments and irrelevant facts do little to create a genuine issue of material fact. This issue is more fully explained below.

P.3d 563, 574 (2014) ("Generally, to defeat the motion for summary judgment, the nonmoving party must submit ***admissible evidence*** to show a genuine issue of material fact.") (*citing Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.,* 123 Nev. 598, 603, 172 P.3d 131, 134 (2007)) (emphasis added).

a. The Parol Evidence Rule

Simply stated, the "parol evidence rule forbids the reception of evidence which would vary or contradict the [written agreement], since all prior negotiations and agreements are deemed to have been merged therein." *Daly v. Del E. Webb Corp.*, 96 Nev. 359, 361, 609 P.2d 319, 320 (1980) (citations omitted). For the parol evidence rule to apply, there must be (1) a clear, unambiguous written agreement, (2) which the contracting parties agree is their final statement of the agreement. *In re Cay Clubs*, 340 P.3d at 574 (citations omitted). In other words, the agreement must be a clearly written final draft which encompasses the contracting parties' intentions.

b. The Parol Evidence Rule Applies to Written Trust Agreements

As it does for all written agreements, the parole evidence rule applies to the interpretation of written trust agreements (so long as the above requirements are met). *See* George Gleason Bogert et al., LAW OF TRUSTS AND TRUSTEES § 88 (3rd

ed. Rev. 2008).[10] Indeed, this Court recently upheld a trial court's rejection of extrinsic evidence relating to a trust settlor's intent. *See Frei ex rel Litem v. Goodsell*, 129 Nev. Adv. Op. 43, 305 P.3d 70, 73-74 (2013). In *Goodsell*, the trust settlor complained that he was wrongfully prohibited from offering testimony which clarified his "actual" intent. *Id.* at 73. This Court upheld the trial court's exclusion of the settlor's testimony, despite his contention that "the parol evidence rule should not have applied because, in the context of estate planning, courts routinely admit extrinsic evidence of a testator's intent." *Id.* at 74.

i. The relevant Trust provision is clear and unambiguous

A written agreement is considered ambiguous if its terms may reasonably be interpreted in more than one way. *Galardi,* 301 P.3d at 366 (*citing Anvui, L.L.C. v. G.L. Dragon, L.L.C.,* 123 Nev. 212, 215, 163 P.3d 405, 407 (2007)). Nevertheless, "ambiguity does not arise simply because the parties disagree on how to interpret their contract." *Id.* (*citing Parman v. Petricciani*, 70 Nev. 427, 430-32, 272 P.2d

[10] "Oral evidence will not be received to supply terms in the writing which are wholly absent, for example, the name of the beneficiary, the description of the land to which the trust attached, or the other essential terms of the trust. If the memorandum is deficient in regard to one or more of its essential items, parol proof cannot be used to supplement it. ***And so, too, oral testimony will not be received if its purpose is to show that one of the essential terms actually stated in the memorandum is incorrect and to substitute therefor another term.*** If such evidence is received and believed, it will invalidate the document as a memorandum." (internal citations omitted) (emphasis added).

492, 493-95 (1954) (*abrogated on other grounds by Wood*, 121 Nev. 724, 121 P.3d 1026).

The applicable provision of the Trust Agreement is Article Third. *See* Opening Brief at p. 23. Article Third provides:

> The Trustee shall allocate to [Subtrust 3] from [William's] separate property, the fractional share of the said assets which is equal to the ***maximum marital deduction*** allowed for federal estate tax purposes ...In making the computations and allocations of the said property to [Subtrust 3] as herein required, the determination of the character and ownership of the said property and the value thereof ***shall be as finally established for federal estate tax purposes.***

(1 AA 22.) (emphasis added).

There is no dispute that 100% of the Texas Oil Property was William's separate property at the time of his death. *See* Opening Brief at p. 10. Furthermore, the parties agree that the Trust Document governs the allocation of the Texas Property between Subtrust 2 and Subtrust 3. *See id.* at 9-16; (1 RA 102).[11]

The language in Article Third is not only clear, it is controlling. It requires an allocation between the Subtrusts which "maximize[s] the marital deduction." To determine how the marital deduction is "maximized," you merely look to the "finally established" federal tax situation at the time of William's death. *See*

[11] The Former Trustee's counsel (Ms. Renka) stated the following to the trial court at the January 30, 2015 hearing: "Here, [the Former Trustee] has raised the terms of the Trust as a defense to establish her ownership. ***She's trying to confirm the plain language of the Trust.*** She's trying to enforce the Trust." (emphasis added).

Galardi, 301 P.3d at 367 ("[w]ords derive meaning from usage and context."); *See also Reno Club v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947) ("words must be presumed to have been used in their ordinary sense, and given the meaning usually and ordinarily attributed to them.").

Using these clear instructions—and after reviewing relevant evidence related to William's estate taxes—the trial court determined that the appropriate allocation was 64.493/35.507 in favor of Subtrust 3. (*16 AA 3431.*); *see also Watson v. Watson,* 95 Nev. 495, 496, 596 P.2d 507, 508 (1979) ("Courts are bound by language which is clear and free from ambiguity and cannot, using the guise of interpretation, distort the plain meaning of an agreement.").

The Former Trustee does not contend (nor has she ever contended) that the instructions contained in Article Third can be reasonably interpreted to have more than one meaning—i.e. that there is a different method for calculating the allocation. *See Talbot v. Nevada Fire Ins. Co.*, 52 Nev. 145, 283 P. 404, 405 (1930) (explaining that a clear and unambiguous contract "cannot be distorted into meaning anything other than what is implied by the language use."). *See* Opening Brief at p. 23-24 (arguing that the trial court disregarded "contradictory evidence" related to Article Third, not that Article Third is ambiguous).

The language provided in Article Third is plain and straightforward and there can be no reasonable alternative interpretations (nor have any been offered) for the

direction provided therein. Accordingly, the consideration of extrinsic evidence beyond what was provided to demonstrate the estate tax situation[12] at William's death is prohibited by the parol evidence rule.

ii. The Settlors intended the Trust Document to be their final agreement

The parties agree that the allocation of Trust assets to the Subtrusts is controlled by the Trust Document. *See* Opening Brief at p. 9-16. Importantly, there is no allegation that the Trust Document resulted from duress, undue influence, or incompetence. *See generally id.* Nor is there evidence that the Settlors revoked or superseded the Trust Document prior to William's death. *Id.* Accordingly, the Trust Document stands alone, and must be understood as the Settlors' final statement of their intentions. *See Brooks, Inc. v. Brooks*, 201 N.W.2d 128, 129 (S.D. 1972).[13]

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[12] *Mohr Park Manor, Inc. v. Mohr*, 83 Nev. 107, 113, 424 P.2d 101, 106 (1967) ("Where possible, the court must supply those things which it is bound under the law to imply in order to carry out the intent of the parties so as to make the agreement lawful, effective and reasonable."). The trial court was bound to consider extrinsic evidence regarding the estate tax situation at the time of William's death, but nothing more.

[13] "There is a presumption that a written instrument was carefully prepared and executed, that the parties knew and understood its contents, that it is clear, that it truly embodies and expresses the intention of the parties, and that it speaks the final and entire agreement or contract of the parties." (*citing* 76 C.J.S. Reformation of Instruments s 82(a), p. 447; 45 Am.Jur., Reformation of Instruments, s 112, p. 649.)

c. The *Young v. Young* Court Excluded Extrinsic Evidence under Virtually Identical Facts

In *Young v. Young*, the Utah Supreme Court upheld a trial court's exclusion of parol evidence relating to the interpretation of a written trust agreement. 979 P.2d 338, 342 (1999). There, the trial court had interpreted trust provisions which created and funded two subtrusts upon the death of the settlor of the original trust. *Id.* at 340. Specifically, the trial court analyzed trust provisions which allocated assets between the two subtrusts based on clear trust language which "required the [trust] assets to be allocated in a manner that minimized federal estate taxes." *Id.* After declaring the allocation provisions clear and unambiguous, the trial court excluded extrinsic evidence related to the settlor's intent and determined the proper asset allocation between the trusts based only on estate tax considerations. *Id.* at 340-41. The trial court also invalidated several deeds that purported to transfer trust assets contrary to the intended tax-saving allocation. *Id.* at 341. The proponents of the excluded extrinsic evidence appealed. *Id.*

On appeal, the proponents argued that the trust document was ambiguous because of an alleged contradiction between two relevant trust provisions; thus, making parol evidence regarding the actual allocation of trust assets relevant to understanding the settlor's intent. *Id.* at 342. In rejecting these arguments, the *Young* court determined that although the subtrust allocation instructions were contained in two separate trust provisions, the intent was clear when "[r]eading the

two provisions together." *Id.* at 342. The court further noted that because the parties agreed that the trial court's allocation did, in fact, achieve the stated objective of minimizing estate taxes, no error had been committed. *Id.*

In conjunction with its ruling on parol evidence, the *Young* court also upheld the invalidation of the improper deeds:

> There is no basis in the language of the [trust] for such [allocations]. In fact, the [trust] expressly prohibited [the transferor] from invading principal of the residuary [subtrust]. By attempting to convey away all of the [trust] assets via warranty and grant deeds, [the transferor] attempted to circumvent that express prohibition.

Id. at 343. In other words, not only did the inappropriate deeds have no bearing on understanding the settlor's intent (because intent was clear from the trust document), they were evidence that the settlor's intent had been ignored. Stated another way, evidence of what you did is not evidence of what should have been done.

d. The Former Trustee's "Disputed Facts" Are Barred by the Parol Evidence Rule and Wholly Irrelevant

The Former Trustee points to events that occurred after the Trust Documents execution as controverting evidence barring summary judgment. More specifically, she contends that genuine issues of material facts exist because: (1) from 1989 until 2006, Marjorie and the Former Trustee always identified Subtrust 2 as the owner of the Texas Oil Property,[14] (2) Marjorie's hand-written records as co-trustee use the

[14] *See* Opening Brief at p. 13.

Tax ID for Substrust 2 to account for income from the Texas Oil Property,[15] (3) the relevant deeds for the Texas Oil Property are still in the name of the Trust,[16] (4) Jacqueline provided testimony that she relied on Marjorie's oral promise (and not the Trust Document) to form the belief that she would get Trust income after Marjorie's death,[17] and (5) the Former Trustee testified that Marjorie knew that she held 100% of the rights to the Texas Oil Property income.[18]

Even if such facts were true (which the Beneficiaries dispute), they are barred by the parol evidence rule because they are being offered as evidence of the Settlors' intent—i.e. how the Trust should be distributed contrary to the terms of the Trust Document. There is no ambiguity in the Trust Agreement, so no extrinsic clarifications are allowed.

However, even if this "evidence" is allowable, it remains unclear how it would be relevant. All of these alleged acts took place after the Trust Document was executed. Neither the Beneficiaries' nor the Former Trustee's actions and intent have *any* bearing on the Settlors' joint intent in 1972. *See* Chart/Timeline at Section I(I) *supra*. Additionally, although Marjorie is a co-settlor of the Trust, her *individual*

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[15] *See id.*at 14.

[16] *See id.*

[17] *See id.*

[18] *See id.*

actions and intent also have no bearing on the *joint* intent of her and William on the date they executed the Trust Document. In short, what these individuals thought and did subsequent to the Trust Document's execution has no bearing, whatsoever, on what William and Marjorie *jointly* intended on May, 18, 1972.

Furthermore, pointing out that the Former Trustee, the Beneficiaries, and even Marjorie may have acted contrary to Trust provisions is not evidence that the Trust provisions are wrong. If anything, it is evidence that the Trust Document was ignored and circumvented.

e. The Beneficiaries' Evidence Regarding the "Martial Deduction" Is Uncontroverted

Given the straightforward language of Article Third, the only extrinsic evidence required by the trial court to reach its ultimate determination on declaratory judgment was information relating to the applicable "marital deduction." The Former Trustee claims that the trial court "disregarded contradictory evidence provided by [her]" relating to the maximum marital deduction for federal estate tax purposes. *See* Opening Brief at p. 25. In particular, the Former Trustee contends that a genuine issue of material fact exists because: (1) Marjorie's accountant presumably prepared the Texas Tax Return in secret,[19] (2) the Texas Tax Return erroneously claims Marjorie personally, rather than Subtrust 3, received part of

[19] *See id.* at p. 13.

William's separate property,[20] and (3) the Federal Tax Return (specifically, Form 706) was not produced.[21]

Even if these observations are true (which the Beneficiaries dispute), it is difficult to comprehend how they call into question the veracity and accuracy of the evidence presented regarding the 65/35 split. In short, the Former Trustee is arguing that because some irrelevant elements of the Texas Tax Return may be missing, the 65/35 split should be disregarded. Of course, she does not bother explaining how these alleged deficiencies have any bearing on the 65/35 split, nor does she propose to what extent the 65/35 split is inaccurate (should it be 20/80? 10/90?). However, implicit in the Former Trustee's argument is an admission that the Beneficiaries met their initial burden of production on this issue (she is not arguing that there is an absence of evidence, only that the evidence is not definitive and/or trustworthy). *See Cuzze*, 123 Nev. at 601, 172 P.3d at 134.[22]

Significantly, only the Beneficiaries have provided evidence on the tax issue. To support the 65/35 split, the Beneficiaries relied on the following evidence:

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[20] *See id.*

[21] *See id.* at p. 14.

[22] "The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. If such a showing is made, then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact." (internal citations omitted).

- The Texas Tax Return,[23]
- The Cover Letter,[24] and
- The Expert Report.[25]

In response to the above evidence, the Former Trustee produced nothing. Instead, she did what she does now: attack the Beneficiaries' tax evidence as insufficient by pointing to alleged "missing" information (e.g. the Federal Estate Tax Return).[26] *See* Opening Brief at p. 24-27. Accordingly, the trial court cannot have fixed the 65/35 split by mistakenly weighing conflicting evidence, as there is no conflicting evidence. The trial court reached its determination by looking at the only evidence available, which was provided exclusively by the Beneficiaries. (16 AA 3421.)

The Former Trustee cannot simply rest on her bare contention of inadequacy—while providing no actual evidence of her own—to avoid summary judgment and proceed to trial. *See Riley v. OPP IX, L.P.*, 112 Nev. 826, 919 P.2d 1071 (2007);[27] *see also United Nat. Ins. Co. v. Frontier Ins. Co., Inc.*, 120 Nev. 678,

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[23] Opposition and countermotion (Dec. 23, 2014) at Exhibit A. (8 AA 1790 – 1796.)

[24] *Id.* at Exhibit B. (8 AA 1798.)

[25] *Id.* at Exhibit F. (8 AA 1811 – 1849.)

[26] All of these issues are discussed *supra.*

[27] The "party opposing the summary judgment motion ***must show*** that he can produce evidence at trial to support his allegations." (emphasis added).

99 P.3d 1153 (2004).[28] ("In response to a motion for summary judgment, the nonmoving party may not rest upon mere general allegations to defend its position; rather, the nonmoving party must set forth specific facts demonstrating that the case presents genuine issues of material fact warranting a trial.").

i. A negative inference under NRS 47.230(3) would be inappropriate.

Shockingly, the Former Trustee argues that this Court should draw a negative inference against the Beneficiaries under NRS 47.230(3) because the Federal Tax Return (specifically, Form 706) has never been produced. *See* Opening Brief at p. 24, n. 7. This argument blatantly ignores the following facts: (1) the Beneficiaries (as indicated by their title) have never had an administrative role in the Trust (unlike the Former Trustee), making it improper to charge them with maintaining and preserving important Trust documents, and (2) even the Internal Revenue Service no longer has a copy of this return. (16 AA 3421.) Given these facts, the Beneficiaries inability to produce Form 706 (despite diligent effort) cannot be held against them.

[28] "In response to a motion for summary judgment, the nonmoving party may not rest upon mere general allegations to defend its position; rather, the nonmoving party ***must set forth*** specific facts demonstrating that the case presents genuine issues of material fact warranting a trial." (emphasis added).

ii. The Former Trustee's complaints regarding hearsay have been waived.

On appeal, the Former Trustee contends that the trial court erred by relying on inadmissible hearsay in making its determinations. *See* Opening Brief at p. 24, n. 8; p. 30. Regardless of its veracity, this argument fails as the Former Trustee did not raise this issue in the lower court.[29] *See In re Cay,* 340 P.3d at 573 ("But when a party does not object to the inadmissibility of evidence below, ***the issue is waived and otherwise inadmissible evidence can be considered.***") (emphasis added).

However, even if not waived, the Expert Report remains admissible. In response to interrogatories dated May 5, 2014, Jaqueline identified Daniel Gerety as her potential expert witness regarding tax issues. (10 AA 2255.) On September 27, 2014, Mr. Gerety produced his Expert Report, which he signed and dated. (8 AA 1811 – 1849.)

Despite knowing of Mr. Gerety's involvement,[30] the Former Trustee did nothing to challenge Mr. Gerety's opinions and credibility. She did not depose him,

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[29] The Expert Report, Texas Tax Return, and Cover Letter were all attached to the Beneficiaries December 24, 2014 Opposition and Countermotion. (cite record). Despite this, there is no mention of hearsay or admissibility in the Former Trustee's January 2, 2015 (Omnibus Opposition) or January 9, 2015 (Reply ISO) filings. (cite record). The only hearsay issues raised at January 30, 2015 hearing related to statements made by Mr. Haina and Mr. Hartman. (at page 65 and 76).

[30] The original evidentiary hearing on this matter was set for February 18, 2014. On February 12, 2014, the Beneficiaries filed their trial memorandum, which included a list of exhibits and witnesses. Mr. Gerety is identified as the Beneficiaries' "sole"

nor did she propound any discovery related to his findings. Importantly, the parties consented to a summary adjudication of this matter (as evidenced in the MSJ Order),[31] meaning they knew witnesses would not be called to the stand and subjected to cross-examination.

Given these unique facts, the Expert Report falls within the general hearsay exception outlined in NRS 51.075(1) ("A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though the declarant is available."); *see also Televisa, S.A. de C.V. v. Univision Commc'n, Inc.*, 635 F.Supp.2d 1106, 1109 (C.D. Cal. 2009) (holding that an expert report was admissible under the general hearsay exception found in Fed. R. Evid. 807).[32]

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and "expert" witness who would offer testimony "relat[ing] to the allocation of the Texas [Oil] Property that was done in 1980 as reflected on the Texas [Tax] Return." (1 RA 5.) The Former Trustee's filing of her Counterclaim postponed this evidentiary hearing.

[31] Page 2 of the MSJ Order explains: "...it was agreed, and the Court recognized, that the parties claims and defenses in these proceedings could be resolved summarily by the Court in its adjudication of the parties' said Countermotions for Summary Judgment." (16 AA 3419.) In other words, the parties agreed to waive an evidentiary hearing.

[32] "Here, the Expert Report consists of [the expert's] opinions. Since the item in question is a report prepared by a designated expert witness, rather than a remark or statement, many of the classic hearsay risks, such as faulty perception, faulty memory, and faulty narration do not seem to be of concern here. [The expert] signed

Furthermore, the Former Trustee's argument that the trial court considered additional "inadmissible" evidence in reaching its conclusion at paragraph 15 of the MSJ Order is without merit. *See* Opening Brief at p. 30. Not only has this argument been waived (*see In re Cay,* 340 P.3d at 573), it is irrelevant to the trial court's determination of the 65/35 split. Paragraphs 5 and 6 of the MSJ Order detail the evidence the trial court considered in making the 65/35 determination. (16 AA 3421 – 3422.) Nowhere in these paragraphs does the trial court mention the "handwritten record" complained of by the Former Trustee. (16 AA 3421 – 3422.) This is because the information contained in paragraph 15 is cumulative, as evidenced by the fact that it states that "Marjorie's communications and conduct [which are irrelevant given the application of the parol evidence rule] supported her belief that she owned the rights to 65% of the [Texas Oil Property]." (16 AA 3424.) In other words, even though Marjorie's later actions and communications are irrelevant to understanding the Settlors' contractual intent, they still demonstrate a 65/35 split. The Former Trustee is arguing about a ship that already sailed.

iii. A trial court can grant summary judgment *sua sponte,* regardless of the content of the parties' moving papers

The Former Trustee contends that the trial court's grant of summary judgment was inappropriate because "it was not until [the Beneficiaries'] reply brief in support

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[the report] and adopted it, during his deposition, as a true and correct copy of the Expert Report he submitted in this case." (internal citations omitted).

of their motion that [the Beneficiaries] improperly requested judgment on the merits." Opening Brief at p. 20, n. 6. This argument ignores a trial court's "inherent power to enter summary judgment *sua sponte,*" so long as the "losing party [has] notice that it must defend its claim." *Renown Reg'l. Med. v. Second Jud. Dist. Ct.*, 130 Nev. Adv. Op. 80, 335 P.3d 199, 202 (2014) (internal citation omitted) (emphasis in original). The Former Trustee had ample time to respond to the Beneficiaries' request for summary judgment and was represented by counsel at the January 30, 2015 hearing. (1 RA 29 – 2 RA 224.) This issue is a false alarm.

4. The Trial Court's Grant of Summary Judgment on the Issue of Laches Was Appropriate and Must Be Upheld

a. The Equitable Doctrine of Laches

This Court has long acknowledged that the equitable doctrine of laches is universally applicable in a court of equity. *See Cooney v. Pedroli*, 49 Nev. 55, 235 P. 637, 640 (1925). The doctrine applies when an unreasonable and unjustified delay in the enforcement of a legal right occurs. Simply stated, "equity aids the vigilant and not those who slumber on their rights." *State of Kansas v. State of Colorado*, 514 U.S. 673, 687 (1995).

b. The Doctrine of Laches Applies to this Case

"[I]f it appears that the adverse party has lost ***any*** advantage he might have retained if the claim had been asserted with reasonable promptness, or exposed to any injury through inexcusable delay, a court of equity ***will not interfere to give***

relief to the dilatory claimant." *Miller v. Walser*, 42 Nev. 497, 181 P. 437, 444 (1919) (emphasis added); *see also Cooney*, 235 P. at 640 ("Whenever the passage of time has brought in its train anything that works to the disadvantage of a party and makes it doubtful if equity can be done, relief will be denied."). Accordingly, the non-delaying party must demonstrate (1) an unreasonable lapse of time, which (2) works a disadvantage to the non-delaying party. *See Cooney* 235 P. at 640.

i. The Beneficiaries appropriately asserted laches as a defense

The Former Trustee argues that summary judgment was inappropriately granted on the issue of laches because the Beneficiaries "did not plead laches as required by NRCP 8." Opening Brief at p. 33. She further contends that the Beneficiaries cannot "use laches to bar a right asserted merely by way of defense." *Id.* These argument misconstrues relevant facts, while confusing the holding in *N. Pac. Ry. Co. v. United States*, 277 F.2d 615, 623 (10th Cir. 1960).

Although NRCP 8(c) requires that a party "set forth" affirmative defenses, this requirement is removed if the affirmative defense is asserted in a motion to dismiss or tried by consent of the parties. *Second Baptist Church of Reno v. First Nat. Bank of Nevada*, 89 Nev. 217, 220 510 P.2d 630, 632 (1973). In response to the Former Trustee's Counterclaims, the Beneficiaries filed a Motion to Dismiss, which specifically addresses the Former Trustee's 33-year delay in asserting her

claim to 100% allocation of Trust income.[33] (8 AA 1775 – 1779.) Additionally, the MSJ Order directly addresses laches (16 AA 3432), and is the product of extensive briefing and argument by all parties. Plainly stated, the Former Trustee consented to an adjudication of any rights and/or defenses arising out of the doctrine of laches.

The Former Trustee also mistakenly believes that the doctrine of laches does not apply to her Counterclaim. The Counterclaim specifically requests that the trial court determine that the Former Trustee "is the sole beneficiary" of the Trust. (3 AA 615.) In addition, it asks that the Trust's no-contest clause be enforced against Jaqueline (i.e. that she forfeit all interest in the Trust save $1).[34] (3 AA 615.) These contentions clearly give rise to a right to assert an affirmative defense of laches, as such would act as a complete bar to the Former Trustee's requested relief. In other words, unlike the defendants in *N. Pac. Ry. Co.*, the Former Trustee did file a "counterclaim, cross claim, cross action, or other like pleading," which gives rise to the Beneficiaries' right to assert the affirmative defense of laches. 277 F.2d at 623.

ii. The undisputed facts support a finding of laches

The Former Trustee's undisputed actions demonstrate an unreasonable lapse of time which worked a clear disadvantage to the Beneficiaries. Stated another way,

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[33] "Furthermore, given the history of the income allocation for the last 34 years, and the fact [the Former Trustee] has not elaborated on why she believes she is now entitled to set aside the distribution practice she herself countenanced over the years, her actions lack probable cause or good faith."

[34] *See* Trust Document, attached as Exhibit A to Original Petition. (1 AA 31 – 32.)

even if the Former Trustee was originally entitled to 100% of the Trust income (which she was not), her 33-year failure to assert this clam—while making 65% distributions to the Beneficiaries—bars any recovery.

It is undisputed that the Former Trustee took no action to enforce her alleged rights for more than 33 years. (16 AA 3423.) Significantly, the Former Trustee acknowledges that during this time she received legal consultation and advice regarding such rights, yet did nothing. (2 AA 349 -350.) The Opening Brief does not dispute that the Former Trustee received a 35% interest in Trust income until 2013. Opening Brief at p. 32-35; (16 AA 3422 – 3423.) Nor does it dispute that for 33 years the K-1/tax allocation for each beneficiary (the Beneficiaries and the Former Trustee) evidences the same allocation. *Id.*; (16 AA 3422.) In fact, at no time during this 33-year period has the Former Trustee ever claimed or paid income taxes on Trust Income in excess of 35%. (16 AA 3422.)

Critically, the Former Trustee also waited until *after* the death of Marjorie (a co-settlor and a co-trustee of the Trust, who died in 2009) to defend her rights. (16 AA 3428.) *See Cooney*, 235 P. at 640. ("It is a ***very material circumstance*** to be considered in connection with the lapse of time *that* ***death of those who could have explained the transaction*** has intervened before the claim is made.") (emphasis added). Darrel Knight, the accountant who prepared the Texas Tax Return (and was, therefore, familiar with the Federal Tax Return) is now also deceased. (16 AA 3428.)

While alive, these parties would have been instrumental in understanding and explaining the underlying transaction, including the proper Trust income allocation (especially Mr. Knight, as his actions "maximized the marital deduction" as required by the Trust).

As if this was not enough, the Former Trustee also delayed so long that the most vital piece of evidence—the Federal Tax Return—is no longer available, even from the IRS. (16 AA 3428.)

In every respect, the Former Trustee's actions were dilatory, negligent, and egregious. Because of her, vital evidence—which would have proven the Beneficiaries' assertions—was lost. When a court encounters such unreasonable delay, the "injustice, if any, must fall upon the negligent." *Cooney*, 235 P. at 641. The MSJ Order properly provides such relief.

5. The Trial Court Appropriately Held that the Former Trustee Breached Her Fiduciary Duty and Should Be Removed

The Former Trustee's arguments regarding a breach of fiduciary duty are illogical and unsupported. First, the Former Trustee explains that the trial court found that the parties did not assert their respective claims in "bad faith." *See* Opening Brief at p. 35. Building on this idea, the Former Trustee inappropriately assumes that a lack of "bad faith" is the equivalent of a finding of "good faith." *See id.* at p. 36. Her assumption is wrong. *State v. Lindsey,* 770 P.2d 804 (explaining that a "trial judge did not find good faith; he found only a lack of bad faith.").

Second, the Former Trustee mistakenly concludes that a breach of fiduciary duty cannot occur where good faith is found. *See* at p. 35. Not surprisingly, she provides no authority for this proposition. *See id.* Under Nevada law, a "a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship." *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (citing Restatement (Second) of Torts § 874 cmt. a (1979)). Tortious conduct is defined as "[c]onstituting a tort; wrongful, or in the nature of a tort." BLACK'S LAW DICTIONARY (10th ed. 2014). A tort is defined as a "civil wrong, other than breach of contract, for which remedy may be obtained." *Id.*

In other words, "good faith" has no bearing on a determination that the Former Trustee committed a "civil wrong" against the Beneficiaries by wrongfully diverting the distributions.

B. The First Allocation Order Is Moot

The Former Trustee fails to grasp the full effect of the MSJ Order. Importantly, the "validity of [a] preliminary injunction[35] is mooted, however, by a subsequent granting of a summary judgment. Once a permanent injunction is entered, the preliminary injunction merges with it and appeal may be held *only* from the order of preliminary injunction." *Burbank-Glendale-Pasadena Airport*

[35] Although its questionable whether the First Allocation Order is, in fact, a preliminary injunction, it is assumed such for purposes of this argument.

Authority v. City of L.A., 979 F.2d 1338, 1340, n 1 (1992) (citing *Securities and Exchange Commission v. Murphy,* 626 F.2d 633, 637 n. 1 (9th Cir.1980); *see also Alliance for America's Future v. State ex rel. Miller*, 2012 WL 642540 (February 24, 2012) (unpublished order of affirmance) ("If post-appeal events make the preliminary injunction moot then the interlocutory appeal is moot and should be dismissed, so the unresolved damage and other issues can be litigated to conclusion in the district court.").

In short, the First Allocation Order merged into the MSJ and Accounting Orders when the trial court made its final determination regarding the 65/35 split, as well as the Former Trustee's responsibility to repay withheld distributions to the Beneficiaries. In fact, the MSJ Order acknowledges the same by *requiring* the Former Trustee to dismiss her appeal of the First Allocation Order. (16 AA 3433.)[36] Accordingly, this issue is moot and need not be addressed.

C. The Attorneys' Fees Order Must Be Upheld

This Court has made clear that "district courts have great discretion to award attorney fees, and this discretion is tempered ***only by reason and fairness***." *Haley v. Dist. Ct.*, 128 Nev. Adv. Op. 16, 273 P.3d 855, 860 (2012) (citation omitted) (emphasis added). Consequently, an award of attorneys' fees "will not be overturned

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[36] Paragraph H of the MSJ Order reads: "The parties shall each sign a Stipulation and Order for Dismissal of the Appeal presently pending in Nevada Supreme Court Case No. 66231, filed by [the Former Trustee], appealing a portion of the Court's Order in these proceedings entered on July 7, 2014."

absent a manifest abuse of discretion." *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005) (internal quotation omitted). The attorneys' fees awarded by the trial court are both reasonable and fair.

The Former Trustee does not challenge the amount of attorneys' fees awarded. *See* Opening Brief at p. 35-36. Instead, she argues that an award of any amount is inappropriate because the trial court previously determined "that the purpose of this declaratory action is resolution of a good faith dispute between beneficiaries." *Id.* at p. 36. This argument confuses the trial court's true holding, while failing to acknowledge the legal effect of NRS 153.031(3).

NRS 153.031(3) provides:

> 3. If the court ***grants any relief to the petitioner***, the court may, in its discretion, order any or all of the following additional relief if the court determines that such additional relief is appropriate ***to redress or avoid an injustice***:
> ...
>
> (b) Order the trustee to pay to the petitioner or any other party all reasonable costs incurred by the party ***to adjudicate the affairs of the trust pursuant to this section***, including, without limitation, reasonable attorney's fees. ...

(emphasis added).

The MSJ Order requires the Former Trustee to "provide to [the Beneficiaries] an accounting of the [applicable Trust income] received by the Trust from January 1, 2012, through entry of [the MSJ Order]." (16 AA 3432.) It further requires the Former Trustee to "reimburse and pay to [the Beneficiaries] any portion of their 65%

share of [applicable Trust income] which was not distributed to them during this period of time." (16 AA 3432.)

The Accounting Order clarifies the MSJ Order by: (1) holding that the Former Trustee breached her fiduciary duty to the Beneficiaries by withholding the Beneficiaries' 65% allocation without first appointing a third-party trustee or petitioning the court (16 AA 3458), and (2) setting the *minimum* amount owed to the Beneficiaries (from the Former Trustee) at $2,163,758.88. (16 AA 3456.)

Together, these orders clearly provide the "relief" sought in the Original Petition—which included a request under NRS 153.031. (1 AA 64 – 81.) Accordingly, the fees awarded were incurred as part of an adjudication "[regarding] the affairs of the [Trust] pursuant to this section."

The trial court granted attorneys' fees because such an award offered the only real opportunity for the Beneficiaries to be made whole for the wrongfully diverted distributions—i.e. even if all wrongfully withheld distributions are recovered, the Beneficiaries are still out $417k[37] in legal fees made necessary by the Former Trustee's breach. In other words, the trial court avoided a $417k "injustice" by awarding attorneys' fees against the party responsible for withholding the distributions. This cannot be an abuse of discretion.

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[37] This only includes attorneys' fees incurred through March 20, 2015. (16 AA 3455 – 3459.)

D. The New Trustee Order Was Not Addressed in the Opening Brief

Although the Former Trustee lists the New Trustee Order as one of the trial court's rulings at issue in this appeal (*see* Opening Brief at p. 1), she fails to delineate any alleged trial court error regarding the same. *See generally id.* Accordingly, this issue has been waived. *See Powell v. Liberty Mut. Fire Ins. Co.,* 127 Nev. 156, 161 n. 3, 252 P.3d 668, 672 n. 3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

E. Conclusion

For the aforementioned reasons, the trial court's First Allocation, New Trustee, MSJ, Accounting, and Attorneys' Fees Orders must all be affirmed on appeal.

Respectfully submitted this 19th day of February 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains **10,122 words**.

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

Respectfully submitted this 19th day of February 2016.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of February, 2016, Electronic service of the foregoing RESPONDENTS' ANSWERING BRIEF shall be made in accordance with the Master Service List as follows:

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