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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF FREI
IRREVOCABLE TRUST DATED
OCTOBER 29, 1996.

STEPHEN BROCK

Appellant,

v.

PREMIER TRUST, INC.; LAWRENCE
HOWE; AND ELIZABETH MARY
FREI,

Respondents.

Supreme Court No. 68029
District Court Case No. P065257

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This Court has Jurisdiction over this case based on a petition hearing that was decided on April 14, 2015. This hearing created a final appealable order pursuant to NRAP 3A(b)(1). Pursuant to NRAP 4(a)(1), Appellant's notice of appeal was due on May 14, 2015, and such notice was filed on May 14, 2015. Therefore, this case is properly before this Court and ripe for a decision.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the death of a settlor eliminates the possibility of modification of an existing irrevocable trust.
2. Whether the elimination of a spendthrift provision in an irrevocable trust eliminates a material purpose of the trust.
3. Whether the trustee of an irrevocable trust has a fiduciary duty to object to, and oppose, a modification to the trust, including protecting a spendthrift provision of the trust.
4. Whether the good faith actions of a misinformed party fall outside the bounds of judicial estoppel doctrine.

STATEMENT OF THE CASE

The action below sought redress of payments made from Mr. Brock's share of the subject irrevocable trust in violation of the spendthrift provisions of said trust. Respondents advanced the position that an amendment to the trust allowed the trustee to make said payments. The subject trust had two original settlors, and Mr.

Brock contends that any attempt to amend the trust after the death of one of the settlors is void *ab initio*. The District Court found that because the purported amendment that abrogated the terms of the spendthrift provision was based upon agreement between one of the settlors and the affected beneficiary, the amendment was valid. Accordingly, the District Court reached a decision on April 14, 2015, and held as follows:

- 1) Denied Appellant's Petition to Construe the Terms of the Trust, Confirm Removal of Trustee, Compel Redress of Breach of Fiduciary Duties, and Release Jurisdiction of the Trust;
- 2) Granted an order ratifying the 2009 reformation and modification of the spendthrift provision;
- 3) Found that Appellant is judicially estopped from claiming the 2010 settlement is void; and
- 4) Denied claims that Premier Trust violated its fiduciary duties.

Mr. Brock filed Notice of Appeal on May 14, 2015.

STATEMENT OF FACTS

- 1) Emil Frei, III ("Dr. Frei"), and Adoria B. Frei ("Adoria") (collectively, the "Settlors") created the irrevocable subject trust on October 29, 1996 (the "Trust"). See Trust Art. 1 § 1-4, Exhibit 10.1.
- 2) In four separate provisions of the trust instrument, the Settlers designated the trust irrevocable, and specifically withheld "any power to control and direct

payments, remove trust property, or alter, amend, revoke, or terminate this trust, either in whole or in part.” *Id.*

- 3) The Settlers designated Emil Frei, IV, and Peter Augustine Brock as the initial trustees of the Trust. See Trust Art. 1 § 1, Exhibit 10.1.
- 4) At some point thereafter, the Settlers transferred their interest in a joint survivor life insurance policy, through Transamerica Insurance and Investment Group (the "Transamerica policy"), to the Trust. See Exhibit 13.4 at FIT 00459.
- 5) The Transamerica policy insured the joint lives of Dr. Frei and Adoria with a face amount death benefit of \$7,000,000. *Id.*
- 6) The Settlers designated their ten children as the beneficiaries of the Trust (five of the children are Dr. Frei's children, and five of the children are Adoria's children). See Trust Art. 3 § 1, Exhibit 10.1.
- 7) On January 28, 2009, Adoria died. Leaving the only surviving settlor Dr. Frei. See Findings of Fact, Paragraph 6, Exhibit 19.
- 8) On March 11, 2009, Mr. Brock filed a petition to confirm the Trustees of the FREI Irrevocable Trust and to reform terms of the Trust.
- 9) The District Court took jurisdiction over the Trust, and an order was entered on June 12, 2009 reforming the terms of the Trust. See Exhibit 6.A.

- 1) In particular, the court reformed Article Seven, Section One of the Trust, which provided for the distribution of the Trust upon the death of the surviving Settlor. See Findings of Fact, Paragraph 8, Exhibit 19. The court replaced the redundant provisions of the original Article Seven, Section One, with a uniform provision that applied to all beneficiaries of the Trust. See Exhibit 6.A at FIT 00101-00102.
- 2) The majority of the reformed Article Seven, Section One is essentially identical in function to the original provision. However, allowed the beneficiaries to elect in writing, to require the trustees to terminate that beneficiary's share of the Trust, and to then distribute all of the net income and principal of that beneficiary's share of the Trust outright and free of trust. See reformed Article Seven, § 1.a., as set forth in June 12, 2009, Order, at *Id.*
- 3) According to the modification, if the beneficiary does not provide such a written election, the trustees are to continue to hold the Trust share for the beneficiary, and administer and distribute the Trust share as set forth in the remaining provisions of Section 1 of Article Seven. *Id.*
- 4) Nothing in the record indicates that consent of all the beneficiaries was given for this modification.

- 5) On September 14, 2009, Premier Trust Inc. (“Premier”) replaced Emil Frei, IV as trustee of the Trust by executing a written Acceptance of Trustee. See Findings of Fact, Paragraph 10, Exhibit 19.
- 6) At the same time this modification of the Trust was being handled, Mr. Brock was involved in other litigation. (See A-09-588750-C, A-10-A609292-C and A-10-607772-C). While the allegations varied between these cases, all the cases arise out of Mr. Brock’s use of funds from another, separate trust, the Adoria Frei Trust, of which Mr. Brock was the trustee. See Exhibit 6.D.
- 7) While Mr. Brock’s was not found to have engaged in an wrongdoing, through settlement, Mr. Brock agreed to pay the amounts of \$175,000, \$150,000 and \$90,000, plus the prime rate of interest, over the course of three years, in \$5,000 installments a month. See Findings of Fact, Paragraph 14(i), Exhibit 19.
- 8) This amount was to be secured by Mr. Brock’s interest in the new modified Trust which Mr. Brock could not disclaim. *Id.*
- 9) At the time of the 2010 settlement, Dr. Frei was still alive, and therefore, Mr. Brock lacked the right to demand distribution of income or principal from the Trust, as any demand for payment could only come after the death of Dr. Frei. See Exhibit 6.D. at FIT 00101.

- 10) Dr. Frei died on April 30, 2013. Following Dr. Frei's death, the trustees of the Trust obtained the proceeds from the Transamerica policy with a total death benefit of approximately \$7.5 million. See Exhibit 19.
- 11) Upon information and belief, following Dr. Frei's death, all nine of the other beneficiaries of the Trust, except Mr. Brock, elected to receive distribution in full of their respective shares of the Trust, or have received the distribution at the discretion of the trustees.
- 12) Mr. Brock has not elected to receive distribution in full of his respective share of the Trust. Thus, Petitioner's share of the trust assets remains in the Trust, to be held, administered, and distributed pursuant to the terms of Article Seven, Section 1 of the Trust (as reformed).
- 13) Premier has paid over \$300,000, without Mr. Brock's consent or knowledge, from Mr. Brock's share of the Trust to his purported creditors. See Findings of Fact, Paragraph 21, Exhibit 19.
- 14) In response, Mr. Brock filed this instant action to have the \$300,000 returned to the Trust, to have Respondent removed as trustee of the Trust, and to compel Respondent to pay any damages the court deems necessary for their Breach of Fiduciary duty to Mr. Brock.
- 15) The underlying District Court case was heard on Mr. Brock's petition, and on April, 14, 2015, in a final order, found that Respondent did not breach any

fiduciary duty to Mr. Brock, and that Respondents could rely on the doctrine of *judicial estoppel* regarding Mr. Brock's position in the settlement agreement. See Exhibit 21.

- 16) Mr. Brock filed his notice of appeal on May 14, 2015, within the 30-day timeliness restriction, pursuant to NRAP 4(a).

SUMMARY OF THE ARGUMENT

The 2009 modification and 2010 Settlement Agreement directly violated the explicit terms of the Trust, in addition to the well-established law of irrevocable trusts and spendthrift trusts. Based on the language of the trust instrument, and relevant case law and statutory provisions, the 2010 modification of the Trust is void.

The Frei Trust was explicitly irrevocable from its inception, and the power to amend, revoke, or terminate any portion of the trust was expressly denied to the Settlers. Under the Nevada Supreme Court's own precedent, and the relevant provisions of NRS 163, the clear intent of the Settlers was to create an irrevocable trust that could not be modified. When Dr. Frei entered into the 2010 settlement agreement, he acted solely as a creditor. His role as a settlor was now without any legal significance. As such, the 2009 modification of the Trust was improper.

Even under the narrow, limited exceptions that allow for modification of an irrevocable trust, the 2009 modification lacked the requisite consent from all

beneficiaries. Moreover, the 2009 modification attempted to remove the spendthrift provision of the Trust, which would defeat a material purpose of the Trust as indicated by the language of the Trust instrument. Therefore, the 2010 modification of the Trust is void.

Finally, the spendthrift provision of the Trust expressly prohibits the action taken by Dr. Frei in the 2009 modification and Settlement Agreement. As the trust instrument specifies that the trust property is protected from “the claims of *any* creditors,” the 2010 modification would have been directly contrary to the terms of the trust. Furthermore, the provisions of NRS 166 clearly establish that a valid spendthrift trust bars exactly the type of modification that Dr. Frei sought, as a creditor, to effectuate in 2010. Accordingly, the 2010 modification is, and always has been void.

The doctrine of judicial estoppel is not applicable to the present case because Mr. Brock did not act wrongfully or in bad faith. All of Mr. Brock’s actions were taken in accordance with advice from his counsel at the time. The complete lack of wrongdoing or bad faith motive renders judicial estoppel inapplicable to the case at bar.

Premier violated its fiduciary duties by distributing Trust assets to Mr. Brock’s creditor. According to the language in the trust instrument, Premier’s duties as trustee included protecting the beneficiaries’ interest from claims by any creditors.

Additionally, NRS 166 articulates that any distributions made contrary to the spendthrift provision, and not within the settlor's powers under the Trust, are a violation of the trustee's duties. In fact, the trustees have a duty to "defend and defeat" any attempts to do so under NRS 166. Therefore, Premier's distributions of the Trust assets to Dr. Frei constitute a breach of its fiduciary duties to Mr. Brock.

STANDARD OF REVIEW

In probate matters, any question of statutory interpretation or purely legal question is reviewed *de novo*. *Waldman v. Maini*, 195 P.3d 850, 856 (Nev. 2008). In this case, a question of law is presented in how an irrevocable trust with a spendthrift provision can be modified. This question should be addressed *de novo*. Application of judicial estoppel is also a question of law, and accordingly, this Court should review that issue *de novo*. *Marcuse v. Del Webb Cmtys., Inc.*, 163 P.3d 462, 468 (Nev. 2007). Whether Premier violated their fiduciary duty to Mr. Brock is a question of fact on which the Court can overturn the District Court's Findings of Fact if this Court determines they are completely erroneous. *See Lopez v. Corral*, 2010 Nev. LEXIS 69, *5 (Nev. Dec. 20, 2010).

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ARGUMENT

I. The 2010 Modification of the Trust is Void Because the Trust is Irrevocable by its Own Explicit Terms, the Attempted Modification did not Comport with the Requirements of Such a Modification, and the Spendthrift Provision Specifically Prohibits the Action Taken with the 2010 Modification.

This case involves the modification of an irrevocable trust with a spendthrift clause. The irrevocable nature of the Trust prohibited the Settlers from claiming any interest in the Trust, or amending, revoking, or terminating the trust. Moreover, the requirements for modification, in the narrow exceptions that allow for the modification of an irrevocable Trust, were not met by the 2010 modification. And even if the 2010 modification is deemed acceptable, the spendthrift provision of the trust specifically bars the action taken, by Mr. Brock and Dr. Frei, in attempting to execute the 2010 modification and Settlement Agreement, thereby rendering both void.

A. The unambiguous language of the Settlers explicitly made the Trust irrevocable, and as such, not susceptible to modification or amendment.

The trust at issue in this case is an irrevocable, inter vivos trust. Thus, even if the settlor and the beneficiary are the same person, the trust is deemed irrevocable for “all purposes.” Nev. Rev. Stat. Ann. § 163.560. See also *Monzo v. Eighth Judicial*

Dist. Court of Nev. (In re Irrevocable Tr. Agreement of 1979), 331 P.3d 881, 886 (Nev. 2014).

In determining whether a trust is irrevocable, the Nevada Supreme Court has held that “it is axiomatic in trust law that the Court is required to ascertain and enforce the intent of the settlors.” *See Concannon v. Winship*, 581 P.2d 11, 13 (Nev. 1978) (stating that a court's primary aim in construing a testamentary document is "to give effect ... to the intentions of the testator") (internal citations omitted).

Additionally, Nevada’s relevant statutory provisions further enforce that a settlor’s unambiguous creation of an irrevocable trust will receive great deference from the court. Nev. Rev. Stat. Ann. § 163.004. Specifically, NRS 163 definitively establishes that an otherwise irrevocable trust will only be construed as revocable where the settlor expressly reserves a right to amend or revoke the trust. *Id.* Moreover, when the language of the trust instrument specifically declares the trust irrevocable, it shall not be construed as revocable, regardless of the relationship between the settlor and the beneficiary. Nev. Rev. Stat. Ann. § 163.560.

Here, the explicit language employed by the Settlers, in the trust instrument, leaves no question that the Trust is, and always has been, irrevocable. All four provisions of Article One of the trust instrument expressly identify the Trust as irrevocable. The third provision of Article One goes on to define the Trust as “An Irrevocable Trust” in its title, and specifically withholds from either Settlor “any

power to control and direct payments, remove trust property, or alter, amend, revoke, or terminate this trust, either in whole or in part.” Moreover, the fourth provision of Article One specifies that after the execution of the trust agreement, the Settlers “shall have no right, title interest, power, incident of ownership, or any other benefit in any trust property.” This language informed the District Court’s finding, as explicitly stated in its Findings of Fact, that the Trust was “irrevocable from its inception.”

Based on the unambiguous language used in the trust instrument, and the fact that the Settlers reiterated throughout the trust instrument that the trust was to be irrevocable, there can be no dispute that the Settlers intended to create an irrevocable trust, and withhold any ability to revoke or amend. Accordingly, based on the Supreme Court’s decisions, and the relevant statutory provisions, the attempted 2010 modification was a blatant violation of the express intent of the Settlers and the nature of the Trust.

B. The 2010 modification of the Trust lacked the requisite consent of all beneficiaries, and defeated a material purpose of the Trust, and accordingly, is void.

An irrevocable trust can be modified under very limited circumstances, however, the Nevada Courts have not established clear guidelines with regards to these modifications. NRS 164 states that when all of the beneficiaries agree to a modification of an irrevocable trust, such modification is allowable if it “is not

inconsistent with a material purpose of the trust.” Nev. Rev. Stat. Ann. § 164 [2015, ch. 524, § 61]. If such a modification would be inconsistent with the trust, then modification must be made with the settlor’s consent. *Id.* Alternatively, if a settlor is deceased, then the beneficiaries may only enact a modification by order of the court. Restat 3d of Trusts, § 65 (2012). It is important to note that **this modification can only be approved by the Court if the Court determines that the reason for modification outweighs the material purpose.** *Id.* Consistent with the Restatement of Trust, this Court has held that a sole beneficiary may terminate a trust before its expiration date only if continuation of the trust is not necessary to carry out a material purpose. *Ambrose v. First Nat'l Bank*, 482 P.2d 828, 829 (Nev. 1971).

The case herein, presents an issue of first impression in regards to what standards needs be applied in regards to the death of a single settlor when the creation of a trust was made by multiple settlors. The language of the Restatement of Trusts reads, “if the settlor and all of the beneficiaries of a trust consent [...] they can compel the termination or modification of the trust.” *Restat. 2d of Trusts*, § 338 (2012). The language, “the settlor and all of the beneficiaries” implies that modifications of a trust require unanimous consent. This is the only interpretation that ensures that the intent of the deceased settlor will be executed according to her wishes, thereby avoiding the potential for a surviving settlor to completely disregard the intentions of the deceased settlor. In support of this interpretation, at least one

jurisdiction has clarified that the death of a settlor makes an irrevocable trust unmodifiable, even with the consent of all beneficiaries. *Neeley v. Neeley*, 996 P.2d 346, 348 (Kan. Ct. App. 2000). In *Neely*, the court articulated, “[the settlor] reserve[s] the right to modify and terminate the trust. Once he die[s], however, the trust [becomes] irrevocable and unmodifiable, and the consent of all the beneficiaries is insufficient to modify the trust.” *Id.*

The Trust could have only been modified with consent of *all* of the beneficiaries, and approval of the Court, and even then, only if the material purpose of the Trust was still accomplished after the modification. No modification of the Trust could be done with unanimous settlor consent, as only Dr. Frie was alive. Thus, any modification required the approval of the Court, consent of all of the beneficiaries, and a showing that the modification would not defeat the material purpose of the Trust. The modification in this case did not satisfy the aforementioned requirements, and therefore, is void.

First, the record indicates that only one beneficiary, Mr. Brock, approved of the modification of the Trust. See Probate Commissioner’s Report and Recommendation Regarding Petition for Order Reforming Terms of Trust, attached hereto as Exhibit 6.A. The Probate Commissioner’s report does state that “the only objection raised by any party to the reformation of the Trust was Dr. Frei’s allegation

that this Court did not have jurisdiction over the Trust. *Id.* at 3:14-16. However, failure to object does not equate to affirmative approval as required by Nevada law.

Next, the District Court did not properly consider if the modification defeated a material purpose of the Trust. As established by *Ambrose*, a modification of an irrevocable trust is void when such a modification would defeat the trust's material purpose. *Ambrose*, 482 P.2d at 829. One material purpose of the Trust herein is the spendthrift provision, which protects the Trust corpus from financial improvidence of the beneficiary. As demonstrated by Premier, without the spendthrift clause, Mr. Brock's creditors would seize all of the assets in the Trust, potentially including assets that Mr. Brock himself would not have access to. Based on the fact that the Court did not consider if a material purpose of the Trust would have been defeated, and if the Court had, they would have seen that the spendthrift provision was defeated by the modification, such modification is void.

This interpretation of the Trust is consistent with the Second Restatement of Trust §153. Subsection 1 clearly states that if a beneficiary is entitled to have the principal conveyed to him "at a future time," then a spendthrift restriction is valid. Restat 2d of Trusts, § 153 (2012). Subsection 2 provides that if a beneficiary is entitled to immediate conveyance of the principal, then a spendthrift restriction is not valid. *Id.* In this case, in 2010, Mr. Brock had no immediate right to demand distribution; he instead had only a future right to the principal. As such, the

spendthrift provisions of Article Thirteen of the Trust were valid in 2010, and restricted Brock's ability to pledge his interest in the Trust.

After the death of the surviving settlor, a modification could only be effectuated with the consent of all beneficiaries, and approval of the Court. Additionally, the Court could only agree to modifications that did not destroy a material purpose of the Trust. In this case, the record clearly indicates the lack of requisite consent by *all* beneficiaries. Moreover, this modification did eliminate the spendthrift provision, as evidenced by the seizure of Mr. Brock's assets in the Trust, therefore rendering the modification void.

C. The inclusion of the spendthrift provision in the terms of the trust, by definition, bars the 2010 modification.

The subject Trust in this case was not only irrevocable, but also contained a valid spendthrift provision. NRS §166 allows for the creation of spendthrift clauses in trusts. The defining characteristics of a spendthrift clause is described in detail in NRS 166.120:

[A] spendthrift trust as defined in this chapter restrains and prohibits generally the assignment, alienation, acceleration and anticipation of any interest of the beneficiary under the trust by the voluntary or involuntary act of the beneficiary, or by operation of law or any process or at all. The trust estate, or corpus or capital thereof, **shall never be assigned, aliened, diminished or impaired by any alienation, transfer or seizure** so as to cut off or diminish the payments, or the rents, profits, earnings or income of the trust estate that would otherwise be currently available for the benefit of the beneficiary.

Nev. Rev. Stat. Ann. § 166.120(1)(emphasis added). The statute establishes that the beneficiary cannot control any of the income or property belonging to the trust, nor can the beneficiary compel distribution from the trust. The key benefit of a spendthrift provision is that creditors cannot access property or money transferred under a spendthrift trust for up to two years. *See* Nev. Rev. Stat. Ann. § 166.170(1)(a). These qualities support the general policy behind spendthrift clauses by giving settlors a means of protecting trust assets for the benefit of the beneficiaries.

The predominant purpose of a spendthrift trust is “**to prevent anticipation or control of future income or corpus** by the protected income beneficiary.” *In re Estate of Bonardi*, 871 A.2d 103,108 (N.J. App. Div. 2005) (emphasis added). Furthermore, spendthrift trusts are, by definition, “created for the maintenance or benefit of a beneficiary which is **secured against his improvidence**, placing it beyond the reach of his creditors.” *Jackson v. Fidelity and Deposit Co. of Maryland*, 608 S.E.2d 901, 903 (Va. 2005) (emphasis added).

Moreover, the existence of a spendthrift provision, in a trust, bars termination of the trust while the beneficiary is still alive. *See Cotham v. First National Bank*, 697 S.W.2d 101, 104 (Ark. 1985); *Merchants' Nat'l Bank v. Crist*, 118 N.W. 394, 395 (Iowa 1908); *In re Tr. D.*, 234 P.3d 793, 800 (Kan. 2010); *Shriners Hosps. for Children v. Firststar Bank, N.A. (In re Estate of Somers)*, 89 P.3d 898, 903-05 (Kan.

2004); *Univ. of Maine Found. v. Fleet Bank of Maine*, 817 A.2d 871, 875 (Me. 2003); *Mahan v. Mahan*, 577 A.2d 70, 77 (Md. 1990); *Rose v. So. Michigan Nat'l Bank*, 238 N.W. 284, 287 (Mich. 1931); *Heritage Bank-North, N.A. v. Hunterdon Medical Center*, 395 A.2d 552, 554 (Super. Ct. App. Div. 1978); *Africa Estate*, 59 A.2d 925, 926 (Pa. 1948); *Germann v. N.Y. Life Ins. Co.*, 331 S.E.2d 385, 387 (S.C. Ct. App. 1985); see also Restatement (Second) of Trusts § 337, general cmt. 1.

As set forth in the Petition, Nevada law cannot provide any more clearly that the trust estate of a spendthrift trust "**shall never be assigned, aliened, diminished or impaired** by any alienation, transfer or seizure" Nev. Rev. Stat. Ann. § 166.120(1) (emphasis added). In fact, the trustee of a spendthrift trust is "**required** to disregard and defeat every assignment or other act, **voluntary** or involuntary, that is attempted contrary to the provisions of [Chapter 166]." Nev. Rev. Stat. Ann. § 166.120(4)(emphasis added). Even a settlor's powers and rights concerning a spendthrift trust are restricted to "only those [...] that are conferred to the settlor by the trust instrument." Nev. Rev. Stat. Ann. § 166.045. As previously discussed, the Settlers specifically barred any power or right to modify or revoke any part of the trust, or control any trust property. Therefore, even if the beneficiary *voluntarily* attempts (i.e., "consents") to pledge his interest in a spendthrift trust, such a voluntary pledge is explicitly prohibited by the nature and language of the trust, and Nevada law, and therefore must be disregarded and defeated.

Here, the spendthrift provision specifically blocked the attempted 2010 modification. Any holding supporting Premier's argument that Mr. Brock's voluntary consent to the pledge destroyed the spendthrift nature of the Trust in 2010 would undermine the very nature of spendthrift trust law, which is premised upon the inability of beneficiaries to voluntarily grant their creditors access to their interest in a spendthrift trust. Such a proposition is so axiomatic in spendthrift trust law that citation to cases in support of this position should seem unnecessary and would prove voluminous. See, Reporter's Notes to Restatement (Second) of Trusts, § 153, for a multitude of cases cited in support of this proposition.

Additionally, the 2010 modification is rendered void, and Premier's argument is defeated, by the explicit language of the trust instrument. Specifically, the trust agreement provides that the interests of the beneficiaries "shall not be subject to [...] the claims of *any* creditors while such interests remain trust property." See Trust Art. 13 § 3 – Exhibit 10.1. (emphasis added). Accordingly, whether Mr. Brock consented to the Settlement Agreement or not, the pledge of his interest in the Settlement Agreement and the 2010 modification are rendered void by the explicit language of the trust instrument.

The fact that Dr. Frei was a settlor to the trust does not alter the fact that he was acting in the capacity of a creditor to a beneficiary of the Trust in the 2010 modification and Settlement Agreement. The spendthrift provision of the Trust

protects the interest of the beneficiaries and the trust assets from “the claims of *any* creditors.” This language is critical because it does not limit its protections to claims by third-party creditors. Dr. Frei was acting as a creditor, in furtherance of his interests as creditor, and therefore, the Settlement Agreement and 2010 modification could not be validly executed under the unambiguous terms of the trust, regardless of Dr. Frei’s involvement in the creation of the Trust.

II. Mr. Brock is not Barred by the Doctrine of Judicial Estoppel.

The primary purpose of judicial estoppel is to protect the judiciary's integrity, and to prevent litigants from improperly gaining an unfair advantage through bad faith means; however, it does not prohibit a change in position that is not intended to sabotage the judicial process. *NOLM, LLC v. Cty. of Clark*, 100 P.3d 658, 663 (Nev. 2004). Judicial Estoppel is generally limited to situations where there is “intentional wrongdoing, or an attempt to obtain an unfair advantage.” *Id.*

While Respondents have attempted to demonstrate that Mr. Brock intentionally misled the court, nothing could be further from the truth. Mr. Brock was subject to abusive counsel, whose demands for payment of legal fees left him with no recourse, other than to accept the proposal offered by his now-creditors. Mr. Brock took no position on whether he had the right to secure his debts with his interest in the Trust. To the contrary, there was never any discussion with any party, the court, or his attorney as to the implication of the spendthrift clause on his pledge.

However, once Mr. Brock's new counsel informed him that the Trust's spendthrift provisions prevented him from securing his debts with the Trust proceeds, he took immediate action to remedy a problem which was created through excusable mistake. Mr. Brock is not an attorney, and cannot be expected to understand the nuanced details of how spendthrift provisions work. To the contrary, spendthrift provisions are designed to protect beneficiaries exactly like Mr. Brock from making the types of mistakes that were made in the instant case.

Using the doctrine of judicial estoppel to defeat a spendthrift provision each time a beneficiary seeks to do so would sidestep the entire purpose of the spendthrift provision in trust law. If the Court accepts respondent's position, Beneficiaries could pledge their debts as security at any time, sign a notarized document claiming they had the right to make such a pledge, and that party would be judicially estopped from claiming otherwise. Beneficiaries would then have to rely on Trustees to faithfully execute their duties to oppose any such agreement. However, in cases such as the instant case, where the trustee failed to properly guard against this type of void *ab initio* pledge, the protections offered by a spendthrift trust would simply be lost. This defeats centuries of established trust law, and cannot be allowed to stand.

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III. Premier's acquiescence to the Settlement Agreement, contrary to the language of the Trust, constitute a breach of their fiduciary duties to Mr. Brock.

It is axiomatic in trust law that the court is required to ascertain and enforce the intent of the settlors. See *Concannon*, 581 P.2d at 13 (stating that a court's primary aim in construing a testamentary document is "to give effect ... to the intentions of the testator") (citations omitted). Premier has violated the Settlers' intent by paying assets of the Trust, to creditors of a beneficiary of the Trust, contrary to the Settlers' explicit intent. The terms of the Trust do not allow, or even permit, the trustee to give access to the principal and income of the Trust to an unsecured, non-judgment creditor of a beneficiary of the Trust. The presence of the spendthrift provision specifically prohibits the trustee from subjecting the trust corpus to claims by "any creditors." See Trust Art. 13 § 3, Exhibit 10.1. In fact, there is no provision in the Trust authorizing the trustee of the Trust to pay any amount of the income, or principal, of the Trust to any creditor of the beneficiaries. Thus, the Settlers' intent was clear that the Trust was prepared to provide for the benefit of their beneficiaries, not for the benefit of their beneficiaries' creditors.

Despite the Settlers' intent that their estate be applied only to the education, health, maintenance, and support of their beneficiaries, Premier paid over \$300,000 of Mr. Brock's share of the Trust to the Frei family, as alleged creditors of Mr. Brock. The Frei family has never sought for, much less ever actually obtained, a judgment

against Mr. Brock, nor has the Frei family ever served any legal process on Premier to attach to Mr. Brock's interest in the Trust. Premier paid over \$400,000 out of the Trust, based solely on a demand letter received from the Frei family after Dr. Frei's death. Premier's actions in paying over \$300,000 to an unsecured non-judgment creditor is prima facie evidence of a breach of its fiduciary duty.

Premier, however, asserts that Mr. Brock consented to the actions, and therefore, cannot allege a breach of fiduciary duty against Premier. This argument ignores or mischaracterizes the facts of this matter. Mr. Brock has never consented to Premier's actions turning over \$400,000 of Mr. Brock's share of the Trust to his unsecured, non-judgment, and disputed, alleged creditors. As Premier is well aware, Mr. Brock has previously informed Premier that he did not consent to any payments to the Frei family. See Declaration of Stephen Brock on file in this matter filed on January 12, 2015, Exhibit 8.

Premier also argues that because Mr. Brock "consented" to the Settlement Agreement in 2010, Mr. Brock also apparently implicitly consented to Premier's future actions, three and four years later. Such an assertion is mischaracterization of the role of trustee, and the notion of consent, generally. Whether Mr. Brock may have consented to the Settlement Agreement in 2010 - which he asserts he did not do - simply cannot be construed as consent to unknown and unanticipated breaches of Premier's fiduciary duties four years later. Even if Mr. Brock's consent to the

Settlement Agreement constitutes implicit consent to some future, undefined and unknown actions of the trustee, such consent in 2010 was in anticipation of, and pledge against, the future interest, which is clearly prohibited by the Trust and Nevada law. Nev. Rev. Stat. Ann. § 166.120.

To be certain, Mr. Brock has never consented to Premier paying any portion of the Trust over to Mr. Brock's alleged unsecured, non-judgment creditors, including to the Frei family. Premier has never asked for Petitioner's consent, and has never consulted with Mr. Brock about the demands made against Premier by the Frei family. At all times, Premier has acted on its own, in complete disregard for Mr. Brock's rights or interests under the Trust, and has acted solely at the direction of the Frei family. An invalid, attempted pledge and anticipation of Petitioner's interest in the Trust cannot excuse Premier's total disregard of its fiduciary duties to Mr. Brock.

Furthermore, even if Mr. Brock had consented to Premier's actions, the nature of the spendthrift clause under NRS 166 specifically prohibits Premier's actions in distributing the trust funds to Mr. Brock's creditor. NRS 166 specifically states that the trustee of a spendthrift trust must not make payments to "any assignee of the beneficiary, whether such assignment or order be the voluntary contractual act of the beneficiary or be made pursuant to or by virtue of any legal process." Nev. Rev. Stat. Ann. § 166.120(2). The chapter goes on to specify that the beneficiary does not have

the “power or capacity” to make such an assignment, and that the trust estate is “discharged of and from any and all obligations of the beneficiary whatsoever.” Nev. Rev. Stat. Ann. § 166.120(3). Not only is the trustee prohibited from allowing such actions to occur, but they are affirmatively “required to disregard and defeat every assignment or other act, voluntary or involuntary, that is attempted contrary to the provisions of [NRS 166].” Nev. Rev. Stat. Ann. § 166.120(4).

Premier has acquiesced at every step to the demands of the Frei family, while completely disregarding the beneficiary, Mr. Brock, to whom it owes fiduciary duties under the Trust. These actions violate the terms of the Trust, and the duties of a trustee under NRS 166. Therefore, Premier’s actions constitute a blatant breach of the fiduciary duties it owes to Mr. Brock.

CONCLUSION

In conclusion, the modification to the Trust is void for three reasons. First, the trust was irrevocable by its very terms. Second, the attempted modification of the Trust lacked consent of all beneficiaries, and defeated a material purpose of the Trust, and is therefore, void. And third, the spendthrift provision of the Trust explicitly prohibits the action attempted with the 2010 Settlement. Furthermore, the doctrine of judicial estoppel is not applicable to this case, as Mr. Brock’s actions were taken in good faith, but were merely misinformed. Finally, Premier’s payment

of over \$300,000 to creditors to the Trust, and failure to enforce the spendthrift provision of the Trust, constitute a breach of their fiduciary duties as trustee.

For the foregoing reasons, Mr. Brock seeks the following:

- A. That the Supreme Court affirm the District Court's finding that the Trust was irrevocable from its inception;
- B. That the Supreme Court affirm the District Court's finding that the Trust had a valid spendthrift provision pursuant to Nevada law;
- C. That the Supreme Court find that any modification to the Trust is void as such a modification changed a material purpose of the Trust;
- D. That the attempted pledge or assignment of Mr. Brock's interest in the Trust is void *ab initio* according to the explicit terms of the Trust;
- E. That the trustees be compelled to comply with the terms of the Trust;
- F. That the trustee reimburse the Mr. Brock all funds payed to Mr. Brock's creditors out of the Trust; and
- G. That the Court confirm the removal of Premier as trustee based on their repeated violations of their fiduciary duties to Mr. Brock.

CERTIFICATE OF COMPLIANCE

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 in Times New Roman and 14 point font size.

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 proportionally spaced, has a typeface of 14 points or more and contains less than 14,000 words.

FINALLY, I HEREBY CERTIFY that I have read this **APPELLANT'S OPENING 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 Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), 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.

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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.

DATED this 23rd day of December, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of December, 2015, I served and hand delivered a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF**, to:

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