

**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.

Electronically Filed  
Feb 13 2017 09:09 a.m.  
**MOTION TO REISSUE  
ORDER AS PUBLISHED  
OPINION PURSUANT TO  
NRAP 36(F)**  
J. A. Brown  
Clerk of the Supreme Court

The Rushforth Firm, Ltd. (the "Firm") counsel for respondents, Jacqueline M. Montoya and Kathryn A. Bouvier, hereby files its motion to reissue the unpublished ORDER DISMISSING APPEAL AND ORDER OF AFFIRMANCE (the "Order") issued by this Honorable Court on January 26, 2017, as an opinion to be published in the Nevada Reports. This motion is made pursuant to NRAP 36(f) and is supported by the memorandum of points and authorities below.

Respectfully submitted this 10<sup>th</sup> day of February 2017.

**THE RUSHFORTH FIRM, LTD.**

By:   
JOSEPH J. POWELL (State Bar No. 8875)  
DANIEL P. KIEFER (State Bar No. 12419)

## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. Criteria for Publication.**

Pursuant to NRAP 36(f)(3), publication is proper if the Order satisfies one or more of NRAP 36(c)(1)'s three criteria. Specifically, publication is proper if the Order:

- (A) Presents an issue of first impression;
- (B) Alters, modifies, or significantly clarifies a rule of law previously announced by the court; or
- (C) Involves an issue of public importance that has application beyond the parties.

NRAP 36(c)(1).

NRAP 36(c) further explains that an “unpublished disposition, while publicly available, does not establish mandatory precedent except in a subsequent stage of a case in which the unpublished disposition was entered, in a related case, or in any case for purposes of issue or claim preclusion or to establish law of the case.” NRAP 36(c)(2).

For the reasons explained below, the Firm believes that this Order is appropriate for publication because the reasoning set forth in the unpublished order has precedential value and should, therefore, be published as an opinion in the Nevada Reports.

## **II. The Case Is Appropriate for Publication.**

The Order is appropriate for publication because it “significantly clarifies a rule of law previously announced by the court.” Furthermore, the Order focuses on and “involves an issue of public importance that has application beyond the parties.”

### ***A. Significantly Clarifies A Rule Of Law.***

Publication is proper if the opinion “significantly clarifies a rule of law.” NRAP 36(c)(1)(B). NRS 163.115 outlines the remedies and injunctions available should a trustee commit or threaten to commit a breach of trust. The statute, however, does not outline specific trustee behaviors that indicate a breach of trust. For that clarification, it is essential to consider relevant Nevada case law.

Nevada is a “trust friendly” jurisdiction where an ever-growing number of trusts are established. Accordingly, Nevada’s case law on trusts and trustees should be robust. Unfortunately, this is not the case as there is presently an insufficiency of Nevada case law on the topic. Because of this deficiency, Nevada courts are forced to look to other jurisdictions for guidance in evaluating the actions of trustees take in relation to trusts governed by Nevada law. By publishing the Order (and others like it), this Honorable Court can help remedy this situation.

The Order provides specific examples and clarifications of actions that constitute a trustee’s breach of fiduciary duty. Specifically, the Order indicates that the unilateral ceasing of distributions constitutes both a breach of the duty of

impartiality, as well as the duty to avoid conflicts of interest. Tellingly, the Order cites New Jersey and California cases in supporting its ultimate determination. With publication, Nevada will have more of its own precedential case law, reducing the necessity to look to persuasive authority outside the state.

Moreover, the Order provides significant clarification of NRS 153.031(3)(b) (providing that the district court may award a petitioner attorney fees “to redress or avoid an injustice” and that the trustee herself may be made liable for the fees if the trustee “breached her fiduciary duties”). This clarification serves as a clear guidepost for future district court decisions, while providing notice to trustees of their potential personal liability.

In sum, relevant Nevada case law is essential to clarify existing Nevada statutes. In Nevada’s continued pursuit of serving as a “trust friendly” jurisdiction, it is imperative that opinions like the Order are published as mandatory authority.

***B. An Issue of Public Importance.***

Publication is proper if the opinion “Involves an issue of public importance that has application beyond the parties.” NRAP 36(c).

The importance of clarity, certainty, and confidence in trust law cannot be overstated. Trusts are often designed to implement the wishes and desires of a decedent after his passing. Without certainty, clarity, and confidence in the law, this preparation becomes a guessing game—often aided only by piecing together

decisions from outside jurisdictions without any knowledge of how this Honorable Court would rule on the same issue.

At its core, this case involves notice. Notice to trustors, notice to trustees, and notice to courts. This notice provides for a more competent, clear, and certain Nevada trust law. Clear law leads to more clear administration. In other words, the publication of the Order helps all trust-related actors in Nevada to better accomplish their objectives with the comfort of controlling case law. If nothing else, this Order can serve as reassurance to settlors that their last wishes and desires cannot be unilaterally set aside by a rouge trustee.

The Order offers clarity to an established rule of law, a rule of law that is of great public importance. Therefore, publication of the Order is warranted.

### **III. Conclusion**

Based upon the foregoing, the Firm respectfully requests that this Honorable Court reissue the Order entered on January 26, 2017, as an opinion to be published in the Nevada Reports.

Respectfully submitted this 10<sup>th</sup> day of February 2017.

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