

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this **DOCKETING STATEMENT** was filed electronically with the Nevada Supreme Court on the \_\_\_\_ day of November, 2016. Electronic service of the foregoing **DOCKETING STATEMENT** shall be made in accordance with the Master Service List as follows:

Kirk B. Lenhard, Esq. BROWNSTEIN HYATT FARBER SCHRECK, LLP 100 North City Parkway, Suite 1600 Las Vegas, Nevada 89106  <i>Attorney for Eleanor Ahern</i>	
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I further certify that I served a copy of this document by electronically mailing a true and correct copy thereof as follows:

Todd Moody, Esq.  
HUTCHISON & STEFFEN LLC  
10080 W. Alta Drive #200  
Las Vegas, Nevada 89145  
*Attorney for Interim Trustee, FREDRICK P. WAID*

Dated this 21 day of November, 2016

  
\_\_\_\_\_  
An Employee of the RUSHFORTH FIRM, LTD.

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

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

JACQUELINE M. MONTOYA; AND  
KATHRYN A. BOUVIER,

Appellants,

vs.

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

Respondent.

No 71577

**DOCKETING STATEMENT**

**CIVIL APPEALS**

Electronically Filed  
Nov 22 2016 08:14 a.m.  
Erin A. Brown  
Clerk of Supreme Court

**GENERAL INFORMATION**

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

**WARNING**

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

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

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of

sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District County Eighth Department 26  
County Clark Judge Gloria J. Sturman  
District Ct. Case No. P-09-066425-T

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

Attorney Joseph J. Powell and Daniel P. Kiefer Telephone 702-255-4552

Firm THE RUSHFORTH FIRM, LTD.

Address 1707 Village Center Circle, Suite 150  
Las Vegas, Nevada 89134

Client(s) Jacqueline M. Montoya and Kathryn A. Bouvier

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

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

Attorney Kirk B. Lenhard<sup>1</sup> Tel. (702) 382-2101

Firm BROWNSTEIN HYATT FARBER SCHRECK

Address 100 North City Parkway  
Las Vegas, Nevada 89106-4614

Client(s) Eleanor C. Ahern a/k/a Eleanor Connell Hartman Ahern

(List additional counsel on separate sheet if necessary)

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

- |  |   |
|--|---|
| <input type="checkbox"/> Judgment after bench trial  | <input type="checkbox"/> Dismissal:           |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |

<sup>1</sup> Mr. Lenhard has filed a Motion to Withdraw as Counsel on Order Shortening Time in the district court. This motion is set for hearing on November 23, 2016.

- |   |   |
|---|---|
| <input type="checkbox"/> Summary judgment                   | <input type="checkbox"/> Failure to state a claim                       |
| <input type="checkbox"/> Default judgment                   | <input type="checkbox"/> Failure to prosecute                           |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief  | <input type="checkbox"/> Other (specify)                                |
| <input type="checkbox"/> Grant/Denial of injunction         | <input type="checkbox"/> Divorce Decree:                                |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination     | <input checked="" type="checkbox"/> Other disposition (specify):        |

An order issued pursuant to NRS 155.190(1)(k)(l), (m), and (n)

**5. Does this appeal raise issues concerning any of the following? No.**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

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

Related appeals:

- Docket Nos. 66231; 67782; 68046. These cases have been consolidated into one appeal (the "Consolidated Appeal"). The respondent in this matter (Eleanor C. Ahern) is the appellant in the Consolidated Appeal. The Consolidated Appeal is fully briefed and the parties are awaiting a decision from the Nevada Supreme Court.
- Docket No. 69737. This appeal was filed by the present appellants, but a stipulation to dismiss the appeal was accepted by the Nevada Supreme Court prior to any briefs being filed (although there was motion practice).

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

None, however, the underlying district court case commenced in 2009 with the filing of Ms. Ahern's (the "Respondent") original petition. Ms. Montoya's and Ms. Bouvier's (the "Appellants") involvement in the underlying case began in September

2013, when they filed a petition seeking declaratory relief regarding distributions from the relevant trust, which Respondent controlled as trustee.

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

This action arises out of a dispute regarding trust distributions. The Appellants became beneficiaries of the subject trust in 2009. From 2009 to June 2013, Respondent, acting as trustee (and who is also a co-beneficiary of the trust) distributed trust assets in accordance with the trust document as follows: 65% to the Appellants (who are beneficiaries of a separate trust which is the nominated beneficiary of the subject trust) and 35% to Respondent. In June 2013, all distributions to the Appellants stopped.

In September 2013, the Appellants filed a petition seeking a declaration from the district court regarding the appropriate allocation and distribution of trust assets required under the trust document. On April 16, 2015, the district court entered summary judgment in favor of the Appellants which declared that the required trust allocation/distribution scheme was 65% (to Appellants) / 35% (Respondent). The Respondent appealed the summary judgment order (which is part of the Consolidated Appeal).

The district court later provided supplemental orders (dated April 20, 2016 and June 23, 2015) which established the Respondent's minimum liability for unpaid trust distributions to the Appellants at \$2.163 million. These supplemental orders also awarded the Appellants attorneys' fees against the Respondent in excess of \$390,000. The district court also issued an order which removed the Respondent as trustee of the trust (April 1, 2015). These supplemental orders are also part of the Consolidated Appeal.

On June 3, 2015, the Appellants filed their Motion for Assessment of Damages Against Eleanor Ahern; Enforcement of No Contest Clause; and Surcharge of Eleanor's Trust Income (the "Motion"). Relevant here is the Motion's request to enforce the trust's no-contest clause pursuant to NRS 163.00195. The district court held an evidentiary hearing on the Motion on February 22, 2016 and March 3, 2016.

On September 19, 2016, the district court entered its Order Regarding Motion for Assessment of Damages; Enforcement of No Contest Clause; and Surcharge of Trust Income (the "Order"). Among other things, the Order denies the Appellants' request to enforce the no-contest clause against Eleanor Ahern, despite the Court's previous findings of fraud, misconduct, and breaches of fiduciary duties by Eleanor Ahern.

The Appellants challenge the district court's unwillingness to enforce the no contest clause.

**9. Issues on appeal.** State specifically all issues in this appeal (attach separate sheets as necessary):

This appeal presents issues regarding the mandatory nature of NRS 163.00195(1) which requires that with limited exception a "no-contest clause in a trust must be enforced by the court":

1. Can the district court refuse to enforce a no-contest clause pursuant to NRS 163.00195 when the contesting party has already been adjudicated to have committed fraud, misconduct, and breached certain fiduciary duties in relation to the trust?

2. Can the district court refuse to enforce a no-contest clause pursuant to NRS 163.00195 when the court has already determined that the contesting party ceased making trust distributions, while withholding them for herself, without reasonable excuse in violation of the trust documents?

3. Does NRS 163.00195 allow a district court to skirt enforcement of a no-contest clause simply because the court believes that the enforcement of the no-contest clause is a "harsh remedy"?

**10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

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

- ☐ Reversal of well-settled Nevada precedent (identify the case(s))
- ☐ An issue arising under the United States and/or Nevada Constitutions
- ☒ A substantial issue of first impression
- ☐ An issue of public policy
- ☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- ☐ A ballot question

**13. Assignment to the Court of Appeals or retention in the Supreme Court.**

Briefly set forth whether the matter is presumptively retained in Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

Undersigned counsel is unsure whether this appeal is retained by the Supreme Court under NRAP 17(a)(13) ("issue of first impression") or presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(9) ("appeals in trust matters and estate matters in which the corpus has a value of less than \$5,430,000").

However, considering it is unlikely that the trust's present value exceeds \$5,430,000,<sup>2</sup> this appeal should likely be assigned to the Court of Appeals.

**14. Trial.** If this action proceeded to trial, how many days did the trial last?

Two-day evidentiary hearing.

Was it a bench or jury trial? Bench

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<sup>2</sup> The value of the trust is dependent on the length of time that Eleanor Ahern lives (the main asset is an oil lease which produces periodic lease payments). Upon Eleanor Ahern's death remainder interest in the trust goes directly to the Appellants. Eleanor Ahern is believed to be 78 years old.

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

### **TIMELINESS OF NOTICE OF APPEAL**

**16. Date of entry of written judgment or order appealed from** September 19, 2016 (Exhibit A).

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

**17. Date written notice of entry of judgment or order was served** September 28, 2016 (Exhibit B).

Was service by:

☐ Delivery

☒ Mail/electronic/fax

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

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b)    Date of filing    N/A

☐ NRCP 52(b)    Date of filing    N/A

☐ NRCP 59        Date of filing    N/A

**NOTE:**    **Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion N/A

(c) Date written notice of entry of order resolving tolling motion was served N/A



Was service by:

☐ Delivery

☐ Mail/Electronic/Fax

**19. Date notice of appeal filed October 19, 2016 (Exhibit C)**

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

N/A

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

The time limit for filing the notice of appeal from the Order is governed by NRS 155.190(1), which provides in part:

[A]n appeal may be taken to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution within 30 days after the notice of entry of an order: ...

**SUBSTANTIVE APPEALABILITY**

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

(a)

☐ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☒ Other (specify) 155.190(1)(k)(l), (m), and (n)

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

NRS 155.190(1)(k) allows an appeal from an order “[d]etermining heirship or the persons to whom distribution must be made or trust property must pass.” Enforcement of the trust’s no-contest clause has a direct effect on the party(ies) to whom the trust property must pass.

NRS 155.190(1)(l) allows an appeal from an order “[d]istributing property.” Enforcement of the trust’s no-contest clause has a direct effect on “distributing property” of the Trust.

NRS 155.190(1)(m) allows an appeal from an order “[r]efusing to make any order mentioned in this section.” This is a “catch-all” provision which is likely intended to ensure an appellate right for issues like the present appeal (i.e. issues not expressly delineated in the statute).

NRS 155.190(1)(n) allows an appeal from an order “[m]aking any decision wherein the amount in controversy equals or exceeds, exclusive of costs, \$10,000.” Eleanor Ahern’s interest in the trust greatly exceeds \$10,000. If the no-contest clause is enforced, she loses that interest.

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

(a) Parties:

Jacqueline M. Montoya

Kathryn A. Bouvier

Eleanor C. Ahern

Frederick P. Waid (court-appointed interim trustee who is an interested party)

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

The court-appointed interim trustee, Fredrick P. Waid, is an interested party in the district court proceedings but he is not a party to this appeal.

**23. Give a brief description (3 to 5 words) of each party’s separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

***Appellants***

Appellants claim that Eleanor Ahern’s actions, including fraud, misconduct, and fiduciary breaches, violated the trust document’s no-contest clause. Appellant further claims that the district court was obligated to enforce the no-contest clause under these circumstances by virtue of mandatory language contained in NRS 163.00195.

***Respondent***

Respondent claims that her actions, including fraud, misconduct, and fiduciary breaches, did not violate the trust document's no-contest clause. Respondent further claims that the district court was empowered to ignore the mandatory language contained in NRS 163.00195 and elect not to enforce the trust's no-contest clause under these circumstances.

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

☐ Yes

☒ No

**25. If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

The district court has yet to determine the amount of damages that will be awarded to the Appellants against Eleanor Ahern.

(b) Specify the parties remaining below:

All parties remain below.

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

☐ Yes

☒ No

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

☐ Yes

☒ No

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

NRS 155.190(1) provides for an immediate right to appeal any order which fits the parameters outlined in sub-sections (a) through (p). As discussed above, the relevant portion of the Order regarding the no-contest clause applies to (k), (l), (m) and (n). Accordingly, immediate appellate review is appropriate.

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

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims

Petition for Declaratory Judgment (Exhibit D).

Answer and Counterclaims of Eleanor Ahern (Exhibit E).

Motion for Damages, Enforcement of No-Contest Clause, and Surcharge (Exhibit F).

- Any tolling motion(s) and order(s) resolving tolling motion(s)  
N/A
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal  
N/A
- Any other order challenged on appeal

***The following order is challenged in this appeal***

September 19, 2016 Order Regarding Motion for Assessment of Damages; Enforcement of No Contest Clause; and Surcharge of Trust Income (Exhibit A).

***The following orders on are on appeal in the Consolidated appeal***

April 16, 2015 summary judgment order (Exhibit G)

April 20, 2015 order regarding accounting (Exhibit I).

July 7, 2014 order regarding pending motions (Exhibit K).

June 23, 2015 judgment for attorneys' fees and costs (Exhibit M).

- Notices of entry for each attached order

***The following notice of entry of order is applicable to this appeal***  
September 28, 2016 notice of entry of Order Regarding Motion for Assessment of Damages; Enforcement of No Contest Clause; and Surcharge of Trust Income (Exhibit B).

***The following notices of entry of order are applicable to the Consolidated Appeal***

April 17, 2015 notice of entry of summary judgment order (Exhibit H).  
April 20, 2015 notice of entry of order regarding accounting (Exhibit J).  
July 8, 2014 notice of entry of order regarding pending motions (Exhibit L).  
June 30, 2015 notice of entry of judgment for attorneys' fees and costs (Exhibit N).

## VERIFICATION

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

Name of appellants: Jacqueline M. Montoya and Kathryn A. Bouvier

Name of counsel of record: Daniel P. Kiefer

Date: November 21, 2016

Signature of  
counsel of record: /s/ Daniel P. Kiefer

State and county  
where signed: Clark County, Nevada

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this **DOCKETING STATEMENT** was filed electronically with the Nevada Supreme Court on the \_\_\_\_ day of November, 2016. Electronic service of the foregoing **DOCKETING STATEMENT** shall be made in accordance with the Master Service List as follows:

Kirk B. Lenhard, Esq. BROWNSTEIN HYATT FARBER SCHRECK, LLP 100 North City Parkway, Suite 1600 Las Vegas, Nevada 89106  <i>Attorney for Eleanor Ahern</i>	
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I further certify that I served a copy of this document by electronically mailing a true and correct copy thereof as follows:

Todd Moody, Esq.  
HUTCHISON & STEFFEN LLC  
10080 W. Alta Drive #200  
Las Vegas, Nevada 89145  
*Attorney for Interim Trustee, FREDRICK P. WAID*

Dated this \_\_\_\_\_ day of November, 2016

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An Employee of the RUSHFORTH FIRM, LTD.