

**In the Supreme Court 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,

Appellant,

vs.

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

Respondent.

Electronically Filed  
May 03 2017 08:28 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPELLANT'S APPENDIX**

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

**APPELLANT'S APPENDIX, VOLUME 2 OF 8**

**(PAGES AA0247-0493)**

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CLERK OF THE COURT

**RSPN**  
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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

In re the Matter of the

THE W.N. CONNELL and MARJORIE  
T. CONNELL LIVING TRUST, dated  
May 18, 1972

A non-testamentary trust.

Case No.: P-09-066425-T  
Department: 26 (Probate)

**RESPONSE TO MOTION TO REFER CONTESTED PROBATE MATTER  
TO MASTER-PROBATE COMMISSIONER PER EDCR 4.16**

Date of Hearing: November 12, 2013  
Time of Hearing: 9:30 a. m.

JACQUELINE M. MONTOYA ("Jacqueline"), as both an individual and also in her capacity as the trustee of the "MTC Living Trust" dated December 6, 1995, by and through her counsel of record, JOSEPH J. POWELL, Esq., of THE RUSHFORTH FIRM, LTD., hereby respectfully responds to the "Motion to Refer Contested Probate Matter to Master-Probate Commissioner Per EDCR 4.16" ("Motion"), which has been filed by ELEANOR C. AHERN, also known as Eleanor Marguerite Connell Hartman, in her capacity as the trustee

1 of "The W.N. Connell and Marjorie T. Connell Living Trust" ("Trust"), dated May 18, 1972,  
2 by and through her counsel of record, JEFFREY L. BURR, Esq. and JOHN R. MUGAN, Esq.  
3 of the law firm of JEFFREY BURR, LTD., as an objection to Jacqueline's "Petition for  
4 Declaratory Judgment Regarding Limited Interest of Trust Assets pursuant to NRS 30.040,  
5 NRS 153.031(1)(E), and NRS 164.033(1)(A)" ("Petition for Declaratory Judgment"), which  
6 was previously filed in this matter on September 27, 2013. Jacqueline respectfully responds  
7 to the Motion as follows:  
8

9 **A. OVERVIEW OF ARGUMENTS IN MS. AHERN'S MOTION AND RESPONSES**

10 **Arguments by Ms. Ahern**

11 In her Motion, Ms. Ahern has essentially made the three following arguments:  
12

13 (1) Trust No. 3, a subtrust of the Trust, never acquired an interest in the Texas  
14 Property and the mineral and gas rights associated with such interest because there was  
15 never a deed that was executed that placed title in Trust No. 3;  
16

17 (2) Jacqueline and her sister, Kathryn Bouvier ("Kathryn"), signed consents to a trust  
18 reformation petition concerning the final disposition and administration of Trust No. 2 of  
19 the Trust and by doing so essentially disclaimed all rights and interests in the Texas  
20 Property, including mineral, oil, and gas rights associated with such interest; and  
21

22 (3) The trust reformation petition mentioned directly above now constitutes a  
23 "contested" matter for purposes of the proposed local rule 4.08 before the Probate  
24 Commissioner because Jacqueline's Petition for Declaratory Judgment is a direct extension  
25 of that matter and therefore Jacqueline cannot request that Judge Sturman hear this matter  
26 until after the Probate Commissioner hears it first.  
27  
28



**Responses of Jacqueline**

(1) As to argument (1), the Trust expressly provides that there is no requirement to execute a deed separating the undivided property interests between the two subtrusts. Furthermore, the Trust also expressly provides that the allocation of assets between the two subtrusts shall be based solely on how the allocation was done for purposes of the federal estate tax. The federal estate tax return allocated 64.493% of the Texas Property and the associated rights to Trust No. 2, and 35.507% to Trust No. 3, just as it has been distributed for the 33 years since such allocation.

(2) As to argument (2), the consents of Jacqueline and Kathryn were merely effective as to those aspects of the reformation petition that were found in the prayer. The prayer never asked for an affirmative determination and declaration as to the assets that belonged to Trust No. 2, as opposed to Trust No. 3. The consents were extremely generic and never once had any affirmative declaration of consent to a relinquishment or disclaimer of substantive rights and interests that they had at the time of that reformation petition. The significance and scope of those consents has been severely misconstrued and improperly spun in the Motion.

(3) As to argument (3), the reformation petition was not a contested matter in the slightest, as evidenced by the consents signed by Jacqueline and Kathryn. Furthermore, Jacqueline's Petition for Declaratory Judgment has absolutely no substantive connection to the reformation petition and is an entirely separate matter from any previous authorization granted by the Probate Court.

//

1                   **B. THE LACK OF A DEED TO TRUST NO. 3 IS ENTIRELY IMMATERIAL AND**  
2                   **IRRELEVANT**

3           B.1     Ms. Ahern's Motion fails to address the elephant in the room, which is the fact  
4     that for the last 33 years there has been an approximate 65%/35% split of the monies  
5     derived from of all income generated from gas, oil, and mineral leases relating to the Upton  
6     County, Texas real property. This split has been documented on a yearly basis via the filing  
7     of tax returns by Ms. Ahern. Ms. Ahern's Motion fails entirely to have any discussion of this  
8     crucial fact.

9  
10          B.2     Ms. Ahern's motion takes no time to address the fact that there was a clear  
11     allocation of the interests done on the Texas estate tax return, which reflected the numbers  
12     used on the Federal Estate tax return. Ms. Ahern, in her capacity as the trustee of Trust No.  
13     2, had the opportunity 33 years ago, or any reasonable time thereafter, to address the  
14     allocation if she felt that it was faulty.

15  
16          B.3     There is no discussion of these issues; only an assertion that Trust No. 3 must  
17     not have ever acquired any interest in the Texas Property and rights to the oil, gas, and  
18     minerals because a formal deed was never executed.

19  
20          B.4     Ms. Ahern's Motion overlooks the fact that the trust instrument itself does not  
21     actually require that any deed be prepared to establish this interest in Trust No. 3. The  
22     Motion further overlooks the fact that the trust instrument expressly provides that the  
23     allocation as done for purposes of the federal estate tax shall be controlling.

24  
25          B.5     Paragraph K of Section Seventh of the Trust provides for the following:

26                   *All of the trust powers set forth in Nevada Revised Statutes 163.265 to*  
27                   *163.410 inclusive, are hereby incorporated into this Trust Agreement.*

28     //

1 B.6 Therefore, the power afforded to the trustees of the Trust under NRS 163.385  
2 was in effect.

3 B.7 NRS 163.385, titled "Acquisition and holding of property of two or more trusts  
4 undivided", provides for the following:  
5

6 1. *A fiduciary may:*

7 (a) *Acquire, receive, hold and retain the principal of several trusts created*  
8 *by a single instrument undivided until division becomes necessary in order*  
9 *to make distributions.*

10 (b) *Hold, manage, invest, reinvest and account for the several shares or*  
11 *parts of shares by appropriate entries in the fiduciary's books of account,*  
12 *and allocate to each share or part of share its proportionate part of all*  
13 *receipts and expenses.*

14 2. *The provisions of this section shall not defer the vesting in possession of*  
15 *any share or part of share of the estate or trust.*

16 B.8 Therefore, as clearly established by NRS 163.385 there was absolutely nothing  
17 that required the trustees of the Trust to prepare a deed to separate the interests in the  
18 Texas Property belonging to Trust No. 2 and Trust No. 3. There was express authorization  
19 to not prepare a deed and divide the interests of the undivided property interests, but  
20 instead to merely separate and track the allocations of the receipts and expenses, which has  
21 been done for the past 33 years.

22 B.9 Additionally, as stated above, the Trust expressly declares that the allocation  
23 between the subtrusts as was done for federal estate tax purposes is controlling.

24 B.10 As to this allocation issue, under Section Third of the Trust, which is titled  
25 "Marital Deduction", it provides in pertinent part for the following:  
26

27 *In making the computations and **allocations** of the said property to Trust*  
28 *No. 3 as herein **required**, the determination of the character and*  
***ownership** of the said property and the value thereof shall be as finally*

1 *established for federal estate tax purposes. [Emphasis added]*

2 B.11 Preceding the above quoted provision, is a mandate to the trustee to maximize  
3 the marital deduction by allocating the Decedent's separate property to Trust No. 3.  
4

5 B.12 As previously stated in Jacqueline's Petition for Declaratory Judgment, a final  
6 copy of the Form 706 cannot be located. The Texas estate tax return, which applied the  
7 numbers as used on the Form 706, must be relied upon instead. Both the Federal and Texas  
8 returns were accepted by the respective taxing agencies, and, more importantly, the figures  
9 contained therein were honored by the co-trustees from the time of Mr. Connell's death  
10 until the death of Marjorie Connell, approximately 29 years. Further, these numbers  
11 continued to be used for another 4 years after Mrs. Connell's death. One of the co-trustees  
12 that accepted these numbers for the last 33 years was Ms. Ahern herself. Furthermore, as  
13 reflected on Ms. Ahern's own divorce documents from 1984, which can be produced upon  
14 request of the Court, she acknowledges and confirms the 65%/35% split.  
15  
16

17 B.13 As established, the lack of a deed is entirely immaterial to this matter and has  
18 no relevance at all. The fact of the matter is that what was done 33 years ago has been  
19 honored and acted upon since that time.  
20

21 **C. CONSENTS TO PETITION TO REFORM TRUST NO. 2**

22 C.1 As discussed in Ms. Ahern's Motion, Ms. Ahern filed a "Petition to Assume  
23 Jurisdiction Over Trust; Confirm Trustee; and Construe and Reform Trust" ("Reformation  
24 Petition") in August of 2009.

25 C.2 A thorough reading of the Reformation Petition reveals that the point of the  
26 Petition was to seek to add clarification to the terms of Trust No. 2 regarding the events that  
27 should occur upon Ms. Ahern's death.  
28

1 C.3 Namely, the Reformation Petition sought to address the allocation and  
2 distribution of Trust No. 2 upon the death of Ms. Ahern and to clearly address who should  
3 be the successor trustees for Trust No. 2.

4  
5 C.4 As revealed in the Prayer of the Reformation Petition, noticeably absent is any  
6 request for the Probate Court to make a determination as to the assets belonging to Trust  
7 No. 2. In other words, there is absolutely no request made by Ms. Ahern to have the Court  
8 declare that the assets relating to the Upton County, Texas property be deemed to solely  
9 belong to Trust No. 2. The likely reason for this is the fact that the allocation between the  
10 two subtrusts had already been done on the tax filings approximately 29 years prior and  
11 each year thereafter. The allocation was a 65%/35% split of the income relating to the  
12 Upton County real property.

13  
14 C.5 As the Prayer in the Reformation Petition dealt solely with seeking to add  
15 provisions to Trust No. 2, the presence of misstatements concerning the composition of  
16 Trust No. 2 was an entirely irrelevant inclusion as that discussion had no bearing on the  
17 ruling of the Court to allow the reformation to occur, which again was done solely for the  
18 purpose of adding clarity.

19  
20 C.6 The misstatements found in sections 18 and 19 of the Reformation Petition  
21 were overlooked by Jacqueline and Kathryn, but even assuming that they had noticed them,  
22 the relevant question is whether or not there would have been any benefit to raise an  
23 objection. The obvious answer is a resounding "No!" and that is based on the simple fact  
24 that what was sought by the Reformation Petition had nothing to do with these statements.  
25 The statements were erroneous as shown by the allocation that was done in 1980 and the  
26 29 years since that time in which Ms. Ahern received 35% of the income proceeds, not  
27  
28

1 100%.

2 C.7 Although Ms. Ahern is somehow of the opinion that consenting to the  
3 addition of the provisions to Trust No. 2 was the equivalent of Jacqueline and Kathryn  
4 suddenly giving up their 65% interest in the income, which continued for nearly 4 years  
5 after the order for the reformation petition was entered, the reality of the matter is entirely  
6 different.  
7

8 C.8 The consents that were signed by Jacqueline and Kathryn were extremely  
9 generic and boilerplate in their provisions. Neither of the consents reflects any affirmative  
10 declaration that the Jacqueline and Kathryn were choosing to relinquish any substantive  
11 rights in the Trust. The purpose of the consents was to inform the Probate Court that the  
12 reformation was not opposed and could be rubber stamped by the Probate Court, as it was  
13 done. Given the consents that were obtained from Jacqueline and Kathryn, it is extremely  
14 likely that the there was no oral interaction with the Probate Commissioner on the date of  
15 the hearing and that the matter was placed on the "approved list".  
16  
17

18 C.9 Furthermore, Ms. Ahern's assertion that Jacqueline and Kathryn were  
19 represented in regard to the Reformation Petition by Attorney David Strauss is entirely  
20 incorrect. In reality, Jacqueline and Kathryn were told to simply sign the consent if they  
21 had no problem with what the Court was being asked to authorize. They did not have a  
22 problem with anything in the prayer, since it was only asking for additional provisions to  
23 be added to the Trust. Therefore, the consents were signed.  
24

25 C.10 An e-mail from Ms. Ahern's attorney at the time, Brian K. Steadman, Esq., of  
26 Solomon, Dwiggins, & Freer, dated July 27, 2009, is attached hereto as Exhibit "A". The  
27 e-mail from Attorney Steadman explains the purpose and intent behind the Reformation  
28

1 Petition. Noticeably absent is any discussion about the Reformation Petition affecting the  
2 current property rights of Jacqueline or Kathryn. There was no discussion because there  
3 no intent for the Reformation Petition to have any effect on the 65%/35% rights.  
4

5 C.11 For full disclosure, Attorney Strauss was not only the estate planning attorney  
6 for Jacqueline, but he was also the estate planning attorney for Ms. Ahern and Ms. Connell.  
7 Therefore, it was a “family representation” situation in every sense of the word.  
8

9 C.12 To attempt to argue that the consents constituted a relinquishment of rights  
10 in the 65% of the income proceeds is absurd and ridiculous.

11 **D. REFERENCE TO PROBATE COMMISSIONER IS ENTIRELY UNNECESSARY AND**  
12 **INEFFICIENT**

13 D.1 It is entirely unknown why Ms. Ahern is insistent that Jacqueline’s Petition  
14 for Declaratory Ruling not be heard by this Court, but rather be referred to Commissioner  
15 Yamashita.

16 D.2 As is well known, and has always been the protocol, allowing the Probate  
17 Commissioner to hear a matter, and be the “trier of fact” is allowed, absent an express  
18 referral by this Court after first hearing a matter, only upon the mutual consent of the  
19 parties. As the Probate Commissioner routinely states during his Friday calendars, there  
20 has to be an agreement by the parties to allow him to be the trier of fact.  
21

22 D.3 In this particular case, Jacqueline, upon the suggestion of her counsel, based  
23 on the urgency to have this matter resolved since both she and Kathryn have not been  
24 receiving substantial distributions to which they are entitled and rely on, has chosen to have  
25 this matter heard directly by Judge Sturman, which is her right.  
26

27 D.4 Given what is at stake with this matter, it is absolutely certain that no matter  
28

1 the ruling of the Probate Commissioner that there would be an appeal to Judge Sturman  
2 by the unsuccessful party. As such, given the urgency of the matter, and the fact that the  
3 determination of Commissioner Yamashita would be subject to *de novo* review, it is simply  
4 entirely inefficient to waste the resources of the parties and Commissioner Yamashita in a  
5 situation such as this. Furthermore, and most importantly, this is a matter that this Court  
6 can certainly decide on its own without the need to involve a special master.

8 D.5 As stated in NRCP 53(b), “*A reference to a master shall be the exception and*  
9 *not the rule.*” It is further stated in NRCP 53(b) that “*in actions to be tried without a jury,*  
10 *save in matters of account and of difficult computation of damages, a reference shall be*  
11 *made only upon a showing that some exceptional condition requires it.*”

13 D.6 There is nothing presented in this matter that creates an “*exceptional*  
14 *condition*”. To the contrary, this is a very simplistic case which can be boiled down to the  
15 following issue: After 33 years of a 65%/35% allocation of income derived from oil, gas, and  
16 mineral rights leases, Ms. Ahern has determined, without substantiation, that she is entitled  
17 to 100% of the income and is refusing to honor the long established, and correctly allocated,  
18 status quo. The sole question is whether or not this is appropriate and justified behavior  
19 on her part.  
20

22 D.7 As to Ms. Ahern’s reference to the new proposed local Rule 4.08, in no shape  
23 or form is the Petition for Declaratory Judgment a matter that has previously been raised  
24 in front of the Probate Commissioner. The matter in 2009 related solely to adding  
25 clarifying provisions to Trust No. 2 and this case has absolutely nothing to do with that  
26 matter. It is an entirely separate case from that previous matter. As explained, at the heart  
27 of this matter is the conduct and action of the trustee, Ms. Ahern, and Jacqueline seeking  
28



1 to get a declaratory judgment to restore the 33 years of precedent that was set long ago.

2 D.8 The new rule under 4.08 will be merely a codification of the long understood  
3 option that any party can opt out of having the Probate Commissioner be the trier of fact.  
4

5 **E. BRIEF RESPONSE TO ASSERTION OF BAD FAITH IN TEXAS PROCEEDING**

6 Ms. Ahern has spent a good deal of time and energy establishing that she was the  
7 adopted daughter of Mrs. Connell. This fact is not in dispute and never has been. The  
8 statements made in the Texas probate filing were merely a mistake that was made by  
9 Jacqueline's Texas counsel, Stubbeman, McRae, Sealy, Laughlin & Browder, Inc. Upon  
10 discovery of the mistake, Ms. Ahern's Texas counsel was appropriately notified of the  
11 mistake. This key fact is being left out of the discussion. Furthermore, what has occurred  
12 in a Texas proceeding is irrelevant to the fact that the actions and conduct of Ms. Ahern  
13 regarding the Trust are what this Court must analyze. If Jacqueline were to guess as to the  
14 significance of rehashing the mistake that was made and acknowledged, she would conclude  
15 that this is nothing but a diversionary tactic that Ms. Ahern is employing to take the focus  
16 off of Ms. Ahern's inappropriate and unjustified actions in suddenly refusing to honor the  
17 65%/35% split of income that has occurred for the last 33 years.  
18

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**F. CONCLUSION**

JACQUELINE M. MONTOYA hereby prays that this Court dismiss and deny Ms. Ahern's "Motion to Refer Contested Probate Matter to Master-Probate Commissioner Per EDCR 4.16" in its entirety and in turn hear and grant the relief sought in the "Petition for Declaratory Judgment Regarding Limited Interest of Trust Assets pursuant to NRS 30.040, NRS 153.031(1)(E), and NRS 164.033(1)(A)" in its entirety.

Respectfully submitted,

THE RUSHFORTH FIRM, LTD.



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JOSEPH J. POWELL  
State Bar No. 8875

**EXHIBIT A**

**EXHIBIT A**

**From:** Brian K. Steadman [<mailto:bsteadman@sdfnlaw.com>]  
**Sent:** Monday, July 27, 2009 3:48 PM  
**To:** David Straus; Montoya, Jacquie  
**Cc:** Mark Solomon; Debra L. Denithorne  
**Subject:** Petition - Connell

David and Jacquie,

Pursuant to Jacquie's request, I am attaching in PDF format a draft copy of the Petition for Reformation along with consents for both Jacquie and Kathy. Please review the same and let me know if you have any questions or comments.

If everything appears in order, we will obtain Jacquie's, Kathy's and Eleanor's signatures and file the petition. Once signed, I will set the Petition for hearing, and, as is typical in this type of case, the Probate Court will approve the Petition without requiring me to attend the hearing. Of course, although unlikely, Shriners Hospitals may object to the petition, in which case we will have to deal with the objection.

I will let you know when the hearing is scheduled and if the court is requiring that I attend. If no hearing is required, we will simply pick up an order allowing the reformation. If a hearing is required, you will not need to attend (although you may attend if you so choose).

As we discussed, the language accomplishes two things. First, upon Eleanor's death, the remaining assets in Trust No. 2 will be distributed outright to Jacquie and Kathy. If either Jacquie or Kathy is not living at that time, their share will pass to whomever they have named in what is commonly referred to as a "general power of appointment." In order to exercise the general power of appointment, Jacquie and Kathy will need to have their respective attorneys prepare a short document referring to the Trust, stating to whom they want the assets to be appointed. The intent here is to allow Jacquie and Kathy to appoint the assets to a revocable trust (or other trust/person), if they so chose. If they do not appoint their share of the assets, then their share will pass to their children/grandchildren ("issue"), who will receive it when they turn 21 years old.

As Jacquie and I discussed, including the general power of appointment and giving the shares outright upon Eleanor's death may have some federal (and possibly state) estate tax consequences. If, for example, Jacquie dies before Eleanor, then the value of Jacquie's  $\frac{1}{2}$  share of the "remainder" of Trust No. 2 will be included in her estate for federal estate tax purposes. If Eleanor dies before Jacquie, thus allowing Jacquie to receive her full share, then all of Jacquie's share will be included in her estate for federal estate tax purposes. This power may require Jacquie's heirs to pay additional estate taxes to the IRS if her estate is over the federal estate tax credit (currently 3.5 million, but is subject to change).

Since I am not working with Jacquie or Kathy on preparing their estate plans, I recommend that, once the court has reformed the Trust, they contact their respective attorneys to help them structure their estates taking into consideration the testamentary general power of appointment created in the Petition (although, if I am not mistaken, David you are preparing Jacquie's trust, correct?). I will also be preparing a short memorandum outlining the issue for Jacquie and Kathy to review and agree to.

Second, the Petition removes First National Bank of Nevada as the successor Trustee and names Jacquie first and Kathy second as successors. The basis for this change is that First National Bank of Nevada went under in the recent economic crisis, and thus no longer exists. By making the change now, you will be able to save time and money in petitioning the court at a later date to name a successor Trustee.

After your review, please let me know if you have any changes and/or corrections you would like made. If everything appears in order, I will proceed with coordinate obtaining the necessary signatures.

Sincerely,

Brian K. Steadman, Esq.  
Solomon Dwiggin & Freer, Ltd.  
Cheyenne West Professional Center  
9060 W. Cheyenne Avenue  
Las Vegas, NV 89129  
Direct Dial: 702.589.3510  
Telephone: 702.853.5483  
Facsimile: 702.853.5485  
Email: [bsteadman@sdfnvlaw.com](mailto:bsteadman@sdfnvlaw.com)  
Web: [www.sdfnvlaw.com](http://www.sdfnvlaw.com)

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CLERK OF THE COURT

**ERR**  
THE RUSHFORTH FIRM, LTD.  
JOSEPH J. POWELL  
State Bar No. 8875  
P. O. Box 371655  
Las Vegas, NV 89137-1655  
Telephone (702) 255-4552  
fax: (702) 255-4677  
e-mail: probate@rushforthfirm.com  
Attorneys for Jacqueline M. Montoya

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

In re the Matter of the

THE W.N. CONNELL and MARJORIE  
T. CONNELL LIVING TRUST, dated  
May 18, 1972

A non-testamentary trust.

Case No.: P-09-066425-T  
Department: 26 (Probate)

**ERRATA TO RESPONSE TO MOTION TO REFER CONTESTED PROBATE  
MATTER TO MASTER-PROBATE COMMISSIONER PER EDCR 4.16**

Date of Hearing: November 12, 2013  
Time of Hearing: 9:30 a. m.

COMES NOW, Petitioner, Jacqueline M. Montoya, by and through counsel, The  
Rushforth Firm, Ltd., and hereby submits this Erratum to Response to Motion to Refer  
Contested Probate Matter to Master-Probate Commissioner per EDCR 4.16 to correct page  
3, paragraph (1) as follows, based on the previous mistaken transposed percentages:

(1) *As to argument (1), the Trust expressly provides that there is  
no requirement to execute a deed separating the undivided property*

1 *interests between the two subtrusts. Furthermore, the Trust also expressly*  
2 *provides that the allocation of assets between the two subtrusts shall be*  
3 *based solely on how the allocation was done for purposes of the federal*  
4 *estate tax. The federal estate tax return allocated 35.507% of the Texas*  
5 *property and the associated rights to Trust No. 2, and 64.493% to Trust No.*  
6 *3, just as it has been distributed for the 33 years since such allocation.*  
7

8 Dated this 8<sup>th</sup> day of November, 2013.  
9

10 Respectfully submitted,

11 THE RUSHFORTH FIRM, LTD.

12   
13

14 \_\_\_\_\_  
15 JOSEPH J. POWELL  
16 State Bar No. 8875  
17  
18  
19  
20  
21  
22  
23  
24  
25  
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27  
28

  
CLERK OF THE COURT

**ROC**  
JOSEPH J. POWELL  
State Bar No. 8875  
THE RUSHFORTH FIRM, LTD.  
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Attorneys for Jacqueline M. Montoya

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

In the Matter of

**THE W.N. CONNELL and MARJORIE**  
**T. CONNELL LIVING TRUST**, dated  
May 18, 1972,

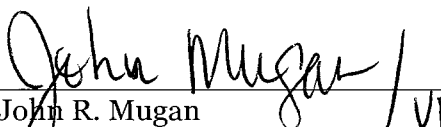
A non-testamentary trust.

Case No. P-09-066425-T  
Department: 26 (Probate)

**RECEIPT OF COPY**

A RECEIPT OF COPY of the **Response to Motion to Refer Contested Probate Matter to Master-Probate Commissioner per EDCR 4.16 and Errata to Response to Motion to Refer Contested Probate Matter to Master-Probate Commissioner per EDCR 4.16** is hereby acknowledged this 8<sup>th</sup> day of November, 2013.

**JEFFREY BURR, LTD.**

  
John R. Mugan / VP  
2600 Paseo Verde Parkway, #200  
Henderson, NV 89074

THE RUSHFORTH FIRM, LTD.  
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**RPLY**

JOHN R. MUGAN, Esquire  
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john@jeffreyburr.com  
MICHAEL D. LUM, Esquire  
Nevada Bar No. 12997  
michael@jeffreyburr.com  
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2600 Paseo Verde Parkway, Suite 200  
Henderson, NV 89074  
Telephone: (702) 433-4455  
Facsimile: (702) 451-1853  
*Attorneys for Trustee ELEANOR CONNELL HARTMAN AHERN*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

In the Matter of  
THE W. N. CONNELL AND MARJORIE T. CONNELL  
LIVING TRUST,  
Dated May 18, 1972

Case No. P-09-066425-T  
Dept. No. XXVI (26)  
Date of Hearing: November 12, 2013  
Time of Hearing: 9:30 a.m.

An Inter Vivos Irrevocable Trust.

**REPLY OF ELEANOR C. AHERN TO RESPONSE OF JACQUELINE M. MONTOYA TO  
MOTION TO REFER CONTESTED PROBATE MATTER TO MASTER-PROBATE  
COMMISSIONER PER EDCR 4.16**

COMES NOW ELEANOR C. AHERN, a/k/a ELEANOR CONNELL HARTMAN  
AHERN, as Trustee of THE W. N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST  
dated May 18, 1972, by and through her counsel of record, JOHN R. MUGAN, Esquire, and  
MICHAEL D. LUM, Esquire, of the law firm of JEFFREY BURR, LTD., and hereby submits her  
Reply To Response Of JACQUELINE M. MONTOYA To Motion To Refer Contested Probate  
Matter To Master-Probate Commissioner Per EDCR 4.16 (the "REPLY"), and in support thereof  
states:

**PRELIMINARY**

The matter presently before the Court is the Motion To Refer Contested Probate Matter To  
Master-Probate Commissioner Per EDCR 4.16 (the "MOTION") requesting that this case be

1 referred to the Probate Commissioner as a Master per EDCR 4.16. There are a number of  
2 substantive allegations, arguments and conclusions contained in the Response Of JACQUELINE M.  
3 MONTOYA To Motion To Refer Contested Probate Matter To Master-Probate Commissioner Per  
4 EDCR 4.16 (the "RESPONSE") which are not germane to the issue before the Court, namely the  
5 MOTION. In particular, arguments (1) and (2) contained in the RESPONSE of JACQUELINE M.  
6 MONTOYA go the merits of the case and not to the pending MOTION. This is not a hearing on the  
7 merits of the case but a hearing on whether the case should be referred to the Probate Commissioner  
8 as a Master per EDCR 4.16. Accordingly, although such substantive allegations, arguments and  
9 conclusions contained in the RESPONSE of JACQUELINE M. MONTOYA are disputed by  
10 ELEANOR, they will not be addressed in this REPLY and the REPLY will be limited to the issue  
11 of whether the case should be referred to the Probate Commissioner as a Master per EDCR 4.16 and  
12 argument (3) contained in the RESPONSE of JACQUELINE M. MONTOYA.  
13

14 REPLY

15 1. The RESPONSE alleges in part that the Petition To Assume Jurisdiction Over Trust;  
16 Confirm Trustee; And Construe And Reform Trust (the "PETITION") "... was not a contested  
17 matter in the slightest, as evidenced by the consents signed by Jacqueline and Kathryn." This is not  
18 the case. It is again noted that a hearing on the PETITION was scheduled before the Probate  
19 Commissioner on September 4, 2009 at 9:30 a.m.; notice of the date, time and place of hearing and  
20 a copy of the PETITION were mailed to JACQUELINE M. MONTOYA and KATHRYN A.  
21 BOUVIER on August 17, 2009; the PETITION came on for hearing before the Probate  
22 Commissioner on September 4, 2009; and an Order Assuming Jurisdiction Over Trust, Confirm  
23 Trustee, And For Construction Of And Reform Of Trust Instrument (the "ORDER") was entered  
24 and filed herein on said date.  
25  
26

27 As noted in the Certificate Of Mailing of the Notice attached to the MOTION as Exhibit G,  
28 notice of the date, time and place of hearing and a copy of the PETITION were also sent to the

1 Legal Department of the Shriners Hospitals for Children, an interested party. Shriners Hospitals for  
2 Children did not consent to the matter. Also Exhibit A to the RESPONSE of JACQUELINE M.  
3 MONTOYA, an email of BRIAN K. STEADMAN, Esquire, dated July 27, 2009, addressed and  
4 sent to DAVID STRAUS, Esquire, and to JACQUELINE M. MONTOYA, references the right and  
5 possibility of Shriners Hospitals to object to the PETITION.

6 Further, the ORDER was not a stipulated Order that was approved as to form and content by  
7 legal counsel and/or the interested parties.

8  
9 2. The RESPONSE further alleges in part that "... Jacqueline's Petition for  
10 Declaratory Judgment has absolutely no substantive connection to the reformation petition and is an  
11 entirely separate matter from any previous authorization granted by the Probate Court." This is  
12 clearly and certainly not the case. It is again noted that the PETITION contained certain  
13 representations and allegations that are relevant to "Jacqueline's Petition for Declaratory Judgment"  
14 (the DECLARATORY JUDGMENT PETITION"). Such representations and allegations are:

15 "18. As of the death of MARJORIE, **Trust No. 2 owned land and oil and gas shares**  
16 **in reserves and income located in Upton County, Texas** (the 'Oil Assets'). The Oil  
17 Assets have not been valued for some time, but are estimated to be worth approximately  
18 \$700,000." (emphasis added)

19 "19. **Pursuant to Article Fourth, which Article governs the administration of Trust**  
20 **No. 2, all income from the Oil Assets is to be paid to the Petitioner [ELEANOR] as**  
21 **the 'Residual Beneficiary' during her lifetime.**" (emphasis added)

22 The DECLARATORY JUDGMENT PETITION of JACQUELINE M. MONTOYA now  
23 seeks in part a determination that her mother, ELEANOR, both individually and as Trustee of the  
24 TRUST, "... is only entitled to a 35% proportion of all real property located in Upton County,  
25 Texas, including the income generated from gas, oil, and mineral leases relating to such Upton  
26 County, Texas real property..." and that JACQUELINE M. MONTOYA and KATHRYN A.  
27 BOUVIER or Trusts that they are beneficiaries of are entitled to 65% proportion of all real property  
28

1 located in Upton County, Texas, including the income generated from gas, oil, and mineral leases  
2 relating to such Upton County, Texas real property. The above set out representations and  
3 allegations of the PETITION are directly contrary to and contradictory of the relief sought in  
4 “Jacqueline’s Petition for Declaratory Judgment.”

5 JACQUELINE M. MONTOYA now claims in her RESPONSE that the above paragraphs  
6 18 and 19 “... were overlooked by Jacqueline and Kathryn...” It is important to again look at  
7 Exhibit A to the RESPONSE of JACQUELINE M. MONTOYA, the email of Mr. STEADMAN  
8 dated July 27, 2009 to DAVID STRAUS, Esquire. The email states that attached in PDF format is a  
9 draft of the PETITION, and requests Mr. STRAUS to review and send any questions or comments  
10 to Mr. STEADMAN. Apparently Mr. STRAUS had no problems with Paragraphs 18 and 19.  
11 Importantly, this email was also addressed and sent to JACQUELINE M. MONTOYA with the  
12 same instructions-to review and send any questions or comments to Mr. STEADMAN.  
13

14 Furthermore, as noted in the MOTION, attached as Exhibit 6 to the PETITION is the  
15 Consent To Petition To Assume Jurisdiction Over Trust; Confirm Trustee; And Construe And  
16 Reform Trust And Waiver Of Notice of JACQUELINE M. MONTOYA dated August 8, 2009. *See*  
17 copy of Consent attached as Exhibit E to the MOTION. (An identical Consent of KATHRYN A.  
18 BOUVIER was attached to the PETITION. *See* copy of Consent attached as Exhibit F to  
19 MOTION.) Both Consents contain the following relevant statements:  
20

21 “1. I am a **contingent** income beneficiary of the W. N. CONNELL AND MARJORIE T.  
22 CONNELL LIVING TRUST, dated May 18, 1972 (the ‘Trust’).” (emphasis added)

23 “2. **I have read the Petition** To Assume Jurisdiction Over Trust; Confirm Trustee; And  
24 Construe And Reform Trust (the ‘Petition’) and **believe it to be true and correct to the**  
25 **best of my knowledge.**” (emphasis added)

26 “3. **I hereby consent to the Petition and request that the Court enter an Order**  
27 **approving the Petition in its entirety.**” (emphasis added)

28 Again, the above paragraphs 1, 2 and 3 are directly contrary to and contradictory of the

1 relief sought in the DECLARATORY JUDGMENT PETITION of JACQUELINE M. MONTOYA.  
2 These Consents constitute an admission or declaration against interest by both JACQUELINE M.  
3 MONTOYA and KATHRYN A. BOUVIER regarding the DECLARATORY JUDGMENT  
4 PETITION of JACQUELINE M. MONTOYA

5 It is important to again look at Exhibit A to the RESPONSE of JACQUELINE M.  
6 MONTOYA, the email of Mr. STEADMAN dated July 27, 2009 addressed and sent to Mr.  
7 STRAUS and to JACQUELINE M. MONTOYA. The email states that attached in PDF format is  
8 also the Consents, and requests Mr. STRAUS and JACQUELINE M. MONTOYA to review and  
9 send any questions or comments to Mr. STEADMAN. Apparently Mr. STRAUS and  
10 JACQUELINE M. MONTOYA had no problems with Paragraphs 1, 2 and 3 noted above.

12 The RESPONSE of JACQUELINE M. MONTOYA states that the "... consents that were  
13 signed by Jacqueline and Kathryn were extremely generic and boilerplate in their provisions." One  
14 can see by examining the Consents and the PETITION in which they acknowledge they have read  
15 and believe to be true and correct that this is not the case. The Consents are very specific in stating  
16 that JACQUELINE M. MONTOYA (and KATHRYN A. BOUVIER) are "contingent income  
17 beneficiaries," in affirming the allegations contained in the PETITION that Trust No. 2 owned the  
18 land and oil and gas shares in reserves and income located in Upton County, Texas, and in stating  
19 that pursuant to Article Fourth, which Article governs the administration of Trust No. 2, all income  
20 from the Oil Assets is to be paid to ELEANOR as the 'Residual Beneficiary' during her lifetime.

22 The ORDER in part reformed and construed the TRUST agreement. The  
23 DECLARATORY JUDGMENT PETITION of JACQUELINE M. MONTOYA gives rise to the  
24 possible necessity of again construing the terms of the TRUST agreement and therefore there is a  
25 clear, substantive connection between the MOTION and the DECLARATORY JUDGMENT  
26 PETITION. As noted in the MOTION, it is obvious that the intent of W. N. CONNELL as  
27 expressed in the terms of the TRUST agreement was that his only child, ELEANOR, should have  
28

1 the right to receive an amount equal to all of income generated from the his sole and separate  
2 property that he brought into his second marriage, namely the Upton County, Texas, Oil rights, as  
3 long as ELEANOR lived. Accordingly, any power of appointment given to MARJORIE T.  
4 CONNELL was impliedly subject to the right of ELEANOR to receive an amount equal to all of  
5 income generated from the Upton County, Texas, Oil rights as long as ELEANOR lived. The  
6 Probate Commissioner previously construed and reformed the TRUST agreement in the prior  
7 matter, and is most familiar with the TRUST agreement and how it was previously construed and  
8 reformed. It makes perfect and logical sense then that the Probate Commissioner should continue to  
9 preside over this matter.  
10

11 Under proposed EDCR 4.08 and the long standing practice of the Probate Court that it  
12 embodies, this matter should be retained by the Probate Commissioner. However, it is undisputed  
13 that regardless of proposed EDCR 4.08, the Probate Judge may hear whichever contested matters  
14 the judge selects and may alone also refer contested matters pertaining to the probate calendar to a  
15 master appointed by the judge for hearing and report per existing EDCR 4.16. Also under NRC  
16 53, the Court in which any action is pending may appoint a special master such as the Probate  
17 Commissioner therein. Accordingly, under the facts and case history herein, the Probate Judge  
18 should refer the DECLARATORY JUDGMENT PETITION of JACQUELINE M. MONTOYA to  
19 the Probate Commissioner for hearing and report as the Probate Judge is allowed to do under EDCR  
20 4.16.  
21

22 WHEREFORE, ELEANOR C. AHERN, a/k/a ELEANOR CONNELL HARTMAN  
23 AHERN, as Trustee of THE W. N. CONNELL AND MARJORIE T. CONNELL LIVING  
24

25 ///

26 ///

27 ///

28 ///

1 TRUST dated May 18, 1972, requests the Court to enter an Order granting her Motion To Refer  
2 Contested Probate Matter To Master-Probate Commissioner Per EDCR 4.16.

3 DATED: November 11, 2013.

4 JEFFREY BURR, LTD.

5  
6 By: 

JOHN R. MUGAN, Esquire

Nevada Bar No. 10690

MICHAEL D. LUM, Esquire

Nevada Bar No. 12997

2600 Paseo Verde Parkway, Suite 200

Henderson, Nevada 89074

*Attorneys for Trustee ELEANOR C. AHERN, a/k/a*

*ELEANOR CONNELL HARTMAN AHERN*

**VERIFICATION**

STATE OF NEVADA            )  
  ): ss  
COUNTY OF CLARK        )

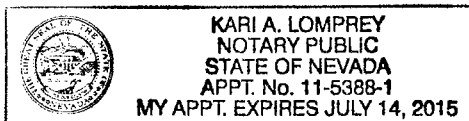
ELEANOR C. AHERN, a/k/a ELEANOR CONNELL HARTMAN AHERN, as Trustee of  
THE W. N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST dated May 18, 1972,  
being first duly sworn, deposes and says: That I am the Petitioner herein; that I have read the above  
and foregoing Reply Of ELEANOR C. AHERN To Response Of JACQUELINE M. MONTOYA  
To Motion To Refer Contested Probate Matter To Master-Probate Commissioner Per EDCR 4.16;  
that the same is true of my own knowledge, except for matters therein stated on information and  
belief, and as for those matters, I believe it to be true.

  
ELEANOR C. AHERN, a/k/a ELEANOR  
CONNELL HARTMAN AHERN

SUBSCRIBED and SWORN to before me

this 11 day of November, 2013.

  
NOTARY PUBLIC



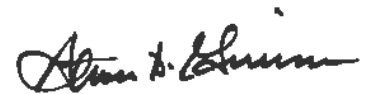


**CERTIFICATE OF MAILING**

I hereby certify that on the 11 day of November, 2013, I did email to JOSEPH J. POWELL, Esquire, as indicated below, and I did email and deposit in the U.S. Post Office at Las Vegas, Nevada, postage prepaid, a copy of the above and foregoing Reply To Response Of JACQUELINE M. MONTOYA To Motion To Refer Contested Probate Matter To Master-Probate Commissioner Per EDCR 4.16 to each person as indicated below, addressed as follows:

JOSEPH J. POWELL, Esquire  
The Rushforth Firm. Ltd.  
P.O. Box 371655  
Las Vegas, NV 89137-1655  
[probate@rushforthfirm.com](mailto:probate@rushforthfirm.com)

  
An employee of JEFFREY BURR, LTD.



CLERK OF THE COURT

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

In the matter of the Trust of:)

The W.N. Connell and Marjorie )  
T. Connell Living Trust, dated )  
May 18, 1972 )

CASE NO. P-09-066425  
DEPT. NO. XXVI

**Transcript of Proceedings**

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

**HEARING ON PETITION FOR DECLARATORY JUDGMENT REGARDING  
LIMITED INTEREST OF TRUST ASSETS PURSUANT TO NRS 30.040,  
NRS 153.031(1) (E) , AND NRS 164.033(1) (A)**

TUESDAY, NOVEMBER 12, 2013

APPEARANCES:

For the Petitioner,  
Eleanor Ahern:

JOHN MUGAN, ESQ.  
MICHAEL LUM, ESQ.  
JOSEPH POWELL, ESQ.

For Jaqueline Montoya:

RECORDED BY:  
TRANSCRIBED BY:

KERRY ESPARZA, COURT RECORDER  
KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript  
produced by transcription service.

1 TUESDAY, NOVEMBER 12, 2013 9:54 A.M.

2

3 THE COURT: Connell Living Trust, P066425. All  
4 right. Will everybody make their appearances?

5 MR. MUGAN: Good morning, Your Honor, John Mugan,  
6 10690, for Eleanor Connell Ahern.

7 MR. LUM: Good morning, Your Honor, Michael Lum,  
8 bar number 12997, co-counsel with Mr. Mugan.

9 MR. POWELL: Good morning, Your Honor, Joey Powell  
10 appearing on behalf of Jacqueline Montoya.

11 THE COURT: Okay. All right. So this is a  
12 petition for declaratory judgment regarding limited  
13 interest of the trust assets and then there was -- I'm not  
14 sure if it was technically noticed for today, but we see on  
15 here that there is something filed with respect to  
16 referring this back to the Commissioner, but I didn't know  
17 if it was opposed, I didn't know if there was anything else  
18 filed on that one because --

19 MR. POWELL: Yeah, we filed --

20 THE COURT: -- that was kind of confusing.

21 MR. POWELL: -- a response to that.

22 MR. MUGAN: I believe there -- I believe you filed  
23 a response Thursday and then we filed a reply yesterday in  
24 a moment of brilliance. I didn't realize yesterday was  
25 Veteran's Day when we got it Thursday and we filed it

1 electronically yesterday. I don't know if our runner put  
2 one in your drop box or not.

3 THE COURT: Yeah and it hasn't shown up yet in --

4 MR. MUGAN: I --that's my fault. I apologize. I  
5 --

6 THE COURT: Oh I see, yeah.

7 MR. MUGAN: Our office was open yesterday --

8 THE COURT: Right.

9 MR. MUGAN: -- and it didn't dawn on me that it  
10 was Veteran's Day.

11 THE COURT: Yeah, exactly. Exactly. I remember  
12 those days. Now that I'm a government employee, it's a  
13 little different.

14 So, with respect to that issue of referring it  
15 back to the Commissioner --

16 MR. MUGAN: I -- if I may, Your Honor? I think --

17 THE COURT: If it's --

18 MR. MUGAN: You know, I think it's a relatively  
19 simple issue. I think it needs to be handled first before  
20 we start getting into the substantive issues. We didn't  
21 address the substantive issues because we filed this motion  
22 and, quite frankly, after this motion, we're going to be  
23 filing a motion to dismiss on issue preclusion and some  
24 other facts, but on this motion, and looking at it, I think  
25 the saving grace is twofold.

1           Number one, I don't see any *Landreth* II problems.  
2 I don't think we need a super judge. So I don't think we  
3 have *Landreth* problems and I think the issue is solely in  
4 your discretion. I mean, you can do whatever you want.

5           Our whole point is -- and I practiced law back in  
6 the Midwest for 33 years and then came out here because all  
7 of our children and grandchildren are here and I've  
8 practiced here for 7 years and I never quite understood how  
9 Probate Court worked even though I appear there all the  
10 time and this luckily has hopefully clarified some of it.

11           If you look at the law -- the Rule 4.16 of the  
12 local rules, it basically says that you, as Probate Judge,  
13 may hear whatever contested matters you select and you also  
14 may refer any contested matters on the probate calendar to  
15 a Master appointed by you for hearing and report. And  
16 Nevada Rule of Civil Procedure 53 always gives the Court,  
17 you know, the power to appoint a Master in any case.

18           And then, granted it's not a rule, it's a proposed  
19 rule on the new rules that have been redone and proposed  
20 and they're a long way from being adopted, but Rule 4.08  
21 basically is a rule of the longstanding practice in Probate  
22 Court. If the Probate Commissioner hears something and you  
23 don't request that it go to the Probate Judge, then you  
24 live with the Probate Commissioner otherwise you're going  
25 to be doing forum shopping or the minute you get a bad

1 ruling, you want the Probate Judge and I know that's not  
2 the rule, but that's the practice as I understand it.

3           And in this situation, back in 2009, exact same  
4 case, case number, exact same trust, there was a petition  
5 brought in part to construe and reform the trust. Sat down  
6 for a hearing, and notice given, hearing date comes, an  
7 order entered, notice of entry sent out, and that was it  
8 and part of the order construed and reformed the trust.

9           Now we have 2013, one of the interested parties  
10 comes back and basically says that her mother is only  
11 entitled to 35 percent of the income from certain assets  
12 and we believe that even though we have no problem with you  
13 as a Judge, I've appeared before you a number of times, we  
14 believe that the Probate Commissioner is the one that's  
15 most familiar with it, has construed this and reformed it  
16 previously. We think it should go before him, that he  
17 should keep it. It would be just easier and simpler.

18           In the response Mr. Powell said it's not a -- it  
19 was not a contested matter. We searched and searched in  
20 Nevada law, there is no definition of a contested matter.  
21 I note -- like I said previously, this was all done on  
22 notice, etcetera, etcetera. The order wasn't stipulated  
23 to. There was another interested party: Shriners  
24 Hospital, and they were sent notice of the hearing. They  
25 were sent notice of the notice of entry. They never

1 stipulated. They never consented. There's an email  
2 attached to Mr. Powell's response, Exhibit A, where the  
3 attorney, Mr. Steadman, says that there is an interested  
4 party, Shriners, they have the right to object, etcetera,  
5 etcetera. They got notice of the hearing and also the  
6 notice of the entry.

7           So we believe it was a contested matter that was  
8 handled by the Probate Commissioner and now we're coming  
9 back four years later, same case, same trust, and we're  
10 asking for a declare -- a declaration that my client's only  
11 entitled to 35 percent of the income and we believe that  
12 there is a substantive and direct connection between the  
13 two matters and if you look at the pleadings in the 2009  
14 case, you look at the consent of the party in this case,  
15 Mr. Powell's client, there are allegations and consents  
16 that basically say trust number two has these assets and  
17 our client is a lifetime beneficiary.

18           And so, there is a direct connection, direct  
19 connection, and we believe that there may be issues of  
20 reforming and construing the trust because we believe if  
21 you look at the trust language and the facts and  
22 circumstances, it was obviously the intent of the decedent,  
23 W. N. Connell, that my client, his only child, be entitled  
24 to income from these Texas assets which were his sole and  
25 separate property that he brought into the marriage and he

1 wanted to make sure that she receive the income for as long  
2 as she lived and any alleged power of appointment that Mr.  
3 Powell's client is claiming that the second wife had was  
4 specifically subject to that life estate.

5           So I think there's reformation issues. There's  
6 construction issues. Like I said, you know, regardless of  
7 how you rule, we're going to be filing a motion to dismiss  
8 on issue preclusion, etcetera, but we believe that since  
9 the Probate Commissioner handled it previously, the  
10 longstanding practice, regardless of the proposed rules,  
11 you as Probate Judge, have the right at any time to refer  
12 the matter to a Master including the Probate Commissioner.

13           We just think under the circumstances it would be  
14 better if the Probate Commissioner handled it because he's  
15 familiar. I know you've got plenty of things to do. If  
16 you want the case, that's fine, too. We don't have any  
17 problem with it; we just think under this circumstance it  
18 would be better if the Probate Commissioner handled it.

19           THE COURT: Okay. So, I guess just trying to  
20 figure out procedurally where we are here, that motion is  
21 technically not on calendar. I guess it's been fully  
22 briefed although the only thing that shows up in Odyssey is  
23 the motion which, you know, we didn't see noticed. It  
24 didn't show up at least on our calendar from Master  
25 Calendar and an errata and I don't -- didn't see an



1 opposition or a reply. So, just, you know, for the record,  
2 I don't know -- Mr. Powell, do you want to be heard on the  
3 issue of whether this is really appropriately before this  
4 Court --

5 MR. POWELL: Yeah and --

6 THE COURT: -- and why you -- I guess, because --  
7 it's here because you requested that it be here. So, --

8 MR. POWELL: Yeah. In terms of the motion, their  
9 motion, you know, it's up to you. We've already briefed  
10 it. We've filed our response. Even though it had the  
11 heading of motion to reference back, it had substantive  
12 arguments. So I took it as though that was an objection to  
13 our petition. It was basically pleading in the alternative  
14 of here's our argument that we -- you know, we don't want -  
15 - we want this to go back to the Commissioner to hear these  
16 arguments.

17 THE COURT: And so then that really I guess gets  
18 us really to the issue here which is --

19 MR. POWELL: Yeah.

20 THE COURT: -- and I think that's what Mr. Mugan  
21 was --

22 MR. POWELL: Yeah.

23 THE COURT: -- referencing that in 2009, a certain  
24 action was taken, --

25 MR. POWELL: Yeah.

1 THE COURT: -- and now in 2013 there was a  
2 petition for declaratory relief.

3 MR. POWELL: Yeah.

4 THE COURT: So --

5 MR. POWELL: We have that petition because 33  
6 years of precedent and status quo is now being changed and  
7 that's the issue before us is there's -- there was --  
8 again, 33 years of a 65/35 split of the income from oil,  
9 gas, and mineral rights in Texas and suddenly in basically  
10 June/July, Ms. Ahern decides: No, I'm entitled to 100  
11 percent. That 65/35 that I've been living with for 33  
12 years, I don't want to abide by that anymore. No logic, no  
13 reason, nothing, just I'm keeping 100 percent now. Okay?  
14 Well, that changes the status quo and --

15 THE COURT: Okay. So the issue is -- because I  
16 think kind of the argument they were arguing here is that  
17 if --

18 MR. POWELL: Yeah.

19 THE COURT: -- you're going to oppose this order  
20 reforming the trust back in 2009, --

21 MR. POWELL: Yeah.

22 THE COURT: -- the process should have been  
23 followed in 2009 to do that; there was no such process.  
24 But the point is she didn't do anything until 2013.

25 MR. POWELL: Well, no, actually the 2009 had no

1 effect on the 65/35 split.

2 THE COURT: Okay.

3 MR. POWELL: That -- the whole point of what '09  
4 did was to add provisions and that was the key. It added  
5 provisions to the trust to basically say: These are the  
6 remainder beneficiaries after Ms. Ahern's death which  
7 wasn't first spelled out. It was easily inferred that it  
8 would go to her issue, it was just spelled out because it  
9 wasn't addressed. So that was the point of the reformation  
10 was to say we need to -- we should probably just handle  
11 this now so that there's no issues that arise later.

12 THE COURT: So -- and so there's nothing that  
13 happened in 2009 that would have prompted any kind of an  
14 appeal? You're not like --

15 MR. POWELL: No.

16 THE COURT: -- it's not like [indiscernible] --

17 MR. POWELL: There was nothing wrong with it.

18 THE COURT: -- to do a late appeal of that earlier  
19 --

20 MR. POWELL: Exactly. None of that is being  
21 appealed at all and that's why a consent was signed to say:  
22 We're fine with it, spelling out the fact that my sister  
23 and I are the remainder beneficiaries of trust number two.  
24 No problem.

25 I mean, that -- it basically was to their benefit

1 to have that go into effect because basically it's spelled  
2 out.

3 Not -- again, it was -- if you read the trust, the  
4 language clearly inferred that that was the normal way that  
5 it would go, it just -- it didn't expressly state it and  
6 that was the issue of the reformation.

7 THE COURT: If there -- Mr. Mugan's point that  
8 traditionally if a matter starts out with the Probate  
9 Commissioner, it stays with the Probate Commissioner unless  
10 you think some sort of -- you know, he has no authority to  
11 hear a jury trial for example. So that's -- it's got to  
12 come up here. And the way it's always been handled, as he  
13 pointed out, you know, it hasn't ever been really clear how  
14 we're going to handle probate. It's just sort of been  
15 grafted on as a --

16 MR. POWELL: Yeah.

17 THE COURT: -- you know, to a highbred of what  
18 part of District Court it was going to be and no real clear  
19 rule.

20 So I guess the point is what you're seeking now is  
21 instead of filing a new action, there's -- you don't file a  
22 new action, it stays under the old action, --

23 MR. POWELL: Yeah.

24 THE COURT: -- which -- like probate cases never  
25 close.

1 MR. POWELL: Right.

2 THE COURT: They are never --

3 MR. POWELL: Not --

4 THE COURT: -- over.

5 MR. POWELL: -- in a trust situation unless you

6 affirmatively --

7 THE COURT: Right.

8 MR. POWELL: -- request that jurisdiction be taken

9 off and then, in that case, you've got to get jurisdiction

10 back. But, absent that, yeah, it just continues forever

11 until --

12 THE COURT: We've got a case from --

13 MR. POWELL: -- somebody --

14 THE COURT: -- 1972.

15 MR. POWELL: Yeah.

16 THE COURT: So, I mean, --

17 MR. POWELL: Yeah.

18 THE COURT: -- I -- it -- they just never end.

19 MR. POWELL: They never end unless you do

20 something affirmative --

21 THE COURT: Right.

22 MR. POWELL: -- to get rid of jurisdiction.

23 THE COURT: Right. So you had to file under the

24 old case number because that jurisdiction --

25 MR. POWELL: That --

1 THE COURT: The Court's got jurisdiction there.  
2 So fine.

3 MR. POWELL: Jurisdiction still exists. Yep.

4 THE COURT: Okay.

5 MR. POWELL: Yep.

6 THE COURT: So, now it gets to the next point --

7 MR. POWELL: Yep.

8 THE COURT: -- which is who is really the most  
9 appropriate person to hear the case?

10 MR. POWELL: Right and --

11 THE COURT: I mean, because that really seemed  
12 like that was --

13 MR. POWELL: -- basically it's not a knock on  
14 Commissioner Yamashita, it's really a situation of it's an  
15 urgent, pressing matter that we get a determination now and  
16 it's something that we feel that you're clearly capable of  
17 handling. There's not -- there's no special expertise  
18 which, you know, obviously you have -- you can do as you  
19 choose, but there's no special expertise that's required  
20 that Commissioner Yamashita would bring to this that you  
21 otherwise don't possess.

22 So, really, it's a matter of efficiency and  
23 urgency because we need an order, not just a report and  
24 recommendation, as soon as possible because we've got big  
25 money at stake here, we have reliance on these

1 distributions, and as Mr. Goodsell pointed out with his  
2 case, it's a situation that you can be a war of attrition  
3 because these monies are being choked off that they have  
4 been relying on, my client and her sister, basically for  
5 the last four years when they stepped into the shoes then  
6 of their grandmother, Marjorie, who had for the previous 29  
7 years been receiving 65 percent of oil, mineral, and gas  
8 income.

9           So, --

10          THE COURT: Okay. So that --

11          MR. POWELL: -- the whole point is --

12          THE COURT: The question is --

13          MR. POWELL: Yeah.

14          THE COURT: -- you know, is this -- I can't think  
15 of any other way to frame it and I don't know if Mr. Mugan  
16 necessarily accused you of this, but is this forum  
17 shopping? Because that's what I want to make real clear.

18          MR. POWELL: Yeah.

19          THE COURT: You're not seeking to --

20          MR. POWELL: Not -- no.

21          THE COURT: -- reform anything that Commissioner  
22 Yamashita has previously done?

23          MR. POWELL: No.

24          THE COURT: It's just a question: Who is more  
25 perfect to hear this? So what are you looking for because

1 --

2 MR. POWELL: We're looking for --

3 THE COURT: -- if you're looking for it to be  
4 decided on just, you know, the pleadings or is this  
5 something where you need some discovery and an evidentiary  
6 hearing?

7 MR. POWELL: I think we're good with the pleadings  
8 because --

9 THE COURT: Because it's a petition for  
10 declaratory relief.

11 MR. POWELL: I think we're good with the  
12 pleadings. We can't -- we -- there's nothing further that  
13 I can submit to you in terms of testimony or anything else  
14 other than to -- and I don't think this is being contested  
15 and if it is, then I'm super surprised because we have tax  
16 returns all the way up through 2012 showing a 65/35 split.  
17 It's been that way for the last 33 years; only over the  
18 summer has this now changed. So, the issue is pretty black  
19 and white there.

20 The other thing is on the one tax return we have  
21 which we can't locate the Form 706. The IRS has been  
22 asked. They don't have a copy of it. It was prepared  
23 here. The preparer doesn't have a copy of it and, I mean,  
24 how can you really expect it? It was a -- from '79/'80.  
25 So, I mean, that's going back a long time to try to get



1 form way back before we had electronic -- saving documents  
2 through electronic means. So, we just don't have it.

3 But going back to that return that was filed, it  
4 shows a 65/35 split. That's the way, again, it's gone  
5 since 1980 when Mr. Mugan's client became a co-trustee of  
6 the trust. So we've got the precedent. There's nothing  
7 more than we can declare.

8 THE COURT: What was going on in Texas? That was  
9 another point where I wasn't quite clear if --

10 MR. POWELL: There was a -- oh --

11 THE COURT: -- there was maybe a -- and, like I  
12 said, I don't want to accuse anybody of forum shopping, --

13 MR. POWELL: Sure. Sure.

14 THE COURT: -- but it seemed like there was a  
15 concern about that that might be some forum shopping.

16 MR. POWELL: Yeah, I don't know if you could call  
17 it forum shopping. The issue there was the fact that there  
18 -- it was Texas property and it's --

19 THE COURT: Right.

20 MR. POWELL: -- related to Texas real estate.

21 THE COURT: Right.

22 MR. POWELL: So I think that was the issue there  
23 is covering all bases because I -- it's basically a  
24 situation where, again, you have 33 years of the status quo  
25 and then all of a sudden the plug is pulled and then the

1 question is: Wait a second, how do we put the plug back  
2 in? And so, that was part of it was basically I think just  
3 simply getting a declaratory ruling there on the issue.

4           There's -- the accusations, you know, -- and it  
5 upsets me when there's not full disclosure given. There  
6 was a mistake made in the Texas filings and immediately  
7 upon the Texas attorney realizing the mistake, it was --  
8 there was a phone call made, it was corrected.

9           So it's a half-truth to say: Well, you tried --  
10 in bad faith, you tried to avert this and done this.  
11 Nobody has ever made any assertion that Ms. Ahern is not  
12 the adopted daughter of Marjorie Connell, not -- that's not  
13 even an issue. They spent time briefing the issue somehow  
14 trying to establish that. It's not a -- it's a nonissue.

15           The Texas return -- the Texas filing was simply a  
16 mistake. Texas counsel didn't realize it. Upon being  
17 notified he made a mistake called opposing counsel and said  
18 I made a mistake. You know, your client is clearly this.  
19 That was my error as the drafting attorney and that's it.  
20 It wasn't in bad faith. Nobody is looking to hoodwink  
21 anybody or do anything like that.

22           The situation that we have here is we need an  
23 order and so --

24           THE COURT: Well but I guess my question --

25           MR. POWELL: -- going back to --

1 THE COURT: -- is it you're --

2 MR. POWELL: Yeah.

3 THE COURT: -- trying to get a different order  
4 here from --

5 MR. POWELL: No.

6 THE COURT: -- what you're getting out of Texas --

7 MR. POWELL: No.

8 THE COURT: -- because what is the Texas --

9 MR. POWELL: Yeah.

10 THE COURT: -- going to be asked to do?

11 MR. POWELL: Yeah. No, I'm glad to kind of bring  
12 you up to speed on that.

13 Basically, the Texas proceeding has essentially  
14 been simply stayed. Ms. Ahern has Texas counsel. They had  
15 a mediation there. It was unsuccessful. The last report I  
16 got is basically Texas is just kicking the can down  
17 basically saying: No, really, Nevada should probably be  
18 deciding this because that's where the trust has  
19 jurisdiction.

20 So, my understanding is that whole proceeding is  
21 just simply stayed pending this outcome.

22 THE COURT: Okay. So, I guess then what are you  
23 looking for? Are you looking --

24 MR. POWELL: We're looking for a declaratory --

25 THE COURT: I guess --

1 MR. POWELL: Yeah.

2 THE COURT: -- my question is: What's the  
3 procedure that you think would be followed and who is more  
4 appropriately, I guess, set up to hear that? If it's a  
5 matter of having a hearing and putting this evidence on,  
6 because, I mean, when you're seeking declaratory relief, it  
7 seems to me that -- I mean, you can get a declaratory  
8 judgment basically on the pleadings, but I think that  
9 they've got -- you know, their initial response was: We  
10 think this has to go back to the Commissioner because there  
11 is -- this has already been determined and I understand  
12 your position is that that order didn't really determine  
13 anything that effects --

14 MR. POWELL: Yeah.

15 THE COURT: -- this issue that you've got going on  
16 right now, --

17 MR. POWELL: Yeah.

18 THE COURT: -- but they've indicated that their  
19 next step is they want to file a motion to dismiss this  
20 because they think that it does. So, --

21 MR. POWELL: Which I think is something --

22 THE COURT: -- logistically, what's the schedule?

23 MR. POWELL: Which I think is something that you  
24 can basically handle right now just by looking at the  
25 pleading that the petition that was filed, nowhere in that

1 petition is there any declaration of basically asking for -  
2 - them, in their prayer, asking for declaration that Ms.  
3 Ahern has 100 percent interest in that income. It's solely  
4 a reformation petition saying: We want to add provisions  
5 so that it's clear who the remainder beneficiaries of trust  
6 number two are and that's another key function.

7           The whole thing was -- this was -- and it gets a  
8 little confusing because they use the term trust one, trust  
9 two, trust three. Trust one was essentially just when both  
10 of the settlers were living, they refer to that as trust  
11 one, basically an undivided trust. Then at the first  
12 death, which was Mr. Connell, they did a division of the  
13 trust number two, trust number three. Trust number three  
14 was the survivor's trust along with a marital trust because  
15 back at that time there was no such thing as what we do now  
16 with the martial trust as being the third sub trust. So,  
17 it basically -- whatever was determined to me the marital  
18 monies for purposes of tax deferment went into the  
19 survivor's trust. Trust number two was essentially the  
20 decedent's trust.

21           So, when they were reforming the trust, the  
22 provisions that they were adding to were dealing with trust  
23 number two. That's another issue as well and what they did  
24 is basically -- and, again, I'm not saying anything that's  
25 not in the pleadings and then in the accompanying order.

1 All they sought was to act -- basically what I would say  
2 clarification provisions saying: At the death of Ms. Ahern  
3 that Jacqueline Montoya and her sister, Kathryn, would be  
4 the residuary beneficiaries of that trust. It also  
5 basically prescribed the way that that trust would be  
6 administered for Jacqueline and Kathryn, and then it also  
7 prescribed as well that -- who would be the successor  
8 trustees of trust number two upon Ms. Ahern's death.

9           Currently Ms. Ahern is the only trustee of trust  
10 number two. So, that's what that '09 petition did. It had  
11 nothing to do with a declaration of rights saying: Ms.  
12 Ahern now owns 100 percent of the income. My client and  
13 her sister would have never agreed to that. That wasn't  
14 even remotely in the mindset of why they would agree to  
15 that. It wasn't even -- it wasn't being asked.

16           And so, in my response to their motion, again,  
17 relying entirely on a consent? You're consenting to the  
18 prayer. The prayer is the substance of the petition. Any  
19 other facts that get thrown in are irrelevant. You're --  
20 again, the substance of the petition is the prayer. We all  
21 know that. The only thing that can be in the order is  
22 what's asked for in the relief, in the prayer.

23           So, they had no reason to object to that. That's  
24 why they signed consents. Yeah, fine, add in the  
25 clarifying language. We want it. It's not detrimental to

1 them.

2           And to the assertion, again, that contested, we're  
3 on two different wavelengths then in terms of what  
4 contested means because the whole point of the approved  
5 list in Probate Court is there is not an objection filed,  
6 therefore -- meaning there is no contest to what's being  
7 asked for and the fact that you have to give notice and a  
8 notice of a hearing, well, you have to do that for every  
9 petition, and the fact that you don't necessarily secure  
10 consents from anybody, that doesn't defer it from being put  
11 on the approved list, which this was. There was no oral  
12 argument at this hearing. It was -- the order got rubber  
13 stamped. So, that's --

14           THE COURT: Well I --

15           MR. POWELL: -- my point is this is not a --

16           THE COURT: But I guess the --

17           MR. POWELL: -- contested matter.

18           THE COURT: -- point, as I understood it, the  
19 point that was being made about shouldn't this be heard by  
20 the Commissioner is isn't he the more perfect person to  
21 make that determination of when I entered that order in  
22 2009 granting this reforming of the trust it was or was not  
23 addressing an ultimate issue here and I understand your  
24 point that you don't want to go through that process and  
25 then have to object to that report and recommendation and

1 then come up here, but it seems like that's kind of the  
2 suggested method --

3 MR. POWELL: Well, --

4 THE COURT: -- that Mr. Mugan is --

5 MR. POWELL: Yeah, and I'm not sure why.

6 THE COURT: -- seeking.

7 MR. POWELL: I don't really understand. They are  
8 two separate things. It's apples and oranges what's going  
9 on here and so I don't think there's any need to clarify  
10 because the order itself doesn't reference any declaration.  
11 If you read the order, it doesn't reference any declaration  
12 about: Oh Ms. Ahern is 100 percent -- has 100 percent  
13 interest in these oil, mineral, and gas rights. It doesn't  
14 say that. The only thing it says -- and that's, again, if  
15 the Commissioner looks at the order, there's --

16 THE COURT: And certainly it --

17 MR. POWELL: -- nothing you can ever infer from  
18 that.

19 THE COURT: -- would seem that if she had thought  
20 that it did, she would have taken that action in 2009.

21 MR. POWELL: Exactly. Exactly.

22 MR. MUGAN: Your Honor, if it --

23 THE COURT: That's a good point. Thanks.

24 MR. MUGAN: I don't mean to interrupt Mr. Powell,  
25 but --



1 MR. POWELL: But so --

2 MR. MUGAN: This is a really important issue,  
3 really important.

4 THE COURT: Okay.

5 MR. MUGAN: And you look at the petition that was  
6 filed in 2009 and here's what it says in part:

7 Trust number two owned land and oil and gas shares  
8 in reserve and income located in Upton County, excuse  
9 me, Texas.

10 That's what we're talking about in this  
11 declaration, petition today, and paragraph 19 of that  
12 petition in 2009 says:

13 Pursuant to Article 4<sup>th</sup>, and they're referring to  
14 Article 4<sup>th</sup> of the Trust Agreement, which article  
15 governs the administration of trust number two, all  
16 income from the oil assets is to be paid to the  
17 petitioner, and the petitioner is my client, as the  
18 residual beneficiary during her lifetime.

19 I agree it's black and white. It's already been  
20 decided and that was stated in the 2009 petition and Mr.  
21 Powell and his clients say: Doesn't have anything to do  
22 with it. Doesn't have anything to do with it. It's got  
23 everything to do with it.

24 And you look at their consent that his client  
25 signed, she not only consents to it, she makes an

1 affirmative statement and says:

2 I am a contingent income beneficiary of the trust.  
3 I have read the petition and believe it to be true and  
4 correct to the best of my knowledge. I hereby consent  
5 to the petition and request that the Court enter an  
6 order approving the petition in its entirety.

7 I don't know how the two of them aren't related.  
8 That's what we're arguing about in his declaratory  
9 petition. My client's not entitled to all of the income.  
10 The order that was entered in 2009, it's based on the  
11 petition with affirmative allegations which his client  
12 consented to and she even admits she's the contingent  
13 income beneficiary.

14 So, how you can say they're completely separate  
15 and distinct and how this shouldn't be handled by the  
16 Probate Commissioner, at least the motion to dismiss since  
17 he's the one who handled the previous matter, I -- in my  
18 limited intellect, I don't see it. I think they're  
19 intricately -- there's a substantive, intricate  
20 relationship between that action and what was done and pled  
21 in there and what they're asking for now.

22 And, you know, I don't want to get into  
23 substantive matters because basically we're just asking for  
24 a motion here. We really didn't address the substantive  
25 matters --

1 THE COURT: Well but see [indiscernible] me. The  
2 motion that you filed isn't technically on my calendar  
3 today.

4 MR. MUGAN: Right. Right. And I think he said  
5 that it was all right and we can go ahead with it unless I  
6 misunderstood him.

7 MR. POWELL: No, let's do it. Let's do it. It's  
8 fine. I briefed it. I'm --

9 THE COURT: Okay.

10 MR. POWELL: -- fine with it. So let's go.

11 THE COURT: Okay. But I haven't seen your brief.

12 MR. POWELL: My response?

13 THE COURT: Yeah. Haven't seen it.

14 MR. POWELL: Okay.

15 THE COURT: So, you know, that's my problem is  
16 that --

17 MR. POWELL: Yeah.

18 THE COURT: -- we've got this fugitive motion out  
19 there that was filed and not calendared, but if the parties  
20 feel that it's appropriate to address it, then I guess we  
21 can address it and -- because then I think we get down then  
22 to the next point which is it sounds to me that even if  
23 this Court keeps jurisdiction, that Mr. Mugan wishes to  
24 file his motion to dismiss, that -- and it seems to me that  
25 the declaratory judgment action then -- it's kind of a

1 countermotion almost to it that you're seeking -- your  
2 petitioner seeks declaratory judgment and their opposition  
3 is: No, we oppose that and our countermotion is that there  
4 is -- there's already been a ruling on this essentially by  
5 the Commissioner, despite the fact that she didn't act on  
6 it for four years, there's a ruling from the Commissioner  
7 in 2009 that governs this, that she's acting under the  
8 authority of. So, this should have already been decided.

9 MR. POWELL: Which I would have no problem with  
10 except let's read the order.

11 THE COURT: Right. Okay.

12 MR. POWELL: The order doesn't correct any of  
13 that.

14 THE COURT: I'm not --

15 MR. POWELL: Yeah.

16 THE COURT: I don't really want to get to the  
17 merits, but I'm trying to figure out the procedure what we  
18 are trying --

19 MR. POWELL: Yeah.

20 THE COURT: -- to do here today.

21 MR. MUGAN: Excuse me, Your Honor, but maybe the  
22 answer is to kick it out two weeks, give the Court an  
23 opportunity to read the pleadings and then we come back and  
24 try and answer whatever questions you have. If that -- if  
25 that's agreeable to Mr. Powell and you, I'm willing to do

1 whatever the Court wants to do.

2 THE COURT: Okay. Well because see -- and I agree  
3 that with the -- the first thing to be decided is who's  
4 going to hear it. Is this something that's more  
5 appropriate for this Court to hear? Is it more appropriate  
6 for this to be referred to the Commissioner to hear and  
7 then seek this -- you know, appeal any report and  
8 recommendations?

9 Mr. Powell's clients are -- you know, position is:  
10 We want this to go faster. We don't want the additional  
11 built-in delay of getting a report and recommendation and  
12 then doing an appeal on that.

13 MR. POWELL: Yes.

14 THE COURT: We want this all decided now. We  
15 think the Court can hear all of it. Both the question of  
16 was this in fact previously ruled on by the Commissioner,  
17 that's -- basically, that's the opposition to the petition  
18 of declaratory relief is: No, you can't have this ruling  
19 that you're seeking because it's already ruled on by the  
20 Commissioner and you've lost it or you consented to the  
21 action that she's taking now, whatever the opposition is.  
22 It sort of seems to me that procedurally that's where we  
23 are with it that --

24 MR. MUGAN: Well, yeah, I didn't intend to do  
25 that. What I intended to do is take it one step at a time.

1           I think the first question is who is this matter  
2 going to be heard by: Your Honor or the Probate  
3 Commissioner? And so that's the issue that I was trying to  
4 get decided and then whoever it is going to be, whether  
5 it's you or Commissioner Yamashita, then we're going to  
6 file our motion to dismiss based on issue preclusion.

7           I think the first step is to decide whether this  
8 Court or the Probate Commissioner is going to handle this  
9 matter and then the next step is for me to either file the  
10 motion to dismiss or an opposition.

11           THE COURT: Okay. All right. Well, so then if  
12 you're prepared to have this unfiled motion -- or unnoticed  
13 motion ruled on now, I appreciate the point, Mr. Mugan,  
14 that practice has been that if the Commissioner hears  
15 something, then it's going to -- he's going to continue the  
16 hearing. You know, whether he actually took action on  
17 this, he signed an order on something that was unopposed  
18 and consented to. I think ultimately whatever he would rule  
19 on issue preclusion would be appealed up here anyway. The  
20 request has been made by these petitioners that we skip  
21 that step and just come here. So I'll grant the  
22 petitioner's request and I'll hear the -- I'll keep  
23 jurisdiction over this and we'll keep this motion here.  
24 So, respectfully, deny the motion to remand back to the  
25 Commissioner.

1           Now we have this question of this petition for  
2       declaratory relief --

3           MR. MUGAN:   If I may --

4           THE COURT:   Yeah.

5           MR. MUGAN:   Pardon me, Your Honor, if I may say  
6       one thing?

7           THE COURT:   Okay.

8           MR. MUGAN:   I just want to clarify the record.  If  
9       part of your ruling is based on the fact that it was on the  
10      approved list and rubber stamped, I don't think there's  
11      ever been any showing of that.  In fact, I don't think that  
12      was an allegation in his response on that.  This, today, is  
13      the first time I've heard that.  So, I just --

14          MR. POWELL:   It was --

15          MR. MUGAN:   -- want to clarify the record.

16          MR. POWELL:   It was addressed.  I can't say with  
17      100 percent certainty because I haven't located a  
18      transcript of that, but I can say with nearly 99.99 percent  
19      certainty it would have been on the approved list and there  
20      would not have been additional oral argument and that  
21      implication is addressed in my response.  So it's not the  
22      first time I'm raising it here.

23          MR. MUGAN:   I just wanted the record to reflect  
24      that, Your Honor.

25          THE COURT:   It's likely that it wasn't because

1 there's no minutes.

2 THE CLERK: There are minutes. If you go ahead  
3 and click on it, it's just it is so old, it didn't locate  
4 it.

5 THE COURT: I didn't see minutes.

6 THE CLERK: Here's the -- you're clicking too far.

7 THE COURT: Oh.

8 THE CLERK: They just didn't go over because --

9 THE CLERK: Yeah, it says: Matter being on the  
10 approved list there being no objection.

11 MR. POWELL: Yeah.

12 THE COURT: So it was on the approved list.

13 MR. POWELL: It was on the approved list, yeah.

14 THE COURT: Okay.

15 MR. MUGAN: Very good.

16 THE COURT: All right. So, anyway I don't see any  
17 reason to send it back to him and then -- because the  
18 request is of the petitioner's that it be heard here and we  
19 skip that step. Okay, fine.

20 So having -- moving on then, I think though, Mr.  
21 Powell, that the point is, and I don't know, Mr. Mugan,  
22 what -- I appreciate your position being that we have to  
23 take this step by step. First you have to see, you know,  
24 our -- we have the right to oppose this and our opposition  
25 is going to be that this has already been decided. So



1 however you want to present that because the -- otherwise  
2 it's a petition for declaratory relief which is you need to  
3 oppose it or file some -- whatever -- and I guess my  
4 question is: Do you view this as something that requires -  
5 - that can all be done on affidavits because it's strictly  
6 a legal issue? Do you need testimony?

7 MR. MUGAN: No, I think it's going to need  
8 testimony if we -- you know, if we get to that point. I  
9 really think there's going to need to be some evidence.  
10 There's two sides --

11 THE COURT: Okay.

12 MR. MUGAN: -- to every story and you need to hear  
13 her side of the story.

14 THE COURT: Okay.

15 MR. MUGAN: My client's side.

16 THE COURT: All right. So, is it something that  
17 requires any kind of -- is it more like a preliminary  
18 matter like an injunction hearing where you don't need  
19 discovery first or are you going to need discovery? This  
20 is just what --

21 MR. MUGAN: Oh I --

22 THE COURT: -- I'm trying to just figure out is  
23 how we schedule this and set this up procedurally to go  
24 forward.

25 MR. MUGAN: I think we're going to need some

1 discovery.

2 THE COURT: Okay. Mr. Powell.

3 MR. POWELL: No. I don't need any. I mean, it --  
4 Mr. Mugan was just saying a moment ago that it's black and  
5 white, it's already been decided, and now we're saying it's  
6 not. So, --

7 THE COURT: Right.

8 MR. POWELL: -- I think --

9 THE COURT: So I guess the --

10 MR. POWELL: We don't need discovery on our end.  
11 There's nothing more we can offer to establish that 33  
12 years of precedent has been established. There's nothing  
13 more that we can go by.

14 If that's what we're intending to raise that issue  
15 that it was done improperly back then, I don't know what  
16 more we can go to than saying that this is the way that  
17 it's been done and, really, at the basis of what we're  
18 asking for is if they want to now dispute that 65/35, let -  
19 - what we would ask is put -- let's go back to the status  
20 quo and then we'll haggle it out from there, but it's not  
21 fair to have my clients, my client choked off from  
22 receiving what they've been -- what she's been getting for  
23 the last four years, her grandmother has been getting for  
24 the previous 29 years and that's the issue.

25 I'm not sure how the delay benefits anybody. To

1 me, this is something you want declared now. Both sides  
2 apparently feel it's black and white. So let's go. I  
3 mean, again, there's nothing more we can offer than what  
4 we've already established. I can give -- we can provide  
5 tax returns. Those are just pleadings. There's no  
6 testimony that can be offered in that regard.

7           It's precedent. It's been 33 years of this split.  
8 If that's -- if that issue -- I don't think that issue is  
9 in dispute. If the issue in dispute is: Well, it  
10 shouldn't have been that way, okay, fine. Then that's up  
11 to them now to change what's been, but you can't just,  
12 again, pull the plug and then go: No, I'm not putting it  
13 back in. It doesn't work that way and --

14           THE COURT: Okay. So you're seeking some sort of  
15 --

16           MR. MUGAN: Your Honor, --

17           MR. POWELL: That's why I'm seeking the  
18 declaratory --

19           THE COURT: -- preliminary --

20           MR. POWELL: -- judgment is so that we can go back  
21 to the trustee -- trustee, again, not beneficiary, the  
22 trustee and say: This must be honored. It's a 65/35  
23 split. What --

24           THE COURT: Okay.

25           MR. MUGAN: The --

1           THE COURT: So you're looking for a preliminary  
2 relief which is to maintain the status quo --

3           MR. POWELL: Exactly.

4           THE COURT: -- pending a determination on the  
5 underlying issue?

6           MR. POWELL: Exactly. Exactly.

7           THE COURT: Okay. Got it. Thanks.

8           MR. MUGAN: Your Honor, it's black and white I  
9 think in my motion to dismiss, that issue preclusion.  
10 That's what I mean when it's black and white. If they get  
11 over that hurdle, then I think there's evidentiary issues.

12           You know, he keeps talking about urgency and  
13 returning to the status quo, his client -- and if you look  
14 at their petition, they state that my client is entitled to  
15 at least 35 percent, at least 35 percent -- no argument  
16 about that.

17           MR. POWELL: No argument about that.

18           MR. MUGAN: No argument.

19           MR. POWELL: Nope. No.

20           THE COURT: Yeah.

21           MR. MUGAN: Her Texas attorney sends a letter to  
22 all of the oil companies --

23           THE COURT: When you say her in Texas, you mean  
24 the petitioners?

25           MR. MUGAN: She had -- the petitioner. Not Mr.

1 Powell, but her Texas attorney sends a letter to all of the  
2 oil companies paying the royalties, encloses copies of the  
3 petition up here, and doesn't say: There's 65 percent in  
4 dispute, we want you to hold the 65 percent. No. The  
5 letter says: There's a dispute, we want you to hold it  
6 all. You know, even though there's no dispute about my  
7 client getting 35 percent, we want you to hold it all. And  
8 what did the oil companies do? They hold until we show  
9 them the petition and try and convince them and the biggest  
10 one is Apache, the one who really pays the money and we  
11 haven't convinced them yet that they should release the 35  
12 percent.

13           So this urgency and return to the status quo, it's  
14 a little fuzzy, a little fuzzy because they claim they want  
15 it but yet they tie us up.

16           MR. POWELL: Let's go back to 65/35 and we're  
17 done.

18           MR. MUGAN: No.

19           MR. POWELL: And then we can go --

20           MR. MUGAN: That's not going to happen because  
21 it's --

22           MR. POWELL: Oh, so give us our money but you keep  
23 yours.

24           THE COURT: One at a time.

25           MR. POWELL: Okay.

1           THE COURT: So, Mr. Mugan, I guess my problem -- I  
2 guess it's -- I'm just trying to understand --

3           MR. MUGAN: Right.

4           THE COURT: -- procedurally how we're going to go  
5 forward. The petition for declaratory relief doesn't seek  
6 an emergency finding. It is emergency relief saying, you  
7 know, at least maintain the status quo pending a  
8 resolution.

9           MR. MUGAN: No.

10          THE COURT: But it sounds to me like that might be  
11 a perfectly reasonable option to order -- enter a  
12 preliminary order saying: Let's maintain the status quo  
13 and we'll make a determination as to who is correct.

14          MR. MUGAN: Well, I think if you want to go that -  
15 - down that line, down that path, and there's no argument  
16 that my client's entitled to 35 percent. There's a dispute  
17 over the 65 percent and whose it's going to go to. The oil  
18 company holds 65 percent until the dispute is determined.  
19 That would seem to be more logical to me than to kind of  
20 make a predetermination and then say: Well, we're going to  
21 give them 65 percent.

22          There's reasons for what happened in the past, the  
23 33 years, and I'll be glad to get into them if you want me  
24 to but then we're starting to get into substantive issues  
25 and stuff, but there's reasons, there's explanations,

1 there's reasons why it changed. There's Nevada statutes  
2 that we can cite, etcetera, but I don't want to get into  
3 the substantive issues.

4 But addressing your point, what's in dispute is  
5 the 65 percent. If anything, I would think you just hold  
6 that -- hold the 65 percent and that doesn't go to anybody  
7 --

8 THE COURT: Well, here's my question and this is  
9 why I asked earlier, is there some forum shopping going on  
10 here because what's happening in Texas? Is this Texas  
11 attorney just takes it on himself to send an order -- to  
12 send around a petition that hasn't even got an order  
13 attached to it and oil companies act on that?

14 MR. POWELL: There's an obligation because they  
15 don't want to payout to anybody anytime there's a dispute  
16 and that's the whole thing is -- it's -- if they don't,  
17 there's issues there with them not having notified that  
18 there's a dispute as to these.

19 The oil companies, like anything else, it's almost  
20 kind of like an interpleader. They want to be informed:  
21 Wait a second. Okay. There's disputes here, you better  
22 notify us.

23 And I -- if -- and I could be mistaken and so  
24 please don't hold me to this, but I believe there's some  
25 boiler plate in there -- in these contracts that are

1 voluminous basically saying if there's any other claims  
2 going on here, you better notify us immediately. That's my  
3 understanding of the way it's done. I'm not a Texas  
4 authority. I don't know --

5 THE COURT: I don't think any of us would hold  
6 ourselves out to be authority for --

7 MR. POWELL: Yeah, and the whole --

8 THE COURT: -- Texas oil and gas law.

9 MR. POWELL: -- oil and gas -- and, I mean, that's  
10 really almost a Texas-based --

11 THE COURT: Yeah.

12 MR. POWELL: I mean, that's -- Texas is oil  
13 country.

14 THE COURT: It is its own thing.

15 MR. POWELL: Yeah. It's its own entity.

16 So the -- it's not an issue of simply retaliating  
17 or anything like that. It's basically giving notice to  
18 this third party to say: I'm putting you on notice, you  
19 know, and basically there's a dispute. We have a dispute  
20 here from the way it was being originally anticipated and  
21 going.

22 So, I mean, --

23 MR. MUGAN: I've been through those leases and  
24 I've been through those addendums and they're about that  
25 thick and, again, don't hold me to it, but I sure don't



1 remember any provision like that and this attorney is  
2 representing Ms. Montoya down there in Texas and I presume  
3 he wouldn't be doing anything without her direction and  
4 consent.

5 THE COURT: Okay. But here's my question is  
6 procedurally, how do we go forward? If there's been some  
7 action taken, and it sounds to me like Texas Court doesn't  
8 -- Probate Court doesn't want to take jurisdiction over  
9 this, they will honor any order entered if that's what the  
10 point is. Then the question is: At this point in time, is  
11 there any proper order? Because is what they're -- is what  
12 the oil and gas companies are doing in reaction to this  
13 premature? There has been no finding that anybody is  
14 entitled to any of this money other than I think it says  
15 pretty clearly that everybody agrees that 35 percent goes  
16 to Eleanor. Nobody disputes the 35 percent to Eleanor.

17 So, Mr. Powell's suggestion is let's just go back  
18 to the status quo and I understand, Mr. Mugan, your  
19 opposition to that is the undisputed portions should be  
20 distributed but if you distribute the disputed portion,  
21 there's no way for your client to get it back if ultimately  
22 it's determined it is hers.

23 MR. MUGAN: Well, I don't think that was  
24 requested.

25 THE COURT: Okay.

1           MR. MUGAN: You know, I think we're going way  
2 beyond what we were here today for, number one.

3           Number two, Texas --

4           THE COURT: What we are here today for technically  
5 is an unopposed motion for declaratory relief.

6           MR. MUGAN: Well, I am appearing personally to  
7 oppose it.

8           THE COURT: Okay.

9           MR. MUGAN: Texas has not turned down  
10 jurisdiction, Your Honor.

11          THE COURT: Okay.

12          MR. MUGAN: What happened was that petition was  
13 filed. My client was never given any notice of it. The  
14 will was admitted to probate and the -- Ms. Montoya was  
15 appointed personal representative down there.

16          THE COURT: Why would the will be admitted to  
17 probate in Texas? I mean, nobody lived in Texas, did they?

18          MR. POWELL: I think those rights -- dealing with  
19 the rights --

20          THE COURT: Right, but nobody lived in Texas?

21          MR. MUGAN: I don't understand that either, Your  
22 Honor.

23          MR. POWELL: Well it was just --

24          MR. MUGAN: Died a Nevada --

25          MR. POWELL: It was --

1 MR. MUGAN: -- resident.

2 MR. POWELL: Yeah.

3 THE COURT: I was going to say she's a Nevada  
4 resident.

5 MR. POWELL: I -- yeah, I think it's like anything  
6 else. It's an ancillary proceeding dealing with property  
7 rights or something there. You know, obviously, same thing  
8 here, if somebody owns a house -- mineral rights in Las  
9 Vegas or water rights, I guess would be more appropriate  
10 out here --

11 MR. MUGAN: But property rights were owned by the  
12 trust. There's no dispute about that. You know, why you  
13 would go to Texas and then have a false or incorrect  
14 allegation in there and get yourself appointed down there  
15 and try and get the will admitted to probate down there  
16 without noticing my client and the will is the document  
17 that they claim exercised this power of appointment where  
18 my client, you know, doesn't get all the rights -- all of  
19 the money and as soon as my client finds out about it, they  
20 file a -- they intervene and file a motion basically to set  
21 it aside, etcetera, and the matter was scheduled for  
22 hearing and, as I understand it, an expert witness was  
23 supposed to testify, had serious health problems, is  
24 hospitalized, and so they continued the hearing  
25 indefinitely until the expert witness who is hopefully

1 available to testify. Texas has never said -- turned down  
2 jurisdiction; has never said we'll do whatever Nevada  
3 tells. That is just not correct.

4 MR. POWELL: Well, one is a probate matter and one  
5 is not a probate matter. The trust matter is this matter;  
6 the probate matter for Marjorie Connell is a Texas matter.  
7 I don't think there's -- I think it's clear they are two  
8 separate things. So I'm not sure -- I am not even sure  
9 what the relevance of Texas as opposed to what we're asking  
10 for here even comes into play.

11 THE COURT: But see this is my problem, I'm not --  
12 I'm trying to figure out what exactly it is you're asking  
13 for this Court to do and what the best process is --

14 MR. POWELL: Yeah.

15 THE COURT: -- to get to a hearing on that.

16 MR. POWELL: We're asking for the status quo to go  
17 back which was the whole point of the declaratory judgment  
18 was to say: It's 65/35 like it's been --

19 THE COURT: Well --

20 MR. POWELL: -- for 33 years.

21 THE COURT: But it didn't say status quo, it said  
22 we want --

23 MR. POWELL: Well, not in those terms, but, I  
24 mean, we asked for the declaration that it's 65 percent  
25 interest, 35 percent interest. So, --

1 THE COURT: Okay.

2 MR. POWELL: Yeah, I mean, I'm kind of just  
3 informalizing the relief, but if you see what we're praying  
4 for it's the declaration that it's the 35/65 split.

5 THE COURT: But I -- but that to me, the  
6 declaratory relief is seeking a conclusive and permanent  
7 determination of that --

8 MR. POWELL: Right.

9 THE COURT: -- as opposed to maintaining the  
10 status quo which is a little bit different --

11 MR. POWELL: Right.

12 THE COURT: -- which is that pending the outcome  
13 of these various motions, we're going to --

14 MR. POWELL: Yeah.

15 THE COURT: -- return to that.

16 MR. POWELL: And I -- and the only thing I can  
17 offer is I guess, you know, we pray in general, too, for  
18 any other relief the Court may grant and so, to me, it goes  
19 hand-in-hand with -- you know, basically, the whole point  
20 is to get the determination done with and that sets the  
21 record straight.

22 There has been no declaration despite what Mr.  
23 Mugan says. Show me any order, order -- I want to see the  
24 order that says that Ms. Ahern is entitled to 100 percent.  
25 There was just simply statements in a petition as to that.

1 There's no prayer seeking to confirm that. And, again, as  
2 Your Honor recognizes, if that was what -- if that was the  
3 point of what you were going for and you then continued  
4 four years of distributions and some of which were \$500,000  
5 plus, where's the gift tax returns? Were those gifts? If  
6 you had your declaration, those must be gifts. You don't  
7 have --

8 THE COURT: Well but -- that -- and that gets us  
9 to the how procedurally do we get there --

10 MR. POWELL: Yeah.

11 THE COURT: -- because I'm trying to figure out  
12 what -- how this thing should go forward.

13 MR. POWELL: Yeah.

14 THE COURT: I mean, it -- are you just looking for  
15 right now a temporary determination to let the oil and gas  
16 companies in Texas know the Court's assuming jurisdiction  
17 over this, we're going to have a hearing to determine who's  
18 ultimately entitled to this money, until then, continue  
19 with the distributions as you were previously making them,  
20 35 percent to Eleanor, 65 percent to the granddaughters,  
21 and we'll let you know once we've determined --

22 MR. POWELL: That there's an ultimate --

23 THE COURT: -- who in fact is entitled permanently  
24 --

25 MR. POWELL: That's fine.

1 THE COURT: -- to this money?

2 MR. POWELL: That's fine with us.

3 THE COURT: Because --

4 MR. POWELL: Yeah.

5 THE COURT: -- it may be that it's 100 percent, it  
6 may be that it remains 65/35.

7 MR. POWELL: Right.

8 THE COURT: We don't know yet. That remains to be  
9 determined.

10 MR. POWELL: And what I will tell you, though, is  
11 when Ms. Ahern decided I'm entitled to 100 percent, she was  
12 taking 100 percent. That's the issue is it was previously  
13 taking 35 percent, 65 percent going to Jacqueline and her  
14 sister, then the plug was pulled, and then from essentially  
15 June, she --

16 THE COURT: You see, I'm not understanding the  
17 logistics of this. Is it the --

18 MR. POWELL: Okay.

19 THE COURT: -- oil and gas companies that you  
20 notify to stop this or is it a trustee that gets notified?

21 MR. POWELL: Well, that's the whole thing. The  
22 petition is based on a declaratory ruling that the trustee  
23 must then honor.

24 Again, we have this weird situation where we've  
25 had 65/35 for 33 years including the last four and then all

1 of a sudden, the trustee determines: No, -- the trustee  
2 and the beneficiary being the same person --

3 THE COURT: Okay.

4 MR. POWELL: -- no, I'm entitled to 100 percent,  
5 I'm not giving you that 65 anymore. I've turned off the  
6 spigot. It's done. You're not getting it.

7 So that puts my client in the precarious position  
8 of: Under what authority are you acting with that?

9 THE COURT: That's --

10 MR. POWELL: Yeah.

11 THE COURT: There you go. That's my question is -  
12 -

13 MR. POWELL: Yeah.

14 THE COURT: -- how do we ultimately get to that  
15 question?

16 MR. POWELL: Yeah.

17 THE COURT: It seems to me that that's an  
18 evidentiary hearing.

19 MR. POWELL: I guess. I mean, --

20 MR. MUGAN: I agree.

21 MR. POWELL: I -- the thing is we can go into an  
22 evidentiary hearing, I'm -- your question though is, you  
23 know, basically are you -- do you need discovery? Do you  
24 need any more evidence? There's nothing --

25 THE COURT: Well --



1           MR. POWELL: -- more we can offer other than what  
2 we've -- what we already have.

3           THE COURT: Okay. Thank you.

4           MR. POWELL: Tax returns, and all that, yeah.

5           THE COURT: So then, Mr. Mugan, I understand that  
6 the procedurally you have a motion you want to file, but as  
7 to the status quo, you're -- let's just say we'll be  
8 returning to the status quo. Your position is, at most,  
9 the undisputed portions should be distributed and I don't  
10 understand if it's the oil and gas companies that aren't  
11 honoring it or if it's your client as the role of trustee.

12           MR. MUGAN: Yeah. And I apologize if I haven't  
13 made myself clear.

14           Number one, I'm opposed to returning to the  
15 alleged status quo.

16           THE COURT: Right.

17           MR. MUGAN: There was no request for that. There  
18 was a request for a final determination. He can certainly  
19 file and request a temporary order, injunction, whatever,  
20 you know, but that was never prayed for and I think we're  
21 going beyond the bounds of the pleadings, number one.

22           Number two, if the Court in its discretion thinks  
23 there should be some type of order entered at this point in  
24 time, the 65 percent should not go to his clients because  
25 that's in dispute. The 65 percent should just be held or

1 tied up or put in trusts or whatever until there's a final  
2 determination and my client, there's no dispute that she's  
3 entitled to the 35 percent.

4 And my understanding is that the companies are the  
5 ones, you know, who -- they're the ones who issue the  
6 checks, etcetera. They're the ones that have to be  
7 notified, not the trustee.

8 THE COURT: Okay. Well, here's my concern here is  
9 that I have before me this petition and yes, it does -- I  
10 viewed it as seeking an ultimate ruling. I don't think  
11 we're at the point where we can make an ultimate ruling,  
12 however, you know, the concern I have is that these Courts  
13 in Texas are taking action based on just getting a letter  
14 from an attorney that -- and there's -- I have this whole  
15 question of whether the Texas Court is doing anything with  
16 respect to this, but my point is that who would be ordered  
17 to -- is it an order saying: Resume your distributions,  
18 the trustee's ordered to impound the 65 percent and not  
19 make any distributions of the 65 percent, she's entitled to  
20 her 35 percent as the beneficiary?

21 Because the whole point is I understand your  
22 concern is that if the granddaughters aren't entitled to  
23 it, how do you claw it back, but if it's -- but their  
24 concern is: Wait a minute, we don't want to go back to the  
25 -- to her getting 100 percent because we think 65 percent

1 of that is ours and how do we claw it back?

2 MR. POWELL: How about a bond?

3 THE COURT: Pardon?

4 MR. POWELL: How about a bond? I mean, if the  
5 assertion is essentially we can't give it to you because we  
6 think you're going to go and take it and then we can't ever  
7 get it back from you, how about a bond? I mean, that seems  
8 to me to be --

9 THE COURT: Well -- and so that's, I guess, a  
10 point is at some point in time is this something that can  
11 be ruled on in this point in time or do we need to have a  
12 separate motion on it? It seems to me that I can go  
13 forward and say that it's undisputed that 35 percent of  
14 this money should be going to Eleanor and she is that  
15 beneficiary, but to the extent that the -- my concern is  
16 just that there's oil and companies that are out there who  
17 are responding to letters from attorneys. I've never seen  
18 any company respond to a letter from an attorney.

19 MR. POWELL: Yes.

20 THE COURT: I'm shocked that they did, but  
21 apparently oil and gas law in Texas is unique --

22 MR. POWELL: Yeah.

23 THE COURT: -- and they actually are responsive to  
24 claims for their --

25 MR. MUGAN: Well, --

1           THE COURT:  -- oil rights because they don't want  
2 to end up paying them twice.

3           MR. POWELL:  Right.

4           THE COURT:  So if there's some direction to say:  
5 Go ahead and make the distributions to the trustee and the  
6 trustee is directed because I -- she is a Nevada resident  
7 and we certainly have jurisdiction over her.  The trustee,  
8 in her capacity as trustee of this trust, is directed that  
9 she can distribute the undisputed portion of the funds to  
10 herself but the 65 percent needs to be held until further  
11 order and then --

12          MR. POWELL:  I --

13          THE COURT:  -- we have to figure out how we're  
14 going to go about getting to how we determine who's got the  
15 --

16          MR. POWELL:  And --

17          THE COURT:  -- entitlement to that 65 percent?  
18 What's --

19          MR. POWELL:  -- I guess -- yeah.

20          THE COURT:  -- the process?

21          MR. POWELL:  You direct us because I think that's  
22 where it's ultimately going to come down to is how we do  
23 this.  If you want me to come back and seek an injunction,  
24 I -- what I was trying to do with this declaratory ruling  
25 is skip all the steps, go right to the heart of the issue,

1 and set forth to you we've had 33 years of precedent --  
2 THE COURT: I understand but --  
3 MR. POWELL: That's only changed --  
4 THE COURT: I don't know that we can do --  
5 MR. POWELL: Yeah.  
6 THE COURT: I appreciate the interest in the  
7 judicial economy, --  
8 MR. POWELL: Yeah.  
9 THE COURT: -- however, I'm not sure we can get  
10 there --  
11 MR. POWELL: Okay.  
12 THE COURT: -- in one big leap because I do think  
13 that it requires steps --  
14 MR. POWELL: Yeah.  
15 THE COURT: -- and it's because I've got these  
16 other parties involved here and --  
17 MR. POWELL: Yeah.  
18 THE COURT: -- I -- this Court -- if you're  
19 saying: Will this Court today enter an order directing  
20 these oil and gas companies in Texas to resume their  
21 distributions, which I guess means it goes to the trustee  
22 and the trustee has been ordered to do the 65/35? Yeah, I  
23 have no problem in saying: Oil and gas companies in Texas,  
24 go ahead, we've taken this under consideration. We will  
25 deal with this at the trust level. It's not a problem for

1 you, oil and gas company. Pay your royalties the way  
2 you're supposed to be, make those distributions. I'm going  
3 to direct the trustee what to do because I control that  
4 trustee.

5 MR. POWELL: Yeah. And I don't have a problem  
6 with that. That's --

7 THE COURT: Okay.

8 MR. POWELL: -- totally fine.

9 THE COURT: And my ruling to that trustee is  
10 you're entitled to 35 percent and nobody says you're not.

11 MR. POWELL: Yeah. The only thing I would ask  
12 though just to keep fairness is for the last distributions  
13 that have gone back, I think starting in June, it was less  
14 than 65/35, is require the trustee -- again, if we're  
15 keeping it all fair here is to go back, put that money back  
16 in that same 65 percent category that's in dispute. She  
17 can have 35 percent of June, July, August, September,  
18 October. Take the 35, but that other 65, put that back in  
19 the pot, too.

20 THE COURT: You know, I have no idea how much  
21 money this is involved here --

22 MR. POWELL: It's a lot.

23 MR. MUGAN: That --

24 THE COURT: No, but my point is, --

25 MR. POWELL: Yeah.

1           THE COURT:  -- I don't know how much -- at what  
2 point did these oil and gas companies stop distributing any  
3 money.  All I'm saying is my only point of what I want to  
4 do here is to tell these oil and gas companies stop  
5 responding to letters from attorneys.  An

6           MR. MUGAN:  Your Honor, --

7           THE COURT:  -- attorney can't tell an oil and gas  
8 company what to do.

9           MR. POWELL:  Sure.

10          THE COURT:  Make your distributions.  The trustee  
11 is going to do the following.

12          MR. MUGAN:  But, Your Honor, we've gotten several  
13 of them straightened out.  Basically -- my client, of  
14 course, has Texas counsel, too, and we've gotten several of  
15 them straightened out.  Apache just happened, just  
16 happened.  I think the letter was dated November or October  
17 29<sup>th</sup> or something and we're just getting it straightened out  
18 with them.

19          Again, I think we're going way past what was asked  
20 here and, you know, if you want to do it on a separate  
21 motion, that's fine.  In the interim, we may get the spigot  
22 turned back on.  You know, I mean, we just keep moving down  
23 the road, you know, and kind of making predeterminations  
24 that I just don't think are proper.

25          THE COURT:  What's wrong with what I suggested

1 that we go to -- we tell these oil and gas companies that  
2 you don't have to honor this letter from this attorney,  
3 start making distributions to this trustee, the trustee is  
4 directed she has to in her role as a beneficiary is  
5 entitled to 35 percent. She's got to hold 65 percent.  
6 What's wrong with that?

7 MR. MUGAN: There's nothing wrong with it except  
8 that it does prejudice my client. It wasn't -- he never  
9 asked for that in his petition. He had the right to ask  
10 for that, for a temporary injunction, a restraining order,  
11 etcetera. It was never requested. I mean, all of a sudden  
12 we have to address it right now and I, you know, that's  
13 fine. That's fine. But I just -- again, I think we're  
14 going down the road in making some predeterminations that  
15 were never requested, you know, and it's just, you know,  
16 return to the status quo, well then go back three months,  
17 go back --

18 THE COURT: I never said I was willing to go back  
19 --

20 MR. MUGAN: I know, but that's where we're going.  
21 We're just going --

22 THE COURT: I appreciate that. I never said I'm  
23 willing to go back any period of time. All I'm saying is  
24 that as of today's date when I have what's before me what  
25 technically is an unopposed motion for declaratory relief



1 that my only -- the only thing I'm willing to do is to say  
2 to these Texas oil and gas companies, whoever they may be,  
3 you do not have to honor that letter from counsel. I am  
4 telling you that 35 percent of this is the undisputed  
5 property of this beneficiary, pay your distributions to the  
6 trust, and I'm ordering the trustee to hold 65 percent of  
7 it, to not make a distribution as to 65 percent of it.

8 MR. MUGAN: That's fine.

9 THE COURT: And then we -- we're going to set this  
10 out for a hearing at some point in the future because I  
11 think, as you've said, your opposition -- your first thing  
12 is we have this opposition that it shouldn't even be --  
13 that there's nothing to be heard because it's already been  
14 ruled on. You've got your right to do the motion to  
15 dismiss. Mr. Powell's got the right to oppose it and then  
16 we wanted to get there much faster than this, but  
17 procedurally I just think you can't. I think you have to  
18 follow the procedural steps. So we have to follow the  
19 procedural steps.

20 I think ultimately this petition for declaratory  
21 relief may not be whether it requires a lot of discovery,  
22 but I think that there's still going to have to be  
23 documents produced and you need to come in for a hearing.  
24 So we need to probably put it out 60 or 90 days and have a  
25 hearing. And, in the interim, if you've got a motion to

1 file, you can file your motion and we can rule on that, but  
2 I think it's got to be out at least 60 days for the hearing  
3 on the declaratory relief and I think that there needs to  
4 be testimony.

5 MR. POWELL: And would that be -- that would be a  
6 final determination at that point? That won't just be --

7 THE COURT: That's the petition for --

8 MR. POWELL: Okay. That will be hearing the  
9 petition on the merits?

10 THE COURT: On the merits.

11 MR. POWELL: Okay.

12 THE COURT: Right.

13 MR. MUGAN: Yeah. I -- 60 days, to me, is a  
14 little short especially with the holiday season.

15 THE COURT: Okay.

16 MR. MUGAN: You know, I think we should be out at  
17 least 90 days.

18 THE COURT: Okay.

19 MR. MUGAN: We are going to have to do some  
20 discovery. You know, we have people down in Texas,  
21 etcetera. So I would ask at least 90 days.

22 THE COURT: All right.

23 MR. POWELL: Just to clarify for the Court, too,  
24 though, this was already -- this was filed in September.  
25 So there's already been almost a month and a half here to

1 do a lot of fact gathering and fact finding.

2 THE COURT: Yeah, and that's --

3 MR. POWELL: So to just -- and, again, it -- and I  
4 don't have a problem with what you're --

5 THE COURT: Well --

6 MR. POWELL: -- saying is --

7 THE COURT: -- I think Mr. Mugan was only recently  
8 retained though because I think there was this whole  
9 problem about --

10 MR. POWELL: No, he was retained --

11 THE COURT: October.

12 MR. POWELL: -- pretty quickly on. In fact, I  
13 even gave him a continuance --

14 THE COURT: In October?

15 MR. POWELL: Yeah. And so, I -- you know, again,  
16 we have the whole thing of who is really being choked off  
17 here and, again, there's not a problem with what you were  
18 suggesting which is go back to oil and gas say: 65/35,  
19 keep it coming; 65 stays in trust until the determination,  
20 35 goes out to Ms. Ahern. That's not a problem.

21 The only thing I would suggest though is, again,  
22 my clients, who rely on this for their living expenses,  
23 this is -- my client, just so you're aware, and this will  
24 be raised further, my client quit her job on reliance --

25 THE COURT: Okay.

1 MR. POWELL: -- on this. So, it's a situation  
2 where -- and, again, I just want to be forthcoming so -- to  
3 which sets up my next question which is in the meantime, is  
4 there -- is it problematic for me, and, again, I don't want  
5 to do anything that upsets you, can I come in for  
6 injunctive relief to have the 65 continue to flow with  
7 something like a bond?

8 THE COURT: That would be -- yeah, that's a  
9 different issue.

10 MR. POWELL: Okay.

11 THE COURT: That's a different issue and --

12 MR. POWELL: Because that's -- I'll tell you right  
13 now, I'm going to come back in as soon as possible then on  
14 that --

15 THE COURT: Okay.

16 MR. POWELL: -- just -- yeah.

17 THE COURT: That's what I'm saying is I'm not  
18 going to rule on anything other than --

19 MR. POWELL: Sure.

20 THE COURT: -- I just want the oil --

21 MR. POWELL: Understood.

22 THE COURT: -- and gas companies to start sending  
23 the money to the trust --

24 MR. POWELL: Understood.

25 THE COURT: -- and the trust can deal with it in

1 accordance --

2 MR. POWELL: Understood. Yeah. Understood.

3 THE COURT: It can be held and I have --

4 MR. POWELL: Yeah.

5 THE COURT: -- no reason that it wouldn't be.

6 MR. POWELL: Okay.

7 THE COURT: So that's my only -- the only thing  
8 I'm prepared to do today is --

9 MR. POWELL: Okay.

10 THE COURT: -- I'm denying the request to remand  
11 this back to the Commissioner. I --

12 MR. POWELL: Okay.

13 THE COURT: -- think it's ultimately going to have  
14 to be heard here anyway.

15 MR. POWELL: Okay.

16 THE COURT: Step number two, set this out. Let's  
17 go 90 days.

18 MR. POWELL: Okay.

19 THE COURT: And that gives everybody time to file  
20 these interim motions that they wish to feel.

21 MR. POWELL: Okay.

22 THE COURT: Mr. Mugan's going to want to file his  
23 motion to dismiss this thing in its entirety.

24 MR. POWELL: Sure.

25 THE COURT: Your clients may wish to seek some

1 distributions.

2 MR. POWELL: Yes.

3 THE COURT: I just -- my only point right now is  
4 just if these oil and gas companies are holding onto this  
5 money for no reason other than an attorney sent them a  
6 demand letter which I just find --

7 MR. POWELL: I don't think it was a demand letter.

8 THE COURT: -- mind boggling.

9 MR. POWELL: I think it was just -- I don't think  
10 it was a demand letter, I think it was just a notification  
11 letter of just so you are aware, this is what's pending.

12 THE COURT: Okay.

13 MR. POWELL: And from what I understand, that's  
14 the way it's done there. I don't think there's --

15 THE COURT: Like I said, --

16 MR. POWELL: I don't --

17 THE COURT: -- maybe. I don't think any of us  
18 presumes to represent --

19 MR. POWELL: Yeah. Out here, I know it's a shock  
20 --

21 THE COURT: -- to know anything about --

22 MR. POWELL: -- that you can send a letter to  
23 anybody and they'll do anything. So --

24 MR. MUGAN: I can read the letter to you and it's  
25 a demand letter.

1 MR. POWELL: Okay.

2 THE COURT: Yeah. Okay. So here's my point. At  
3 this juncture, this is the procedure and I don't know what  
4 it would take in an order that would satisfy these oil and  
5 gas companies that they can begin distributions. It may be  
6 all it needs to say is the Court is assuming jurisdiction  
7 for this petition for declaratory relief. It appears  
8 undisputed that the 35 percent -- so that the Court makes a  
9 finding that as to the 35 percent, Ms. Ahern's entitled to  
10 that. The 65 percent should be held by the trust.

11 Hopefully that will satisfy the oil and gas  
12 companies that they're off the hook and that it's going to  
13 be litigation involving the trust and it doesn't involve  
14 the oil and gas companies.

15 MR. MUGAN: Maybe the best thing would be for Mr.  
16 Powell and I, you know, to contact our respective co-Texas  
17 counsel and they can -- they know more about oil and gas  
18 companies than I think both of us would ever know and make  
19 sure that that's the way to do it and that the oil  
20 companies will do what they're told that way and then we'll  
21 just prepare an order for you.

22 THE COURT: Right because --

23 MR. POWELL: Yeah.

24 THE COURT: -- if Mr. Powell wants to see his  
25 clients get some money in the interim, there's no point in

1 asking for that if the oil and gas companies aren't sending  
2 it.

3 MR. POWELL: Right.

4 THE COURT: So we need the oil and gas companies  
5 to send the money.

6 MR. POWELL: Yeah. And that makes --

7 THE COURT: So --

8 MR. POWELL: -- logical sense. We'll figure out  
9 what they need to do that but then we're, just for the  
10 record, we're preserving that we will have you sign an  
11 order to that effect basically saying you're hereby  
12 demanded to continue the 65 -- well, pay 100 percent of the  
13 proceeds, 65 must be held by the trustee and --

14 THE COURT: Correct.

15 MR. POWELL: -- 35 to Ms. Ahern.

16 THE COURT: Correct.

17 MR. POWELL: So, yeah.

18 THE COURT: But the -- it's strictly an issue as -  
19 -

20 MR. POWELL: Sure.

21 THE COURT: -- as under the trust, shouldn't --  
22 that these third parties don't need to be involved in it  
23 any further. It's litigation with the trust. This Court's  
24 got the jurisdiction. This Court will make that finding  
25 and, you know, proceed accordingly.



1 MR. MUGAN: And --

2 THE COURT: And that's -- if we put it out 90  
3 days, you can file your respective motions and we can maybe  
4 get all this stuff resolved in the interim, but at the  
5 earliest the declaratory relief would be heard would be,  
6 you know, 90 days in the future which would be -- and we  
7 might need to --

8 MR. MUGAN: Maybe a status check, I don't know.

9 THE COURT: I was going to say we might need to  
10 put it actually on a stack to actually give you like a date  
11 for an evidentiary hearing, but -- so it would probably be  
12 better to let you know what our stack looks like in  
13 February. Would it be February?

14 THE CLERK: Yeah, February 17<sup>th</sup>. We have one med-  
15 mal that starts on the 10<sup>th</sup>.

16 THE COURT: Okay.

17 THE CLERK: That was before we changed our --

18 THE COURT: Okay. So February 17<sup>th</sup> is --

19 THE CLERK: We have a preferential --

20 THE COURT: -- probate.

21 THE CLERK: -- [indiscernible].

22 THE COURT: Okay. So it will be a status check to  
23 give you a hearing date for your --

24 MR. POWELL: On the 17<sup>th</sup> will be a status check?

25 THE COURT: Correct, for your actual --

1 MR. POWELL: Okay.

2 THE COURT: It's not going to be the actual  
3 evidentiary hearing, but we'll hopefully have enough  
4 information that we can give you a date that day.

5 MR. POWELL: Okay.

6 MR. MUGAN: I just --

7 THE CLERK: The 17<sup>th</sup> in our department is on  
8 calendar call --

9 THE COURT: What's calendar call?

10 THE CLERK: The 24<sup>th</sup> of January. That's the trial  
11 stack [indiscernible].

12 MR. MUGAN: I --

13 THE COURT: Okay. So -- okay. I guess it might  
14 be -- yeah, we might be better off then seeing you at the  
15 calendar calls for that stack which is Friday, the 24<sup>th</sup>, and  
16 we'll be able to tell you if there's any time on that stack  
17 that we can go because we do have one med-mal and one --

18 MR. MUGAN: That's February 24<sup>th</sup>, Your Honor?

19 THE COURT: No, January 24<sup>th</sup>.

20 MR. POWELL: January.

21 THE COURT: And it's the calendar calls that  
22 correspond to that stack that starts February --

23 THE CLERK: 17<sup>th</sup> through March 14<sup>th</sup>.

24 THE COURT: Yeah.

25 MR. MUGAN: And by way of full disclosure, Your

1 Honor, and I don't know if it will affect the thinking at  
2 all, and we can deal with it later if we have to, if in  
3 fact this ends up going to an evidentiary hearing and our  
4 motion to dismiss is not successful, there are going to be  
5 some counterclaims made by my client in this matter --

6 THE COURT: Okay.

7 MR. MUGAN: -- that are --

8 THE COURT: And I think --

9 MR. MUGAN: -- going to involve some things.

10 THE COURT: -- at that point in time, on the 24<sup>th</sup>  
11 if it's not going to be ready to go, if we ruled on all  
12 those other motions in the interim, then it may or may not  
13 be ready to go. It's a calendar call just to see if we can  
14 get you on that stack, but I -- because until we actually  
15 see what the pleadings are, you know, who knows. I just  
16 want to make sure that we've got this calendar and the  
17 declaratory relief petition is calendared. If it has to be  
18 continued, it has to be continued, but we've got a date for  
19 it which will be on that stack, that February 17<sup>th</sup> and I  
20 think the first day of that stack might be a holiday. So,  
21 you know, just keeping in mind that --

22 MR. POWELL: Okay.

23 THE COURT: -- if the first day of the stack is a  
24 holiday, then it won't go -- obviously it won't go -- just  
25 like yesterday was a holiday for us, the -- you know,

1 that's just the first day. It doesn't necessarily mean it  
2 can go on that day because of the holiday and whatever else  
3 we can figure out with respect to anybody who has a  
4 preference on it.

5 MR. POWELL: Okay. What time is your calendar on  
6 the 24<sup>th</sup>?

7 THE COURT: On January 24<sup>th</sup>?

8 MR. POWELL: Yeah.

9 THE CLERK: The calendar calls are --

10 THE COURT: 9 a.m.?

11 THE CLERK: No. They're late. I'll have to get  
12 that to him.

13 MR. MUGAN: Aren't they at 11?

14 THE COURT: That's right.

15 THE CLERK: 11 is [indiscernible].

16 THE COURT: Yeah. They're 11 because we have them  
17 after regular motions.

18 MR. POWELL: 11.

19 MR. MUGAN: Yeah, I was thinking it was 11 but I  
20 might be wrong.

21 THE CLERK: It's 11.

22 THE COURT: Okay. Sorry about that. 11 a.m.

23 MR. POWELL: 11 a.m.

24 And, Judge, just lastly, I know you want to move  
25 on with your day, but just for the record again, we have in

1 -- our declaratory judgment petition asked for the fees,  
2 costs, and damages. So we just wanted to preserve that  
3 that we have requested it --

4 THE COURT: Right.

5 MR. POWELL: -- and everything related. So, --

6 THE COURT: Yeah, exactly. That's why I said I'm  
7 not making any rulings on any other request for relief.

8 MR. POWELL: Sure.

9 THE COURT: The petition itself is set to be heard  
10 on that --

11 MR. POWELL: Yeah.

12 THE COURT: -- date. This is just a preliminary  
13 ruling --

14 MR. POWELL: Yeah.

15 THE COURT: -- and the only reason is I'm just  
16 concerned about, you know, these -- a foreign state that  
17 they're somehow holding up -- I mean, the whole thing's  
18 moot if they're not going to distribute any money.

19 MR. POWELL: Right. And just, again, foreshadow,  
20 we will be coming back in shortly --

21 THE COURT: Sure.

22 MR. POWELL: -- on a petition, too.

23 THE COURT: I'll expect to see that and I'll  
24 expect to see the motion to dismiss in its entirety.

25 MR. POWELL: Yep. Exactly.

1 THE COURT: Okay. Without prejudice, I'm not  
2 making any findings or any rulings --

3 MR. POWELL: Right.

4 THE COURT: -- on anything. It's all going to be  
5 argued unfortunately [indiscernible] the interest and let's  
6 get right to the point, but I don't see any way to do it  
7 other than a set time.

8 MR. POWELL: Okay.

9 THE COURT: Okay. So --

10 MR. MUGAN: Thank you, Your Honor.

11 THE COURT: -- all right.

12 MR. POWELL: Thank you, Your Honor.

13 THE COURT: Thanks.

14 MR. POWELL: Appreciate the time.

15

16 PROCEEDING CONCLUDED AT 11:04 A.M.

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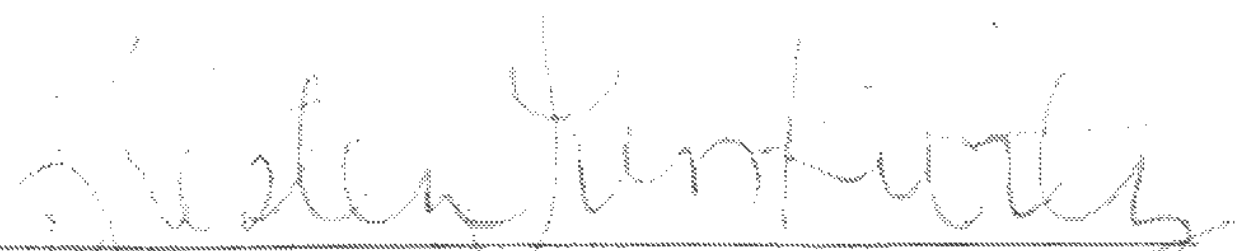
25

1 **CERTIFICATION**

2  
3  
4 I certify that the foregoing is a correct transcript from  
5 the audio-visual recording of the proceedings in the above-  
6 entitled matter.  
7

8 **AFFIRMATION**

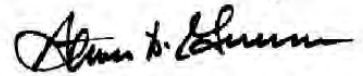
9  
10 I affirm that this transcript does not contain the social  
11 security or tax identification number of any person or  
12 entity.  
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22 KRISTEN LUNKWITZ  
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*Attorneys for Trustee ELEANOR CONNELL HARTMAN AHERN*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

In the Matter of  
THE W. N. CONNELL AND MARJORIE T. CONNELL  
LIVING TRUST,  
Dated May 18, 1972

Case No. P-09-066425-T

Dept. No. XXVI (26)

Date of Hearing: November 12, 2013

Time of Hearing: 9:30 a.m.

An Inter Vivos Irrevocable Trust.

**ORDER DENYING MOTION TO REFER CONTESTED PROBATE MATTER TO  
MASTER-PROBATE COMMISSIONER PER EDCR 4.16; DIRECTING PAYMENT OF  
ALL OIL, GAS, MINERAL AND INTEREST ROYALTIES AND RENT TO ELEANOR C.  
HARTMAN, ALSO KNOWN AS ELEANOR C. AHERN, AS TRUSTEE OF TRUST NO. 2  
OF THE W. N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST DATED MAY  
18, 1972; AND SETTING CALENDAR CALL AND HEARING**

THIS MATTER having come on for hearing on the Petition For Declaratory Judgment Regarding Limited Interest Of Trust Assets Pursuant To NRS 30.040, NRS 153.031(1)(E) and NRS 164.033(1)(A) (the "Petition") filed by Petitioner JACQUELINE M. MONTOYA, who appears by and through her counsel of record, JOSEPH J. POWELL, Esquire, of THE RUSHFORTH FIRM, LTD., and ELEANOR C. AHERN, a/k/a ELEANOR C. HARTMAN, as Trustee of THE W. N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST dated May 18, 1972, appearing by and through her counsel of record, JOHN R. MUGAN, Esquire, and MICHAEL D. LUM, Esquire, of the law firm of JEFFREY BURR, LTD., in opposition to the Petition and the Court having reviewed the pleadings, including the Motion To Refer Contested Probate Matter To Master-Probate



1 Commissioner Per EDCR 4.16 filed herein by ELEANOR C. AHERN, a/k/a ELEANOR C.  
2 HARTMAN, as Trustee of THE W. N. CONNELL AND MARJORIE T. CONNELL LIVING  
3 TRUST dated May 18, 1972, examined the evidence and heard the arguments of counsel, the Court  
4 makes the following Findings Of Fact, Conclusions Of Law, and Order:

5 **FINDINGS OF FACT**

6 1. The Motion To Refer Contested Probate Matter To Master-Probate Commissioner  
7 Per EDCR 4.16 should be denied per the discretion of the Court.

8 2. An evidentiary hearing will be necessary regarding the Petition and the parties shall be  
9 entitled to conduct discovery herein. Accordingly, this matter should be set on a four week stack to  
10 begin February 18, 2014 at 9:00 a.m., and a Calendar Call will be held on January 24, 2014 at 11:00  
11 a.m. at which Trial Counsel (and any party in proper person) must appear.

12 3. Texas legal counsel for Petitioner JACQUELINE M. MONTOYA has notified in  
13 writing the various lessees-payors of the Upton County, Texas, oil, gas, mineral and interest royalties  
14 and surface rent to lessor-payee ELEANOR C. HARTMAN, also known as ELEANOR C.  
15 AHERN, as Trustee of THE W. N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST  
16 dated May 18, 1972, including but not limited to Apache Corporation-oil and gas leases with owner  
17 number 47052 and owner number 45572, Plains Marketing, L.P.-oil and gas leases with owner  
18 number 0782216 and owner number 0488845, and Drag A Cattle Company, LLC-surface tenant, of  
19 the Petition of JACQUELINE M. MONTOYA filed herein and requested that all such payments be  
20 held in suspense until the resolution of this action. The following was stated and agreed to by legal  
21 counsel of both parties herein in open Court and as set forth in the Petition:

22 A. There is currently no reasonable doubt and currently no legitimate title dispute as to the  
23 continued right that ELEANOR C. AHERN, individually as beneficiary of Trust No. 2 of  
24 THE W. N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST dated May  
25 18, 1972, is entitled to a minimum of thirty-five percent (35%) of such oil, gas, mineral  
26 and interest royalties and surface rent from the Upton County, Texas;  
27  
28

1 B. Petitioner JAQUELINE M. MONTOYA currently makes no claim to such thirty-five  
2 percent (35%) share that has always been distributed to ELEANOR C. HARTMAN, also  
3 known as ELEANOR C. AHERN;

4 C. The only current dispute between the parties is how the remaining sixty-five percent  
5 (65%) share should be allocated;

6 D. Legal title of record to such Upton County, Texas, real estate and oil, gas, mineral and  
7 interest rights is vested in ELEANOR C. HARTMAN, also known as ELEANOR C.  
8 AHERN, as Trustee of THE W. N. CONNELL AND MARJORIE T. CONNELL  
9 LIVING TRUST dated May 18, 1972, and

10 E. The last, peaceable, non-contested status quo between the parties was when all such oil,  
11 gas, mineral and interest royalties and surface rent was paid to ELEANOR C.  
12 HARTMAN, also known as ELEANOR C. AHERN, as Trustee.

13 None of the oil, gas, mineral and interest royalties and surface rent should be suspended but  
14 should continue to be paid in a timely fashion to ELEANOR C. HARTMAN, also known as  
15 ELEANOR C. AHERN, as Trustee of THE W. N. CONNELL AND MARJORIE T. CONNELL  
16 LIVING TRUST dated May 18, 1972, during the pendency of this action, and ELEANOR C.  
17 AHERN as beneficiary shall be entitled to thirty-five percent (35%) of such oil, gas, mineral and  
18 interest royalties and surface rent and the remaining sixty-five percent (65%) of such oil, gas,  
19 mineral and interest royalties and surface rent shall be held in the Trust by ELEANOR C.  
20 HARTMAN, also known as ELEANOR C. AHERN, as Trustee until final resolution of this matter.

## 21 CONCLUSIONS OF LAW

22  
23 Rule 4.16 of the Rules of Practice For The Eighth Judicial District Court Of The State Of  
24 Nevada provides in part:

25 **“Rule 4.16. Contested matters and referrals to probate commissioner.**

26 (a) The probate judge may hear whichever contested matters the judge shall select, and  
27 schedule them at the convenience of the judge’s calendar. The judge alone may also refer  
28 contested matters pertaining to the probate calendar to a master appointed by the judge for  
hearing and report.”

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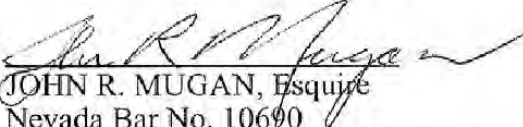
1 interest royalties and surface rent shall be held in the Trust by ELEANOR C. HARTMAN, also  
2 known as ELEANOR C. AHERN, as Trustee, until final resolution of this matter.

3 DATED: December 20, 2013.


4  
5  
6   
DISTRICT JUDGE

7 Submitted by:

8 JEFFREY BURR, LTD.

9   
10 JOHN R. MUGAN, Esquire  
11 Nevada Bar No. 10690  
2600 Paseo Verde Parkway, Suite 200  
Henderson, NV 89074  
12 Attorneys for Trustee ELEANOR CONNELL HARTMAN AHERN

13 APPROVED:

14   
15 JOSEPH POWELL, Esquire  
Nevada Bar No. 8875  
16 The Rushforth Firm  
P.O. Box 371655  
17 Las Vegas, NV 89137-1655  
18 Attorneys for Petitioner JACQUELINE M. MONTOYA  
19  
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DISTRICT COURT

CLARK COUNTY, NEVADA

MATTER OF THE TRUST OF W.N.  
CONNELL AND MARJORIE T.  
CONNELL LIVING TRUST DATED  
5/18/72

CASE NO. P-066425

DEPT. XXVI

BEFORE THE HONORABLE GLORIA J. STURMAN, DISTRICT COURT JUDGE

TUESDAY, JANUARY 14, 2014

**RECORDER'S TRANSCRIPT  
MOTIONS HEARING**

**APPEARANCES:**

For the Plaintiff: Michael D. Lum, Esq.  
John R. Mugan, Esq.  
JEFFREY BURR, LTD.

For the Respondent: Joseph J. Powell, Esq.  
THE RUSHFORTH FIRM, PLLC

RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 TUESDAY, JANUARY 14, 2014 AT 9:02 A.M.

2 THE COURT: Peter 9066425.

3 MR. POWELL: Good morning, Your Honor. Joey Powell  
4 appearing on behalf of Jacqueline Montoya.

5 MR. MUGAN: Good morning, Your Honor. John Mugan on  
6 behalf of Eleanor Ahern.

7 MR. LUM: Good morning, Your Honor. Michael Lum bar  
8 number 12997 on behalf of Eleanor Ahern.

9 THE COURT: Okay. We have two motions. The first one is  
10 a motion to dismiss the debt for relief action and the second  
11 one is a hearing to compel distributions. So we'll take the  
12 motion to dismiss first.

13 MR. MUGAN: If it pleases the Court, I presume that  
14 you've had an opportunity to review the motion. Basically  
15 claim preclusion and there's three things that are required.  
16 The parties or their privies are the same. The final judgment  
17 in the first action is valid. And most importantly the  
18 subsequent action is based on the same claims or any part of  
19 them that were or could have been brought in the first case.

20 It's undisputed there's two cases involved. A 2009  
21 case, which involved the trust, specifically trust number two,  
22 reformation construction action. Basically construed the  
23 document, said who the residuary beneficiaries are when my  
24 client died. And there's no question that the privies and  
25 parties are the same as in this action. There's no question

1 that the judgment is valid. There's an order entered. Notice  
2 of entry back in 2009. Appeal time et cetera is long past.

3 Probably the most important one is that number  
4 three, that the claims could have been brought in the first  
5 case. Opposing counsel cited the Tarkanian (phonetic) case as  
6 saying that the same claims have to be included in both  
7 actions. The Tarkanian case was back in '94. Five Star  
8 Capital Crop which we cited a 2008 case changed that. And  
9 basically said that it's broadened to include all claims which  
10 could have been brought in the first action.

11 And there's no question that the claims -- I mean,  
12 we're dealing with the same thing. Trust number -- the trust,  
13 trust number two, the rights thereunder. Also I don't think  
14 there's any question that we're dealing with the same oil  
15 rights. If you look at the pleading in 2009 it refers to the  
16 oil assets in trust number two and says that there's an  
17 appraisal being done. And it estimates the value at 700,000.

18 As we set out in our pleading Jackie, the  
19 Petitioner, did in fact have an appraisal done. It came back  
20 at \$716,000 and it was for all of the oil assets not just 35  
21 percent of them.

22 And so arguably not only do we have claim preclusion  
23 we also have issue preclusion because we're basically dealing  
24 with the exact same thing. The rights of the parties under  
25 trust number two.

1           And so our belief is that claim preclusion is  
2 applicable. And accordingly this action needs to be  
3 dismissed. In the alternative we even think issue preclusion  
4 is applicable because of what I stated.

5           Thank you, Your Honor.

6           THE COURT: Okay.

7           MR. POWELL: Your Honor, as we discussed the last time  
8 the 2009 petition is a reformation petition. It dealt with  
9 basically in essence a couple of basically two major issues.  
10 That was the succession of who the residuary beneficiaries  
11 were of trust number two and then also as well who was going  
12 to be the successor trustee of that.

13           If you've read the petition in 2009 and the order  
14 that was in 2009, that's the substantive part of what is going  
15 on. In fact, the petition even states these issues didn't  
16 come up with trust number three, they're only related to trust  
17 number two, but we can see what was done in trust number three  
18 in terms of final distribution, who would be the trustees. We  
19 didn't have that same matching language in trust two. So we  
20 need to solve that issue.

21           Arguably was it critical that the 2009 petition was  
22 brought? I would say probably not just because you could  
23 glean from trust number three what the intent was. It was  
24 more of a clarification petition just so there weren't issues  
25 down the road. That's what the 2009 petition did.



1           THE COURT: So the fact that at the same time that trust  
2 three was being litigated that your clients didn't seek to  
3 also litigate the issue with respect to trust number two  
4 doesn't preclude them from now doing so?

5           MR. POWELL: Well, correct, exactly. And there were no  
6 issues with trust number three. Trust number three was  
7 basically what we refer to as the survivor's trust. But  
8 because of the timeframe in which it was done it also included  
9 essentially marital trust as well. So it was a marital trust  
10 along with a survivor's trust. In which Mrs. Connell as the  
11 surviving trustor had the ability to freely amend that trust.  
12 She also had the ability to do a -- exercise a power of  
13 appointment, which she did.

14           And so at the time there was -- the relevance of  
15 trust number three was not in question. That had already been  
16 in exercise of power of appointment to her individual trust  
17 that she setup the MTC living trust.

18           So this petition, this reformation petition was not  
19 a declaration of rights in terms of current rights. What it  
20 was, was to have clarification at the time that Ms. Ahern  
21 passed was the issue here, so that there wasn't any confusion.  
22 Her children, my client and her sister were deemed to be the  
23 residuary beneficiaries and also as well the successor  
24 trustees.

25           So that was the extent of what that petition did.

1 Again, if you look at what the prayer was in that petition, if  
2 you look what the accompanying order said, that's what it did.  
3 And in their petition and in subsequent petitions as well in  
4 their arguments they essentially said that -- really that my  
5 client and her sister were behind that petition. Even though  
6 Ms. Ahern had her own counsel. Even though the petition was  
7 discussed with her own counsel, somehow my clients were behind  
8 that.

9 So which again, begs the logical question

10 THE COURT: So you're contesting that the issue that it  
11 seems Mr. Mugan is focused on is the same issues were could  
12 have been filed, but it's your position that there -- it  
13 wasn't necessarily the same parties, it wasn't necessarily a  
14 final judgment as to the issues that are at issue here?

15 MR. POWELL: Correct, correct. It wasn't even an issue  
16 at that point because there was a 65/35 split of this income.  
17 And again, it continued for nearly four years after the order  
18 was entered. Which again begs the question is, if that was  
19 the point of what the order was, was this declaration of  
20 rights, why exactly is the status quo being followed for an  
21 additional four years after that fact?

22 The fact of the matter is it wasn't a declaration of  
23 rights as to Ms. Ahern. It wasn't a declaration of rights as  
24 to the issue that's now present which is the 65/35 split. It  
25 was a clarification as to what would happen at Ms. Ahern's

1 death. And what it was, was that my client and her sister  
2 were to be the residuary beneficiaries as basically was  
3 gleaned from and was consistent with the way that trust three  
4 read. Trust three ultimately wound up being different because  
5 it -- exercise the power of appointment so.

6 THE COURT: All right, thank you.

7 MR. POWELL: Yeah.

8 THE COURT: Anything else, Mr. Mugan?

9 MR. MUGAN: Yes, thank you, Your Honor. We're not  
10 arguing issue preclusion. Issue preclusion, the claims have  
11 to be identical. We're arguing claim preclusion.

12 THE COURT: Right.

13 MR. MUGAN: Which is much, much broader and much more  
14 expansive. There doesn't have to be a final judgment on the  
15 specific issue in the first case under Nevada law claim  
16 preclusion. You don't need a final judgment. Alls [sic] you  
17 need is that the claims, or any part of them in the first case  
18 -- in the second case, excuse me, could have been brought in  
19 the first case. And there's no question it could have been  
20 brought in the first case. And this argument about trust  
21 number three and trust number two.

22 I believe it's very, very important when you look at  
23 the pleadings in the first case they refer to the oil assets.  
24 And again, I repeat myself and I apologize. They reference an  
25 appraisal being done. And it's in the approximate amount of

1 \$700,000.

2           And it's undisputed that there was an appraisal done  
3 by his client in 2009 that included all of the oil rights; not  
4 35 percent. So all of the oil rights were included in trust  
5 number two. And that's what we were talking about in the  
6 first case. And even if we weren't you don't need a final  
7 judgment on the issue. Under claim preclusion it's just a  
8 claim that could have been brought in the first action. It's  
9 very, very broad and expansive the Nevada position under Five  
10 Star.

11           Thank you.

12           THE COURT: Okay. I'm not understanding that there  
13 shouldn't -- there doesn't have to be a valid final judgment.  
14 I think that that is an essential issue. Sit back down, Mr.  
15 Powell. You don't get to talk again.

16           MR. POWELL: Sorry.

17           THE COURT: The same parties or their privies are  
18 involved in both cases. A valid final judgment has been  
19 entered and the subsequent action is based on the same claims  
20 or any part of them could have been brought in the first case.  
21 That's to me, I don't see that it meets any of those elements.  
22 I don't think it's the same parties. We have a judgment on  
23 something that's entirely different than what's involved here.

24           I guess you could have litigated at the same time,  
25 but it -- not to the extent that I feel that they're precluded

1 from litigating it now. I mean, it was an entirely different  
2 and I think somewhat I guess a previous issue that was  
3 reasonably litigated when it was litigated. But there's  
4 nothing to indicate that you would need to litigate this issue  
5 because nobody knew that four years in the future the trustee  
6 was going to change how she's making distributions. I mean,  
7 nobody could have anticipated that. So how would you litigate  
8 it?

9           To me it just doesn't seem that it's an issue that  
10 should be precluded from being litigated at this time. So I'm  
11 going to deny the motion to dismiss the declaratory relief  
12 petition.

13           Then we have the second issue which is the -- this  
14 is now your turn, Mr. Powell.

15           MR. POWELL: Okay.

16           THE COURT: Which is the issue of whether distributions  
17 should be made.

18           MR. POWELL: Your Honor, as is pointed out, we have a 33  
19 year, we're now in year 34, status quo distribution of 65/35.  
20 That is going back to the way that the trust was initially  
21 allocated between trust two and trust three in approximately  
22 1980. That the -- Mr. Connell died I think in December of  
23 '79. So returns were done in '80.

24           From '80 on we had a situation where Mrs. Connell as  
25 the surviving trustor received 65 percent of this oil gas

1 mineral income. And Ms. Ahern received 35 percent. Also in  
2 1980 as well Ms. Ahern became a co-trustee of the trust as  
3 well, which is a significant fact. So it was Ms. Ahern and  
4 Ms. Connell as trustees. These returns were done. And for 34  
5 -- or 29 --

6 THE COURT: Okay.

7 MR. POWELL: Yes?

8 THE COURT: But didn't we already litigate or argue the  
9 whole issue of whether there we should maintain the status  
10 quo, or they should be reinstated? And didn't we already rule  
11 on that? And isn't that what we're having the trial for in a  
12 month or so?

13 MR. POWELL: I --

14 THE COURT: What's the change? In other words --

15 MR. POWELL: Well --

16 THE COURT: -- why would we change -- six weeks before  
17 the trial --

18 MR. POWELL: Sure, I understand.

19 THE COURT: -- why would we change and say no. Now we've  
20 got too many distributions here?

21 MR. POWELL: Well --

22 THE COURT: What's the change, or why would I change that  
23 previous status quo that you've established?

24 MR. POWELL: Well, one, the issue previous was that we  
25 had not petitioned for relief to reinstate that status quo

1 until such time as a final determination was made. So that's  
2 one issue. Secondary issue was it was argued that the -- we  
3 hadn't made the argument supposedly about laches. We feel  
4 like the hearing in six weeks does not need to occur. That  
5 the doctrine of laches must apply here.

6 We also have as well, we have a clear declaration  
7 from Ms. Ahern that she was aware at the time that supposedly  
8 she had these rights but she claims she consulted with an  
9 attorney who told her that she had these rights. She then  
10 decided that I guess apparently on the advice of the attorney  
11 she may not want to actually enforce these rights because she  
12 might be better off simply waiting for -- she might be better  
13 not upsetting Ms. Connell for fear that she might get  
14 disinherited from Ms. Connell's estate plan.

15 In fact, the language that's actually used in her  
16 response is that she acquiesced. We believe the doctrine of  
17 laches applies here and makes all of this case irrelevant in  
18 terms of needing to proceed forward. The doctrine of laches  
19 is supposed to prevent somebody from sleeping on their rights.  
20 And then in this case 33 years down the road arguing that they  
21 have rights, they have enforceable rights and they have  
22 justification for doing what they did.

23 THE COURT: So you're not just seeking to have the  
24 distributions reinstated in anticipation of the outcome of the  
25 ultimate hearing. You're saying there's no need to have that

1 hearing?

2 MR. POWELL: There's no need to have that hearing because  
3 the doctrine of laches is applicable here. The Kuni case as  
4 -- at which seems to be the landmark case for doctrine of  
5 laches, that was a 22 year period of sleeping on one's rights.  
6 This is again, we're in year 34 now. This is the first time  
7 again that there's been this assertion that no. I always had  
8 this hundred percent right to the income, not the 35 percent  
9 income that I was taking for 29 years of Ms. Connell's life  
10 and then four years subsequent to that.

11 So we believe as we've outlined the doctrine of  
12 laches is applicable here and needs to be enforced.

13 Now we don't need to even -- just like a statute of  
14 limitations issue, we don't need to get into the substantive  
15 arguments because the doctrine of laches has to apply. Even  
16 assuming arguendo that she does have this right. She slept on  
17 it for 33, 34 year snow. And this is not behavior that should  
18 be rewarded. Especially in this court, a court of equity.

19 And again, like I said, we have the Kuni case that  
20 spells out. And I'm assuming you've seen the quotes that are  
21 in there. They're pretty clear. That when you have an issue  
22 like we have here where Ms. Connell's already deceased. So we  
23 have a -- we can't also locate the 706 because the IRS hasn't  
24 retained a copy. The preparer of the 706 hasn't retained a  
25 copy. We have spoliation of evidence.



1           So we are at a severe disadvantage for being able to  
2   rebut the assertions that Ms. Ahern is making other than what  
3   we've already provided, which is --

4           THE COURT:  If there's spoliation of evidence it wouldn't  
5   have been by Ms. Ahern.  I mean, it's just a lapse of time.  
6   It's not something that she --

7           MR. POWELL:  Well, Miss -- if -- well, my point is if Ms.  
8   Ahern had brought this in a timely manner, and specifically if  
9   she had brought this when Ms. Connell had the ability to  
10   rebut --

11          THE COURT:  Doesn't that get back to this whole point of  
12   claim preclusion then?  Why didn't we litigate this four years  
13   ago?

14          MR. POWELL:  Exactly.  Why did no -- it wasn't raised  
15   four years ago.  There was still 65/35 four years ago.

16          THE COURT:  Right.

17          MR. POWELL:  There was 65/35 up until June.  Then the  
18   plug is pulled by Ms. Ahern who says, I've always been  
19   entitled to a hundred percent of it.  I just never told any of  
20   you apparently that I felt this way and had these rights.

21                 I mean, this is analogous to again, a homeowner who  
22   says, you're encroaching on my property by 30 feet.  I've  
23   known for 30 years but I'm telling you now.  Well, too late.

24          THE COURT:  You're about to talk me into reconsidering my  
25   -- Mr. Mugan's motion.  Because what you're saying basically

1 is that we should have known this and it should have all been  
2 litigated when Ms. Connell was still alive. And you know, Ms.  
3 Ahern didn't tell us and so, you know, it should have been  
4 litigated four years ago. You know --

5 MR. POWELL: But I'm not sure how that would be on my  
6 client's burden when Ms. Ahern is the trustee and Ms. Ahern is  
7 still doing a 65/35 split that whole time.

8 THE COURT: Okay. So it's her fault that it didn't --

9 MR. POWELL: How can my client anticipate

10 THE COURT: -- we didn't get litigate -- this didn't get  
11 litigated nine years ago when maybe I don't know if Ms.  
12 Connell was competent to -- I don't know what condition she  
13 was in at the end of her life.

14 MR. POWELL: Oh, well, she was still -- but my point  
15 being is if you're going to make an argument of saying, you're  
16 not entitled to the 65 percent; I was always entitled to it.  
17 Why was this not done during Mrs. Connell's lifetime so Ms.  
18 Connell could have responded to it? Ms. Connell was a trustee  
19 as well.

20 THE COURT: Right.

21 MR. POWELL: Not just a beneficiary. Again, they were --  
22 since 1980 they were both co-trustees.

23 THE COURT: Uh-huh.

24 MR. POWELL: So again, Ms. Ahern's point is since day one  
25 I was always entitled to a hundred percent of the income. Ms.

1 Connell was never entitled to a red cent. And then following  
2 her passing Jacqueline and her sister were never entitled to  
3 that.

4 So again, we have a situation where somebody is  
5 raising an argument that nobody's aware of existed until June  
6 essentially when the --

7 THE COURT: And so she should now be foreclosed from  
8 raising it just because while her step -- her I guess adopted  
9 mother, step mother was living she let her have the 65  
10 percent.

11 MR. POWELL: Uh-huh, supposedly.

12 THE COURT: Now she should be precluded --

13 MR. POWELL: From arguing that -- right, exactly.

14 THE COURT: -- that she was in fact entitled to that 65  
15 percent?

16 MR. POWELL: Exactly, exactly. We have -- again, we have  
17 33 years of a 65/35. Only recently do we have the assertion,  
18 no. I was always entitled to a hundred percent. The only  
19 evidence we have left is a Texas estate tax return which shows  
20 a 65/35 allocation.

21 THE COURT: Uh-huh, okay.

22 MR. POWELL: So we -- the spoliation is the fact that we  
23 can't offer any testimony from Mrs. Connell, the other co-  
24 trustee to say no. This was all done properly. They're  
25 trying to basically assert that as was done on the Texas

1 return, which again is the only evidence we have left because  
2 the 706 can't be found, that somehow --

3 THE COURT: Well, spoliation really just raises a  
4 rebuttal presumption. So it doesn't necessarily mean that  
5 judgment would be granted.

6 MR. POWELL: Sure.

7 THE COURT: It just means that at trial --

8 MR. POWELL: Sure.

9 THE COURT: you know, if you raise that there's been  
10 spoliation that somehow I guess would be attributable --

11 MR. POWELL: Well, and --

12 THE COURT: -- to Ms. Ahern.

13 MR. POWELL: Yeah.

14 THE COURT: And which I'm kind of not seeing that, but  
15 you know, it could be. I mean --

16 MR. POWELL: Well --

17 THE COURT: -- it wasn't really briefed. So okay.

18 MR. POWELL: Well, the Kuni case basically says is that a  
19 critical factor in determining whether laches should apply is  
20 whether there's a disadvantage of basically the injured  
21 party --

22 THE COURT: Right.

23 MR. POWELL: -- which would be my client.

24 THE COURT: Sure.

25 MR. POWELL: And we can't offer any rebutting evidence

1 from Mrs. Connell as to what the realities of the situation  
2 were. And that's a huge factor in Kuni and also many of the  
3 other laches cases that said that if a key witness cannot  
4 present their testimony that's a huge factor that has to be  
5 considered by the Court --

6 THE COURT: Okay, got it.

7 MR. POWELL: -- because that's the damage so.

8 THE COURT: Mr. Mugan.

9 MR. MUGAN: Thank you, Your Honor. Talk about the  
10 injunction. I'll just respectfully remind you that we were  
11 here in November. We went through this. You basically issued  
12 an order saying that my client as trustee, there was no  
13 dispute that she was entitled to 35 percent; she could have  
14 that. The 65 percent as trustee she had to hold until this  
15 matter was --

16 THE COURT: Right.

17 MR. MUGAN: -- going to be heard in a couple months. And  
18 nothing can be more fair than that. You're treating both  
19 sides equally. When the final judgment is rendered the  
20 money's going to be there whoever wins. And nobody has the  
21 use or enjoyment in the interim.

22 Like we said in our objection, it's like trying to  
23 argue again the merits of the case and we're not there yet.  
24 You found that we have to have an evidentiary hearing. And if  
25 you look at the requirements for an injunction they have to

1 prove irreparable harm, compensatory damages are not adequate  
2 remedy. And a showing of reasonable probability of success.  
3 They haven't shown any of those.

4 And they have to show all three. If they fail on  
5 any of them then they're not entitled to an injunction.  
6 Basically you've already issued an injunction regarding the 65  
7 percent. There's no proof of irreparable harm. We're talking  
8 about dollars here.

9 THE COURT: Right.

10 MR. MUGAN: That's adequate compensation. We're not  
11 talking about blowing up a building that can't be replaced, or  
12 the sale of real estate that's irreplaceable. We're talking  
13 about dollars. That's adequate compensation.

14 THE COURT: And since it's not even like an asset that  
15 would fluctuate like in the stock market. It's oil lease  
16 money. It's --

17 MR. MUGAN: Yeah, it's oil.

18 THE COURT: It's revenue from oil leases.

19 MR. MUGAN: Right.

20 THE COURT: It's cash coming in.

21 MR. MUGAN: And the last thing is the reasonable  
22 probability of success. We don't think they've shown that.  
23 And we went into great detail as to why.

24 Laches, let's talk about laches. Laches work both  
25 ways. If you recall Marjorie died in 2009.

1 THE COURT: Uh-huh.

2 MR. MUGAN: And they're claiming that Marjorie in her  
3 last will and testament exercises general power of appointment  
4 as to the 65 percent. And it went to a separate and distinct  
5 trust called the MTC Living Trust.

6 And they cite 163.385 about not having to, you know,  
7 deed it out, not having to divide it. Well, if you look at  
8 163.383 that's applicable when you're talking about a trust or  
9 trusts created by a single instrument. Once she died we're  
10 talking about two separate trusts, two separate documents.  
11 One created way back in '72. And now a separate and distinct  
12 trust in 2009.

13 So you know, they should have deeded out that at  
14 that point, the 65 percent. And it was never done. Also they  
15 make in their pleadings they talk in detail about the oil --  
16 apache oil and gas leases in 2012 and how Jacqueline was  
17 intimately involved in blah, blah, blah. And how she had  
18 professionals helping her. And how they had Eleanor, my  
19 client as trustee sign all the new leases as the sole lessor  
20 as trustee.

21 Well, if they had 65 percent, if MTC Living Trust  
22 had 65 percent interest they would -- Jackie as trustee of  
23 that trust would have been legally required to sign those  
24 leases. And they never did. They only had Eleanor. And that  
25 speaks volumes of not only Jackie's belief, but also the

1 professionals that she employed.

2           The division orders. You go back years and years.  
3 All of the division orders from Apache and the other oil  
4 companies, they don't use the employer ID number, the federal  
5 ID number for trust number three. They use trust number two.  
6 And again, in 2009 at the latest that should have been  
7 changed. And Jackie was intimately involved. And she's the  
8 trustee, the sole trustee of MTC Living Trust. And she's also  
9 one of the two primary beneficiaries.

10           And so when you talk about laches it works both  
11 ways. And Marjorie really is the only one who can say what  
12 the deal was. And Marjorie is dead. And it's just as much to  
13 our detriment if not more than to theirs.

14           And when you talk about laches and detrimental  
15 reliance you have to talk about first offer and acceptance.  
16 And there really has been no proof of any offer and  
17 acceptance. What detrimental reliance and laches is, is  
18 really a substitute for consideration. And we kind of skip  
19 over those first two elements and alls we talk about is  
20 consideration.

21           Well, even if it's a substitute for consideration  
22 we're talking about oil and gas rights and an undivided  
23 interest in real estate that cannot be performed within one  
24 year.

25           So under the statute of frauds it would have had to



1 be in writing. You're dealing with real estate. And you're  
2 dealing with a situation that cannot be performed with one  
3 year.

4 So laches works both ways. And you already decided  
5 last time that we needed an evidentiary hearing in this  
6 matter.

7 THE COURT: Okay.

8 MR. MUGAN: Thank you.

9 THE COURT: Mr. Powell, briefly.

10 MR. POWELL: Your Honor, I -- the crux of this, we're  
11 acting again as though somehow this -- that Eleanor just out  
12 of the blue decided to give the 65/35. I would point to  
13 again, on the Texas estate tax return the only evidence we  
14 still have left because of this huge passage of time, is  
15 schedule B2. It says specifically the language coming up with  
16 the 65/35 split on this return. Marital bequest.

17 As pointed out trust number three was a survivor's  
18 trust but it also had the marital trust as well. Back when  
19 this trust was created and back when Mr. Connell died there  
20 was no thing as -- there was no such thing as the Q Tip trust.

21 So -- and the trust itself says, I want to max out  
22 the marital deduction --

23 THE COURT: Okay. When I started out -- when you started  
24 Mr. Powell --

25 MR. POWELL: Yeah.

1 THE COURT: -- the question was what's changed; didn't we  
2 already argue all of this? And you said well --

3 MR. POWELL: Here's --

4 THE COURT: -- the release issues hadn't been addressed.  
5 And to me they all sound like they really were more in support  
6 of Mr. Mugan's motion on claim preclusion. That she shouldn't  
7 have changed this. Why wasn't it litigated previously? To me  
8 this is the whole point why we have to have this evidentiary  
9 hearing is because we don't have any other way. I don't  
10 understand how we could possibly do this short of an  
11 evidentiary hearing. Because as you said, some of the  
12 evidence is gone, the written documentary evidence would be  
13 gone.

14 Through nobody -- I'm not saying it's anybody's  
15 fault, but it just -- this goes back to '72. This is like 40  
16 years old.

17 MR. POWELL: Which -- and that again went to our point of  
18 why we think again laches should be applicable here because of  
19 the fact that this -- and if I could read you just real  
20 quickly --

21 THE COURT: Sure.

22 MR. POWELL: -- the passage directly from Ms. Ahern's  
23 response. Which did you have the opportunity to read our --

24 THE COURT: Yeah.

25 MR. POWELL: -- response to their --

1 THE COURT: Oh, yeah. I've got it right here.

2 MR. POWELL: okay.

3 THE COURT: Yeah.

4 MR. POWELL: This is the assertion in their words. "When  
5 W.N. Connell passed away Marjorie T. Connell as a surviving  
6 trustor and trustee of the trust began paying herself 65  
7 percent of the Upton County Texas oil right income.

8 THE COURT: Uh-huh.

9 MR. POWELL: Eleanor consulted an attorney and was  
10 advised that although Eleanor was entitled to all of the Upton  
11 County Texas Oil right income, if she asserted her rights to  
12 all the income against Marjorie at the time it would in all  
13 likelihood result in Marjorie disinherit Eleanor when  
14 Marjorie died.

15 The advice essentially was to take less now so you  
16 could inherit all of Marjorie's estate later. Although  
17 Eleanor knew that she, Eleanor, was entitled to a hundred  
18 percent of the Upton County Texas Oil income. She consented  
19 to Marjorie receiving the 65 percent. The advice of the  
20 attorney and Eleanor's love and respect for and appreciation  
21 of Marjorie T. Connell as her mother led to her acquiescence.

22 How is this not laches if you sleep on your rights,  
23 you don't assert anything different? And I'm not sure how my  
24 client could have expected anything different than the status  
25 quo to remain in effect. How did she know?

1 Her evidence is she's got this Texas estate tax  
2 return showing 65/35.

3 THE COURT: Okay. But they can all come in and testify,  
4 Mr. Powell.

5 MR. POWELL: Okay.

6 THE COURT: That's -- I think that's what we said back in  
7 November is that this is a factual dispute. It's going to  
8 require taking the testimony. And in the meantime money's  
9 being held. It's just cash. It's not some sort of an estate,  
10 or something -- it's being just held. If it's theirs they get  
11 the money. If it's not theirs Ms. Ahern gets the money.

12 MR. POWELL: Okay.

13 THE COURT: I'm just not understanding why we can't do  
14 this in February when -- as was planned originally.

15 MR. POWELL: It was planned originally --

16 THE COURT: What has changed?

17 MR. POWELL: -- but it was also left that we could  
18 petition for any other relief because it was deemed -- it was  
19 deemed essentially -- and Mr. Mugan argued that we didn't  
20 plead enough of the issues. That we only pled for a  
21 declaratory judgment.

22 THE COURT: Right. Well, I just think that at this point  
23 in time this is one of the issues that would be appropriately  
24 determined at the hearing. And I don't think it's any  
25 different --

1 MR. POWELL: The laches issue, okay.

2 THE COURT: -- it's any different from any of the other  
3 issues that are going to be --

4 MR. POWELL: Okay.

5 THE COURT: -- determined at the hearing. It's --

6 MR. POWELL: Okay.

7 THE COURT: It's just one of the claims that goes to, is  
8 she barred from making this change --

9 MR. POWELL: Okay.

10 THE COURT: -- by the doctrine of laches.

11 MR. POWELL: Okay.

12 THE COURT: I mean, it's now --

13 MR. POWELL: I understand.

14 THE COURT: -- I think it's something that's part of our  
15 February trial.

16 MR. POWELL: Okay, okay.

17 THE COURT: So --

18 MR. POWELL: Understood.

19 THE COURT: -- when I say I'm not going to grant it today  
20 it's not that I'm saying you --

21 MR. POWELL: Sure.

22 THE COURT: -- aren't entitled to pursue it --

23 MR. POWELL: Sure.

24 THE COURT: -- as a claim. It's just that I can't grant  
25 preliminary relief. To me this is part of the whole

1 evidentiary hearing that's coming up in a month. I just  
2 didn't see what the change was in circumstances.

3 MR. POWELL: Okay.

4 THE COURT: Now that I understand that you're just --  
5 this is an issue you want -- you would have liked me to grant  
6 today, but it's just an issue to get as part of the ultimate  
7 case it's one of the claims is that she's barred by the  
8 doctrine of laches.

9 And now I understand that's how I understand it.

10 MR. POWELL: Okay.

11 THE COURT: That's how I view it. And I think it's  
12 something that has to be determined at the same time we  
13 determine the other issues --

14 MR. POWELL: Understood.

15 THE COURT: -- in the pending evidentiary hearing in  
16 February.

17 MR. POWELL: Okay, understood.

18 THE COURT: So denying both petitions. It's without  
19 prejudice because if for some reason something develops  
20 through the evidentiary hearing that one of the other claims  
21 has merit, either that this is precluded or that there's  
22 laches then, you know, we can rule on it at that time, but  
23 that's when I think it all has to be part of the evidentiary  
24 hearing.

25 MR. POWELL: Understood. Thank you, Your Honor.

1           MR. MUGAN: I'm not trying to be a smart aleck, Your  
2 Honor. But I'm just asking if the Court wishes to reconsider  
3 its ruling in light of what he said regarding the claim  
4 preclusion.

5           THE COURT: I appreciate that, Mr. Mugan. And as I said,  
6 you know, he almost talked me into reconsidering it. But now  
7 that I understand that he's just raising this issue as a  
8 potential claim or theory for determination at the time of  
9 trial then I think that's where we'll leave it. We'll  
10 consider all these issues at the trial.

11          MR. MUGAN: Thank you, Your Honor.

12          THE COURT: Okay, thanks.

13          [Proceedings Concluded at 9:36 a.m.]

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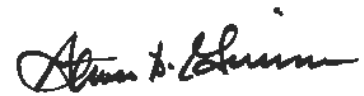
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

A handwritten signature in black ink, appearing to read 'Matthew Smith', is written over a horizontal line.

Matthew Smith

Certified Transcriber





CLERK OF THE COURT

1 RTRAN

2  
3  
4  
5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7  
8 MATTER OF THE TRUST OF W.N.  
9 CONNELL AND MARJORIE T.  
10 CONNELL LIVING TRUST DATED  
11 MAY 18, 1972

CASE NO. P-066425

DEPT. XXVI

12  
13  
14 BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

15 FRIDAY, JANUARY 24, 2014

16 **RECORDER'S TRANSCRIPT OF PROCEEDING:**  
17 **ALL PENDING MOTIONS &**  
18 **CALENDAR CALL**

19 APPEARANCES:

20 For the Plaintiff:

JOHN R. MUGAN, ESQ.  
MICHAEL D. LUM, ESQ.  
JEFFREY BURR, LTD.

22 For the Respondent:

JOSEPH J. POWELL, ESQ.  
THE RUSHFORTH FIRM, PLLC

24  
25 RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 FRIDAY, JANUARY 14, 2014 AT 11:07 A.M.

2  
3 THE COURT: Powell, Mugan. Everyone state their appearances. It's case:  
4 P-09-066425.

5 MR. POWELL: Good morning, Your Honor, Joe Powell, appearing on behalf  
6 of Jacqueline Montoya.

7 MR. MUGAN: Good morning, Your Honor, John Mugan on behalf of Eleanor  
8 Ahern.

9 MR. LUM: Good morning, Your Honor, Michael Lum on behalf of Eleanor  
10 Ahern.

11 THE COURT: Okay. February 18<sup>th</sup>, 2014, cross stack on for a bench trial.  
12 You guys ready to go?

13 MR. POWELL: Yup.

14 MR. MUGAN: I -- there's one potential problem, Your Honor, and I don't know  
15 whether it will resolve itself or not. If you recall, this is a declaratory judgment action  
16 as to a 65 percent interest in oil and gas rights, and the allegation is that it was in  
17 Trust Number 3 and that the Decedent, Marjorie Connell, had a testamentary power  
18 of appointment over Trust Number 3 and she exercised that. And accordingly, the  
19 65 -- disputed 65 percent went to the MTC Living Trust.

20 And like I said, this is declaratory judgment action relating to that 65  
21 percent interest. Marjorie's Last Will and Testament has never been probated in  
22 Nevada. And if you recall, three years after her death, the Petitioner filed a probate  
23 down in Texas and alleged that Marjorie owned it individually, and there's no, no  
24 dispute that a trust owned it and that she had no children, and she did have a child,  
25 my client.

1           And there is a challenge to that down in Texas that we thought would  
2 be long over with by this point in time.

3           THE COURT: Uh-huh.

4           MR. MUGAN: And an expert witness, who we also want to use, down, in our  
5 case here got very, very ill, with advanced stage of leukemia, went to MD Anderson  
6 for -- and actually was -- is -- or was hospitalized, and they had to postpone the  
7 Texas matter until he's able to testify. My understanding is he's going through  
8 treatments down there.

9           I called the Texas counsel this week. I emailed him last weekend to  
10 find out what the status is. He advised me they were checking on the status of the  
11 witness but it -- the Texas matter had not been determined. So, if the Texas matter  
12 is not determined then I -- we don't have him as a witness and we need him as a  
13 witness, as an expert witness, number one.

14           Number two, the issue may not be ripe because if, if the will is  
15 challenged -- I mean, it's never been, you know, admitted to probate, formally. If it's  
16 been -- if it's challenged and it's defeated then the testamentary power of  
17 appointment is invalid, and so, it's a basic premise on which his case rests. And  
18 that needs to be determined before this Court can determine the ownership of the  
19 65 percent interest.

20           THE COURT: Uh-huh.

21           MR. MUGAN: Am I making myself clear?

22           THE COURT: Uh-huh.

23           MR. MUGAN: Okay, thank you, Your Honor.

24           THE COURT: Mr. Powell.

25           MR. POWELL: I, I don't even know how to respond other than --

1 THE COURT: Yeah.

2 MR. POWELL: -- this seems to me to just to be a tactic to basically get an  
3 advantage to start out my client and her sister as beneficiaries. I -- the whole thing  
4 with the Texas probate was -- that was actually intended to address what has been  
5 claimed to say: Well, you didn't take any action to formally change title of the 65  
6 percent interest belonging to the MTC Living Trust so -- and then once that was --  
7 basically, once that was attempted to be done it was blocked. And so, we seem to  
8 be in this strategic game here, essentially of chess, where we're cutting off  
9 distributions without any declaration that that's acceptable. We're then preventing  
10 the Texas probate from occurring to basically have this. By the way too, it's a  
11 Nevada will.

12 The whole point of the Texas probate was basically just to be able to  
13 change the title because that would be the steps is --

14 THE COURT: Wasn't really to probate the will.

15 MR. POWELL: It's not really related, the probate of the will, because the  
16 probate of the will -- the Texas proceedings --

17 THE COURT: Doesn't the will have to be probated somewhere?

18 MR. POWELL: Not -- not to my understanding because all of her other assets  
19 were already in her trust.

20 THE COURT: Already in the trust.

21 MR. POWELL: Yeah, so there -- there really wasn't a need for this, but don't  
22 -- only again, the reason for the Texas was to get an order, then they could take to  
23 the Recorder's Office and say: "Look, here's an order showing that she has a 65  
24 percent interest." That was blocked. I'm not sure, again, it seems like this is just  
25 strategy to try to gain leverage --

1 THE COURT: Uh-huh.

2 MR. POWELL: -- in this dispute which is, again, are -- is the MTC Living Trust  
3 entitled to the 65 percent?

4 THE COURT: Okay.

5 MR. MUGAN: I can assure the Court, this is not a strategy to delay the  
6 matter. We'd just soon go forward. If you recall, you're treating both parties the  
7 same. My client also does not have access to the disputed 65 percent.

8 THE COURT: Right.

9 MR. MUGAN: You issued an order initial -- the initial hearing, where that  
10 money is all tied up, and so, my client doesn't have access to it either. Just as  
11 prejudiced as, as Mr. Powell's --

12 THE COURT: Right.

13 MR. MUGAN: -- client. The -- I mean, the -- quite frankly, if he would go  
14 ahead with the trial, I think it would be subject to a failure to meet his burden of proof  
15 because it's premised on the testamentary exercise of this power of appointment.

16 THE COURT: Uh-huh.

17 MR. MUGAN: And if the will has never been admitted to probate or been  
18 determined to be valid because someone challenged it, i.e., my client, then, you  
19 know, it -- all of this -- all of what we do in this trial, until that issue is taken care of,  
20 quite frankly, is a waste of time and you can't undo what you've done.

21 THE COURT: We just recently had a hearing on this and notice was raised  
22 and the Court said: "The reason why I'm not going to make a ruling now is we go to  
23 trial in a month."

24 MR. POWELL: Exactly.

25 THE COURT: So I guess one of my concerns is, is there some -- if there is, in

1 fact, some need to have determinations made out of Texas before we proceed

2 [sneezed], is there some --

3 MR. MUGAN: Bless you.

4 THE COURT: -- [sneezed] --

5 MR. POWELL: Bless you.

6 THE COURT: -- some -- something we could do to address the fact that the  
7 funds are being held pending the resolution of this because that is prejudicial; it's  
8 actually prejudicial to both sides. So, it may be that we need to address that issue,  
9 because if there really is some determination I'm waiting for from Texas and an  
10 expert you're waiting for from Texas who is ill which, you know, again, never heard  
11 about before, it might be appropriate to revisit this whole issue and make some, you  
12 know, temporary accommodation such that the parties -- because I don't know how  
13 long this is going to hold these people up.

14 If the real issue is, we have this expert who is seeking treatment, is he,  
15 in fact, going to be available? Is it time to move on and find another expert? How  
16 long is he going to have this treatment? Will he be able to testify? When? That's  
17 all dependent -- somebody -- because we need an oral motion to continue.

18 But I think that may be one solution is that the parties then -- there  
19 should be something done to adjust the situation so that, you know, both parties  
20 have some temporary relief. Not final -- not making a final determination, but giving  
21 the parties some relief. Because one of the reasons why I didn't do anything a  
22 month ago was because we were going to be -- well, two weeks ago, but --

23 MR. POWELL: Yeah.

24 THE COURT: -- because we were going to have a trial --

25 MR. MUGAN: If she -- if --

1 THE COURT: -- and we could make a determination at that time, so.

2 MR. MUGAN: I, you know, I can -- I can press Texas Counsel, again, and  
3 see where -- what in the world is going on, and if this is going to be resolved and  
4 see if they can get this resolved before February 18<sup>th</sup>. If you want to put this out for  
5 a week and us report back to the Court or whatever Your Honor wants to do.

6 THE COURT: All right, I think that the thing is if, at this point the -- Ms. Ahern  
7 wants to continue this trial because of her unavailable neighbor expert, that she can  
8 certainly seek that relief. We need to know what, in fact, we're looking at. But I do  
9 think that Mr. Powell's raised a good point which is -- and I understand it affects your  
10 client too Mr. Mugan -- that we're still holding these monies. We've held them for  
11 kind of a long time, and is there some need to do something to accommodate  
12 everybody, such that nobody is prejudiced by this sudden delay in trial?

13 So, when do you want to present so that Mr. Powell has something to  
14 respond to? The information on your --

15 MR. MUGAN: I --

16 THE COURT: -- request to continue?

17 MR. MUGAN: -- we can -- we can press Texas Counsel and I can get back  
18 with him within a week -- sometime next week.

19 THE COURT: Okay. All right, because we -- I need to know --

20 MR. MUGAN: Earlier the better.

21 THE COURT: -- some sort of an affidavit or something saying: This is what  
22 I've been told is the condition of the expert and he'll be available. What's happening  
23 with the Texas litigation in the Court? I don't have any idea.

24 MR. MUGAN: Well, one of my questions to the Texas Counsel was, Can you  
25 push this? I mean, "Can you push this up?"

1 THE COURT: Uh-huh.

2 MR. MUGAN: "Can you --

3 THE COURT: And then --

4 MR. MUGAN: -- do you really need this person?"

5 THE COURT: -- right. And if it's going to be: Yeah, no problem, we'll get it  
6 done in a month, then maybe that's not a problem, but if it's: No, he's going to be  
7 under treatment for four months, we can't do this without him, we've got to have a  
8 trial, then that's way beyond what anybody expects and it is a change of  
9 circumstance, in such, that some temporary relief might be warranted just to  
10 accommodate the concerns of everybody. Because I think there are certain  
11 amounts that probably are undisputed that we can -- you'll make some sort of a  
12 resolution on.

13 So, at this point in time, that's what I think I would like to see is  
14 something in writing telling us what the status is and when the expert might be  
15 available so that we can -- and then, Mr. Powell, if you had an opportunity to  
16 respond or discuss it with his client and consider if there's a need to request relief. If  
17 it's like, no, you know, we'll be ready, you know, our trial's definitely going February  
18 28<sup>th</sup>, so then, I'm not so worried, but if it's not -- probably not going to go until the  
19 summer than that's a real problem.

20 MR. MUGAN: Can you -- can the Court give us a date that we would  
21 probably go if we're on the February 18<sup>th</sup> stack, so I can tell Texas Counsel: Can  
22 you get it done by this point in time?

23 THE COURT: Well, by the end of the series where you probably can. The  
24 reason you were called first is this the oldest case, it's 2009. But -- so --

25 MR. MUGAN: Actually it's a 2012 case.



1 THE COURT: Well, but the probate's 2009, so that's what started it. So your  
2 position is you're not the oldest case then that's two --

3 MR. MUGAN: It doesn't make any difference.

4 THE COURT: -- but there are a couple of cases, you know, that are also  
5 otherwise ready to go so -- but it's only a four week stack so, I don't know how likely  
6 it is that we would -- we'd put you on there or not so -- and I think it was wanting a  
7 day we could go. So, okay. You want to -- do you want to just give us some time  
8 here and we'll get through the rest of these --

9 MR. MUGAN: All right.

10 THE COURT: -- status checks and see where it is you might be going on the  
11 stack, so you can file something and -- and you can make a determination to  
12 continue this trial?

13 MR. MUGAN: Thank you, Your Honor.

14 [Hearing recessed at 11:19 a.m.]

15 [Hearing resumed at 11:50 a.m.]

16 THE COURT: They are supposed to be -- they're going to go -- they were  
17 going to go what, the week of the --

18 COURT CLERK: I don't even think that we got that far.

19 THE COURT: -- yeah, we didn't because you don't know if they've got a --

20 COURT CLERK: A conflict on the Texas things.

21 THE COURT: Right.

22 COURT CLERK: -- unless --

23 THE COURT: Yeah, I think they were -- they're first. They're on for the 18<sup>th</sup>.

24 MR. LUM: The 18<sup>th</sup>.

25 THE COURT: But there's a potential request to continue the trial.

1 MR. LUM: So February 18<sup>th</sup>?

2 THE COURT: Yeah, due to the unavailability of an expert witness.

3 MR. LUM: Okay, yeah, we'll see if we can push that and get it done by the  
4 18<sup>th</sup>.

5 [Court and Clerk confer]

6 THE COURT: Is that going to take those four days, do you -- do you know?

7 MR. LUM: It shouldn't take four days.

8 COURT CLERK: Well.

9 THE COURT: All right. So and we're just giving you first because that's the  
10 last time -- that's the last week that's available. So --

11 MR. LUM: Okay.

12 THE COURT: -- we'll leave it on the 18<sup>th</sup> and see what happens with your  
13 motion to continue?

14 MR. LUM: Okay, February 18<sup>th</sup> and a certain time?

15 COURT CLERK: 11 o'clock.

16 THE COURT: Yeah, because it's -- yeah, it's -- so it'd be 9 a.m.

17 COURT CLERK: So that pretrial would be at 11?

18 THE COURT: Okay, the 11<sup>th</sup>?

19 COURT CLERK: Is that --

20 THE COURT: February 11<sup>th</sup> at --

21 COURT CLERK: -- 11. Yeah, Wednesday.

22 THE COURT: The 12<sup>th</sup>, February 12<sup>th</sup>. It'd be February 12<sup>th</sup>.

23 COURT CLERK: Right, right, right.

24 THE COURT: February 12<sup>th</sup>.

25 COURT CLERK: February 12<sup>th</sup> at --

1 THE COURT: 11 a.m.

2 COURT CLERK: 11 o'clock.

3 MR. LUM: Okay, great, thank you.

4 THE COURT: Okay. Okay. Now we can go back.

5  
6 [Proceeding concluded at 11:52 a.m.]  
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20 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
21 audio/visual recording in the above entitled case.

22 

23 Kerry Esparza, Court Recorder/Transcriber  
24 District Court, Department XXVI  
25

  
CLERK OF THE COURT

1 **RTRAN**

2  
3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA  
6

7 In re the Matter of the )

8 THE W.N. CONNELL and MARJORIE )  
9 T. CONNELL LIVING TRUST, dated )  
10 May 18, 1972 )  
11 )  
12 )

CASE NO. P-066425

DEPT. XXVI

13 BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

14 TUESDAY, APRIL 22, 2014

15 **RECORDER'S TRANSCRIPT OF PROCEEDING:**  
16 **PETITION**

17 **APPEARANCES:**  
18

19 For Eleanor Ahern:

JOHN R. MUGAN, ESQ.  
MICHAEL LUM, ESQ.  
Jeffrey Burr, Ltd.

21 For Jacqueline Montoya:

JOSEPH J. POWELL, ESQ.  
The Rushforth Firm, Ltd.

23 WHITNEY B. WARNICK, ESQ.  
24 Albright, Stoddard, Warnick, et al

25 RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 TUESDAY, APRIL 22, 2014 AT 9:03 A.M.

2  
3 THE COURT: Case P-066425. Counsel, state their appearances for the  
4 record.

5 MR. MUGAN: Good morning, Your Honor, John Mugan, 10690 for  
6 Trustee, Eleanor Ahern.

7 THE COURT: Okay.

8 MR. LUM: Good morning, Your Honor, Michael Lum, Bar No. 12997 on  
9 behalf of Eleanor Ahern.

10 MR. POWELL: Good morning, Your Honor, Joey Powell appearing on  
11 behalf of Jacqueline Montoya.

12 MR. WARNICKE: Whitney Warnick, also on behalf of Ms. Montoya, Bar  
13 No. 1573.

14 THE COURT: Okay. All right. So, this is a Petition to Release Funds in  
15 order to pay administrative expenses, insurance premium taxes attributable to  
16 the trust property too.

17 MR. MUGAN: If I may, Your Honor.

18 THE COURT: Yeah.

19 MR. MUGAN: It was our petition. I think there's been some  
20 misunderstanding in particular as to attorney fees. We are -- we're not asking --

21 THE COURT: Right.

22 MR. MUGAN: -- for a pro rata of attorney fees and we did not intend to.  
23 In our proposed order back in November we -- we put in language about valid  
24 professional fees, and we specifically noted attorney fees and accountant fees,  
25 and the other side objected.

1 In our pleading here, we intentionally omitted attorney fees, you  
2 know, a reference to attorney fees.

3 THE COURT: Right.

4 MR. MUGAN: And we only – only referenced accounting fees, and we  
5 thought that was self-evident, but apparently it was not, and that's fine. I can  
6 see where there -- there may – may be a little ambiguity there, but we never  
7 intended to ask for her attorney fees. Back in November when the Court  
8 entered its order about isolating the 65 percent, we sat down with our client  
9 and talked about attorney fees and how she could make an argument.

10 At least part of them should be paid by the trust because of her  
11 duty as trustee, to uphold the terms of the trust and follow the intentions of her  
12 father and the trustors. And we strongly recommended to her, in this situation,  
13 not to ask for a pro rata share, and she agreed. And so, the problem was –  
14 evidently we didn't make ourselves clear enough in our pleadings.

15 THE COURT: And the other issue they raised was taxes. That in the past  
16 when there have been distributions the beneficiaries have paid through their K-  
17 1s and paid the taxes on it, but in this case where the funds are being held,  
18 there is no K-1.

19 MR. MUGAN: Actually, I think that's taken care of itself. Also, as an  
20 aside, they referenced, in their objection, and email to us inquiring – and the  
21 problem, quite frankly was, I had a family emergency and I went back to Iowa.  
22 And so, I was gone and then when I came back – was April 15<sup>th</sup> and the CPA  
23 was gone out of town and on vacation.

24 And so, I was not – and they asked for precise figures, and I was  
25 not able to meet with the CPA until yesterday morning when he got back in

1 town and basically – and he -- I had him send me an email to confirm it.

2 Because of depletion allowance, et cetera, there is no income tax that is due on  
3 this year's – or last year's, I should say, return that was due April 15<sup>th</sup> of this  
4 year.

5 He also informed me and I have the email in writing, there is no  
6 estimates. There will be no estimates due, and so, I think the income tax  
7 situation has taken care of itself. When we filed the petition we were under the  
8 impression there were going to be tax ramifications from the accountant, but he  
9 didn't have all the figures and stuff. And so, I think that takes care of itself.

10 THE COURT: Well, then how are you – just, logistically, Mr. Mugan, how  
11 are you posing to – you would get the funds released? I mean, are you saying  
12 you'll make a calculation and submit an order saying: This is how much we've  
13 calculated should be disbursed? And then, the Court orders that disbursement?  
14 I mean, how are you proposing it be done?

15 MR. MUGAN: Well, I mean, the order, the original order said to fund – 65  
16 percent were to be isolated, you know, not touched, et cetera, and that's  
17 what's happened. She – she isolated the 65 percent and when the ad valorem  
18 taxes came due in October they were paid, but they were not paid out of the  
19 65 percent because we did not want to violate the order. And we thought that  
20 the trial would go in February and so, it would all take care of itself and it  
21 didn't.

22 And so, what we're saying now is: Those ad valorem taxes that  
23 were paid, 65 percent should be reimbursed from – from that fund that was  
24 isolated. As I understand it there's no objection, no objection to that, but  
25 correct me if I'm – if I'm wrong. And alls [sic] I'm saying is that she has

1 control and access of the 65 percent as Trustee. She would just reimburse,  
2 you know, herself or the trust, whatever that, that amount is, and we'll  
3 certainly furnish that amount. I mean, we have the receipts and the tax, you  
4 know, documents -- whatever they want to see.

5 On the property taxes, my understanding is, they've consented to  
6 the pro rata share. On the accounting fees, my understanding is, they've  
7 consented to the same with the reservation of the right to object to  
8 reasonableness. And I can assure the Court and I can assure opposing Counsel  
9 that I have already had the discussion with the CPA and I will have it again,  
10 that any billing has to be specifically related to the trust administrative duties,  
11 i.e., tax return, a 10-41, K-1s -- and if there's estimates to be made, but there  
12 aren't now.

13 Anything that he may do for her, individually, that's her problem.  
14 And I will reemphasize that in writing to him, but he understands it. And the  
15 CPA is Shawn King of Gamett and King who's very, very experienced. You  
16 know, I -- I don't think there'd be any -- any dispute as to the reasonableness,  
17 but I think what they were really saying, and again, correct me if I'm wrong.  
18 They don't want any personal things of my client overlapping and they have to  
19 pay 65 percent and I -- I agree, that should not happen.

20 THE COURT: Okay.

21 MR. MUGAN: So I -- I think most of it or all of it has kind of taken care of  
22 itself. And like I said, we did not -- we weren't able to meet with the  
23 accountant again until yesterday. And I was gone in Iowa with all kinds of  
24 computer problems and, you know, that's why -- why we did not get back to  
25 Mr. Powell till yesterday. We met with the accountant at 9 o'clock, first thing.



1 THE COURT: Thank you.

2 MR. MUGAN: You're welcome.

3 THE COURT: Mr. Powell, the representations made by Mr. Mugan, are  
4 there any continued objections with Ms. Montoya?

5 MR. POWELL: No, no, I – I think we're clear. It's basically, assuming  
6 that things go as Mr. Mugan has represented, we're fine.

7 THE COURT: And so, Mr. Mugan prepares an order granting his petition  
8 and – which just shows you the order for review prior to – significant to the  
9 Court. You think you've got the terms worked out, you can sign off on that  
10 order and the Court can hear it.

11 MR. POWELL: I believe so, I mean, again, we're – really what we're just  
12 asking for is, is again, clarification on what exactly we're classifying as  
13 administrative expenses and --

14 THE COURT: Uh-huh.

15 MR. POWELL: -- and what they relate to, given the fact that we're in,  
16 obviously, in litigation.

17 THE COURT: I think he stated that pretty clearly that --

18 MR. POWELL: Yeah, so --

19 THE COURT: -- the --

20 MR. POWELL: -- with that, yeah, as long as we have full transparency  
21 and a breakdown of what exactly we're talking about, absolutely, yeah.

22 THE COURT: Okay. Then, Mr. Mugan, if you prepare that order, just  
23 show it to Mr. Powell before submitting it and we'll be able to -- approval.

24 MR. MUGAN: Well, I'll be glad to, Your Honor, what -- one point of  
25 clarification. We're using Gamett and King, Shawn King, and I presume there's

1 no objection to that. I mean, the Trustee has the right to select. You said  
2 reasonableness of fee and I – I guess I just don't want to get into an argument,  
3 you know, that we're using the wrong CPA or something.

4 THE COURT: Right. I think she's got the choice --

5 MR. POWELL: Absolutely, we're --

6 THE COURT: -- so --

7 MR. POWELL: -- we're not going to complain about anything like that,  
8 again. We just want to make sure, and obviously look at a statement showing,  
9 again --

10 THE COURT: Uh-huh.

11 MR. POWELL: -- what exactly the work is done just so it's --

12 THE COURT: The trust is not paying --

13 MR. POWELL: -- exactly.

14 THE COURT: -- for her personal --

15 MR. POWELL: -- so, exactly, correct.

16 THE COURT: I think Mr. Mugan made that very clear that that's --

17 MR. POWELL: Yeah, yeah.

18 THE COURT: -- their intention, so --

19 MR. POWELL: Yeah.

20 THE COURT: -- they would honor that --

21 MR. POWELL: Sure.

22 THE COURT: -- distribution, and then -- and that the accountant  
23 understands the need to bill things separately. I think it's pretty clear that -- I  
24 think that we've come to an agreement, it's just the unfortunate, timing didn't  
25 allow us to do it.

1 MR. POWELL: Agreed.

2 THE COURT: Okay.

3 MR. POWELL: Agreed.

4 THE COURT: So then, yeah, if you'll just prepare that order, Mr. Mugan,  
5 it's granted, and see you guys back, I guess, in a week or so. Okay, good.

6 MR. MUGAN: Thank you, Your Honor.

7 MR. POWELL: Thank you, Your Honor.

8 MR. MUGAN: Thank you.

9

10 [Proceeding concluded at 9:12 a.m.]

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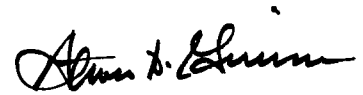
22 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
23 audio/visual recording in the above entitled case to the best of my ability.

24

25



Kerry Esparza, Court Recorder/Transcriber  
District Court, Department XXVI



CLERK OF THE COURT

TRAN

**EIGHTH JUDICIAL DISTRICT COURT  
CIVIL/CRIMINAL DIVISION  
CLARK COUNTY, NEVADA**

IN THE MATTER OF THE TRUST OF )  
W.N. CONNELL AND MARJORIE T. CONNELL ) CASE NO. P-09-066425-T  
LIVING TRUST DATED MAY 18, 1972 )

DEPT. NO. XXVI

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

TUESDAY, MAY 13, 2014

**TRANSCRIPT RE:**  
ALL PENDING MOTIONS

**APPEARANCES:**

For Petitioner Eleanor C. Ahern:

JOHN R. MUGAN, ESQ.  
MICHAEL D. LUM, ESQ.

For Executrix Jacqueline M. Montoya:

JOSEPH J. POWELL, ESQ.  
WHITNEY B. WARNICK, ESQ.

**ALSO PRESENT:**

JACQUELINE M. MONTOYA  
KATHRYN BOUVIER

RECORDED BY: Kerry Esparza, Court Recorder

1 CLARK COUNTY, NEVADA

TUESDAY, MAY 13, 2014

2 **PROCEEDINGS**

3 (PROCEEDINGS BEGAN AT 11:11:20 A.M.)

4 THE COURT: Okay, so then Connell. Will everybody state their appearances  
5 for the record, please.

6 MR. POWELL: Good morning, Your Honor. Joey Powell appearing on  
7 behalf of Jacqueline Montoya, who is present in the courtroom today, along with her  
8 sister, Kathryn Bouvier.

9 MR. WARNICK: Whitney Warnick also representing the same clients, Your  
10 Honor.

11 MR. MUGAN: John Mugan, Your Honor, appearing for trustee Eleanor  
12 Ahern; 10690.

13 MR. LUM: Michael Lum, Your Honor, Bar No. 12997, on behalf of Ahern.

14 THE COURT: Okay. So we saved you for last because you've got the most,  
15 okay. So have we -- any view of the most efficient way to deal with these, because  
16 we've got several things on. Just so we're clear on the record what the calendar  
17 shows, we have a hearing on petition for construction and effect of a probate court  
18 order; a motion to dismiss the counterclaims of Eleanor Ahern; an amended notice  
19 of hearing on petition to compel trustee to distribute accrued income and future  
20 income received from oil and gas leases. We have a motion to continue this  
21 hearing on the constructive effect of the probate court order. So probably the  
22 motion to continue the motion for construction, and then if we don't do the motion  
23 for construction, move into the motion for construction. The other two I think are  
24 somewhat contained issues. Okay?

1 MR. MUGAN: All right.

2 THE COURT: Motion to continue.

3 MR. MUGAN: Thank you, Your Honor. On the motion to continue, as we set  
4 out in our pleading, finally a probate -- petition for probate of the will was filed in late  
5 March in Nevada here for Marjorie Connell, who died back in 2009, and a hearing  
6 was set on April 18th. My client objected to it. The commissioner declared a formal  
7 will contest, ordered the issuance of citations, and so that action is just starting and  
8 is pending. And it would seem to me that that action has to be disposed of prior  
9 to the petition on construction. Quite frankly, it could have been on the motion to  
10 dismiss the counterclaims, too, but we kind of went back and forth on that, so we  
11 left it out.

12 The cornerstone or one of the cornerstones of their argument in the  
13 declaratory judgment action is that the last will and testament of Marjorie T. Connell  
14 exercised a testamentary power of appointment and appointed Trust No. 3, which  
15 they claim that the disputed interest was owned by, to the M.T.C. Connell Trust.  
16 And that, like I said, is a cornerstone to the petition for declaratory judgment.  
17 That is part of their burden of proof that in fact not only that sixty-five percent was  
18 purportedly in this Trust No. 3, which under the terms of the original trust if the  
19 testamentary power of appointment is not exercised, then it goes to my client,  
20 but they have to prove the validity of that will that supposedly exercised the  
21 testamentary power of appointment and appointed it to the M.T.C. Living Trust,  
22 which -- that's the basis of their action in the petition for declaratory judgment.

23 So I don't believe they can meet their burden of proof by proving  
24 the validity of that will until that will contest is disposed of. And obviously judicial

1 economy, if you look at the two of them, that one has to be disposed of first. I'm  
2 not adverse to clients paying attorney fees, especially my own or Mr. Powell's or  
3 Mr. Warnick's, but I don't want to see my client or any other client pay attorney fees  
4 that they don't need to. And so until the will contest is taken care of, I don't want  
5 my client or their clients to be paying all kinds of fees in the petition for declaratory  
6 judgment which may be rendered moot by the outcome of the will contest.

7 THE COURT: Okay.

8 MR. POWELL: Your Honor, that's the issue in this case in general is  
9 burden of proof, who has the burden of proof. The will -- the presumption is the  
10 will is presumed valid until it's shown not to be valid. It meets all the requirements  
11 necessary under Nevada law. The Restatement Third says a will is validly executed  
12 if it is in writing and it is signed by the testator and by a specified number of attesting  
13 witnesses under procedures provided by applicable law. My will is valid, Mr.  
14 Warnick's will is valid, your will is valid, until it's shown not to be valid. So this  
15 presumption that it's up to us to have -- it's our burden of proof to establish the  
16 will is valid or else it's not valid -- incorrect. That's shifting a burden of proof that  
17 opposing counsel has the obligation to show. That's not our burden of proof.

18 THE COURT: Well, but I think the commissioner in saying -- deferring the  
19 will contest because they've come up with these affidavits of these experts who  
20 say that we don't think that's a valid will, we think it's forged or something -- some  
21 document was forged; it isn't clear which one. In this probate, the will case, is -- the  
22 estate case is 080595, so that's the estate case. The commissioner got -- I mean,  
23 it seems like this is a dual track and the issue is are we going to have mixed results,  
24 because you've got the commissioner over there doing what the commissioner is

1 doing and we still have this issue over here and is there the potential for inconsistent  
2 results, because what happens -- And then what happens if the commissioner holds  
3 a will contest and somebody doesn't like the outcome of the will contest and then  
4 you appeal that? I mean, it just seems to me that we're going about this backwards.

5 MR. POWELL: Your Honor, it's actually in front of you because they've  
6 declared a -- they've requested a jury trial, so that matter is actually before you.

7 THE COURT: So it's not the commissioner's anymore?

8 MR. POWELL: It's not the commissioner's. No, Your Honor. No.

9 THE COURT: You know, none of this stuff counts in my statistics. Probate,  
10 they don't count it. Awesome.

11 MR. POWELL: Free work. You don't get credit for it.

12 THE COURT: I wish you guys would try your cases.

13 MR. POWELL: Yeah.

14 THE COURT: We can't get civil attorneys to try their cases. Okay.

15 MR. POWELL: Your Honor, and I go back to my premise, is, again, and I'll  
16 use the best analogy I know how to. If I execute my will, how is my will not valid?  
17 My will doesn't have to be offered for probate. Neither does yours. There's no  
18 requirement that you offer it for probate. The only requirement in Nevada law is you  
19 lodge the will with the court clerk, the district court clerk. That was done. That was  
20 done, and this is the kicker of this. That was done right after Mrs. Connell passed.  
21 It was in '09 that Mrs. Connell passed. We're now in the year 2014. Ms. Ahern had  
22 absolutely every right as the daughter, if she wanted to contest the validity of that  
23 will, she herself had complete standing to offer that in for admission to probate and  
24 then to file a contest because of it.



1           Now, the other super relevant fact here to this as well, Your Honor, is  
2 that the same day that that will was executed was also the restatement of the M.T.C.  
3 Living Trust. Ms. Ahern received in 2009 a three hundred thousand dollar bequest  
4 under that trust. Talk about inconsistent positions. I think we've got an inconsistent  
5 position here clearly. And the other fact of this matter --

6           THE COURT: But I guess my question is do we need somehow, whether it's  
7 all over here, or it probably should be consolidated so that when we file stuff -- you  
8 file it in the Family Court Odyssey system and they've got the P cases and the E  
9 cases. Everybody's P, and they've got the E cases and the T cases and then you  
10 file them both and it's a mess for us. There is also an A case or arguably should be  
11 an A case here --

12           MR. POWELL: Yeah.

13           THE COURT: -- on that other issue and it just -- so we need to make sure  
14 we're all filing in one document -- in one docket. So it just -- I'm trying to figure out  
15 how we stage this in a way that makes the most sense, because I don't know if --  
16 I understand what Mr. Mugan is saying, but I'm not sure he's -- it's really a stay.  
17 It seems to me that it's more a -- you have to stage this because to the extent that  
18 there's an issue with the will that they have raised, it's a will contest, to the jury trial  
19 -- like I said, we should expect you guys to try your cases. We can accommodate  
20 you getting a jury trial scheduled as soon as you can be ready on that issue  
21 because if the jury says, oh, we really think that that's a forged will, then that throws  
22 this whole thing into turmoil. So -- And what's happening in Texas and all that?

23           MR. POWELL: Well, Your Honor --

24           THE COURT: So it's just all a big mess.

1 MR. POWELL: Well, if I can address --

2 THE COURT: So we need to figure out a way to make this the most efficient  
3 so that we can get this resolved, because the whole point, as I've said a couple  
4 times today, is to get these things resolved so people get their money.

5 MR. POWELL: And that's exactly what we're here to ask you to do, is if  
6 you would like to level this playing field and put back the status quo the way that  
7 this was, and again, going to burden, the thing I think that I can't stress enough  
8 to you is this is not a beneficiary versus trustee dispute. This is beneficiary versus  
9 beneficiary. You just so happen to have one beneficiary who's also wearing the  
10 trustee hat and who has her hands wrapped around the throats of the other  
11 beneficiaries, saying I am choking you off because I am not giving you your  
12 distributions.

13 Now, the thing that bothers me tremendously about this, and you've  
14 seen this today, trustees coming in asking for petition for instructions. That was  
15 an alternative here that Ms. Ahern had and should have utilized to say I believe  
16 in my beneficiary capacity that I have an interest to X amount. Likewise, the other  
17 converse and going by thirty-three years of precedent of a 65/35 distribution of  
18 this oil income, is that that was the precedent, so I need instructions, Your Honor,  
19 as to what I should do here when we have competing claims. That didn't happen.

20 You have a beneficiary who has decided, hey, I can gain a tremendous  
21 amount of leverage here and starve out these other people. And that's what's  
22 happened here. They have not received a distribution. The last distribution was  
23 June of 2013, Your Honor. Now with this will contest, this could go out a year. Who  
24 knows when it's going to go out. Fine. If we want to level the playing field, let them

1 take all the time they need. I suspect, though, we're then going to start going really  
2 quickly if we go back to the status quo and the level playing field, which is fair and  
3 equitable and what needs to be done here. I just have a feeling that some of the  
4 delay issues are suddenly going to go really fast now.

5           So, Your Honor, that's what we're asking for. And if they want to play  
6 this, well, you can't resolve this until then, fine. Again, it's their burden of proof. All  
7 the black and white evidence here suggests for thirty-three years there was a 65/35  
8 distribution. The one key piece of evidence here, Your Honor, is we have a 1980  
9 Texas estate inheritance tax return. Why don't we have the 706? Well, because  
10 it's thirty-four years after the fact of what was done in 1980. If you also read as  
11 well the Texas estate tax return, it says on there: Use the numbers reflected in the  
12 Form 706. Opposing counsel has said you can't produce the 706. You can't show  
13 anything. You can't establish your case. Why exactly would beneficiaries of a trust  
14 who are never trustees, why exactly would they have a copy of the Form 706 in their  
15 possession? That's nonsensical.

16           THE COURT: Well, we're talking here about continuing the petition for  
17 construction specifically because there's a will contest. So I'm trying to figure out  
18 what's the most efficient way to address these things in the proper order. I'm not --  
19 It seems important that this motion needs to be argued, but I guess the question is  
20 does it in fact need to be only after the will contest has been concluded, or can they  
21 -- can all this be done -- can we just get this done?

22           MR. POWELL: It sure can be because the thing is --

23           THE COURT: On a track -- and it may be dual track.

24           MR. POWELL: Yeah.

1 THE COURT: I mean, it may have to be triple track because we have a whole  
2 new issue here on these other claims that technically are A claims.

3 MR. POWELL: Right.

4 THE COURT: So how best, how most efficiently can we do this so that we  
5 don't have inconsistent results? Because if we get all the way through the original  
6 petition that was filed here and we still have the will contest going on, and what  
7 happens if the jury says, oh, that's an invalid will, and the whole thing has like wasted  
8 our time? So how do we make this the most efficient way? And then we'll get to the  
9 other issue, which is making the distributions in the interim, but how do we get to our  
10 most efficient method of resolving these, now that we have -- there's a will contest,  
11 here's our experts who are going to say that there's forgeries here. The jury has got  
12 to hear that. And how do we -- how do we make this the most efficient?

13 I'm not necessarily convinced it's a stay. It seems to me that it needs  
14 to be some sort of a plan for how we can alleviate all of these issues in the most  
15 efficient -- and as Mr. Mugan has pointed out, why are we wasting a lot of money on  
16 some of these issues? Is there some more efficient way to do it? Is it staging this or  
17 is it doing it all at once? How do we do this in the most efficient way so that we don't  
18 have inconsistent results and we reach a satisfactory conclusion so everybody knows  
19 what their rights are and all the issues have been litigated? Because everybody  
20 deserves their chance to have that figured out. How is it most efficient? Mr. Mugan  
21 has technically termed this a stay. I'm not sure a stay is really what he's talking  
22 about. So it might be more of a staging of --

23 MR. MUGAN: If I may --

24 THE COURT: -- of each of these issues.

1 MR. MUGAN: If I may, Your Honor, and I apologize for the language or words  
2 that I selected. In my limited intellect I guess in my mind we have the cart in front of  
3 the horse.

4 THE COURT: And that -- yeah, that's my concern.

5 MR. MUGAN: That's the problem. We have the cart in front of the horse.  
6 And why make this Court go through this --

7 THE COURT: What's the most efficient way to do this?

8 MR. MUGAN: -- and why make all the clients go through this, and if the jury  
9 comes back and says the will is invalid, we're not -- in my humble opinion we're not  
10 thrown into turmoil. This party is over. It's done.

11 THE COURT: What I'm saying, if we go forward with what Mr. -- what's  
12 already on file, we could reach an inconsistent result because the jury --

13 MR. MUGAN: Exactly. That's my concern.

14 THE COURT: And so my question is, do we have to stay it or do we stage it,  
15 or is it, depending on the outcome of the will contest and the whole thing's gone --  
16 I mean, how is it most efficient to reach the results that we -- to go through this thing  
17 in an orderly fashion?

18 MR. MUGAN: Well, from my perspective --

19 THE COURT: And we're really staying the other case pending that review.  
20 Can you go ahead and do whatever you need to do on that so that you're ready,  
21 okay, now it's time for our next phase and, you know, in a couple months we'll just  
22 do that?

23 MR. MUGAN: On the doctrine of judicial economy, attorney fees, costs,  
24 etcetera, it would seem to me that you have to go forward with the will contest case

1 and get a determination on that and then go forward with the petition for declaratory  
2 judgment, because the will contest case can render everything in the petition for  
3 declaratory judgment moot. If we try and do it on dual tracks, we're violating the  
4 doctrine of judicial economy, we're wasting the Court's potential time, and I know the  
5 Court has a lot of things to do, as evidenced this morning. We're wasting attorney  
6 fees, costs, etcetera. We've got three high-powered law firms involved here. And  
7 why we would do that -- like I said, we have the cart in front of the horse. And the  
8 cart in front of the horse is not my client's fault.

9           When this woman died in 2009, Marjorie Connell, her nominated  
10 successor trustee was Mr. Powell's client, Jackie Montoya. She was the successor  
11 trustee of the M.T.C. Living Trust. Why would my client file a will she's going to  
12 contest? Petition -- you know, I mean, why would she do that? What they did  
13 was they waited until 2012, three years after this woman died, to file in the wrong  
14 jurisdiction down in Texas. And as we've stated before, they filed down in Texas  
15 under false representations to the court. They didn't even give my client notice.  
16 And I suspect they were hoping that the time for contesting that will would pass and  
17 then they could proceed with the petition for declaratory judgment. But my client  
18 learned of it and contested it.

19           They now, five years after this woman died, finally bring the petition to  
20 probate the will here in Nevada, which always was the proper jurisdiction and venue.  
21 They don't bring it until the end of March. They specifically in their pleadings request  
22 that it be admitted to probate and have the Court determine that it's a valid will.  
23 That was what their petition asked for. And the Probate Commissioner denied it in  
24 its entirety and said -- declared a will contest and ordered the issuance of citations.

1 I could see a little bit if we didn't have a jury demand, you know,  
2 because you'd be making both decisions. But even then, I think you may be running  
3 up attorney fees and costs, you may be wasting the Court's time. So I think we've  
4 got the cart in front of the horse. We have to change it. We have to put the horse,  
5 the will contest, the issue of the validity of the will, which supposedly exercised the  
6 testamentary power of appointment first, and that's a crucial element to their case;  
7 the second case. And so until we know that result, we're all operating in the blind  
8 and wasting time and money.

9 MR. WARNICK: Your Honor, may I put my two bits in here?

10 THE COURT: Okay.

11 MR. WARNICK: Your Honor, this proceeding started back in September of  
12 last year when we filed a petition to have the Court determine who was entitled to the  
13 income from these Texas oil properties. That's what started this whole proceeding.  
14 At that time opposing counsel and his client never came forward and said, well, hey,  
15 wait a minute, we're entitled to this income because the will of Mrs. Connell was  
16 invalid. They never even raised that issue; never asserted that that was even an  
17 issue in this case. And we didn't know it was going to be an issue until we got later  
18 on in this case and we could see what they were doing. And what they were doing is  
19 raising points here and there to try to delay this thing and try to cause more expense,  
20 try to keep any income from going to our clients and trying to force a situation where  
21 they would starve them out.

22 They're the ones that indicated after this proceeding had been going  
23 for several months that they were going to make a claim that the will was invalid.  
24 We never knew they were going to challenge the will. The will was valid on its face.

1 A copy was sent to their client, Mrs. Ahern. She knew that the power of appointment  
2 had been exercised. She knew exactly what was happening, and she did nothing for  
3 the last five years. Then all of a sudden in 2012 she stops the income going to our  
4 clients. For absolutely no explainable reason she just stops the income going to our  
5 clients. Our clients, one of whom is a trustee of the M.T.C. Trust, had a duty to come  
6 before this Court and say wait a minute, this is not right. Why on earth are you doing  
7 that? Let's get an interpretation then of the trust. If you're going to say that our  
8 clients aren't entitled to sixty-five percent of the income that's been paid for thirty-four  
9 years, if you're going to say just on the basis of your interpretation of something that  
10 happened thirty-four years ago, then let's have the Court make a decision and we'll  
11 decide what happens.

12 So we started with this case and we proceeded along. Your Honor  
13 was ready to have a hearing on this matter last February. What happened at the  
14 last minute? They come in and allege several counterclaims, frivolous counter-  
15 claims to delay this matter and to force it to be carried over. We could see what  
16 was happening each step of the way. We could see that they're probably going to  
17 challenge this will. And so we said we'd better go ahead and submit it to probate  
18 here and make sure we remove that leg so when we got down the road here and  
19 had a trial in this matter, an evidentiary hearing, they wouldn't be using that as an  
20 excuse.

21 Now, I agree, Your Honor, that there is an issue with respect to the will  
22 that has to be resolved, but I respectfully submit that if we're going to do that first we  
23 need to make sure that money is going to our clients like it should be under that trust,  
24 because that was happening for thirty-four years, there's a record of that happening



1 for thirty-four years. They have the burden to challenge that and to overturn that.  
2 And until they can show that there's any semblance of a case that they have, we  
3 respectfully submit that that should continue. We should continue that income so  
4 that each party has the same situation they were in before they stopped the income.  
5 And then if we have to take and deal with the will issue first, we can do that.

6 THE COURT: Now, who's going to be litigating the will contest?

7 MR. WARNICK: Who's going to be litigating it? Mr. Powell and I on one side  
8 and I guess them on the other side.

9 THE COURT: Okay. So I guess my question is, what do you think would  
10 be an appropriate amount of time to litigate the will? Because it's a jury trial, it's  
11 preparing for a jury trial, to litigate the will.

12 MR. WARNICK: We're ready to go.

13 MR. POWELL: We can go today if you want.

14 MR. WARNICK: We're ready to go. We've got the witnesses who saw the  
15 will, who can testify that she signed the will. We've got about ten, eleven witnesses  
16 who know what the intent of the decedent was. They've got a couple of phony  
17 forgery experts that we can deal with pretty easily, but we're ready to go.

18 THE COURT: Well, they have their experts. So --

19 MR. POWELL: A convicted felon, just so you know. And I can produce the  
20 law for you right now and I can also show you where this purported expert has been  
21 discredited on many, many occasions, over-stating qualifications, all these --

22 THE COURT: All right.

23 MR. POWELL: But, Your Honor, just real quickly if I could. And again, this  
24 goes back to --

1 MR. MUGAN: Your Honor, I don't mean to interrupt Mr. Powell --

2 MR. POWELL: No.

3 MR. MUGAN: -- but I'd like the opportunity to respond one at a time.

4 MR. POWELL: Do so after I'm done.

5 MR. MUGAN: Two to one here.

6 THE COURT: Exactly.

7 MR. MUGAN: Mr. Warnick, the only name -- the only pleading his name  
8 appears on is the counterclaims.

9 THE COURT: Right. That's why --

10 MR. MUGAN: Not on this case.

11 THE COURT: That's why I specifically --

12 MR. MUGAN: And we seem to be mixing motions.

13 THE COURT: That's why I specifically asked -- Exactly. That's my concern.  
14 I'm trying to stay focused on the motion to continue. So on the motion to continue,  
15 that's why I asked who's going to litigate the will contest, who's going to be counsel  
16 there. Mr. Warnick indicates he thinks that they'd be ready right away. And I would  
17 just ask you then, Mr. Mugan, when do you think you would be ready on the will  
18 contest, because it's a jury trial. So, I mean, I'm not kidding. We had a bunch of  
19 stuff fall off. A case got stayed in June. We could accommodate you, you know,  
20 the week of June 16th.

21 MR. MUGAN: There's no way that we can be ready there, Your Honor, in a  
22 will contest case. We have witnesses in California. And frankly speaking, based on  
23 the discovery responses we have gotten to date -- we sent out interrogatories and  
24 requests to produce in this case. And for example, they argue how this is irreparable

1 damages, their financial detriment. And so we ask, okay, we know you --

2 THE COURT: I just want to stay focused on the will contest.

3 MR. MUGAN: Okay. Well, I'm just telling you --

4 THE COURT: How much time --

5 MR. MUGAN: -- I think we're going to have an absolute war in this discovery  
6 based on the responses we've gotten. We asked for a copy of Marjorie T. Connell's  
7 706. They say objection; irrelevant. Two days later we get a pleading with  
8 supposedly part of the copy of their 706, even though they just refused to give it  
9 to us because it's irrelevant. You know, and if we're going to play those games,  
10 it's going to take a long time. Long time. There's no way we're going to be ready  
11 in June.

12 MR. POWELL: Your Honor, of course I wouldn't expect them to be ready for  
13 a year, a year and a half; whatever. Again, it goes back to our main point. They are  
14 starving out our clients.

15 THE COURT: Well, we'll deal with that in a minute.

16 MR. POWELL: Okay.

17 THE COURT: We'll deal with that in a minute.

18 MR. POWELL: And that's the issue. But --

19 THE COURT: But we've got a will contest we have to deal with, and I think  
20 that he's raised a valid point, which is you would be buying a problem if the jury were  
21 to come to a different conclusion after we've done all this. It makes perfect sense to  
22 me that we have to deal with the will contest first. How quickly can we deal with the  
23 will contest? How much time do you realistically think you need to do the discovery?  
24 It's a jury trial. So how much time do you realistically think you need to be ready on

1 that issue? We'll get to the other issues here in a minute.

2 MR. POWELL: Again, you already know our response, so I think you're  
3 directing it to Mr. Mugan.

4 THE COURT: You said you're ready. You're ready with your witnesses now.

5 MR. POWELL: Yes.

6 THE COURT: Got it. Okay. But I mean, I don't know if you're going to --  
7 you may not want to take any depositions.

8 MR. POWELL: We don't. We don't. We want to just go.

9 MR. MUGAN: We want to take depositions. Quite frankly, you know --

10 THE COURT: And so this is why it gets -- where he was talking about how  
11 -- because it makes sense to call this a stay or it just makes sense -- if somebody  
12 is going to be deposed, can they please just be deposed once?

13 MR. MUGAN: Right. Yeah, that's fine.

14 THE COURT: On all of the issues.

15 MR. MUGAN: Sure.

16 THE COURT: And, you know, why do you need these people coming back  
17 for -- Okay, well, we're going to talk to you today about this issue. It's a waste of  
18 everybody's time. It's not efficient.

19 MR. MUGAN: Well, my suggestion would have been when we got to that  
20 point is that the parties stipulate on the record that any depositions used in the  
21 first case can be used in the second case.

22 THE COURT: Absolutely. So just, that's why I said, I don't think it's  
23 necessary to call it a stay, that we're going to stay this litigation. So about how  
24 much time do you think you need for discovery? Six months for discovery?

1 MR. MUGAN: I would say a minimum of six months, Your Honor. We're  
2 more than glad to try and push. I am really, really concerned as to what has gone  
3 on in this case so far and the answers and the responses that I just got last Tuesday  
4 to our discovery, which I thought was boilerplate. You know, if we're going to have  
5 to be running to the Discovery Commissioner, you know, every time. We can't even  
6 agree on the language of orders. That's why we finally just submitted competing  
7 orders.

8 THE COURT: Okay.

9 MR. POWELL: That's totally accurate. We can't agree because we can't  
10 even agree with documents and what they say. We can't even agree. If you'll  
11 notice, too, everything is purported. Purported. In their last filing, the purported  
12 attorneys were Mark Solomon and Brian Steadman. Purported. Everything is a  
13 forgery. Everything is this. Your Honor, if I could --

14 THE COURT: All right. So if we can then, if six months is an appropriate  
15 amount of time, do you think you could be ready for trial -- it's a jury trial, I keep  
16 stating that. You know, it's a little different. In January? We've got a stack that  
17 starts January 12th.

18 MR. POWELL: Absolutely.

19 THE COURT: January 12th.

20 MR. POWELL: Whenever we can go, let's go.

21 MR. MUGAN: We will gladly push everything, but again, I want to go on the  
22 record, just like I went on the record the first hearing -- and I'll give Mr. Warnick the  
23 benefit of the doubt because he's a late-comer. The first hearing we were here,  
24 November 12th --

1 MR. POWELL: Talk to the judge.

2 MR. MUGAN: -- November 12th, I specifically advised the Court and co-  
3 counsel that if our motion to dismiss was denied, that we were filing counterclaims.  
4 I said I have to give you the heads up, because that may enter into your thinking.

5 THE COURT: All right.

6 MR. MUGAN: I was trying to disclose that, you know. So I don't want to  
7 get into that again.

8 THE COURT: Okay. So we've got a hearing on the will contest. The  
9 commissioner put it on for May 27th. Do we need that hearing?

10 MR. POWELL: I don't think so.

11 THE COURT: If we're setting our scheduling now --

12 MR. POWELL: No.

13 THE COURT: We can take you off on May 27th?

14 MR. POWELL: Absolutely.

15 THE COURT: We're going to schedule the jury trial for the January 2015  
16 stack. You can do your discovery plan, what you've got. If you need to go to the  
17 Discovery Commissioner, great. If not, just submit what you were -- specifically  
18 because that's a jury trial. That's -- the estate case, P-080595, we'll coordinate  
19 it with this one. But it's a will contest, so it's going on its own track as a jury trial  
20 on that issue. We've taken the hearing on the 27th off. We've dealt with that.

21 I appreciate Mr. Mugan's argument that it would lead to a duplication  
22 of effort to go forward with the other issue first and potentially get an inconsistent  
23 result on the will contest. So it doesn't make any sense. It should be staged. But  
24 I think the discovery should be coordinated in both our 66425 case and the 80595

1 case. So it should all be coordinated. You know, under the local rules there's a  
2 distinction between coordinating and consolidating. You can coordinate things, but  
3 they aren't technically consolidated because -- I should be really clear, the 80595  
4 is a will contest and it is a jury trial. We have to treat that differently.

5 We'll try it separately and we'll try it first, but I think we need to  
6 proceed forward with our preparations. I appreciate the argument that it may lead  
7 to a duplication of efforts, but I just can't see causing any delay because I don't see  
8 why we can't go in the very next stack if you survive the will contest, go right into the  
9 next issue one year after we thought we were going to. So that would just be my  
10 view.

11 MR. POWELL: I guess the clarification I would have is what -- you seem  
12 to be indicating, if I'm not mistaken, and again, please clarify if I'm not interpreting  
13 correctly, but you seem to be indicating that there is a presumption that the will is  
14 not valid until it's declared to be valid.

15 THE COURT: No. Absolutely not.

16 MR. POWELL: Okay. Okay, then --

17 THE COURT: They've got a right to prove their will contest.

18 MR. POWELL: Sure.

19 THE COURT: That's what I'm saying.

20 MR. POWELL: And again, they have the burden of proof, obviously, so --

21 THE COURT: Absolutely.

22 MR. POWELL: Yeah, so --

23 THE COURT: I'm not shifting the burden of proof.

24 MR. POWELL: Yeah. Okay.

1 THE COURT: They've raised the will contest. They've got the right to litigate  
2 that.

3 MR. POWELL: Sure.

4 THE COURT: Because I just can't see in the event that you get inconsistent  
5 results --

6 MR. POWELL: Yeah.

7 THE COURT: -- if you go forward with what we've already got on, you go  
8 forward but you get inconsistent results from a jury -- it's a jury.

9 MR. POWELL: Sure. No, I understand. I understand.

10 THE COURT: They're people who work at Walmart and are willing to take  
11 the time off. I mean, come on, it's a jury.

12 MR. POWELL: Yeah. No, I --

13 THE COURT: It could be an entirely different result.

14 MR. POWELL: Understood. Understood. And that again goes back to our  
15 point, which I'm guessing you want to address now --

16 THE COURT: Yes.

17 MR. POWELL: -- which again is the fairness, the fairness, the fairness and  
18 the fairness.

19 THE COURT: That's the next issue.

20 MR. POWELL: Yes.

21 THE COURT: So we've dealt with that issue. We're going to take the  
22 hearing on the 27th off because we've dealt with all the issues having to do with  
23 getting the jury trial.

24 (The clerk confers with the Court)



1 THE COURT: Correct. That would have to go -- that's on the August 11th,  
2 2014 stack.

3 THE CLERK: And I saw -- (indiscernible) --

4 THE COURT: Is there -- The jury demand I think in the -- because on the --  
5 in the T case, which is the 066425 case -- this is the kind of stuff we get hung up on,  
6 there is apparently a jury demand, and I think that's Mr. Warnick's. You did it?

7 MR. POWELL: No.

8 THE COURT: Or Mr. Mugan, you did that. That's on -- I think on the  
9 counterclaim.

10 MR. POWELL: We are -- No. That's been for everything, Your Honor.  
11 That's a problem, too, which -- We'll be filing a written objection.

12 THE COURT: That was always -- it was always a bench trial.

13 MR. POWELL: It is. You're correct.

14 THE COURT: No, I think it's because of the counterclaims, that there's a  
15 jury demand on the counterclaims, which to me --

16 MR. POWELL: They did not distinguish that.

17 THE COURT: -- which to me that always should be -- that's an A case.

18 MR. POWELL: That's an A case.

19 THE COURT: It's like a civil.

20 MR. POWELL: That's an A case.

21 THE COURT: It's like a civil issue.

22 MR. POWELL: Yes, Your Honor.

23 THE COURT: But it was filed as a counterclaim, so that's why I'm saying,  
24 I don't think -- it doesn't sound like the will contest can be ready by August because

1 it's a whole different issue. I understand you feel you're ready to go, but it's a whole  
2 different issue. And if you can't be ready on the will contest by August, when we  
3 already have this thing scheduled, it seems to me that it's all got to be pushed back,  
4 and that's the January date. I don't see any way we can go forward in August.  
5 You can't. Because that's my concern is that you can end up with an inconsistent  
6 verdict. Whatever I were to decide in the bench trial could all end up being mooted  
7 if the jury comes in and says, oh, we don't think it's a valid will.

8 MR. POWELL: I understand. But --

9 THE COURT: And it's a jury.

10 MR. POWELL: No, I totally understand what your logic and your point is and  
11 all that. The thing, again, I would submit is that you have a five year gap between  
12 when the will could have been offered --

13 THE COURT: Right.

14 MR. POWELL: -- by -- again --

15 THE COURT: I understand that.

16 MR. POWELL: -- by the purported contestant if there was a problem. That  
17 was in her possession with a letter from the attorney saying, by the way, there's an  
18 exercise of the power of appointment over Trust No. 3. Yet, there was continuing  
19 to act and there was distributions made that way.

20 THE COURT: Right. I mean, if you have other -- if you have --

21 MR. POWELL: And again, I realize this is something I'll brief for you --

22 THE COURT: Right.

23 MR. POWELL: -- as basically even before the contest --

24 THE COURT: Oh, yeah.

1 MR. POWELL: -- because we have the right, obviously, to file our motions  
2 and all those.

3 THE COURT: Absolutely.

4 MR. POWELL: Yeah.

5 THE COURT: I'm not saying -- I'm not --

6 MR. POWELL: Oh, I --

7 THE COURT: I'm not saying it's about --

8 MR. POWELL: Yeah, yeah. No, I totally understand.

9 THE COURT: I'm not prejudging this outcome at all. Like I said, it's a jury  
10 trial.

11 MR. POWELL: Yeah, yeah, I totally understand. And I mean, again, they  
12 have, like anybody who asks when they come to do estate planning, can anybody  
13 contest this? Unfortunately, yes, because the doors of the court are open to  
14 anybody --

15 THE COURT: Oh, absolutely.

16 MR. POWELL: -- and you can do whatever you want to do. So I get that.  
17 Understood.

18 THE COURT: So we have the bench trial which -- and we have to deal with,  
19 you know, we've got the whole other issue which were going to get to here in a  
20 minute, but the -- that's going to have to be vacated. And so we'll just put it on  
21 for being reset -- (indiscernible). Maybe you're successful, maybe you get the will  
22 contest dismissed. We've got a date and you could have the bench trial.

23 MR. POWELL: Right. And just to clarify --

24 THE COURT: So we'll move it all to that date in January.

1 MR. POWELL: And again, assuming we level the playing field and we  
2 have fairness here. We're okay with they want to take -- take as long as they want.  
3 If they want to play that game, they can do whatever they choose to do. That's fine.  
4 The one thing I do just want to clarify because I think you're confused is they have  
5 requested, despite the fact that you were ready to go, you are the trier of fact for  
6 this petition for declaratory judgment, they have now asked without distinction --  
7 they asked for a jury trial, so they're trying to remove you and they want that matter  
8 decided by a jury as well. Inappropriate because --

9 THE COURT: Well, you know, you can always move to strike a jury demand  
10 if it's not filed timely because it's already scheduled for trial, but the problem that we  
11 have -- what we have is that they've raised these counterclaims which they may be  
12 entitled to a jury trial on because those were not previously on the record.

13 MR. POWELL: And like you said, that's an A case, so yeah, I don't disagree  
14 with that.

15 THE COURT: So that's the issue. So that's where it kind of breaks down for  
16 me is, you know, if it's already been set for trial and it's set for a bench trial and you  
17 afterwards file a demand for a jury, that's untimely --

18 MR. POWELL: Um-hm.

19 THE COURT: -- and you can move to strike the bench trial --

20 MR. POWELL: And we will.

21 THE COURT: I mean, move to -- a jury demand.

22 MR. POWELL: And that's what I just wanted to clarify for you for the record  
23 is we will be submitting a written objection to that.

24 THE COURT: Right.

1 MR. POWELL: But to clarify for your purposes, they are not simply limiting  
2 a request for a jury to the A matters, the counterclaims, they have asked for  
3 basically everything. So I just want to clarify for you --

4 THE COURT: Okay.

5 MR. POWELL: -- that is their current position, which we object to orally,  
6 and I'm going to be filing a written response.

7 THE COURT: And they're entitled to argue why --

8 MR. POWELL: Exactly.

9 THE COURT: -- the whole thing should be.

10 MR. POWELL: Exactly. Exactly.

11 THE COURT: So, it needs to be briefed.

12 MR. POWELL: Again, just clarifying for --

13 THE COURT: It needs to be briefed.

14 MR. POWELL: Yeah. Understood.

15 THE COURT: Understood. Okay, it needs to be briefed.

16 MR. POWELL: Understood.

17 THE COURT: That's all I'm saying.

18 MR. POWELL: Yeah.

19 THE COURT: Then, so it's clear, we'll move the -- we're going to vacate  
20 the March -- the May 27th date hearing. We don't need that because we're setting  
21 the trial now. The will contest -- The hearing on petition for determination of  
22 construction and interpretation of language relating to Trust No. 2. So, I mean --

23 MR. POWELL: That's basically --

24 THE COURT: Do we need that hearing? Because all --

1 MR. POWELL: Well, no. If you're going to -- if you're saying that everything  
2 is getting pushed off, that would be just like the petition for today. That would be  
3 the same thing. So, yeah, I mean, basically you can extend that, the same thing,  
4 if you'd like, because it's the same -- it goes to the same heart of the issue, which  
5 is the declaratory judgment issue.

6 THE COURT: Okay. I guess here's my question, is on what we've got  
7 pending, because we've -- our calendar was a status check in the estate case.

8 MR. POWELL: That's the bench trial. Yeah.

9 THE COURT: That's on May 27th. There's another hearing on May 27th,  
10 though, and that was in this case, the trust case.

11 MR. POWELL: Yeah.

12 THE COURT: So what about that hearing?

13 MR. POWELL: That's the one you just referenced.

14 THE COURT: Right.

15 MR. POWELL: Yeah.

16 THE COURT: Do you want to have that hearing?

17 MR. POWELL: Well, no, because I think we're going to run into the same  
18 issue we just did with today's petition.

19 THE COURT: Okay.

20 MR. POWELL: They're going to do a motion to continue. And so that's what  
21 I'm just saying is it's all related. It's all inter-related to the underlying petition, which  
22 is that, so.

23 THE COURT: Okay. So this -- the hearing -- the petition today and the  
24 petition that was scheduled for the 27th should be continued to -- for what, status

1 check on the same -- at the same time as the jury trial? So you don't lose them  
2 and they don't like fall off and don't ever get resolved. I had people coming in  
3 today saying things never got resolved because they got shipped over here from  
4 the Probate Commissioner. I mean, we have to keep them on the calendar or  
5 master calendar loses them. And we never know that they have not been decided  
6 because there's no way for us to know. So in order to keep this on, the petition,  
7 which would be for construction and effect of the probate court order, that's the  
8 one that's being --

9 MR. POWELL: That was today.

10 THE COURT: That's the one today.

11 MR. POWELL: Yeah.

12 THE COURT: It's being moved. Those are going to be moved then to be  
13 determined at or after the jury trial that we're setting on the will contest. So they  
14 stay on calendar and we can reset them then based on the outcome of the jury  
15 trial, because they may or may not be relevant; may or may not need to be heard.

16 MR. POWELL: I mean, they're relevant to the -- again, to the bench trial  
17 on the underlying petition, the declaratory petition for judgment.

18 THE COURT: Right.

19 MR. POWELL: So that's what they relate to.

20 THE COURT: Okay. And that's the bench trial which is 8/11, which we'll  
21 continue to the same stacked trail, just so we've got -- it needs to be reset. So --  
22 because those issues still are out there and if they fall off -- if they fall off the  
23 calendar, master calendar, if you drop it, it's vacated, you know, the whole thing  
24 has to be re-noticed to get it back on the master calendar. So we need to continue

1 those things.

2 MR. POWELL: Okay.

3 THE COURT: So when are we continuing them to? I just think -- my  
4 suggestion would be we continue all those petitions to the same time as the will  
5 contest and then depending on the outcome of the will contest, they can be set.

6 MR. MUGAN: I would agree, Your Honor. I think they have to be kept on  
7 status check. You know, otherwise they're going to fall through the cracks.

8 THE COURT: Right. So they have to stay on for status check.

9 MR. MUGAN: I think they have to stay on the status check. You know, we  
10 want to save attorney fees and stuff. Even on the counterclaims we're willing to put  
11 those on hold, even though it's kind of a separate and distinct matter, we're willing  
12 to move that, you know, to January also. We're going to coordinate the discovery  
13 anyway. And really, the only thing I think we have is the second petition to  
14 distribute.

15 THE COURT: Right.

16 MR. MUGAN: Just to try and make it easy for the Court and for --

17 THE COURT: Right. And so I don't know, then, Mr. Warnick -- What I hear  
18 Mr. Mugan suggesting is that we would continue your motion. And maybe -- maybe  
19 not necessarily to that date, but maybe to do some discovery --

20 MR. WARNICK: No, I agree, Your Honor. I think if, for instance, we win the  
21 jury trial --

22 THE COURT: Right.

23 MR. WARNICK: -- and we won the other petition, the motion to dismiss is  
24 pretty much taken care of, too. But I agree that they can be continued for economy.



1 THE COURT: Right. So we'll put them on for a status --

2 MR. WARNICK: Although technically they could be dealt with ahead of time --

3 MR. MUGAN: Right.

4 MR. WARNICK: -- because I think they're frivolous claims. But --

5 THE COURT: Right. So that's the thing. I mean, we can -- just so it doesn't  
6 fall off, we can continue it to the time -- all of these are going to be status checks at  
7 the same time as the jury trial on the will contest. So all these status checks -- if you  
8 want to notice one and pull it out and say we would like to have this heard prior to  
9 that, that's always your option. And you -- something tells me you guys are going  
10 to be back, so you can always come back and ask for that.

11 MR. WARNICK: I think it's wise what Your Honor is doing is to set them all  
12 at the same time there so that we then keep it on calendar and don't lose track of it.

13 THE COURT: And if at some point in time you think this is now ripe, I'm  
14 ready to -- I need to file maybe something based on some of the discovery, some  
15 supplemental brief, now you're going to go forward. But if I understand, Mr. Mugan,  
16 your suggestion is that you would not proceed with any discovery on any of those  
17 counterclaim issues at this point in time.

18 MR. MUGAN: Well, what I'm suggesting for the economy of the Court and  
19 co-counsel and myself is that the motion pending today on the counterclaims and  
20 the counterclaims per se, we just move all that to January also because they may  
21 or may not go away.

22 THE COURT: They're continued for a status check. And who knows, they  
23 may listen to your witnesses and say, oh, okay, well, we're satisfied, but we're going  
24 to have to -- (indiscernible).

1 MR. POWELL: Yeah.

2 THE COURT: Who knows?

3 MR. POWELL: Yeah.

4 THE COURT: It's discovery. Things happen in discovery.

5 MR. POWELL: Snow in July I think would be more --

6 THE COURT: Okay. So this is what's left then to go forward today, and  
7 that's what you -- counsel keeps arguing is this unfairness. I mean, it's been many,  
8 many months now that we've had the money being held. We've taken some money  
9 out because -- you know, valid point, when you're holding money over an extended  
10 period of time you're going to have tax issues. And so you need to be able to  
11 accommodate those kinds of things.

12 But, so, what I understand and both Mr. Warnick and Mr. Powell, you  
13 made this argument that if we're doing this, this is a further delay which appears to  
14 have no other purpose but to, you know, place your clients in a position where  
15 they're unable to go forward with their litigation, with their rights.

16 MR. POWELL: Exactly, Your Honor. This is a matter of leverage. It's --

17 THE COURT: So what is your proposal? I mean --

18 MR. POWELL: My proposal is --

19 THE COURT: -- because, you know, we've been holding the money.

20 MR. POWELL: We've been holding the money since 2013.

21 THE COURT: Right.

22 MR. POWELL: Well, actually when the distribution stopped was 2013. We  
23 are proposing that we go back from that point in time when this was unfairly done  
24 and we go back, we distribute sixty-five percent to the M.T.C. Living Trust and in

1 turn the beneficiaries of that trust. And we continue to do so until we're done, which  
2 is the way that this should have always been handled and should have been done  
3 by a trustee, versus a trustee who's also a beneficiary, the only beneficiary gaining  
4 by what's going on here.

5 THE COURT: Now, just so -- for devil advocacy purposes, Mr. Powell --

6 MR. POWELL: Sure.

7 THE COURT: -- hypothetically speaking --

8 MR. POWELL: Sure.

9 THE COURT: -- say the will contest is successful.

10 MR. POWELL: Sure.

11 THE COURT: Got a bunch of Walmart store clerks up there and they say,  
12 yeah, we think that's a forgery. We don't care what the witnesses say --

13 MR. POWELL: Sure.

14 THE COURT: -- we believe the guy with the criminal conviction who's the  
15 document examiner, we believe him, he's very credible. We find this is a forged  
16 document. And what happens?

17 MR. POWELL: Well, I would --

18 THE COURT: I mean, does the trustee clawback the money? I mean, what  
19 do you --

20 MR. POWELL: Let them try if they'd like to. I don't know how to answer your  
21 question other than in a situation like this, how does the trustee who's got --

22 THE COURT: Because what we were trying to do --

23 MR. POWELL: Yes.

24 THE COURT: -- was to hold the money so that whoever was ultimately

1 entitled to it would -- it would be there for them.

2 MR. POWELL: But we're --

3 THE COURT: And I understand that things have changed because we were  
4 going to do it on a much shortened period of time. It was going to be resolved much  
5 sooner.

6 MR. POWELL: Um-hm.

7 THE COURT: This is turning into something much different I think than what  
8 was anticipated by the beneficiaries when they started this. So now that they're  
9 having to go through all this, things have changed.

10 MR. POWELL: Yeah. And I don't know how to -- I'm not sure how to  
11 characterize this other than to say --

12 THE COURT: Unless and until Mrs. -- I'm drawing a blank.

13 MR. POWELL: Ahern is their client.

14 THE COURT: Ahern.

15 MR. POWELL: Right.

16 THE COURT: Until -- unless and until Mrs. Ahern establishes that she's  
17 entitled to one hundred percent --

18 MR. POWELL: Yes.

19 THE COURT: -- they should be receiving --

20 MR. POWELL: Yes.

21 THE COURT: Their share is sixty-five percent?

22 MR. POWELL: Correct. Absolutely. Absolutely.

23 THE COURT: And so to continue to hold the money --

24 MR. POWELL: While Ms. Ahern receives her thirty-five.

1 THE COURT: If it's ultimately determined --

2 MR. POWELL: Yeah.

3 THE COURT: -- that Mrs. Ahern is entitled to that hundred percent, okay,  
4 fine.

5 MR. POWELL: Yeah, exactly.

6 THE COURT: But if it turns out -- and it's not fair to make them wait to say,  
7 oh, no, they are entitled to their share of sixty-five --

8 MR. POWELL: Exactly.

9 THE COURT: -- because that's prejudicing them even though the money  
10 is being held for them.

11 MR. POWELL: Well, the fact is they've been relying -- their lifestyles are  
12 dependent, they rely on this money, just like I rely on my paycheck, you rely on your  
13 paycheck. We budget that in in expectations of how we live our lifestyles. And so  
14 that's exactly what the issue we have here. We have a -- we have thirty-three years  
15 of precedent of 65/35. And I know they're going to argue again, well, this and that.  
16 Well, the fact of the matter is, Your Honor, this continued from 2009 all the way  
17 up until June of '13 in which the trustee abruptly says I'm not paying you anymore.  
18 I'm not going to court to get a petition for instructions. I am unilaterally deciding  
19 that because I am the only one that benefits from this, I'm going to choke you out.

20 THE COURT: And so --

21 MR. POWELL: And you know reading between the lines it's leverage.

22 THE COURT: And so because she didn't do that -- she should have been  
23 required to continue to make the payments.

24 MR. POWELL: Exactly.

1 THE COURT: And so the Court just saying, no, I'm not going to let you take  
2 the hundred percent, you're going to have to hold the sixty-five percent, that's not  
3 adequate?

4 MR. POWELL: Exactly, Your Honor, because, I mean, again, we're talking  
5 June of '13. And the numbers have been submitted to you previously, but we're  
6 not talking inconsequential numbers. We're talking substantial dollars here.

7 The other thing here which is totally absurd is the fact that they're  
8 arguing, well, Ms. Ahern's -- conveniently, Ms. Ahern's thirty-five percent, that's not  
9 in dispute, so we'll just continue to give her what she's been getting all along for  
10 thirty-three years -- thirty-four years now, and, oh, by the way, the opposing side,  
11 oh, no, we'll just hold it for you; we'll just hold it for you. But yet everything is --  
12 Again, we were ready to go on February -- I think it was 17th or 18th. We were  
13 ready for a complete conclusion. And we were here the month prior and you had  
14 indicated at that point because we had asked at that point to compel this --

15 THE COURT: Right. It's going to be done, though.

16 MR. POWELL: -- which was actually filed in December. It was filed  
17 immediately after the initial petition because Mr. Mugan said you can't ask for that,  
18 and Your Honor agreed and said no, you actually have to petition to compel that the  
19 distributions continue, which is what we did. And Your Honor, which I understand  
20 for efficiency purposes, said we're basically a month out, we'll go ahead, but in the  
21 event that this doesn't get resolved, we need to discuss and analyze the fairness  
22 of this. Your point of view at that time was we're so close to trial, the anticipation  
23 is we'll be done. And then on the morning of trial we show up, the courtroom is  
24 packed, as you know, we're ready to go, and then, bang, the counterclaims.

1 THE COURT: All of those people came from Texas.

2 MR. POWELL: The counterclaims. And then now -- and then you indicated,  
3 too, well, I can't put you on another stack for this and that. Now we have the  
4 contest, and that's my point. I just have a sneaky suspicion, real sneaky suspicion  
5 that if you go -- you level the playing field here and you make this fair, I have a  
6 feeling the other side is going to go a lot faster and want actually a final resolution  
7 of this whole thing. Just a sneaky suspicion.

8 But this is game playing, Your Honor. This is tactics; this is leverage.  
9 I like as well, too, that somehow we should be obligated to reveal to the opposing  
10 side in litigation what exactly Jacqueline Montoya and Kathryn Bouvier have in their  
11 finances. What do they have? Gee, that sounds really appropriate in a litigation  
12 matter. Oh, other side, can you please tell me what you have in your bank account  
13 so essentially I know how much more leverage I have against you? That's absurd.

14 And that's what we're asking for. They want to play their tactics and  
15 let's delay it and go all the way down the road. No problem, as long as you do  
16 what's equitable and fair here, and that's level the playing field, because again,  
17 Your Honor, the burden of proof in this whole matter is theirs. Ms. Montoya has  
18 had to be the pursuer of this because she's had a trustee who said I'm turning off  
19 the spigot, just like the person up the river who dams up the water and says you're  
20 not getting any more water, that's the scenario we've got.

21 We had no option but to come to court because the trustee didn't  
22 act reasonably and say, Your Honor, actually I think there is an issue here. In my  
23 beneficial capacity I think I'm actually entitled to one hundred percent. But I need  
24 instructions because actually for the last thirty-three years there's been a 65/35

1 distribution, including four or five years after Mrs. Connell had passed. So,  
2 Your Honor, I need instructions. At that point, again, it would have never been  
3 appropriate for them to say, oh, we're cutting it off cold turkey. No, no, no. There  
4 would have been -- A reasonable trustee would have acted on an order from the  
5 court after hearing it. It wouldn't have said, oh, yeah, that's fine, you just shut off --  
6 you just shut off the income spigot and choke out the other side. It's just not --

7 THE COURT: Okay. Anything else that hasn't already been argued?

8 Okay. Then I'll give it to you, Mr. Mugan.

9 MR. MUGAN: Thank you, Your Honor. It's been a long morning. I don't  
10 know where to start. I can talk for two hours, but I'm not going to. I'm going to try  
11 and simplify this, but I do have to respond to a couple things.

12 They are the ones in their original petition, in their second petition,  
13 talking about they're going to have irreparable harm, financial detriment, if you don't  
14 turn -- don't grant them the money. They put that in issue and that's one of the  
15 three requirements that they have to meet. They have to show irreparable harm  
16 and financial detriment. And so, we know they inherited close to three and a half  
17 million dollars in 2009. We don't know exactly how much. So in discovery this is  
18 an issue. This is an issue of their burden of proof in this hearing right now. And  
19 so in discovery we asked them about that. We don't ask them for leverage. We  
20 asked them to try and show to you this isn't going to cause them irreparable harm.  
21 This isn't going to cause them financial detriment. They inherited three and a half  
22 million dollars in 2009. And what do they do? It's irrelevant, it's immaterial, even  
23 though that's what they're arguing in their petition. That seems to be a contradiction  
24 to me.



1           This status quo I keep hearing about and you keep hearing about, this  
2 thirty-three years. The first twenty-nine years they weren't beneficiaries. They did  
3 not receive a dime. When Marjorie Connell died, what happened? And I cited the  
4 answers -- I set forth the answers in discovery that they did in my pleading and I  
5 hope you read them. What happened? Jacqueline Montoya, who had been -- had  
6 control, had been helping Marjorie, she just continues on. She writes the distribution  
7 checks. She won't give my client access to the money or the payments.

8           THE COURT: Actually, if we can -- we should maybe clarify, Mr. Mugan.  
9 Not being a person familiar with oil and gas revenues, are they paid monthly,  
10 quarterly, annually?

11          MR. MUGAN: I think they're paid quarterly, Your Honor.

12          MS. BOUVIER: No, they're not. It's monthly.

13          THE COURT: Monthly?

14          MS. BOUVIER: Yes, ma'am.

15          MR. MUGAN: Well, my understanding is it depends on the company and  
16 the distributor.

17          MS. BOUVIER: No, it's not, it's monthly.

18          MR. MUGAN: Okay, in this case if it's monthly, they know more about it than  
19 I do.

20          THE COURT: Okay. So I was just curious about how it was being paid out.  
21 I didn't know.

22          MR. MUGAN: Yeah. I've got enough problems being a Nevada lawyer  
23 without being a Texas lawyer.

24          THE COURT: I have no idea how they're paid.

1 MR. MUGAN: Yeah.

2 THE COURT: Okay. So the issue was these monthly royalties.

3 MR. MUGAN: Well, the status quo. The reason they received distributions  
4 after Marjorie Connell died was my client didn't have control, and she didn't have  
5 control because of the wrongful actions of Jackie Montoya. You look at the answers  
6 to interrogatories. She says she continues to make the distribution checks, even  
7 though my client is the successor trustee. She doesn't turn over the records and  
8 documents until my client hires Texas counsel, and then she turns over part of them  
9 in October of 2012, and she turns over supposedly the balance November of last  
10 year. My client is operating in the dark. You know, so this thirty-three, thirty-four  
11 year old business status quo I don't think holds up under looking at the discovery  
12 reports.

13 But I'm going to try and make this as simple as possible and as quick  
14 as possible right now. And I apologize, but I had to respond to those things. We  
15 already had a hearing on a nearly identical -- well, the petition is identical and then  
16 there was an addendum added for this hearing, which basically said, you know,  
17 because of the continuance, etcetera, it's not fair. You look at Nevada case law,  
18 you look at Nevada statutes, you look at Nevada Rules of Civil Procedure, I don't  
19 see grounds stated because a trial gets continued or delayed. And that -- I've been  
20 through this. I gave an affidavit, I set out transcripts. We talked a week before in  
21 the pretrial conference. We talked about the counterclaims. There was no mention  
22 of continuance, etcetera. Everybody knew about that. You know, they knew about  
23 it in November prior to the trial. You know, so this game playing, I'm not going to  
24 go there because both sides can argue that.

1 THE COURT: But Mr. Powell did mention and I do have a recollection of this  
2 that they had previously filed this motion and the court said we're going to have a  
3 hearing in a month; you know, you'll have an answer in thirty days and you'll know  
4 if you're entitled to these funds. So let's just continue to hold the funds and we'll get  
5 a resolution very shortly. And now we're now -- at least we're probably a year away  
6 from that. So that was effective for the Court, was that there was going to be a final  
7 resolution within thirty days, so why rule on the motion to change the status quo  
8 when we were holding the money, it was being held, apparently at some  
9 consternation to the gas companies. But isn't that --

10 MR. MUGAN: But, too --

11 THE COURT: -- it is a change.

12 MR. MUGAN: But the Court --

13 THE COURT: It is a substantial change.

14 MR. MUGAN: But the Court also said, and I cited the transcript where the  
15 Court said we're only talking about money. Money is adequate compensation.  
16 One of the three requirements that they have to meet in order for you to grant their  
17 petition is inadequate compensation. You already ruled at the previous hearing  
18 that we were only talking about money. You even said all we're talking about is oil  
19 revenue, we're not even talking about stock where it fluctuates. We're just talking  
20 about dollars and that's adequate compensation. You stated that on the record.

21 And so now to go back -- and they have to meet all three requirements.  
22 They can't meet two out of the three. And like I said, delay is not a grounds under  
23 the rules. And you've already ruled that that's adequate compensation, and that  
24 means they didn't meet their burden of proof, one of the three requirements, and

1 you can't change that. That's what the law is. And so I don't think you can grant  
2 the petition solely on that; just the fact of that ruling. And that's one of the three  
3 requirements.

4 And the status quo is not a requirement -- the alleged status quo or  
5 purported status quo. You know, that's not really a factor under the law or the case  
6 law or the Rules of Civil Procedure. And he also at that hearing raised the issue  
7 about going way, way back, and you said no, if we go back at all we're only going  
8 to go back to the November 12th order when the money started. We can't  
9 retroactively apply.

10 And you also expressed concern about clawback. What's his  
11 response? If we win, and they've gotten all this money, and we're talking about  
12 a lot of money, and -- well, that's their problem. That's their problem. Let them try.  
13 Really? Really? Aren't my clients entitled ultimately to that money? And you were  
14 going to release it, and if they spend it, well, try and get it back. I don't think that's  
15 fair. I don't think that's right. You know, I just -- to me it's very simple. They have to  
16 meet three requirements. The Court has already ruled that they haven't met one of  
17 the requirements. I don't think they've met the other two requirements, and I'll gladly  
18 go into them if you want to.

19 THE COURT: But what about -- and they've mentioned this, this is a  
20 potential change in circumstances because as the Court specifically said the last  
21 time this came up, it's money -- it's being held; we're going to have a final resolution.  
22 And through no fault of their own they're now not going to have that resolution for  
23 a year.

24 MR. MUGAN: I would respectfully disagree with Your Honor. The delay is

1 their own fault. Frankly, the worst thing that happened was when you continued  
2 the trial. There was no way they could meet their burden of proof. There's no way.  
3 We should have won. We would have won then or we would have won on appeal.  
4 There's no way they could meet their burden of proof because they didn't have a  
5 valid will. And so when it got continued, it was the worst thing that could happen  
6 to us.

7                   And what has been all this delay? This woman died in 2009. She  
8 was -- Ms. Montoya was the nominated executor, her personal representative.  
9 She was the successor trustee. She doesn't -- you know, she just takes control  
10 and ignores my client and starts paying her and her sister in the trust. The personal  
11 representative, nominated person is normally the one who petitions the court for the  
12 probate of the will. She could have done it then. She doesn't. She doesn't do it.  
13 And that's critical to their case.

14                   And so what happens? When all trouble in Paradise -- I'm sorry, my  
15 oration, I almost swore -- when trouble in Paradise arose in 2012, what does she do  
16 then? Lord, we better prove up this will if we're going to have a dispute about this.  
17 So -- well, let's not file it in Nevada, let's file it in Texas. And we're going to say that  
18 she doesn't have any children, so my client -- so Eleanor doesn't get notice of this,  
19 and hopefully the four months period will go by and there will be no challenge to the  
20 will and we are home free. And of course my client finds out about it and contests  
21 that jurisdiction down there in Texas. And so after the trial is continued, I think  
22 opposing counsel realized we've got to prove the validity of the will here. And the  
23 proper jurisdiction is Nevada and we probably should have brought it in Nevada,  
24 and so now we're going to bring it in Nevada.

1                   And so when you say through no fault of their own, I respectfully  
2 disagree. I think this was intentional. She took control of everything, the  
3 distributions, etcetera, as soon as Marjorie died. She wouldn't give my client  
4 access. My client had serious health problems. When they realized there's trouble,  
5 they file it down in Texas and don't give my client notice because they say, well, the  
6 decedent didn't have any children. Well, they know that's false. And hope that the  
7 four month period goes by. And now they realize Nevada is the right jurisdiction and  
8 we've got to prove this, so they file it March 25th of this year. That's not our fault,  
9 you know. And when you say through no fault of their own, I think it's all their fault,  
10 Your Honor. I would respectfully disagree.

11               THE COURT: Okay. So your position is that the funds should continue to  
12 be held as they are being held?

13               MR. MUGAN: Yeah. And this thirty-five percent, it's like, well, she gets  
14 thirty-five percent so we should get sixty-five percent. The thirty-five percent is  
15 undisputed. They've said on the record its undisputed. It could be like -- I mean,  
16 we could be talking, well, she gets -- she's got an investment account, you know,  
17 with Ameritrade and she gets dividends every month. Well, that's not fair; that's  
18 not fair, you know. There's no dispute as to the thirty-five percent.

19               THE COURT: She's already getting that.

20               MR. MUGAN: It just happens to be the oil rights. So we're not comparing  
21 apples to apples here. We really aren't. And what can be more --

22               THE COURT: But Mr. Powell's final argument is that the trustee in making  
23 the decision she was going to stop the distribution of the sixty-five percent did so  
24 unilaterally, did not come to the Court for instructions, simply did so. And as I said

1 at the time, well, we'll just hold the money because we're going to have a  
2 determination hearing. We're not going to be a whole another year beyond that  
3 before we make that determination. So that's I guess Mr. Powell's final point that  
4 that was -- the trustee chose to handle it that way.

5 MR. MUGAN: My -- the --

6 THE COURT: And she has the burden of proof, and why are we harming the  
7 potential beneficiaries? At the time I wasn't going to change the status quo because  
8 we were so close to the trial, but now we're a year away from that, at best.

9 MR. MUGAN: Well, my client is also the potential beneficiary of that.

10 THE COURT: Correct.

11 MR. MUGAN: If she wins, she gets that money. In the interim, she's denied  
12 use of that money. She's -- And what I suspect this is about is maybe fees, attorney  
13 fees and costs. And as you heard at last hearing, my client has voluntarily chosen  
14 to pay attorney fees and costs out of her own pocket. She's not trying to argue,  
15 well, part of this -- I'm the trustee, so part of this is interpreting the terms of the trust  
16 and so the trust should be paying part of my fees.

17 She's -- you know, I mean, and so I have a hard time on this fairness  
18 argument because I don't see what's unfair. If my client wins, she gets the money.  
19 If they win, they get the money. The Court wisely said we're just going to put the  
20 money -- we're going to sequester the money and nobody is going to get it until  
21 this is decided. And they're talking about how they need all this money, and you  
22 rightfully raised the original issue at the last hearing, well, what about clawback?  
23 How are you going to get this back? I guarantee you if you release that money to  
24 them, that money is gone. That's gone. My client would never get it back; never.

1                   And what -- you know, you have to look at my client's side, too. She's  
2 being denied access to that money if she wins, just like they are right now. If they  
3 win, they get the money. If she wins, she gets the money. What's unfair about  
4 that? And the other thing which we haven't talked about is a bond. Under the rules,  
5 an bond. We're talking about a lot of money; a lot of money. And at a minimum,  
6 you know, they should be required to post bonds securing that money if my client  
7 wins. And the bond -- they can collect -- we can collect on the bond. I think  
8 personal bonds -- the trouble is personal bonds are very difficult to get.

9                   But be that as it may, I sound like I'm arguing against myself, but I  
10 come back, it's very simple to me. They have three requirements, and not one of  
11 them is delay or alleged status quo. They have three legal requirements. And the  
12 Court has already ruled they haven't met one of them. And nothing has changed  
13 that. There's nothing to change that. It's adequate compensation. It's dollars.  
14 Now to reverse that, I think there could be problems. I think it's contradictory.

15                   Thank you, Your Honor.

16                   THE COURT: Mr. Powell, anything further?

17                   MR. POWELL: Your Honor, the one thing -- and again, I'm not going to get  
18 into this, but we clearly are always at separate hearings. Apparently the times that  
19 you're making representations, I'm here but they're not, and I guess apparently vice  
20 versa. But the one thing that troubles me, and again, we've gone back to the well  
21 now again with these personal attacks on Jacqueline Montoya. Jacqueline Montoya  
22 is willing and able right now at your leisure to go under oath. She'd gladly answer  
23 any questions that you would have. Again, continue to assassinate her character,  
24 which is getting a little absurd here. And what I'd like to do just for the record is take



1 a little bit of time to just let you know what Mr. Mugan's client -- again, we're dealing  
2 with all these she said this and this --

3 THE COURT: I don't -- I don't care about any of it. What about the bond?

4 MR. POWELL: Your Honor, we actually tried to get a bond and basically  
5 what we were told is that you would need a court order; there's no chance we're  
6 issuing a bond without a court order. And again, who bears the burden of that cost?  
7 Somebody who's complied with thirty-four years of a 65/35, or do my clients again  
8 bear that burden as well? Again, the fact that they did absolutely nothing here.  
9 You had a trustee unilaterally turn off the income spigot and say come get me.

10 THE COURT: Okay. All right. Well, I think there's been a change --

11 MR. MUGAN: If I may?

12 THE COURT: -- there's been a change of circumstances. However, I do  
13 think Mr. Mugan raises a valid point, which is that if this is granted they're required  
14 to bond for it, because that's been my problem all along is how do you get by that?  
15 I'm not going to grant it back to November or whenever it was when it started being  
16 held, but I would grant it going forward on the basis that the 65/35 split, we'll turn  
17 the income back on. They've got to bond. They've got to post a bond.

18 MR. POWELL: And they would pay for the costs --

19 THE COURT: Yeah. Absolutely.

20 MR. POWELL: -- subject to, again, obviously a damage?

21 THE COURT: Yeah.

22 MR. POWELL: Okay. Your Honor, from what point forward? Because we  
23 asked for this relief in December.

24 THE COURT: I'll grant it from today. So, I mean, I don't know when they

1 pay the May payment. I mean, the May payment for May and it's paid in June, or is  
2 the May payment made in May? I don't know how this stuff is paid. I've got no clue.  
3 Your clients can tell you. I've got no clue.

4 MR. POWELL: It's basically -- it's effectively a delay. There's effectively  
5 a one month delay between when the check is for and what it's for.

6 THE COURT: All right. So if there's a check paid in June for May, then it  
7 should be --

8 MR. POWELL: From May.

9 THE COURT: -- the 65/35 starting -- going forward in May.

10 MR. POWELL: From May. Okay.

11 THE COURT: Right. But you're going to have to have time to get the bond,  
12 and I don't know how much the bond would be. That's the problem I have.

13 MR. POWELL: I don't either. I'm going to need --

14 THE COURT: I don't know how much these checks are.

15 MR. WARNICK: Your Honor, in lieu of a bond, you know, you can always  
16 post a personal -- what do they call that now? I forget the terminology. Instead of  
17 a bond, you can put a personal pledge. When do they use that term? Under a  
18 statute you have that alternative. I can't remember what it is. But bonds are difficult  
19 to get nowadays because you have to have your own bank and the banks don't do  
20 it anymore.

21 THE COURT: You post a personal security, I think is what they call it.

22 MR. WARNICK: Yeah. So maybe we could do that instead because --

23 THE COURT: I don't know what the -- that's a clerk's office thing.

24 MR. MUGAN: No. That's not what the rules say. And plus, if they need this

1 money as bad as they want, you know, that's not going to work. It's not --

2 MR. WARNICK: Sure, it will work.

3 MR. MUGAN: No, it's not going to work.

4 MR. WARNICK: I mean, if they've got the assets --

5 THE COURT: I mean, if there's alternative security, I mean, that's what they  
6 call it, and you need to come in with that and say here's the alternative security  
7 because you have to know that it is in fact adequate.

8 MR. MUGAN: This bond is going to have to constantly be adjusted upward.

9 THE COURT: And that's what my problem is. I don't know how -- we've got  
10 to have some sort of a bond.

11 MR. MUGAN: It's going to have to, every time there's a distribution.

12 THE COURT: And that's -- and how do we know how much that is? So,  
13 you know, we've got -- technically now we've got another six month period from  
14 June to January, or seven months. I have no idea how much it is. Your clients will  
15 maybe have an idea of what approximately it works out to. Unless they -- I have  
16 no idea how much it's supposed to be. I've got no clue.

17 MR. MUGAN: I would suggest --

18 THE COURT: Never dealt with this.

19 MR. MUGAN: I would suggest, Your Honor, you know, if a distribution is  
20 made of course my client receives it. We notify them of what 65 percent of that is.

21 THE COURT: Right.

22 MR. MUGAN: And then they have a certain period of time in which to post  
23 a bond for that amount. And we do not -- we're not required to distribute the money  
24 until that bond is posted, and in the interim it's sequestered just like it's been before

1 and not -- nobody. I think it's real easy.

2 MR. WARNICK: Your Honor, my clients have assets. They could take and  
3 put up this personal to a certain amount and it would not require that monthly  
4 change --

5 THE COURT: Right. Because that --

6 MR. WARNICK: -- because they could do it to a certain amount.

7 THE COURT: It's goofy. But there's -- they're entitled to have a bond  
8 because that's why I keep saying you have this clawback problem. So in the event --

9 MR. POWELL: Well, I guess to clarify with you, though, is you seem to be  
10 implicating that the burden of proof is on my clients to establish that the acts were  
11 wrong, and there seems to be a presumption that the actions of Ms. Ahern were  
12 correct.

13 THE COURT: No.

14 MR. POWELL: And that I think is not -- well, I'm not sure how we otherwise  
15 get there because what we're basically saying is we cut this off, we're holding it, and  
16 you still have to continue to chase them down, and there's this potential clawback  
17 and this and that. But at the end of the day, again, why is it that Ms. Ahern is not  
18 establishing that she had this right, and then it's for us to --

19 THE COURT: Okay. Well, you know -- thank you. Mr. Powell --

20 MR. POWELL: Yeah.

21 THE COURT: -- when you have won it is probably appropriate to sit down  
22 and shut up unless you have something to add.

23 MR. WARNICK: I've got one thing to add, Your Honor. I appreciate what  
24 you're saying. I think we can resolve this. They -- well, I guess my great idea is not

1 going to -- I was going to say they had a continued right to income, but if they win  
2 the case that would stop of course. But I think Mr. Powell's point is true, and that  
3 is that when you go for thirty-four years paying something out --

4 THE COURT: If you have something to add that we haven't already  
5 discussed, I'm happy to hear it, but you've won. So it might be appropriate now to  
6 stop arguing what you've won, and simply how do we deal with the logistics of the  
7 fact that you have won?

8 MR. MUGAN: Your Honor --

9 THE COURT: And like I said, I don't know how this is paid, so it's difficult.  
10 The request has been made that until we get this resolved we have to have some  
11 sort of a bond for security. Mr. Warnick has suggested the statute does provide for  
12 alternate security. That's typically done on a motion. We have something that we  
13 can pledge; fine. Then the Court can rule on it. You won. I think it's silly to say  
14 every month we're going to post another bond, which is what Mr. Mugan suggested,  
15 which is the only way you can do it unless you have some idea of what it's going  
16 to be every year, and I don't know if you can say every year we've got X amount  
17 every month, every year it's X dollars, so we'll just take seven months and here's  
18 how much it is. I don't know if it's that dependable or if it wildly fluctuates depending  
19 on the price of oil. I don't know. This is way beyond my wheelhouse. So --

20 MR. MUGAN: And if I may add -- Pardon me, Your Honor. I'm sorry. If I  
21 may add, my understanding, very little understanding from the Texas lawyers is it's  
22 very hard to predict the income because of the fracking --

23 THE COURT: Yeah. So there's no other way to do it.

24 MR. MUGAN: -- fracking technology.

1 THE COURT: Right. There's no other way to do it than monthly.

2 MR. MUGAN: You know, what's past -- happened in the past is --

3 THE COURT: And that's burdensome, so if there's some sort of adequate  
4 security that they can post as an alternative, they can make a request, we would  
5 like the right to post adequate security. It's allowed under our statutes.

6 MR. MUGAN: Well, if I'm understanding you right, and it's just a point of  
7 clarification, what you're saying is they're going to have to post bond for the  
8 distributions --

9 THE COURT: Or in the alternative --

10 MR. MUGAN: -- but if they think they have --

11 THE COURT: -- propose alternative security.

12 MR. MUGAN: If they think they have alternative personal security, then they  
13 need to file a motion to that effect --

14 THE COURT: Correct.

15 MR. MUGAN: -- and we'll decide it. But until they do that, we're talking about  
16 a bond.

17 THE COURT: And it may just be it's a pain in the neck. And if it's impossible  
18 to figure out and you're going to have to do it every month, it's ridiculous, unless  
19 there is some sort of a way to say we estimate, based on what was last year's  
20 amount, that seven months of this year is X. That would be an alternative.

21 MR. MUGAN: I'm more than glad to talk to the Texas attorneys.

22 THE COURT: And it may be easier than having to come in and pledge  
23 personal assets.

24 MR. MUGAN: Yeah. And I'm more than glad -- and each side has their own

1 Texas attorneys.

2 THE COURT: Great.

3 MR. MUGAN: I'm more than glad to visit with ours and yours and maybe  
4 we can work something out.

5 MR. WARNICK: Your Honor, I don't think that statute requires a separate  
6 motion. I thought that the statute said whenever bond is required, in the alternative  
7 the people who have that obligation can put up their personal pledge. And I mean,  
8 it doesn't seem like it's necessary to file a motion now to do that. I mean, that's  
9 basically what you would approve anyway, I believe. And so we just have to make  
10 sure we can get some pledge that is going to satisfy that situation.

11 THE COURT: But they have the right to contest that it's inadequate security,  
12 so that's why I said it has to be -- it has to be -- it has to be ruled on that this is  
13 adequate.

14 MR. WARNICK: And I think that's the way the statute reads.

15 THE COURT: And that's why I think you probably have to figure out, and  
16 the only thing I can think of is to say last year the total number was X. We've got  
17 however many months until at least the will contest trial; that number of months.

18 MR. WARNICK: That's a good idea.

19 THE COURT: Calculate that to whatever; seven, eight -- eight months,  
20 seven, whatever it would be. Based on what was previous, we believe it's  
21 approximately -- and this is -- and it may be significantly less this year. You know,  
22 I don't know. This seems to me like this is a commodity that fluctuates.

23 MR. WARNICK: But that would be a good idea to clarify the amount and  
24 get some idea. I think you're right, Your Honor.

1 THE COURT: And if you have a proposal, an agreement that the bond will  
2 be X, then that's great. If you can't, then I think -- or we've got adequate security  
3 that satisfies the trustee, then that's fine, too. But I think otherwise they've got the  
4 right to contest the security, that it's inadequate. It has to be ruled on.

5 MR. MUGAN: Yeah, that's my understanding, it's got to be done by motion.

6 THE COURT: I've never done it any other way, just by having somebody  
7 say we propose an alternative to post personal security, and the Court says I think  
8 that's adequate, I'll accept it.

9 MR. MUGAN: If I may, Your Honor. And I was the losing party --

10 THE COURT: Correct.

11 MR. MUGAN: -- and I just want to protect the record.

12 THE COURT: Right.

13 MR. MUGAN: I just want to say I don't believe my client has the burden of  
14 proof. There is nothing --

15 THE COURT: I'm not ruling on that. If anybody's got that idea, I'm not.

16 MR. MUGAN: Well, I mean, we keep saying that and it keeps coming up  
17 in the discussion.

18 THE COURT: It's just I haven't -- I haven't prejudged any of this. I'm just  
19 saying that I think there's a change in circumstances. We're now going to be a  
20 whole another year away. Going forward I think it's appropriate because of the  
21 change in circumstances, which I understand your argument, Mr. Mugan, that it may  
22 be -- it's difficult to say in this case, you know, who had what duty when. But right  
23 now this is being pushed out because now we've got the will contest. And they  
24 didn't file that. Maybe there's a delay because they didn't get the will on file in time,



1 but whatever, it is what it is, and I think there's a change.

2 I'm willing to say going forward pay the distribution. You've requested  
3 that a bond be posted. If the bond is appropriate, they suggest alternate security.  
4 I just think that what we have to do first is have some sort of an understanding of  
5 how many months and what your monthly is and figure out how you're going to deal  
6 with it because it saves them having to put their personal assets, which, you know,  
7 apparently has already been an issue, so.

8 MR. WARNICK: We've got a good -- We know that next January you're  
9 looking at trying the case --

10 THE COURT: Right.

11 MR. WARNICK: -- so we've got a good idea of what the time period is.

12 THE COURT: How many months.

13 MR. WARNICK: We can figure out approximately what the amount is.

14 THE COURT: And maybe it doesn't fluctuate greatly. I don't know. It just  
15 seems to me that oil and gas, the price is constantly going up and down. I think it  
16 fluctuates, but maybe it doesn't. Maybe it's the same thing or roughly within X that  
17 you can make a determination.

18 MR. WARNICK: We can just have a provision if there's some dramatic  
19 change they could come before the Court and say that this isn't right. I mean, that  
20 could be done, too.

21 THE COURT: Yeah. Yeah, and if it's something that you agree with Mr.  
22 Mugan, good luck. But if it's not, then I know we'll see you all back here. So we'll  
23 see you, if not before, in January; but between now and then. And as far as your  
24 discovery plan for that jury trial, are you going to do a discovery plan or are you

1 going to go to the Discovery Commissioner for help drafting that? If you want to  
2 stipulate to a discovery plan, that would be fine. I'm sure she would --

3 MR. MUGAN: Either that or we can just have a Rule 16.1 meeting and, you  
4 know, we can work it out.

5 THE COURT: I'm sure she would be happy to sign whatever plan you come  
6 up with. It's a short time frame, but --

7 MR. MUGAN: But we need to get moving. We need to get moving.

8 THE COURT: -- they don't need a lot.

9 (The clerk confers with the Court)

10 THE COURT: It's continued for a status check at the same time. Everything  
11 is. These other petitions are continued -- all the other petitions, everything is moving  
12 to that date in January because depending on the outcome of it, we go forward with  
13 them. If the trustee wins, we don't go forward with them.

14 MR. MUGAN: Your Honor --

15 (The clerk confers with the Court)

16 MR. MUGAN: Just a point of clarification. Is the -- Are you placing it on the  
17 January stack or are you actually setting a trial date?

18 THE COURT: Yeah, the stack.

19 MR. MUGAN: Okay. It will be on the January stack. What date would that  
20 be?

21 THE COURT: And we'll send you that trial order.

22 MR. MUGAN: Okay. Do you want one of us to prepare the order or do you  
23 want to do this?

24 THE COURT: Well, we'll send you out an order setting the trial. I just don't

1 know -- They're going to, I'm sure, want to do an order with respect to they won  
2 on the distribution. You won on the continuance. So you want to work on some  
3 language that it's continued. The other case isn't necessarily stayed except to the  
4 agreement of the parties that whatever discovery would be applicable to everything,  
5 can be used in everything, and that you're not going to go forward at this point in  
6 time with the counterclaims. You'll hold those in abeyance.

7 MR. MUGAN: The discovery is going to be coordinated.

8 THE COURT: Right.

9 MR. MUGAN: Right.

10 THE COURT: The discovery will have to be coordinated.

11 MR. WARNICK: They're holding up the counterclaims, but the discovery on  
12 everything can go forward?

13 THE COURT: The discovery can go forward.

14 MR. WARNICK: On everything?

15 THE COURT: And it's agreed that if discovery is taken in the will contest,  
16 it's certainly usable in any of the petitions.

17 MR. WARNICK: We just didn't want to have the discovery on those things  
18 postponed after January. We'd like to get everything done up to that point. That's  
19 what I'm just trying to say.

20 MR. MUGAN: I believe I said that I was going to suggest that, that they be  
21 used in either case.

22 THE COURT: Okay. Yeah. Okay.

23 MR. POWELL: Your Honor, and I realize you probably have no appetite for  
24 me even talking anymore about this, but the other component of what we asked for

1 was the applicability of laches. Can I have the opportunity, possibly I guess on  
2 another day, to argue that? I have significant points that I would love for you to  
3 hear regarding evidence --

4 THE COURT: Okay.

5 MR. POWELL: -- and everything else. And even to the extent you'd like,  
6 can we have maybe even an evidentiary hearing just on the laches issue?

7 THE COURT: I just -- Is it in the nature of a motion in limine with respect --  
8 because laches isn't really a motion in limine, it's an evidence issue. So, I mean,  
9 there's -- You want like a preliminary hearing prior to the jury trial?

10 MR. POWELL: Yeah, effectively almost -- I guess like a summary judgment  
11 type of a --

12 THE COURT: Sure, you can notice it.

13 MR. POWELL: Based on a laches argument. Again, because that is  
14 something we've raised. And I really feel as though there's a lot of evidence that  
15 we need time to go through. Which, again, that's why I'm suggesting an evidentiary  
16 hearing.

17 THE COURT: And I guess my question is that --

18 MR. POWELL: Yeah.

19 THE COURT: -- on laches does it affect the will contest, does it affect just  
20 the petitions if we go forward afterwards?

21 MR. POWELL: Well, it would effectively moot the whole case, I would say.

22 THE COURT: All right. So it's more of the nature of a -- it's a summary --  
23 more of summary --

24 MR. POWELL: It's more of a summary judgment, yeah, effectively.

1 THE COURT: So, yeah, sure, notice it up.

2 MR. POWELL: Okay.

3 THE COURT: We'll do it whenever -- (indiscernible).

4 MR. MUGAN: Well, again, to give heads up, if you recall we had a motion to  
5 dismiss originally under 12(b)(5) on claims preclusion, which we thought was -- we  
6 thought was a good motion. Your Honor basically denied that without prejudice and  
7 said she'd take that up at trial. We're going to probably renew our motion for claims  
8 preclusion. Maybe we can do them all at once.

9 THE COURT: Right. I mean, if there are motions that need to be made, and  
10 that's why I said, it's all going to be done at a trial and now we've got this change in  
11 circumstances and we're now a whole year down the road from when we thought  
12 we were going to get these all dealt with. If there are motions that you need to bring  
13 me in the interim, I'm not saying you can't bring motions in the interim. Whatever  
14 motions you decide you have to bring.

15 MR. POWELL: Is it possible that you could pull up the minutes from that  
16 hearing? Because I -- and again, this is this we always hear different things. I could  
17 have sworn that claim preclusion, you dismissed that with prejudice, not without,  
18 and you didn't leave the door open. So I just want --

19 THE COURT: Okay. Sure. If that's --

20 MR. POWELL: Okay.

21 THE COURT: If that's what it is, then you can certainly raise that.

22 MR. POWELL: Okay. Okay, thank you, Your Honor, because if I'm not  
23 mistaken, we have pending orders still on that that, if I'm not mistaken --

24 THE COURT: There is one --

1 MR. POWELL: -- I think I've submitted to opposing counsel.

2 THE COURT: I think there's one set of pending orders.

3 MR. POWELL: There's a few, I believe.

4 THE COURT: I think we've got -- I think --

5 MR. POWELL: There's one that was sent in this week.

6 THE COURT: There's one? Is there one?

7 THE LAW CLERK: That's -- I think the only one that's left.

8 THE COURT: There's one. There's one left that I've got.

9 MR. POWELL: I think that was sent in this week -- or last week, excuse me.

10 But there was back to that January hearing --

11 THE COURT: Okay. All right.

12 MR. POWELL: -- again, I think opposing counsel has had sitting on their

13 proverbial desk since January, so.

14 THE COURT: Okay. Well, the one -- I've only got one.

15 MR. POWELL: Yeah, and that's what I'm saying, is we don't have an actual

16 order on that other than I think your minute order, and that's what I was just clarifying

17 is I think in your minute order, if I'm not mistaken --

18 THE COURT: Okay.

19 MR. POWELL -- and again, I may be mistaken, but I think it was with

20 prejudice, is what the minute order reads, so.

21 THE COURT: Okay. Well, you can certainly raise that if you think that's

22 something -- (indiscernible).

23 MR. POWELL: Thank you, Your Honor.

24 THE COURT: And I'll take a look at whatever -- I'm going to CLE seminar

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next week, so I probably wouldn't get to it for a week.

MR. POWELL: Okay. Thank you very much for your time --

MR. WARNICK: Thank you, Your Honor.

MR. POWELL: -- and for giving us the opportunity to argue.

MR. MUGAN: Thank you, Your Honor.


THE COURT: All right. And if you won, you do your order.

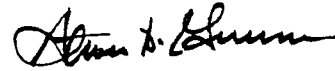
MR. POWELL: Thank you, Your Honor.

(PROCEEDINGS CONCLUDED AT 12:38:30 P.M.)

\* \* \* \* \*

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

  
\_\_\_\_\_  
Liz Garcia, Transcriber  
LGM Transcription Service



CLERK OF THE COURT

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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

In the Matter of  
THE W. N. CONNELL AND MARJORIE  
T. CONNELL LIVING TRUST, Dated  
May 18, 1972,

CASE NO. P-09-066425  
DEPT NO. XXVI (26)

Date of Hearing: May 13, 2014  
Time of Hearing: 9:30a.m.

An Inter Vivos Irrevocable Trust.

**ORDER: RE PENDING MOTIONS  
AND SCHEDULING**

The following Motions and Petitions came on for hearing before the Court on  
May 13, 2014:

1. The Motion, filed herein on or about May 6, 2014, of Eleanor C. Ahern  
in her capacity as the trustee of the W.N. Connell and Marjorie T. Connell Living  
Trust, dated May 18, 1972, to Continue May 13, 2014 Hearing on Petition for  
Construction and Effect of Probate Court Order of Jacqueline M. Montoya (hereinafter  
referred to as the "Motion to Continue");



2. The Petition, which was originally filed herein on December 3, 2013, and renewed with the filing on March 6, 2014, of Jacqueline M. Montoya in her capacity as the trustee and a beneficiary of the MTC Living Trust, dated December 6, 1995, to Compel Trustee to Distribute Accrued Income and Future Income Received from Oil, Gas, and Mineral Leases and Declaration of the Applicability of the Doctrine of Laches (hereinafter referred to as the "Petition to Compel");

3. The Motion, filed herein on March 18, 2014, of Jacqueline M. Montoya, in her capacity as the trustee and a beneficiary of the MTC Living Trust, dated December 6, 1995, to Dismiss the Counterclaims of Eleanor C. Ahern (hereinafter referred to as the "Motion to Dismiss"); and

4. The Petition, filed herein on March 26, 2014, of Jacqueline M. Montoya in her capacity as the trustee and a beneficiary of the MTC Living Trust, dated December 6, 1995, for Construction and Effect of Probate Court Order (hereinafter referred to as the "Petition for Construction").

Present at the hearing on behalf of Eleanor C. Ahern (hereinafter "Eleanor") were her counsel, John R. Mugan, Esq., and Michael D. Lum, Esq. Present at the hearing on behalf of Jacqueline M. Montoya (hereinafter "Jacqueline") were her counsel, Joseph J. Powell, Esq., and Whitney B. Warnick, Esq.

The Court, after having reviewed the Motions, Petitions and Oppositions thereto of the parties, and after having considered the argument of counsel at the hearing, finds and orders as follows:

### **FINDINGS OF FACT**

The Court considered first Eleanor's Motion to Continue wherein she requested that the hearings on the pending Motion and Petitions before the Court, together with consideration of Jacqueline's underlying Petition, filed herein on September 27, 2013, for Declaratory Judgment Regarding Limited Interest of Trust Assets Pursuant to NRS 30.040, NRS 153.031(1)(E), and NRS 164.033(1)(A) (hereinafter referred to as the "Petition for Declaratory Relief"), and her Petition, filed herein on March 27, 2014, for

1 Determination of Construction and Interpretation of Language Relating to Trust No.  
2 2 (hereinafter referred to as the "Petition for Determination"), all be postponed and  
3 continued until after the hearing and resolution of the pending Will Contest between  
4 the parties in this Court in Case No. P-14-080595-E.

5 Eleanor asserted that the resolution of the pending Will Contest Case could  
6 resolve completely all the other pending actions in this Case, and therefore as a matter  
7 of judicial economy, and to avoid unnecessary litigation expenses, it would be prudent  
8 to postpone and continue the other pending matters in this Case until the Court  
9 rendered its decision in the Will Contest Case. Jacqueline asserted that while it may  
10 be prudent that her other Motion and Petitions pending in this Case be continued until  
11 the resolution of the pending Will Contest Case, the Court should address the relief  
12 requested in her Motion to Compel at this time, in order to provide to Jacqueline and  
13 her sister, Kathryn A. Bouvier (hereinafter "Kathryn"), income they depended upon  
14 from the W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972 (the  
15 "Trust"). The Trust owns income producing real property located in Upton County  
16 Texas, together with oil, mineral, and gas rights related to such real property.  
17 Approximately a 65% share of income from this property had historically been paid or  
18 distributed to Marjorie T. Connell, while she was alive, and then to Jacqueline and  
19 Kathryn, until the dispute over entitlement to the income arose in these proceedings.

20 The Court finds that the pending Will Contest in Case No. P-14-080595-E  
21 should be resolved first before addressing the pending Motion to Dismiss, Petition for  
22 Construction, Petition for Declaratory Relief, and Petition for Determination in these  
23 proceedings. Therefore, the Motion to Continue should be granted with respect to those  
24 matters. However, the Court finds that the Motion to Compel should be addressed at  
25 this hearing on May 13, 2014.

26 Because of a change in circumstances, namely the delay in going forward in  
27 these proceedings in order to first resolve the dispute in the pending Will Contest in  
28 Case No. P-14-080595-E, the Court finds that it is now appropriate that the Motion to

1 Compel should be granted, providing to Jacqueline and Kathryn, as beneficiaries of the  
2 MTC Living Trust, dated December 6, 1995 (the "MTC Trust"), the right to receive the  
3 approximate 65% share of accruing income from the Trust, effective with the month  
4 of May, 2014. However, payment to them of this share of the accruing income should  
5 be conditioned upon their posting a bond or other acceptable security facilitating, if  
6 necessary, the repayment and return of the income distributed to them back to Eleanor  
7 in the event it is determined in these proceedings or in Case No. P-14-080595-E that  
8 Eleanor is entitled to such income. The bond or other security posted should be in the  
9 amount of the anticipated income to be distributed to Jacqueline and Eleanor from  
10 May, 2014, until January, 2015. The amount of anticipated income should be based  
11 upon past income payments received from the Trust to the extent they are actually  
12 indicative of what the anticipated income will be, and any dispute over the amount in  
13 question must be settled by the Court. If the parties can agree on the bond or other  
14 security to be posted, they may submit a Stipulation and Order to the Court for approval  
15 of their arrangement. If they cannot reach an agreement regarding the bond or other  
16 security to be posted, including the terms, the amount and the nature thereof, then  
17 Jacqueline must file a Petition with the Court requesting approval of the bond or other  
18 security proposed; Eleanor may then oppose the same; and, after a hearing thereon, the  
19 Court will determine the matter, including whether or not the bond or other security  
20 proposed is acceptable, the amount required for the bond or other security, and any  
21 other terms desired and appropriate to protect the interests of the parties.

22 The Court further finds that while this proceeding and the Will Contest in Case  
23 No. P-14-080595-E are interrelated, they should not be consolidated. However, any  
24 discovery and evidence gathered in one Case should be usable in the other Case, and  
25 therefore discovery proceedings and efforts of the parties for both Cases should be  
26 coordinated to provide economy in and expeditious handling of these matters.

27 The Court further finds that the trial in this proceeding scheduled on the Court's  
28 hearing Stack beginning August 11, 2014, and the Calendar Call, Pre-Trial Conference

1 and other deadlines relating thereto as previously ordered, should be taken off calendar  
2 at this time pending the resolution of the Will Contest Case. However, although  
3 Motions and Petitions mentioned above relating to this case are also being postponed  
4 and continued pending the resolution of the Will Contest Case, this should not preclude  
5 a party from filing in this proceeding hereafter a motion, petition, or other request for  
6 relief, the granting of which is not dependent upon or would otherwise be resolved by  
7 the Court's decision as to the merits of the parties' positions in the Will Contest Case.

8 **ORDER**

9 Based upon these findings, and good cause appearing:

10 IT IS HEREBY ORDERED as follows:

11 1. The Motion, filed herein on or about May 6, 2014, of Eleanor C. Ahern  
12 in her capacity as the trustee of the W.N. Connell and Marjorie T. Connell Living  
13 Trust, dated May 18, 1972, to Continue May 13, 2014 Hearing on Petition for  
14 Construction and Effect of Probate Court Order of Jacqueline M. Montoya, is granted  
15 as hereinafter further ordered.

16 2. The hearing or other consideration by the Court of Jacqueline's Petition,  
17 filed herein on September 27, 2013, for Declaratory Judgment Regarding Limited  
18 Interest of Trust Assets Pursuant to NRS 30.040, NRS 153.031(1)(E), and NRS  
19 164.033(1)(A), is hereby continued for a status hearing before the Court on December  
20 4, 2014, at which time its further consideration will be addressed and scheduled as  
21 necessary.

22 3. The hearing or other consideration by the Court of the Motion, filed herein  
23 on March 18, 2014, of Jacqueline M. Montoya, in her capacity as the trustee and a  
24 beneficiary of the MTC Living Trust, dated December 6, 1995, to Dismiss the  
25 Counterclaims of Eleanor C. Ahern, is hereby continued for a status hearing before the  
26 Court on December 4, 2014, at which time its further consideration will be addressed  
27 and scheduled as necessary.

28 4. The hearing or other consideration by the Court of the Petition, filed

1 herein on March 26, 2014, of Jacqueline M. Montoya, in her capacity as the trustee and  
2 a beneficiary of the MTC Living Trust, dated December 6, 1995, for Construction and  
3 Effect of Probate Court Order, is hereby continued for a status hearing before the Court  
4 on December 4, 2014, at which time its further consideration will be addressed and  
5 scheduled as necessary.

6 5. The hearing or other consideration by the Court of the Petition, filed  
7 herein on March 27, 2014, of Jacqueline M. Montoya, in her capacity as the trustee and  
8 a beneficiary of the MTC Living Trust, dated December 6, 1995, for Determination of  
9 Construction and Interpretation of Language Relating to Trust No. 2, is hereby  
10 continued for a status hearing before the Court on December 4, 2014, at which time its  
11 further consideration will be addressed and scheduled as necessary.

12 6. The Petition, which was originally filed herein on December 3, 2013, and  
13 renewed with the filing on March 6, 2014, of Jacqueline M. Montoya, in her capacity  
14 as the trustee and a beneficiary of the MTC Living Trust, dated December 6, 1995, to  
15 Compel Trustee to Distribute Accrued Income and Future Income Received from Oil,  
16 Gas, and Mineral Leases and Declaration of the Applicability of the Doctrine of  
17 Laches, is granted in part as follows:

18 a. Beginning with the income paid to the Trust for the month of May,  
19 2014, the approximate 65% share of the income from the Trust's ownership of income  
20 producing real property located in Upton County Texas, together with oil, mineral, and  
21 gas rights related to such real property, which income share had historically been paid  
22 or distributed to Marjorie T. Connell, while she was alive, and then to Jacqueline and  
23 Kathryn, until the dispute over entitlement thereto arose in these proceedings, shall be  
24 paid to Jacqueline as trustee of the MTC Trust for further distribution thereunder in  
25 equal shares to Jacqueline and Kathryn.

26 b. Payment of this approximate 65% share of the income shall be  
27 conditioned upon Jacqueline and Kathryn posting a bond or other acceptable security  
28 facilitating the repayment and return of the income distributed to them back to Eleanor,

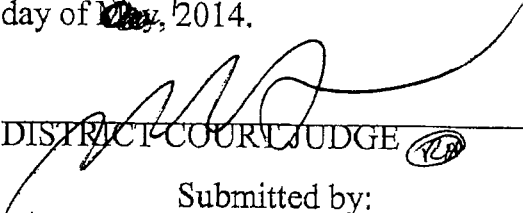
1 in the event it is determined in these proceedings or in Case No. P-14-080595-E that  
2 Eleanor is entitled to such income. The bond or other security posted shall be in the  
3 estimated amount of the anticipated income to be distributed to Jacqueline and Eleanor  
4 from May, 2014, until January, 2015. The amount of anticipated income shall be based  
5 upon past income payments received from the Trust to the extent they are actually  
6 indicative of what the anticipated income will be, and any dispute over the amount in  
7 question must be settled by the Court. If the parties can agree on the bond or other  
8 security to be posted, they may submit a Stipulation and Order to the Court for approval  
9 of their arrangement. If they cannot reach an agreement regarding the bond or other  
10 security to be posted, including the terms, the amount and the nature thereof, then  
11 Jacqueline must file a Petition with the Court requesting approval of the bond or other  
12 security proposed; Eleanor may then oppose the same; and, after a hearing thereon, the  
13 Court will determine the matter, including whether or not the bond or other security  
14 proposed is acceptable, the amount required for the bond or other security, and any  
15 other terms desired and appropriate to protect the interests of the parties.

16 7. While this proceeding and the Will Contest in Case No. P-14-080595-E  
17 are interrelated, they shall not be consolidated. However, any discovery and evidence  
18 gathered in one Case shall be usable in the other Case, and therefore discovery  
19 proceedings and efforts of the parties for both Cases shall be coordinated to provide  
20 economy in and expeditious handling of these matters.

21 8. The trial in this proceeding scheduled on the Court's hearing Stack  
22 beginning August 11, 2014, and the Calendar Call, Pre-Trial Conference and other  
23 deadlines relating thereto as previously ordered, are taken off calendar at this time  
24 pending the resolution of the Will Contest Case. However, although the Motions and  
25 Petitions mentioned above relating to this case are also being postponed and continued  
26 pending the resolution of the Will Contest Case, this shall not preclude a party from  
27 filing in this proceeding hereafter a motion, petition, or other request for relief the  
28 granting of which is not dependent upon or would otherwise be resolved by the Court's

1 decision as to the merits of the parties' positions in the Will Contest Case.

2 So ORDERED this 2<sup>nd</sup> day of July, 2014.

3  
4 DISTRICT COURT JUDGE 

5 Submitted by:

6 ALBRIGHT, STODDARD,  
7 WARNICK & ALBRIGHT

Submitted by:

8 THE RUSHFORTH FIRM, LTD.

9 By: 

10 WHITNEY B. WARNICK, ESQ.  
11 Nevada Bar No. 001573  
12 801 South Rancho Drive, Suite D-4  
13 Las Vegas, Nevada 89106  
14 Tel: (702) 384-7111

By: 

15 JOSEPH J. POWELL, ESQ.  
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19 Tel: (702) 255-4552

20 *Attorneys for Jacqueline M. Montoya and Kathryn A. Bouvier*

21 Approved as to form only by:

22 JEFFREY BURR, LTD.

23 By: 

24 JOHN R. MUGAN, ESQ.  
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1 **NOEJ**

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3 Nevada State Bar No. 001394

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13 *Attorneys for Jacqueline M. Montoya*  
14 *and Kathryn A. Bouvier*

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 In the Matter of the Estate of:  
14 THE W. N. CONNELL AND MARJORIE T.  
15 CONNELL LIVING TRUST, Dated May 18,  
16 1972,

17 An Inter Vivos Irrevocable Trust

CASE NO. P-09-066425  
Dept. XXVI (26)

**NOTICE OF ENTRY OF  
ORDER: RE PENDING MOTIONS AND  
SCHEDULING**

18 PLEASE TAKE NOTICE that an **ORDER: RE PENDING MOTIONS AND**  
19 **SCHEDULING** was entered with this Court on July 7, 2014.

20 A copy of said Order is attached hereto.

21 DATED this 14<sup>th</sup> day of July, 2014.

22 ALBRIGHT, STODDARD, WARNICK  
23 & ALBRIGHT

24 By   
25 G. MARK ALBRIGHT, ESQ.

26 Nevada Bar No. 001394

27 WHITNEY B. WARNICK, ESQ.

28 Nevada Bar No. 001573

801 South Rancho Drive, Suite D-4

Las Vegas, Nevada 89106

*Attorneys for Jacqueline M. Montoya*

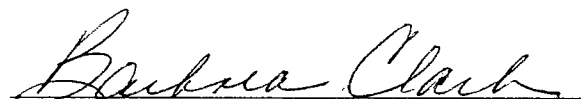


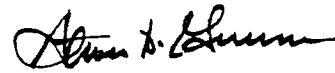
**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Albright, Stoddard, Warnick & Albright and that on this 7 day of July, 2014, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER: RE PENDING MOTIONS AND SCHEDULING** upon all counsel of record by electronically serving the document using the Court's electronic filing system, and by placing a true and correct copy thereof, enclosed in a sealed envelope, in the United States Mail at Las Vegas, Nevada, with first class postage thereon prepaid, addressed to the following:

John R. Mugan, Esq.  
Jeffrey Burr Ltd.  
Suite 200  
2600 Paseo Verde Parkway  
Henderson, Nevada 89074  
Attorneys for Eleanor C. Ahern

Joseph J. Powell, Esq.  
The Rushforth Law Firm, Ltd.  
Suite 100  
9505 Hillwood Drive  
Las Vegas, Nevada 89134  
Attorneys for Jacqueline M. Montoya and  
Kathryn A. Bouvier

  
An employee of Albright, Stoddard, Warnick  
& Albright



CLERK OF THE COURT

**ORDR**

JOSEPH J. POWELL, ESQ.  
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*Attorneys for Kathryn A. Bouvier*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

In the Matter of  
THE W. N. CONNELL AND MARJORIE  
T. CONNELL LIVING TRUST, Dated  
May 18, 1972,

CASE NO. P-09-066425  
DEPT NO. XXVI (26)

Date of Hearing: May 13, 2014  
Time of Hearing: 9:30a.m.

An Inter Vivos Irrevocable Trust.

**ORDER: RE PENDING MOTIONS  
AND SCHEDULING**

The following Motions and Petitions came on for hearing before the Court on  
May 13, 2014:

1. The Motion, filed herein on or about May 6, 2014, of Eleanor C. Ahern  
in her capacity as the trustee of the W.N. Connell and Marjorie T. Connell Living  
Trust, dated May 18, 1972, to Continue May 13, 2014 Hearing on Petition for  
Construction and Effect of Probate Court Order of Jacqueline M. Montoya (hereinafter  
referred to as the "Motion to Continue");

2. The Petition, which was originally filed herein on December 3, 2013, and renewed with the filing on March 6, 2014, of Jacqueline M. Montoya in her capacity as the trustee and a beneficiary of the MTC Living Trust, dated December 6, 1995, to Compel Trustee to Distribute Accrued Income and Future Income Received from Oil, Gas, and Mineral Leases and Declaration of the Applicability of the Doctrine of Laches (hereinafter referred to as the "Petition to Compel");

3. The Motion, filed herein on March 18, 2014, of Jacqueline M. Montoya, in her capacity as the trustee and a beneficiary of the MTC Living Trust, dated December 6, 1995, to Dismiss the Counterclaims of Eleanor C. Ahern (hereinafter referred to as the "Motion to Dismiss"); and

4. The Petition, filed herein on March 26, 2014, of Jacqueline M. Montoya in her capacity as the trustee and a beneficiary of the MTC Living Trust, dated December 6, 1995, for Construction and Effect of Probate Court Order (hereinafter referred to as the "Petition for Construction").

Present at the hearing on behalf of Eleanor C. Ahern (hereinafter "Eleanor") were her counsel, John R. Mugan, Esq., and Michael D. Lum, Esq. Present at the hearing on behalf of Jacqueline M. Montoya (hereinafter "Jacqueline") were her counsel, Joseph J. Powell, Esq., and Whitney B. Warnick, Esq.

The Court, after having reviewed the Motions, Petitions and Oppositions thereto of the parties, and after having considered the argument of counsel at the hearing, finds and orders as follows:

### **FINDINGS OF FACT**

The Court considered first Eleanor's Motion to Continue wherein she requested that the hearings on the pending Motion and Petitions before the Court, together with consideration of Jacqueline's underlying Petition, filed herein on September 27, 2013, for Declaratory Judgment Regarding Limited Interest of Trust Assets Pursuant to NRS 30.040, NRS 153.031(1)(E), and NRS 164.033(1)(A) (hereinafter referred to as the "Petition for Declaratory Relief"), and her Petition, filed herein on March 27, 2014, for

1 Determination of Construction and Interpretation of Language Relating to Trust No.  
2 2 (hereinafter referred to as the "Petition for Determination"), all be postponed and  
3 continued until after the hearing and resolution of the pending Will Contest between  
4 the parties in this Court in Case No. P-14-080595-E.

5 Eleanor asserted that the resolution of the pending Will Contest Case could  
6 resolve completely all the other pending actions in this Case, and therefore as a matter  
7 of judicial economy, and to avoid unnecessary litigation expenses, it would be prudent  
8 to postpone and continue the other pending matters in this Case until the Court  
9 rendered its decision in the Will Contest Case. Jacqueline asserted that while it may  
10 be prudent that her other Motion and Petitions pending in this Case be continued until  
11 the resolution of the pending Will Contest Case, the Court should address the relief  
12 requested in her Motion to Compel at this time, in order to provide to Jacqueline and  
13 her sister, Kathryn A. Bouvier (hereinafter "Kathryn"), income they depended upon  
14 from the W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972 (the  
15 "Trust"). The Trust owns income producing real property located in Upton County  
16 Texas, together with oil, mineral, and gas rights related to such real property.  
17 Approximately a 65% share of income from this property had historically been paid or  
18 distributed to Marjorie T. Connell, while she was alive, and then to Jacqueline and  
19 Kathryn, until the dispute over entitlement to the income arose in these proceedings.

20 The Court finds that the pending Will Contest in Case No. P-14-080595-E  
21 should be resolved first before addressing the pending Motion to Dismiss, Petition for  
22 Construction, Petition for Declaratory Relief, and Petition for Determination in these  
23 proceedings. Therefore, the Motion to Continue should be granted with respect to those  
24 matters. However, the Court finds that the Motion to Compel should be addressed at  
25 this hearing on May 13, 2014.

26 Because of a change in circumstances, namely the delay in going forward in  
27 these proceedings in order to first resolve the dispute in the pending Will Contest in  
28 Case No. P-14-080595-E, the Court finds that it is now appropriate that the Motion to

1 Compel should be granted, providing to Jacqueline and Kathryn, as beneficiaries of the  
2 MTC Living Trust, dated December 6, 1995 (the "MTC Trust"), the right to receive the  
3 approximate 65% share of accruing income from the Trust, effective with the month  
4 of May, 2014. However, payment to them of this share of the accruing income should  
5 be conditioned upon their posting a bond or other acceptable security facilitating, if  
6 necessary, the repayment and return of the income distributed to them back to Eleanor  
7 in the event it is determined in these proceedings or in Case No. P-14-080595-E that  
8 Eleanor is entitled to such income. The bond or other security posted should be in the  
9 amount of the anticipated income to be distributed to Jacqueline and Eleanor from  
10 May, 2014, until January, 2015. The amount of anticipated income should be based  
11 upon past income payments received from the Trust to the extent they are actually  
12 indicative of what the anticipated income will be, and any dispute over the amount in  
13 question must be settled by the Court. If the parties can agree on the bond or other  
14 security to be posted, they may submit a Stipulation and Order to the Court for approval  
15 of their arrangement. If they cannot reach an agreement regarding the bond or other  
16 security to be posted, including the terms, the amount and the nature thereof, then  
17 Jacqueline must file a Petition with the Court requesting approval of the bond or other  
18 security proposed; Eleanor may then oppose the same; and, after a hearing thereon, the  
19 Court will determine the matter, including whether or not the bond or other security  
20 proposed is acceptable, the amount required for the bond or other security, and any  
21 other terms desired and appropriate to protect the interests of the parties.

22 The Court further finds that while this proceeding and the Will Contest in Case  
23 No. P-14-080595-E are interrelated, they should not be consolidated. However, any  
24 discovery and evidence gathered in one Case should be usable in the other Case, and  
25 therefore discovery proceedings and efforts of the parties for both Cases should be  
26 coordinated to provide economy in and expeditious handling of these matters.

27 The Court further finds that the trial in this proceeding scheduled on the Court's  
28 hearing Stack beginning August 11, 2014, and the Calendar Call, Pre-Trial Conference

1 and other deadlines relating thereto as previously ordered, should be taken off calendar  
2 at this time pending the resolution of the Will Contest Case. However, although  
3 Motions and Petitions mentioned above relating to this case are also being postponed  
4 and continued pending the resolution of the Will Contest Case, this should not preclude  
5 a party from filing in this proceeding hereafter a motion, petition, or other request for  
6 relief, the granting of which is not dependent upon or would otherwise be resolved by  
7 the Court's decision as to the merits of the parties' positions in the Will Contest Case.

8 **ORDER**

9 Based upon these findings, and good cause appearing:

10 IT IS HEREBY ORDERED as follows:

11 1. The Motion, filed herein on or about May 6, 2014, of Eleanor C. Ahern  
12 in her capacity as the trustee of the W.N. Connell and Marjorie T. Connell Living  
13 Trust, dated May 18, 1972, to Continue May 13, 2014 Hearing on Petition for  
14 Construction and Effect of Probate Court Order of Jacqueline M. Montoya, is granted  
15 as hereinafter further ordered.

16 2. The hearing or other consideration by the Court of Jacqueline's Petition,  
17 filed herein on September 27, 2013, for Declaratory Judgment Regarding Limited  
18 Interest of Trust Assets Pursuant to NRS 30.040, NRS 153.031(1)(E), and NRS  
19 164.033(1)(A), is hereby continued for a status hearing before the Court on December  
20 4, 2014, at which time its further consideration will be addressed and scheduled as  
21 necessary.

22 3. The hearing or other consideration by the Court of the Motion, filed herein  
23 on March 18, 2014, of Jacqueline M. Montoya, in her capacity as the trustee and a  
24 beneficiary of the MTC Living Trust, dated December 6, 1995, to Dismiss the  
25 Counterclaims of Eleanor C. Ahern, is hereby continued for a status hearing before the  
26 Court on December 4, 2014, at which time its further consideration will be addressed  
27 and scheduled as necessary.

28 4. The hearing or other consideration by the Court of the Petition, filed

1 herein on March 26, 2014, of Jacqueline M. Montoya, in her capacity as the trustee and  
2 a beneficiary of the MTC Living Trust, dated December 6, 1995, for Construction and  
3 Effect of Probate Court Order, is hereby continued for a status hearing before the Court  
4 on December 4, 2014, at which time its further consideration will be addressed and  
5 scheduled as necessary.

6 5. The hearing or other consideration by the Court of the Petition, filed  
7 herein on March 27, 2014, of Jacqueline M. Montoya, in her capacity as the trustee and  
8 a beneficiary of the MTC Living Trust, dated December 6, 1995, for Determination of  
9 Construction and Interpretation of Language Relating to Trust No. 2, is hereby  
10 continued for a status hearing before the Court on December 4, 2014, at which time its  
11 further consideration will be addressed and scheduled as necessary.

12 6. The Petition, which was originally filed herein on December 3, 2013, and  
13 renewed with the filing on March 6, 2014, of Jacqueline M. Montoya, in her capacity  
14 as the trustee and a beneficiary of the MTC Living Trust, dated December 6, 1995, to  
15 Compel Trustee to Distribute Accrued Income and Future Income Received from Oil,  
16 Gas, and Mineral Leases and Declaration of the Applicability of the Doctrine of  
17 Laches, is granted in part as follows:

18 a. Beginning with the income paid to the Trust for the month of May,  
19 2014, the approximate 65% share of the income from the Trust's ownership of income  
20 producing real property located in Upton County Texas, together with oil, mineral, and  
21 gas rights related to such real property, which income share had historically been paid  
22 or distributed to Marjorie T. Connell, while she was alive, and then to Jacqueline and  
23 Kathryn, until the dispute over entitlement thereto arose in these proceedings, shall be  
24 paid to Jacqueline as trustee of the MTC Trust for further distribution thereunder in  
25 equal shares to Jacqueline and Kathryn.

26 b. Payment of this approximate 65% share of the income shall be  
27 conditioned upon Jacqueline and Kathryn posting a bond or other acceptable security  
28 facilitating the repayment and return of the income distributed to them back to Eleanor,

1 in the event it is determined in these proceedings or in Case No. P-14-080595-E that  
2 Eleanor is entitled to such income. The bond or other security posted shall be in the  
3 estimated amount of the anticipated income to be distributed to Jacqueline and Eleanor  
4 from May, 2014, until January, 2015. The amount of anticipated income shall be based  
5 upon past income payments received from the Trust to the extent they are actually  
6 indicative of what the anticipated income will be, and any dispute over the amount in  
7 question must be settled by the Court. If the parties can agree on the bond or other  
8 security to be posted, they may submit a Stipulation and Order to the Court for approval  
9 of their arrangement. If they cannot reach an agreement regarding the bond or other  
10 security to be posted, including the terms, the amount and the nature thereof, then  
11 Jacqueline must file a Petition with the Court requesting approval of the bond or other  
12 security proposed; Eleanor may then oppose the same; and, after a hearing thereon, the  
13 Court will determine the matter, including whether or not the bond or other security  
14 proposed is acceptable, the amount required for the bond or other security, and any  
15 other terms desired and appropriate to protect the interests of the parties.

16 7. While this proceeding and the Will Contest in Case No. P-14-080595-E  
17 are interrelated, they shall not be consolidated. However, any discovery and evidence  
18 gathered in one Case shall be usable in the other Case, and therefore discovery  
19 proceedings and efforts of the parties for both Cases shall be coordinated to provide  
20 economy in and expeditious handling of these matters.

21 8. The trial in this proceeding scheduled on the Court's hearing Stack  
22 beginning August 11, 2014, and the Calendar Call, Pre-Trial Conference and other  
23 deadlines relating thereto as previously ordered, are taken off calendar at this time  
24 pending the resolution of the Will Contest Case. However, although the Motions and  
25 Petitions mentioned above relating to this case are also being postponed and continued  
26 pending the resolution of the Will Contest Case, this shall not preclude a party from  
27 filing in this proceeding hereafter a motion, petition, or other request for relief the  
28 granting of which is not dependent upon or would otherwise be resolved by the Court's



1 decision as to the merits of the parties' positions in the Will Contest Case.

2 So ORDERED this 2<sup>nd</sup> day of July, 2014.

3  
4 DISTRICT COURT JUDGE 

5 Submitted by:

6 ALBRIGHT, STODDARD,  
7 WARNICK & ALBRIGHT

Submitted by:

8 THE RUSHFORTH FIRM, LTD.

9 By: 

10 WHITNEY B. WARNICK, ESQ.  
11 Nevada Bar No. 001573  
12 801 South Rancho Drive, Suite D-4  
13 Las Vegas, Nevada 89106  
14 Tel: (702) 384-7111

By: 

15 JOSEPH J. POWELL, ESQ.  
16 Nevada Bar No. 00875  
17 P.O. Box 371655  
18 Las Vegas, NV 89137-1655  
19 Tel: (702) 255-4552

20 *Attorneys for Jacqueline M. Montoya and Kathryn A. Bouvier*

21 Approved as to form only by:

22 JEFFREY BURR, LTD.

23 By: 

24 JOHN R. MUGAN, ESQ.  
25 Nevada Bar No. 10690  
26 2600 Paseo Verde Parkway, Suite 200  
27 Henderson, Nevada 89074  
28 Tel: (702) 433-4455

*Attorneys for Eleanor Connell Hartman Ahern*

1 **NOAS**  
2 JOHN R. MUGAN, Esquire  
3 Nevada Bar No. 10690  
4 [john@jeffreyburr.com](mailto:john@jeffreyburr.com)  
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6 Nevada Bar No. 12997  
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10 Henderson, NV 89074  
11 Telephone: (702) 433-4455  
12 Facsimile: (702) 451-1853  
13 *Attorneys for Trustee ELEANOR CONNELL HARTMAN AHERN*

14  
15  
16  
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21  
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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

In the Matter of

THE W. N. CONNELL AND MARJORIE T. CONNELL  
LIVING TRUST,  
Dated May 18, 1972

Case No. P-09-066425-T  
Dept. 26

An Inter Vivos Irrevocable Trust.

**NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that the above named, ELEANOR C. AHERN, a/k/a  
ELEANOR CONNELL HARTMAN AHERN ("ELEANOR"), as Trustee of THE W. N.  
CONNELL AND MARJORIE T. CONNELL LIVING TRUST dated May 18, 1972, by and through  
her counsel of record, JOHN R. MUGAN, Esquire, and MICHAEL D. LUM, Esquire, of the law  
firm of JEFFREY BURR, LTD., hereby appeals to the Supreme Court of Nevada the Order: Re

1 Pending Motions and Scheduling entered in this action on July 7, 2014.

2 DATED: July 31, 2014.

3 JEFFREY BURR, LTD.

4  
5 By: 

6 JOHN R. MUGAN, ESQUIRE

Nevada Bar No. 10690

7 MICHAEL D. LUM, ESQUIRE

Nevada Bar No. 12997

8 2600 Paseo Verde Parkway, Suite 200

Henderson, Nevada 89074

9 Attorneys for Trustee ELEANOR CONNELL  
HARTMAN AHERN

10  
11 **CERTIFICATE OF MAILING AND ELECTRONIC DELIVERY**

12 I hereby certify that on the 31 day of July, 2014, I served a true and correct copy of the  
13 above and foregoing **NOTICE OF APPEAL** upon all counsel of record by electronically serving  
14 the document, to each person as indicated below, and by placing a true and correct copy thereof,  
15 enclosed in a sealed envelope, in the United States Mail at Henderson, Nevada, with first class  
16 postage thereon prepaid, addressed as follows:

17  
18 JOSEPH J. POWELL, Esquire  
The Rushforth Firm. Ltd.  
19 P.O. Box 371655  
Las Vegas, NV 89137  
20 [joey@rushforth.net](mailto:joey@rushforth.net)

21 WHITNEY WARNICK, Esquire  
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22 801 S. Rancho Dr., #D-4  
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23 [wbw@albrightstoddard.com](mailto:wbw@albrightstoddard.com)

24  
25  
26   
27 An employee of JEFFREY BURR, LTD.  
28

1 **ASTA**  
JOHN R. MUGAN, Esquire  
2 Nevada Bar No. 10690  
[john@jeffreyburr.com](mailto:john@jeffreyburr.com)  
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Facsimile: (702) 451-1853  
7 *Attorneys for Trustee ELEANOR CONNELL HARTMAN AHERN*

8  
9 **DISTRICT COURT**  
10 **CLARK COUNTY, NEVADA**

11 In the Matter of

12 THE W. N. CONNELL AND MARJORIE T. CONNELL  
13 LIVING TRUST,  
14 Dated May 18, 1972

Case No. P-09-066425-T  
Dept. 26

15 An Inter Vivos Irrevocable Trust.

16  
17 **CASE APPEAL STATEMENT**

18 1. Name of Appellant filing this case appeal statement: ELEANOR C. AHERN, a/k/a  
19 ELEANOR CONNELL HARTMAN AHERN ("ELEANOR").

20 2. Identify the judge issuing the decision, judgment, or order appealed from: Eighth  
21 Judicial District Court Judge Gloria Sturman.

22 3. Identify each Appellant and the name and address of counsel for each Appellant:

23 Appellant: ELEANOR C. AHERN

24  
25 Counsel for Appellant: JOHN R. MUGAN, ESQUIRE  
Nevada Bar No. 10690  
26 MICHAEL D. LUM, ESQUIRE  
Nevada Bar No. 12997  
27 JEFFREY BURR, LTD.  
28 2600 Paseo Verde Parkway, Suite 200  
Henderson, Nevada 89074

1           4.     Identify each Respondent and the name and address of appellate counsel, if known,  
2 for each Respondent (if the name of a respondent's appellate counsel is unknown, indicate as much  
3 and provide the name and address of that respondent's trial counsel):

4                   Respondent: JACQUELINE M. MONTOYA

5                   Appellate counsel: JOSEPH J. POWELL, ESQ.  
6 Nevada Bar No. 08875  
7 THE RUSHFORTH FIRM, LTD.  
8 9505 Hillwood Drive, Suite 100  
Las Vegas, Nevada 89134

9                   Respondent: KATHRYN A. BOUVIER

10                  Appellate counsel: WHITNEY B. WARNICK, ESQ.  
11 Nevada Bar No. 01573  
12 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT  
13 801 South Rancho Drive, Suite D-4  
Las Vegas, Nevada 89106

14           5.     Indicate whether any attorney identified above in response to question 3 or 4 is not  
15 licensed to practice law in Nevada and, if so, whether the district court granted that attorney  
16 permission to appear under SCR 42 (attach a copy of any district court order granting such  
17 permission): None.

18           6.     Indicate whether Appellant was represented by appointed or retained counsel in the  
19 district court: Yes, Appellant was represented by retained counsel in the district court.

20           7.     Indicate whether Appellant is represented by appointed or retained counsel on  
21 appeal: Yes, Appellant is represented by retained counsel on appeal.

22           8.     Indicate whether Appellant was granted leave to proceed in forma pauperis, and the  
23 date of entry of the district court order granting such leave: No.

24           9.     Indicate the date the proceedings commenced in the district court (e.g. date  
25 complaint, indictment, information, or petition was filed): A Petition To Assume Jurisdiction Over  
26 Trust; Confirm Trustee; And Construe And Reform Trust was originally filed herein on August 17,  
27  
28

1 2009. Respondent filed her Petition For Declaratory Judgment Regarding Limited Interest Of Trust  
2 Assets Pursuant To NRS 30.040, NRS 153.031(1)(E), And NRS 164.033(1)(A) on September 27,  
3 2013. The subject of this appeal concerns Respondent's Petition To Compel Trustee To Distribute  
4 Accrued Income And Future Income Received From Oil, Gas, And Mineral Leases And Declaration  
5 Of The Applicability Of The Doctrine Of Laches originally filed on December 3, 2013 and renewed  
6 on March 6, 2014.  
7

8 10. Provide a brief description of the nature of the action and result in the district court,  
9 including the type of judgment or order being appealed and the relief granted by the district court:  
10

11 **Nature of the Action:**

12 This action concerns a dispute between ELEANOR and her daughters, JACQUELINE M.  
13 MONTOYA and KATHRYN A. BOUVIER, over the present beneficial interest of sixty-five  
14 percent (65%) of the income generated by the oil, gas and mineral interests on and under certain real  
15 estate and severed oil, gas and mineral interest in other acreage all located in Upton County, Texas  
16 (the "Upton County, Texas, Oil rights") that were the sole and separate property of ELEANOR's  
17 father, W.N. CONNELL.  
18

19 **Result Being Appealed:**

20 On December 3, 2013, JACQUELINE M. MONTOYA filed her Petition To Compel Trustee  
21 To Distribute Accrued Income And Future Income Received From Oil, Gas, And Mineral Lease  
22 And Declaration Of The Applicability Of the Doctrine Of Laches (the "First Petition"). This First  
23 Petition sought "injunctive relief"; namely, an affirmative injunction compelling ELEANOR, as  
24 Trustee of the W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST dated May 18,  
25 1972 (owner of the Upton County, Texas, Oil rights) to distribute sixty-five percent (65%) of the  
26 Upton County, Texas, Oil right income to JACQUELINE M. MONTOYA and her sister,  
27 KATHRYN A. BOUVIER. To obtain injunctive relief, a person must prove (1) that irreparable  
28

1 harm will result if an injunction is not issued, (2) that compensatory damages is not an adequate  
2 remedy for such irreparable harm, and (3) a reasonable probability of success on the merits in the  
3 action that the person is seeking the injunction. *Sobel v. Capital Management Consultants, Inc.*,  
4 102 Nev. 444, 446, 726 P.2d 335, 337 (1986) citing *Number One Rent-A-Car v. Ramada Inns*, 94  
5 Nev. 779, 780, 587 P.2d 1329, 1330.  
6

7 The district court heard the First Petition on January 14, 2014, and at such hearing the  
8 district court aptly reasoned that compensatory damages are adequate and denied the First Petition  
9 without prejudice. At the January 14, 2014 hearing, the following exchange occurred:

10 “MR. MUGAN: ... **We’re talking about dollars here.**

11 THE COURT: **Right.**

12 MR. MUGAN: **That’s adequate compensation.** We’re not talking about blowing up a  
13 building that can’t be replaced, or the sale of real estate that’s irreplaceable. We’re talking  
14 about dollars. **That’s adequate compensation.**

15 THE COURT: **And since it’s not even like an asset that would fluctuate like in the stock**  
16 **market. It’s oil lease money. It’s –**

17 MR. MUGAN: Yeah, it’s oil.

18 THE COURT: **It’s revenue from oil leases.**

19 MR. MUGAN: Right.

20 THE COURT: **It’s cash coming in.”** (emphasis added)

21 District Court Judge Gloria Sturman set the date for trial in this case for February 18, 2014;  
22 however, the trial was continued on February 18, 2014 and has since been set for a calendar call on  
23 December 4, 2014.

24 On March 6, 2014, JACQUELINE M. MONTOYA renewed her Petition To Compel Trustee  
25 To Distribute Accrued Income And Future Income Received From Oil, Gas, And Mineral Lease  
26 And Declaration Of The Applicability Of the Doctrine Of Laches by filing a petition identical to her  
27 First Petition accompanied by an Addendum (“Second Petition”). Again, in her Second Petition,  
28 JACQUELINE M. MONTOYA sought “injunctive relief” without satisfying the requirements

1 thereof. Particularly, JACQUELINE M. MONTOYA failed to controvert the idea that  
2 compensatory damages are sufficient in this case.

3 Notwithstanding JACQUELINE M. MONTOYA's failure to carry her burden of proof, the  
4 district court entered and filed an Order: Re Pending Motions And Scheduling ("Order") on July 7,  
5 2014 granting the Second Petition. A Notice of Entry Of Order: Re Pending Motions And  
6 Scheduling was entered and filed on July 8, 2014. As indicated in the Order, the district court  
7 premised its decision to grant the Second Petition on "changed circumstances, namely the delay in  
8 going forward in these proceedings in order to first resolve the dispute in the pending Will Contest  
9 in Case No. P-14-080595-E (a related case)." Without satisfying the requirements for injunctive  
10 relief, "changed circumstances" is insufficient justification for granting JACQUELINE M.  
11 MONTOYA's Second Petition, and it is this decision that ELEANOR now appeals.

12  
13  
14 11. Indicate whether the case has previously been the subject of an appeal to or original  
15 writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of  
16 the prior proceeding: No.

17  
18 12. Indicate whether this appeal involves child custody or visitation: No.

19 13. If this is a civil case, indicate whether this appeal involves the possibility of  
20 settlement: No.

21 DATED this 31 day of July, 2014.

22 JEFFREY BURR, LTD.

23 By: 

24 JOHN R. MUGAN, ESQUIRE

25 Nevada Bar No. 10690

26 MICHAEL D. LUM, ESQUIRE

27 Nevada Bar No. 12997

28 2600 Paseo Verde Parkway, Suite 200

Henderson, Nevada 89074

Attorneys for Trustee ELEANOR CONNELL  
HARTMAN AHERN



1                                    **CERTIFICATE OF MAILING AND ELECTRONIC DELIVERY**

2                    I hereby certify that on the 31 day of July, 2014, I served a true and correct copy of the  
3 above and foregoing **CASE APPEAL STATEMENT** upon all counsel of record by electronically  
4 serving the document, to each person as indicated below, and by placing a true and correct copy  
5 thereof, enclosed in a sealed envelope, in the United States Mail at Henderson, Nevada, with first  
6 class postage thereon prepaid, addressed as follows:  
7

8 JOSEPH J. POWELL, Esquire  
9 The Rushforth Firm. Ltd.  
10 P.O. Box 371655  
11 Las Vegas, NV 89137  
12 joey@rushforth.net

11 WHITNEY WARNICK, Esquire  
12 Albright, Stoddard, Warnick and Albright  
13 801 S. Rancho Dr., #D-4  
14 Las Vegas, NV 89106  
15 wbw@albrightstoddard.com

16   
17 An employee of JEFFREY BURR, LTD.  
18  
19  
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FILED

SEP 19 2014

*Alvin L. Johnson*  
CLERK OF COURT

1 TRANS

2 ORIGINAL

3  
4 EIGHTH JUDICIAL DISTRICT COURT

5 FAMILY DIVISION

6 CLARK COUNTY, NEVADA

7 IN THE MATTER OF THE TRUST )

8 OF: THE W.N. CONNELL and )

CASE NO. P-09-066425-T

9 MARJORIE T. CONNELL )

DEPT. PROBATE

10 LIVING TRUST. )

11  
12 BEFORE THE HONORABLE WILLIAM B. GONZALEZ

DISTRICT COURT JUDGE

13 TRANSCRIPT RE: MOTION TO COMPEL

WEDNESDAY, SEPTEMBER 3, 2014

14 APPEARANCES:

15 The Petitioner:  
For the Plaintiff:

NOT PRESENT  
MICHAEL D. LUM, ESQ.  
Jeffrey Burr, Ltd.  
2600 Paseo Verde Parkway  
Las Vegas, Nevada 89075  
(702) 433-4455

18 Other:

NOT PRESENT  
JOSEPH J. POWELL, ESQ.  
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PO Box 371655  
Las Vegas, Nevada 89137  
(702) 255-4552

23 Transcript prepared by:  
24 Verbatim Reporting & Transcription LLC

1 LAS VEGAS, NEVADA

WEDNESDAY, SEPTEMBER 3, 2014

2 P R O C E E D I N G S

3 (Proceedings commence at 9:57 a.m.)

4  
5 THE COURT: Bouvier -- or Bouvier, I don't know how  
6 your client pronounces it -- v. Connell, in the matter of the  
7 Estate of Connell v. Connell Living Trust.

8 MR. LUM: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. LUM: Michael Lum, Bar Number 12997, on behalf  
11 of Eleanor Ahern, Trustee of the W.N. Connell and Marjorie T.  
12 Connell Living Trust.

13 THE COURT: Thank you.

14 MR. POWELL: Good morning, Your Honor. Joe Powell,  
15 Bar Number 8875, appearing on behalf of Jacqueline Montoya,  
16 the respondent in this matter.

17 THE COURT: Good morning.

18 So what I have here is a motion to compel brought by  
19 Eleanor C. Ahern. And I have read through everything. This  
20 is a probate case.

21 MR. POWELL: Uh-huh.

22 THE COURT: So, obviously, there are different  
23 issues in a probate case, which someone pointed out is a case  
24 -- you know, a court of equity. But you still look at

1 evidence the same way; it's still what's calculated to lead to  
2 admissible evidence that's relevant.

3 I've looked at the interrogatories and the requests  
4 to produce. I think, if what is being requested is an  
5 accounting of the -- what is it -- the MTC Trust, that is  
6 something that you're going to ask Judge Sturman about. I  
7 don't think you're there yet. I don't think we're ready to do  
8 an accounting. And quite candidly, a lot of what is being  
9 requested here is, in fact, that type of information. So I'm  
10 not very impressed by the breadth and the scope of what's  
11 being asked.

12 I think, as I understand it, really, the issue is,  
13 right now, whether or not the 65/35 split, whether or not the  
14 65 should have been or was able to be inherited by the  
15 granddaughters. I mean, that's the issue. Yea or nay?

16 MR. POWELL: Correct.

17 THE COURT: And the damages that flow from that are,  
18 obviously, the amounts at issue.

19 I am not inclined to grant the motion because I  
20 think it is just too premature. And I think what it's really  
21 asking for is an accounting of the Connell Trust, Marjorie --  
22 this is Marjorie, right? Marjorie Connell MTC Living Trust,  
23 which we're not at that stage yet, and I'm not sure we ever  
24 really get there. I think what the granddaughter has received

1 from that trust, aside from the 65 distribution; 65 percent  
2 distribution of the oil leases, is not relevant to this  
3 litigation, at the present time. So because of that, I'm not  
4 inclined to grant the motion to compel, as it has been  
5 presented today.

6 I did want to talk about, I guess, some alternative  
7 relief, for lack of a better phrase, of what should, in fact,  
8 be turned over.

9 There was some discussion of a Form 706, which I  
10 believe is the form that is submitted to the IRS --

11 MR. POWELL: Uh-huh.

12 THE COURT: -- right? To show the income --

13 MR. LUM: It's an estate tax return, Your Honor.

14 THE COURT: An estate tax return. So I understand  
15 that this form has been produced, but redacted in a certain  
16 way?

17 MR. POWELL: That was the offer, was to redact the  
18 values. The claim was -- effectively, is they are seeking to  
19 see what assets were declared to be the taxable estate of  
20 Marjorie Connell. And I offered opposing counsel, I'll give  
21 you a redacted copy, showing the actual assets, I'm not going  
22 to produce for you the actual values; the values are  
23 irrelevant.

24 It's a tax return. They're simply seeking, for

1 their purposes of the 65/35 disclosure, did Marjorie Connell  
2 declare the 65 percent that she exercised the power of  
3 appointment over for the benefit of the grandchildren, did she  
4 declare that as an asset belonging to her estate, which was  
5 taxable. That's not even in dispute. In fact, I've already  
6 produced a redacted copy to opposing counsel, showing that  
7 issue.

8           So, beyond that issue, I have no idea as to why else  
9 they would need it, again, other than trying to see values, to  
10 see what my client and her sister received, so that they can  
11 then, in turn -- which they already have -- they've already  
12 put in pleadings, they've already put what they believe that  
13 they inherited.

14           So there's really no function of this, other than to  
15 go beyond, and to see what exactly do you have, effectively,  
16 in your war chest to keep this dispute going, which I believe  
17 is -- again, is totally improper, and goes beyond any relevant  
18 issue that's here, which you correctly pointed out is the  
19 65/35 split. That's the underlying determination that we're  
20 asking Judge Sturman to make.

21           THE COURT: So have both of you exchanged the tax  
22 information that shows how each of your clients treated their  
23 distribution?

24           MR. POWELL: Yes. I mean, we've produced in

1 pleadings -- we've produced, in fact, tax returns, as well,  
2 from Ms. Montoya and Ms. Bouvier, showing the fact that they  
3 got K-1's, and they filed -- they paid their income tax on the  
4 65 percent of the income that they received, so --

5 THE COURT: And does it show the distribution, the  
6 number associated with the --

7 MR. POWELL: Yeah, because --

8 THE COURT: -- 65 percent.

9 MR. POWELL: Right. Because what you can do is it -  
10 -

11 THE COURT: Okay.

12 MR. POWELL: There's total numbers, and you can --

13 THE COURT: Yeah.

14 MR. POWELL: -- you can break down between what was  
15 65 percent --

16 THE COURT: And what was 35.

17 MR. POWELL: -- and what was 35 percent. Exactly.  
18 Exactly.

19 THE COURT: But I think that everybody should  
20 exchange those numbers that were reported, so that the math  
21 can be --

22 MR. POWELL: And the income --

23 THE COURT: -- confirmed.

24 MR. POWELL: Yeah. And the income has been.

1           And the other reality of this scenario, too, is, not  
2 only was the redacted 706 portion of this shown, again, where  
3 she's -- she has the numbers, there's also been, as well, the  
4 appraisal has been shown, when she -- when there was the  
5 appraisal for the purposes of the 706, that's already been  
6 produced. So there's nothing here that would go to the  
7 relevance that already hasn't been turned over, to establish  
8 this 65/35.

9           And going further back, there's also the 65 percent  
10 allocation --

11           THE COURT: Uh-huh.

12           MR. POWELL: -- and 35 percent allocation. That  
13 goes way back to 1980, and those documents -- the original 706  
14 from Mr. Connell can't be located. But what has been located  
15 is a Texas estate tax return, which, on the face of the Texas  
16 estate tax return, expressly declares, use the numbers from  
17 the Form 706.

18           So we know these are the numbers that were on the  
19 form 706, but since it was 1980, we simply can't find -- I  
20 mean, the accountants that were involved in this are all  
21 deceased now. The IRS doesn't go back that far. So every  
22 avenue to find that 706 has been exhausted. But again, the  
23 next best evidence we have is the Texas estate tax return.  
24 There's an express declaration on there, which was actually



1 submitted with our response that shows exactly that.

2 THE COURT: Uh-huh.

3 MR. POWELL: There is a -- there is expressly a --  
4 almost -- it's 64 point -- and then in decimal points;  
5 likewise, it's 35 percent and decimal points. It already  
6 shows expressly what, for the Mr. Connell's estate, the  
7 allocation was done: 65 percent, effectively, to Mrs.  
8 Connell, 35 percent to, effectively, the trust for Ms. Ahern.

9 So we've already established that. And that's why,  
10 again, Your Honor, this is -- this is going beyond what's  
11 relevant in this case, and I don't --

12 THE COURT: And there's no biological relationship  
13 between Ms. Ahern and the granddaughters.

14 MR. POWELL: No, that's their mother. That's their  
15 mother.

16 THE COURT: Adopted.

17 MR. POWELL: No.

18 THE COURT: No, Ms. Ahern was adopted, though.

19 MR. POWELL: Ms. Ahern was adopted by Mrs. Connell.

20 THE COURT: Okay.

21 MR. POWELL: She was a biological daughter of Mr.  
22 Connell.

23 THE COURT: Okay.

24 MR. POWELL: But this was a second marriage

1 scenario.

2 THE COURT: Got it.

3 MR. POWELL: And so Mrs. Connell adopted Ms. Ahern  
4 as an adult. So Ms. Ahern's children are Ms. Montoya and Ms.  
5 Bouvier, biologically.

6 THE COURT: It's a really sad situation.

7 MR. POWELL: It is.

8 THE COURT: I hope the Court can straighten it out.

9 I'm going to deny the motion to compel at the  
10 present time. I think it's premature. If Ms. Ahern wants to  
11 make a motion for an accounting, if that becomes necessary  
12 down the road, then I will be happy to revisit the issue. But  
13 I -- so I guess what I can do is deny it without prejudice.

14 But I can tell you it is highly unlikely, at this  
15 point, that I would ever order the production of the financial  
16 documents or the distribution of the trust that did not  
17 involve this 65/35 percent split. And since that distribution  
18 has already been provided, the 65 percent and the associated  
19 amounts has been provided, then I think that is sufficient for  
20 today.

21 MR. POWELL: So just to clarify, Your Honor, you do  
22 agree that the amounts relevant to that 65 percent; that is,  
23 how that income was reported, from the time that we requested  
24 until the present date --

1 THE COURT: To the extent --

2 MR. POWELL: -- is relevant.

3 THE COURT: Yes.

4 MR. POWELL: And that --

5 THE COURT: And I think that's been produced, as I  
6 understand it.

7 MR. POWELL: Yeah. I'm going to take -- I'm going  
8 to take opposing counsel's word for it. I don't recall  
9 getting all of those documents, but I'll look through.

10 THE COURT: Double check what you have. If you  
11 don't have something, then, by all means, talk to Mr. Powell.  
12 But I think he's turned all of that information over to you,  
13 to the extent that he has it available and it still exists.

14 But likewise, I think Ms. Ahern needs to turn over  
15 her information on the 35 percent. You know, how did she  
16 report it? How -- you know, what number did she report?  
17 Because that's the only way, I think, that you all are going  
18 to be able to verify the distribution.

19 So I would, you know, highly recommend, Mr. Lum, if  
20 you haven't done that, then that needs to be taken care of, as  
21 well, so everyone knows what was reported from these oil  
22 leases.

23 MR. POWELL: Yeah. And Your Honor, I understand  
24 your inclination. But the MTC Living Trust does have a part

1 in this litigation. I mean, it's not been named, you know, a  
2 defendant or a plaintiff, but --

3 THE COURT: If it's named, and there is an  
4 accounting, I'll look at the issue again. But right now, my  
5 answer is no. So your motion is denied. I'll deny it without  
6 prejudice, but with the understanding that you're really going  
7 to have to have a justifiable reason.

8 And I would require the Court to order an accounting  
9 of the MTC Trust before you would bring this motion back to my  
10 attention.

11 So I'm going to have Mr. Powell prepare my report  
12 and recommendations from today's hearing. I need that caveat  
13 in the report and recommendation, that the motion cannot be  
14 brought back to my attention until such time as the Court  
15 would order an accounting of the MTC Trust, Living Trust,  
16 which would make then the financial distribution relevant.  
17 But I'm not sure that that's really something that's on the  
18 horizon, but I don't know because this is -- these are issues  
19 that Judge Sturman will need to address. Okay?

20 MR. POWELL: Thank you, Your Honor.

21 THE COURT: But today, the motion to compel is  
22 denied without prejudice.

23 MR. LUM: Thank you, Your Honor.

24 THE CLERK: Status check is October 10th, at 11.

1 THE COURT: And that's only for Mr. Powell. But I  
2 know he's going to have my report and recommendation to me in  
3 10 days.

4 MR. POWELL: Absolutely.

5 THE COURT: And defense counsel is going to approve  
6 as to form and content. Okay?

7 MR. POWELL: Exactly.

8 MR. LUM: Thank you, Your Honor.

9 MR. POWELL: Thank you, Your Honor.

10 THE COURT: Thank you very much.

11 (Proceedings concluded at 10:10 a.m.)

12 \* \* \* \* \*

13 ATTEST: I do hereby certify that I have truly and  
14 correctly transcribed the digital proceedings in the above-  
15 entitled case to the best of my ability.

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/s/ Coleen M. Rand  
Coleen M. Rand

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