

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,

vs. Appellant,

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

Respondent.

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Elizabeth A. Brown
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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 4 OF 8

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JOSEPH J. POWELL (SBN 8875)
DANIEL P. KIEFER (SBN 12419)
1707 Village Center Cir., Suite 150
Las Vegas, NV 89134
Telephone (702) 255-4552
e-mail: probate@rushforthfirm.com
Attorneys for Appellants

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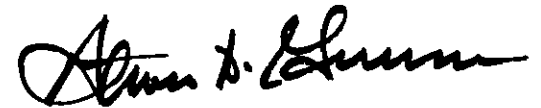
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CLERK OF THE COURT

NEOJ

JOSEPH J. POWELL
State Bar No. 8875
THE RUSHFORTH FIRM, LTD.
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

WHITNEY B. WARNICK, ESQ.
Nevada Bar No. 001573
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
Attorneys for Kathryn A. Bouvier

DISTRICT COURT

CLARK COUNTY, NEVADA

In 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 XXVI, RJC

**NOTICE OF ENTRY OF
ORDER ON SUMMARY JUDGMENT**

NOTICE IS HEREBY GIVEN THAT:

The "Order On Summary Judgment" was entered April 15, 2015 and filed

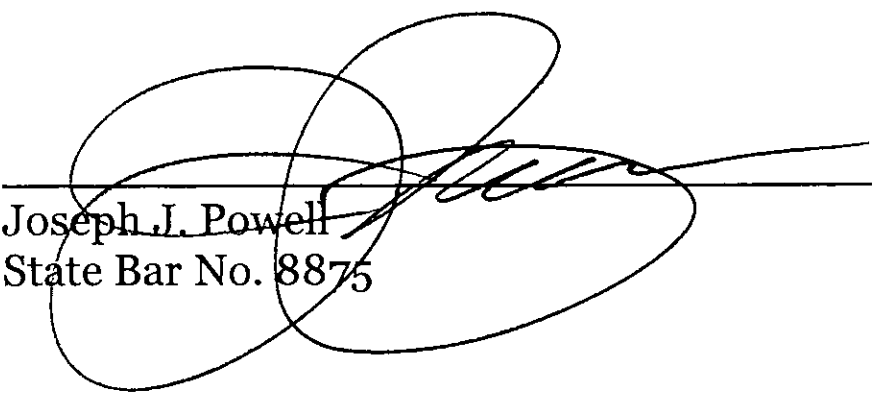
THE RUSHFORTH FIRM, LTD.
Telephone: 702-255-4552 / Fax: 702-255-4677
PO Box 371655
Las Vegas, Nevada 89137-1655

THE RUSHFORTH FIRM, LTD.
Telephone: 702-255-4552 / Fax: 702-255-4677
PO Box 371655
Las Vegas, Nevada 89137-1655

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April 16, 2015 in the above entitled matter, a copy of which is attached hereto.

Respectfully submitted by:



Joseph J. Powell
State Bar No. 8875

4/17/15
Date

THE RUSHFORTH FIRM, LTD.
Telephone: 702-255-4552 / Fax: 702-255-4677
PO Box 371655
Las Vegas, Nevada 89137-1655

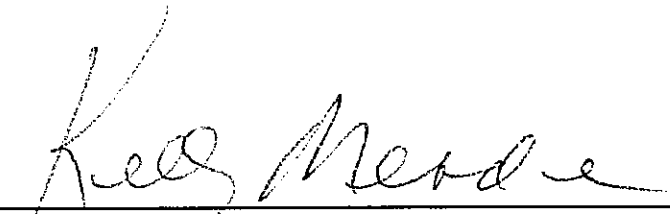
Certificate of Mailing

I, the undersigned, hereby certify that on April 17, 2015, I mailed a copy of the
"Notice of Entry of Order On Summary Judgment" that has been filed in this proceeding,
to each person named below by first-class mail, addressed as follows:

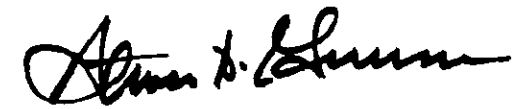
Dale A. Hayes, Esq.
Liane K. Wakayama, Esq.
Marquis Aurbach Coffing
10001 Park Run Drive
Las Vegas, NV 89145
Attorneys for Eleanor Connell Harman Ahern

Albright Stoddard Warnick & Albright
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Attorney for Kathryn A. Bouvier

Jacqueline M. Montoya
3385 Maverick Street
Las Vegas, NV 89108



An employee of,
THE RUSHFORTH FIRM, LTD.



CLERK OF THE COURT

JUDGE

JOSEPH J. POWELL, ESQ.
Nevada Bar No. 008875
THE RUSHFORTH FIRM, LTD.
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134
Tel: (702) 255-4552
Fax: (702) 255-4677
joey@rushforth.net
Attorneys for Jacqueline M. Montoya

WHITNEY B. WARNICK, ESQ.
Nevada Bar No. 001573
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
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: January 30, 2015
Time of Hearing: 10:00a.m.

An Inter Vivos Irrevocable Trust.

SUMMARY JUDGMENT

The current proceedings were commenced with the filing on September 27, 2013, of a 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). This Petition was filed by Jacqueline M. Montoya ("Jacqueline") as Trustee of the MTC Living Trust, and on her behalf and that of Kathryn A. Bouvier ("Kathryn"), her sister, as beneficiaries under the MTC Living Trust. During these proceedings several other Petitions, Motions, and Pleadings have been filed by the parties, including those summarized in the chart attached hereto as Exhibit "A".

On December 23, 2014, Jacqueline and Kathryn filed an OPPOSITION TO ELEANOR C. AHERN'S MOTION TO DISMISS PETITION FOR DECLARATORY JUDGMENT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; AND, COUNTERMOTION OF KATHRYN A. BOUVIER AND JACQUELINE M. MONTOYA FOR SUMMARY JUDGMENT ON PETITION FOR DECLARATORY JUDGMENT, FOR DAMAGES AND ASSESSMENT OF PENALTIES. Thereafter, on January 2, 2015, Eleanor Connell Hartman Ahern ("Eleanor") filed an OMNIBUS OPPOSITION TO (1) PETITION FOR DETERMINATION OF CONSTRUCTION AND INTERPRETATION OF LANGUAGE RELATING TO TRUST NO. 2, AND (2) PETITION FOR CONSTRUCTION EFFECT OF PROBATE COURT ORDER; AND COUNTERMOTION FOR SUMMARY JUDGMENT. The parties agreed at the hearing on January 30, 2015, that their above-denominated Countermotions for Summary Judgment, and the claims and defenses asserted therein, subsumed all of the prior Petitions, Motions and Pleadings, and their defenses and claims asserted therein, as well as those briefed and discussed in the further replies, oppositions and supplements to their Countermotions, ~~as listed on the chart attached hereto as Exhibit "A"~~ (other than Jacqueline's and Kathryn's Motion for Leave to Amend Pleadings filed herein on January 12, 2015). Therefore, it was agreed, and the Court recognized, that the parties' claims and defenses in these proceedings could be resolved summarily by the Court in its adjudication of the parties' said Countermotions for Summary Judgment.

After reviewing the Countermotions for Summary Judgment, and the presentation of argument for and rebuttal against the Countermotions by the parties, the Court finds as follows:

1. A proceeding involving the subject Trust was initially commenced in 2009 by Eleanor, as Trustee of the W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972 (herein referred to as the "Trust"), with an unopposed Petition to

1 obtain a Court order clarifying to whom subtrust benefits would be paid upon her
2 death. The Court assumed jurisdiction over the Trust, recognizing that Eleanor, as
3 Trustee, was a Nevada resident, and the Trust provisions provided that it would be
4 administered pursuant to Nevada law. The unopposed Petition was consented to by
5 Jacqueline and Kathryn as contingent beneficiaries of subtrust No. 2 under the Trust,
6 and the Court approved the Petition by Order filed herein on September 4, 2009.
7 Pursuant to the Order, the Trust was reformed to provide that Jacqueline and Kathryn
8 were designated as the beneficiaries under subtrust No. 2 upon the death of Eleanor,
9 which had not theretofore been clearly delineated in the Trust provisions. In addition,
10 Jacqueline was designated as the successor Trustee under the Trust upon the death or
11 removal of Eleanor as the Trustee.

12 2. When the Trust was created in 1972, community property of W.N. Connell
13 ("William") and Marjorie T. Connell ("Marjorie"), along with two parcels of William's
14 separate real property, were transferred to the Trust. One parcel of William's separate
15 property was located in Clark County, Nevada. The other parcel consisted of a parcel
16 of real property and oil, gas and mineral rights relating thereto, located in Upton
17 County, Texas (hereinafter "Texas oil property"). In 1975, William and Marjorie, as
18 Trustees, deeded the Clark County, Nevada, separate property from their Trust to
19 Eleanor, personally, it having a ^{declared} value at the time, based upon the transfer tax paid, of
20 approximately \$55,000.00.

21 3. The dispute in these Trust proceedings relates to the ownership of and
22 entitlement to income from the Texas oil property. At the time of William's death on
23 November 24, 1979, the Texas oil property was the only remaining separate property
24 of William which had been titled in the Trust. The Trust provisions created two
25 subtrusts upon the death of William in 1979 (referred to in the Trust as Trust No. 2 and
26 Trust No. 3, and hereinafter referred to as "subtrust 2" and "subtrust 3"). Income
27 allocated to subtrust 2 was payable to Eleanor during her lifetime. Marjorie was the
28 beneficiary of the income and assets under subtrust 3, including the right during her

1 lifetime, at her election, to receive the assets outright free of trust. She was also given
2 the option of appointing the benefits under subtrust 3 in her Will to whomever she
3 desired. If she failed to remove the assets from subtrust 3 during her lifetime, or to
4 appoint them under her will, the benefits and assets under subtrust 3 would have
5 devolved by default to Eleanor.

6 4. Under the Trust provisions, Article SECOND, Section C.3, subtrust 3 was
7 to be funded with Marjorie's separate property, her share of the community property,
8 and a portion of William's separate property. The portion of William's separate
9 property to be allocated to subtrust 3 is determined by the provisions in Article THIRD
10 of the Trust. These provisions state:

11 "THIRD: MARITAL DEDUCTION. The Trustee shall allocate to Trust No. 3
12 from the Decedent's separate property the fractional share of the said assets which is
13 equal to the maximum marital deduction allowed for federal estate tax purposes . . . In
14 making the computations and allocations of the said property to Trust No. 3 as herein
15 required, the determination of the character and ownership of the said property and the
16 value thereof shall be as finally established for federal estate tax purposes."

17 5. Federal and Texas Estate Tax Returns were filed for William's estate
18 following his death. At the time of these proceedings, a copy of the Federal Estate Tax
19 Return could not be located, even the IRS no longer maintaining a copy thereof.
20 However, a copy of William's Texas Estate Tax Return, and a copy of the Closing
21 Letter for his Federal Estate Tax Return were available. The Texas Estate Tax Return
22 basically duplicated the information provided on the Federal Estate Tax Return, thereby
23 providing how William's estate was allocated and distributed on the Federal Estate Tax
24 Return. Daniel T. Gerety, CPA, an expert witness for Jacqueline and Kathryn, also
25 verified in his Report that the Texas Estate Tax Return used the property allocations
26 made on the Federal Estate Tax Return, and that the two Returns were consistent.

27 6. Under these two Estate Tax Returns, a 64.493% interest in the Texas oil
28 property was allocated to Marjorie, the beneficiary under subtrust 3, and the remaining
35.507% interest in the Texas oil property was allocated to Eleanor, the beneficiary
under subtrust 2. Further, as provided under Article THIRD, quoted above, this

1 allocation of interests in the Texas oil property determined the allocation of interests
2 in that property between subtrust 2 and subtrust 3 under the Trust. For purposes of
3 convenience, the interests in the Texas oil property are rounded to 65% and 35%. The
4 title to the Texas oil property has remained in the main Trust to the present day.

5 7. Upon William's death, Marjorie became the sole acting Trustee for the
6 main Trust, and the subtrusts thereunder. Pursuant to Article SECOND, Section C.6
7 of the Trust, and shortly after William's death in 1980, Eleanor was appointed by
8 Marjorie to be the co-trustee with her over William's separate property remaining in
9 the Trust; that is, over the Texas oil property which had been allocated between
10 subtrust 2 and subtrust 3. A copy of Eleanor's appointment as co-trustee, along with
11 a copy of the Trust, was recorded with the Upton County Texas Recorder's Office.

12 8. Thereafter, Marjorie sent letters to the oil companies with whom the Trust
13 had leases, advising them of William's death and that she and Eleanor were co-trustees
14 over the Texas oil property owned by the Trust. She directed that all further documents
15 which needed to be signed with the oil companies thereafter recognize the need for her
16 and Eleanor's signature.

17 9. From the time of William's death and the allocation of interests in the
18 Texas oil property between subtrust 2 and subtrust 3, until Marjorie's death on May 1,
19 2009, Eleanor was paid 35% of the Texas oil property income and Marjorie was paid
20 the remaining 65% of the income. Each was allocated a K-1 showing her receipt of her
21 share of the income, and each included the income in her annual Federal Income Tax
22 Returns.

23 10. Prior to her death, on January 7, 2008, Marjorie executed her last Will
24 and Testament, wherein she exercised her Power of Appointment over the assets and
25 benefits under subtrust 3, appointing them to Jacqueline and Kathryn as beneficiaries
26 under her MTC Living Trust. Following Marjorie's death, Eleanor, Jacqueline and
27 Kathryn met with David Strauss, Esq, Marjorie's estate planning attorney. Mr. Strauss
28 had previously provided Eleanor with a copy of Marjorie's Will containing the exercise

1 of her Power of Appointment over subtrust 3. In their meeting, he discussed with them
2 Marjorie's exercise of the Power of Appointment transferring to Jacqueline and
3 Kathryn the rights and interests of Marjorie under subtrust 3 of the Trust, thereby
4 entitling Jacqueline and Kathryn to receive the approximate 65% share of income being
5 generated by the Texas oil property going forward.

6 11. No one expressed any objection to what Mr. Strauss had advised them.
7 Thereafter, in the filing of Marjorie's Federal Estate Tax Return, the value of the 65%
8 interest in the Texas oil property allocated to Marjorie under the Trust was included
9 within her Federal taxable estate and Estate Tax Return, increasing the value of her
10 estate to a taxable estate, requiring the payment of over \$140,000.00 in Federal Estate
11 taxes. Most of Marjorie's estate at the time of her death, through her MTC Living
12 Trust, went to Jacqueline and Kathryn in equal shares. However, in addition to several
13 smaller bequests to friends, Marjorie also bequeathed to Eleanor, through the MTC
14 Living Trust, the sum of \$300,000.00.

15 12. From the time of Marjorie's death until approximately June, 2013, the
16 income from the Texas oil property was allocated with Eleanor continuing to receive
17 a 35% share, and Jacqueline and Kathryn receiving the remaining 65% share. In June,
18 2013, Eleanor as the sole acting Trustee of the Trust, stopped further income
19 distributions to Jacqueline and Kathryn, asserting at that time that she was entitled to
20 100% of the income from the Texas oil property. This led to the filing by Jacqueline
21 on September 27, 2013, of the PETITION FOR DECLARATORY JUDGMENT
22 REGARDING LIMITED INTEREST OF TRUST ASSETS PURSUANT TO NRS
23 30.040, NRS 153.031(1)(E), AND NRS 164.033(1)(A).

24 13. Prior to asserting her right to 100% of the income from the Texas oil
25 property in June, 2013, and the cutting off of any further income distributions from the
26 Trust to Jacqueline and Kathryn, Eleanor had never asserted a claim or right to more
27 than 35% of the Texas oil property income as the lifetime beneficiary to income under
28 subtrust 2. However, in her pleadings and documents filed in these proceedings, she

1 claims she was aware of an alleged mistake made in the allocation of the Texas oil
2 property between subtrust 2 and subtrust 3 shortly after the death of William in 1979.
3 However, rather than assert a claim to all of the income, or otherwise make a claim or
4 start a legal action, Eleanor testified that she decided to do nothing. At one point in
5 these proceedings she testified in her pleadings and documents filed that her inaction
6 was motivated by a fear that it would upset Marjorie if she made a claim to more than
7 a 35% interest. She also testified in these proceedings that her inaction was due to the
8 fact she was happy to allow Marjorie to have 65% of the Texas oil property income,
9 feeling she was being generous and helping to support her mother. She asserted the
10 same motivation of generosity as the basis for her allowing Jacqueline and Kathryn to
11 continue receiving a 65% share of the Texas oil property income following the death
12 of Marjorie in 2009, and until her stoppage of income distributions to them in June,
13 2013.

14 14. However, in 1983, as testified to by Robert Hartman in his affidavit, in the
15 course of Eleanor's divorce proceeding from him, her right to only 35% of the Texas
16 oil property income was asserted and relied upon by the Court in its division of
17 property and determination of his support rights and obligations to Eleanor and their
18 two children. Then, a few years later, as shown on an estate planning intake sheet,
19 when Eleanor met with her own estate planning attorney, she advised him that she was
20 only entitled to 35% of the Texas oil property income, and that Marjorie was the owner
21 of the remaining 65% interest.

22 15. Although Eleanor claims she was being generous in giving to Marjorie
23 65% of the Texas oil property income during the balance of Marjorie's life following
24 the death of William in 1979, Marjorie's communications and conduct supported her
25 belief that she owned the rights to 65% of the Texas oil property income as the
26 beneficiary under subtrust 3. This is confirmed in several memoranda/letters prepared
27 by Marjorie, and in the inclusion of the 65% interest in her taxable estate at the time
28 of her death.

1 16. To summarize, no evidence was produced by Eleanor of any claim or
2 assertion being made by her to anyone else to a right to more than 35% of the Texas oil
3 property income from the time of William's death until June, 2013, when she first
4 asserted her claim to 100% of the income by cutting off income distributions to
5 Jacqueline and Kathryn. Further, Marjorie never communicated or acknowledged to
6 anyone else that she was not entitled to 65% of the Texas oil property income, always
7 acting consistently with owning a right to the income under the Trust allocation of the
8 Texas oil property made following William's death in 1979.

9 17. As purported evidence supporting her claim to 100% of the Trust income
10 from the Texas oil property, Eleanor presented copies of Division Orders and Leases
11 between the oil companies and the Trust relating to the Texas oil property. From the
12 time that Eleanor was made co-trustee with Marjorie over William's separate property
13 owned by the Trust until approximately 1989, it appears that in signing the Division
14 Orders and Leases with the oil companies, Marjorie and Eleanor provided their
15 personal Social Security Numbers as a tax identification number when such a number
16 was requested by the oil companies. However, apparently after it was brought to their
17 attention by an oil company that the Trust was the owner of the Texas oil property and
18 not themselves personally, and the oil company requested and recommended that a tax
19 identification number for a Trust be provided, in approximately 1989, Marjorie and
20 Eleanor started providing a tax identification number to the oil companies which had
21 been assigned by the IRS to subtrust 2. They never provided the tax identification
22 number which had been assigned by the IRS to subtrust 3. However, the Court was not
23 provided with any dates on when subtrust 2 and subtrust 3 were first assigned tax
24 identification numbers.

25 18. Nevertheless, and notwithstanding a tax identification number for subtrust
26 2 was the only tax identification number apparently given to the oil companies from
27 and after 1989, in the actual allocation of income received from the Texas oil property,
28 and in the issuance of K-1's and the filing of their Federal Income Tax Returns,

1 Eleanor's share of the income was always a 35% share and Marjorie, while she was
2 alive, always received the remaining 65% share. Following Marjorie's death, the 65%
3 share went to Jacqueline and Kathryn until the cessation of distributions by Eleanor in
4 June, 2013.

5 19. Eleanor also asserted that the Trust was a special Trust created to retain
6 the Texas oil property for the benefit of only William and his blood descendants.
7 However, since at the time of William's death, the only separate property of his that
8 remained in the Trust was the Texas oil property, pursuant to the Trust provisions, a
9 portion of that property had to be allocated to subtrust 3 in order to obtain the
10 maximum Marital Deduction for Federal Estate Tax savings. In following the Trust
11 provisions, the Texas oil property could not all be allocated to subtrust 2. Further,
12 whatever William's intent may have been when he and Marjorie first created the Trust
13 in 1972, by their deeding the Clark County, Nevada, separate property to Eleanor in
14 1975, William knew that the only remaining separate property of his in the Trust at the
15 time of his death would be the Texas oil property.

16 20. Lastly, in support of her position, Eleanor asserted that Jacqueline and
17 Kathryn acknowledged that she owned rights to all of the income from the Texas oil
18 property by their consents to and verifications of the 2009 Petition Eleanor filed to
19 clarify ownership of subtrust 2 upon her death. Eleanor asserted that in this Petition
20 there are statements averring that she owned the rights to all of the Texas oil property
21 income. However, the Petition's language can also be read as asserting that Eleanor's
22 right to income from the Texas oil property only refers to her 35% interest. More
23 significantly, the 2009 Petition was not filed to clarify rights to the Texas oil property
24 income. Rather, it was a consentient Petition with the purpose only of clarifying
25 entitlement to the benefits of subtrust 2 upon Eleanor's death, and to designate a
26 successor Trustee for the Trust upon her death.

27 21. Based upon the foregoing undisputed facts presented to the Court with the
28 Affidavits and documentary evidence submitted by the parties with their

1 Countermotions and briefs, and from the argument of counsel at the hearing, the Court
2 finds that Eleanor's interest in the Texas oil property income, as the beneficiary under
3 subtrust 2 of the Trust, is limited to a 35% share, and her claim to all of the income is
4 not supported in any way by the facts in this case. The remaining 65% share belongs
5 to subtrust 3 and Jacqueline and Kathryn, equally, as the beneficiaries under the MTC
6 Living Trust, as bequeathed and appointed to them by Marjorie in her Will. While title
7 to the Texas oil property remains titled in the main Trust, in the event a division of the
8 title now needs to be made between the two subtrusts, such division should be made
9 as recognized in the Trust administration, with the filing of William's Estate Tax
10 Returns, and the allocation between the subtrusts resulting therefrom, with a 35%
11 interest being deeded to subtrust 2, and a 65% interest being deeded to subtrust 3 (and
12 thereafter said 65% interest being deeded to the MTC Living Trust, with Jacqueline and
13 Kathryn as equal beneficiaries, should that be their request). Accordingly, Jacqueline's
14 and Kathryn's Countermotion for Summary Judgment regarding ownership of the
15 Texas oil property should be granted; and, Eleanor's Countermotion for Summary
16 Judgment should be denied.

17 22. While the Court finds that Jacqueline's and Kathryn's claim to 65% of the
18 Texas oil property and income is supported by the facts and merits of the case, and that
19 Eleanor's claim to more than 35% is not supported by the facts and merits of the case,
20 regardless of the merits of Eleanor's position, her claim to more than 35% of the
21 income from the Texas oil property cannot be supported or allowed for equitable
22 reasons because she has been guilty of laches in asserting her claim. Her assertion of
23 a claim to 100% of the income in June, 2013, makes no sense after failing in anyway
24 to assert a claim to more than 35% of the income prior to that time. During
25 approximately 34 years, from the death of William and her admitted awareness of the
26 allocation of the Texas oil property under the Trust provisions, until her first assertion
27 of a claim to more than 35% of the income in June, 2013, Eleanor never filed a claim
28 in any court, or otherwise asserted a claim or right to more than 35% of the income.

1 During this time, material documentary evidence, such as William's Federal Estate Tax
2 Return has been lost. During this time key witnesses, such as the accountant and other
3 professionals who prepared and filed William's Estate Tax Returns, as well as Marjorie
4 herself, have died. During this time period Jacqueline and Kathryn, and Marjorie while
5 she was living, made decisions affecting their personal and financial well-being in
6 reliance upon Eleanor's acceptance of the Texas oil property allocation under the Trust,
7 based upon her conduct and failure to make any challenge of the allocation. Eleanor's
8 claim to all of the income first asserted in approximately June, 2013, is made far too
9 late and has caused prejudice to Jacqueline and Kathryn because of the loss of evidence
10 and testimony of key witnesses, clearly requiring a rejection of Eleanor's position and
11 claim in these proceedings under the equitable doctrine of laches.

12 23. Concern was expressed by Jacqueline and Kathryn to Eleanor, through
13 counsel, during 2014 as to the status of funds Eleanor was required to hold in trust on
14 their behalf should the Court rule in their favor in these proceedings. An accounting
15 was requested from Eleanor's former counsel, and they were in the process of preparing
16 the same when Eleanor dismissed her former counsel and engaged new counsel.
17 *is ordered to provide by March 2, 2015, an*
~~Eleanor needs to follow through with the providing of this accounting for the Texas oil~~
18 property income, including the providing of information to Jacqueline and Kathryn
19 showing the total income received, expenses incurred, and distributions made of the
20 income from the beginning of 2012 to the present. Any income which should have
21 been distributed to Jacqueline and Kathryn during this time period, shall be accounted
22 for and reimbursed to them by Eleanor within 30 days from the date this judgment is
23 entered.

24 24. As noted in the chart attached hereto as Exhibit "A", Jacqueline and
25 Kathryn filed a Motion for Leave to Amend Pleadings, which was set for hearing on
26 January 30, 2015. As noted in this Motion and the Supplement thereto, they filed their
27 Motion out of an abundance of caution in that Eleanor in her briefing in support of her
28 Countermotion indicated that she did not feel Jacqueline and Kathryn had properly

1 pleaded all of their claims for relief and defenses for consideration by the Court at the
2 scheduled hearing. While Jacqueline and Kathryn disagreed with Eleanor's pleading
3 concerns, the pleadings and hearings in these proceedings had become disjointed in that
4 a companion Will Contest case, filed with this Court by Eleanor in Case No. P-14-
5 080595-E, intervened to suspend and continue the Trust matters until after the Will
6 Contest case was resolved. The Will Contest was resolved with a Stipulation for
7 Dismissal in early January, 2015. Further, Eleanor has been represented by three
8 different sets of attorney's in these proceedings. Her current attorneys only
9 commencing representation in late November, 2014, and they were not initially familiar
10 with the prior proceedings in this case and the effect of the Will Contest case
11 intervention. In any event, the Court finds that the initial pleadings filed on behalf of
12 Jacqueline and Kathryn in these proceedings properly plead the claims for relief and
13 the defense that the Court has relied upon in granting Judgment to them in these
14 proceedings. Eleanor clearly had notice of the pleadings and in fact the parties
15 negotiated over all of the claims for relief and the affirmative defenses alleged by
16 Jacqueline and Kathryn in concerted settlement negotiations in October, 2014, and such
17 claims and defenses were contained in the several Petitions and Motions filed during
18 the proceedings. In particular the defense of laches was mentioned in the context of
19 equitable defenses mentioned in the initial pleading, and was the subject of a Motion
20 to Dismiss and resolve the case summarily both in late 2013 and in early 2014.
21 Accordingly, the Court finds that there is no reason to file an Amended Pleading in
22 these proceedings and Jacqueline and Kathryn's Motion seeking permission to file the
23 same is considered moot and resolved.

24 25. There are still some claims and issues that the Court is not resolving at this
25 time. Eleanor filed a counterclaim for wrongful interference with contract with her
26 Answer and Counterclaim filed herein on February 10, 2014. The Court finds that this
27 Counterclaim should be dismissed without prejudice at this time, since the issues
28 therein were not addressed by the Court in the January 30, 2015, hearing, but it seems

1 that the issues would be resolved with its decision herein on the Countermotions.
2 Nevertheless, if Eleanor believes she has a valid claim still against Jacqueline for
3 wrongful interference with contract, as asserted in her Answer and Counterclaim, she
4 is free to reassert the same.

5 26. Each of the parties asserted a claim against the other in these proceedings
6 seeking to have the Court enforce the no-contest clause contained in the Trust against
7 the other party. The Court finds that the positions of each of the parties, seeking the
8 correct interpretation of the Trust provisions as to entitlement to the Texas oil property,
9 were not asserted in bad faith, and that therefore good cause to impose the no-contest
10 penalties does not exist and such claims are denied with respect to both parties, Eleanor
11 on the one hand, and Jacqueline and Kathryn on the other hand.

12 27. There still remains the issues and concerns of who will serve hereafter as
13 the Trustee of the Trust, and whether or not the interests of subtrust 2 and subtrust 3
14 in the Texas oil property should now be formally split and allocated with deeds from
15 the main Trust to the subtrusts, so the parties can go their separate ways in dealing with
16 their interests in the Texas oil properties, subject to the terms of the Trust with respect
17 to subtrust 2. Clearly, under the Trust provisions, the beneficiaries under subtrust 3 are
18 granted the right to remove their interest in the Texas oil property out of the main Trust
19 and subtrust 3, to be owned independently by the MTC Living Trust and Jacqueline
20 and Kathryn as beneficiaries thereunder. However, the Court is directing the parties
21 to submit to the Court, on or before March 2, 2015, information regarding the
22 feasibility and effect of now splitting the Texas oil property between subtrust 2 and
23 subtrust 3 (or the MTC Living Trust), and whether or not such division of interests
24 could adversely affect the value and future ownership of the interests hereafter. The
25 Court will set a hearing to consider this issue on March 20, 2015, at 10:00a.m.

26 28. With respect to whether or not Eleanor should be able to continue serving
27 as Trustee, to address both Jacqueline's and Kathryn's position that she should be
28 removed for breach of her duties as Trustee, and Eleanor's position that she is not

1 disqualified from serving, the Court also is directing the parties to provide a brief in
2 support of their positions, filed on or before March 2, 2015, with the issue to then be
3 addressed by the Court at the hearing on March 20, 2015.

4 29. Lastly, with respect to the claim Jacqueline and Kathryn have made for an
5 award of attorney's fees against Eleanor, the Court is directing that the parties file with
6 their briefs due on or before March 2, 2015, their argument and basis for their positions
7 on the award of attorney's fees and costs against Eleanor for the Court to then resolve
8 at the hearing on March 20, 2015.

9 30. In addition to the matters addressed at the hearing on January 30, 2015,
10 there is a pending appeal to the Nevada Supreme Court, assigned Case No. 66231, filed
11 by Eleanor, appealing a portion of the Court's Order in these proceedings entered on
12 July 7, 2014. With the resolution of issues in this case as herein provided, the matter
13 on appeal is now rendered moot. Therefore, the parties should submit a stipulation to
14 the Nevada Supreme Court dismissing that appeal.

15 JUGMENT

16 Pursuant to NRCP Rule 56, the Court finds that the pleadings and other
17 documents filed herein, together with the affidavits and documentary evidence
18 presented, show there is no genuine issue as to any material fact and that Jacqueline
19 and Kathryn are entitled to judgment against Eleanor as a matter of law in these
20 proceedings. Therefore, and based upon the foregoing findings, good cause exists to
21 now render judgment against Eleanor, in favor of Jacqueline and Kathryn, as follows:

22 A. Jacqueline's and Kathryn's Countermotion for Summary Judgment is
23 granted in part as hereinafter provided. The Court hereby declares, adjudges and
24 determines that the allocation of interests in the Texas oil property between subtrust 2
25 and subtrust 3, under the W.N. Connell and Marjorie T. Connell Living Trust, dated
26 May 18, 1972, was properly made under the Trust provisions, with subtrust 2 receiving
27 a 35.507% interest in the Texas oil property and subtrust 3 receiving a 64.493%
28 interest in the Texas oil property.

1 B. The Court adjudges and determines that even if the allocation of the Texas
2 oil property made following the death of William in 1979, in conjunction with the
3 filing of his Federal and Texas Estate Tax Returns, was not properly or accurately made
4 between the two subtrusts, Eleanor's claim and effort to now challenge the allocation
5 and assert an interest greater than 35.507% in the Texas oil property being in subtrust
6 2, is too late and barred under the doctrine of laches, thereby making the actual division
7 made final and binding upon her.

8 C. Eleanor's Countermotion for Summary Judgment is hereby denied.

9 D. On or before March 2, 2015, Eleanor shall provide to Jacqueline and
10 Kathryn an accounting of the Texas oil property income received by the Trust from
11 January 1, 2012, through the entry of this Summary Judgment, showing the total
12 income received, expenses incurred, and any distributions made of the income. Within
13 30 days following the entry of this Summary Judgment, Eleanor shall reimburse and
14 pay to Jacqueline and Kathryn any portion of their 65% share of the Texas oil property
15 income which was not distributed to them during this period of time. From and after
16 the entry of this Summary Judgment, 35% of the Texas oil property income shall be
17 distributed to Eleanor as beneficiary under subtrust 2, and 65% of the income shall be
18 distributed equally between Jacqueline and Kathryn as beneficiaries under subtrust 3
19 and the MTC Living Trust.

20 E. Eleanor's Counterclaim for wrongful interference with contract asserted
21 with her Answer and Counterclaim filed herein on February 10, 2014, is hereby
22 dismissed without prejudice.

23 F. The Court adjudges and determines that the positions of each of the
24 parties, seeking the correct interpretation of the Trust provisions as to entitlement to
25 the Texas oil property, were not asserted in bad faith, and that therefore good cause to
26 impose the no-contest penalties does not exist and such claims, both Eleanor's claim
27 on the one hand, and Jacqueline's and Kathryn's claim on the other hand, are denied
28 with prejudice.

1 G. Each of the parties is directed to file further briefing on the following
2 issues with the Court on or before March 2, 2015, which issues and matters will be
3 resolved by the Court at the next hearing in these proceedings, hereby set on March 20,
4 2015, at 10:00a.m.:

5 1) In the event there is no formal splitting of the Texas oil property between
6 subtrust 2 and subtrust 3 at this time, is there cause to remove Eleanor as Trustee and
7 appoint Jacqueline as the successor Trustee of the Trust and the subtrusts thereunder?
8 If cause does not exist for Eleanor's removal, would it still be better to appoint a
9 neutral successor Trustee?

10 2) Should the interests of subtrust 2 and subtrust 3 in the Texas oil property
11 now be formally split and allocated with deeds from the main Trust to the subtrusts, so
12 the parties can go their separate ways in dealing with their interests in the Texas oil
13 properties, subject to the terms of the Trust with respect to subtrust 2? The Court wants
14 the parties to provide recommendations from qualified persons knowledgeable with
15 respect to the Texas oil and mineral rights and the potential harm or benefit that could
16 result in a splitting of the interests between the parties, and whether or not such
17 division of interests could adversely affect the value and future ownership of the
18 interests hereafter.

19 3) Lastly, with respect to the claim Jacqueline and Kathryn have made for an
20 award of attorney's fees against Eleanor, the Court directs the parties to provide their
21 argument and basis for their positions on the award of attorney's fees and costs against
22 Eleanor in briefing filed on or before March 2, 2015, for the Court to then resolve at
23 the scheduled hearing on March 20, 2015.

24 H. The parties shall each sign a Stipulation and Order for Dismissal of the
25 Appeal presently pending in Nevada Supreme Court Case No. 66231, filed by Eleanor,
26 appealing a portion of the Court's Order in these proceedings entered on July 7, 2014.

27 I. The Court retains jurisdiction over the Trust pending the finalization and
28 resolution of the remaining issues mentioned above, to be addressed hereafter at the

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LAW OFFICES
A PROFESSIONAL CORPORATION

1 hearing scheduled on March 20, 2015, at 10:00a.m. Until that date, Eleanor shall
2 continue to exercise and fulfill her duties as Trustee of the Trust, and the parties shall
3 all cooperate, in the best interest of the Trust and its beneficiaries, in any dealings with
4 the oil companies affecting the Texas oil property.

5 SO ORDERED AND ADJUDGED this 15 day of April, 2015.

6
7 DISTRICT COURT JUDGE

8 Submitted by:

9 ALBRIGHT, STODDARD,
10 WARNICK & ALBRIGHT

11 By: 

12 WHITNEY B. WARNICK, ESQ.
13 Nevada Bar No. 001573
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111

14 Attorneys for Kathryn A. Bouvier

15 Approved by:

16 MARQUIS AURBACH COFFING

17 By:

18 LIANE K. WAKAYAMA, ESQ.

19 Nevada Bar No. 11313

20 CANDICE E. RENKA, ESQ.

21 Nevada Bar No. 11447

22 10001 Park Run Drive

23 Las Vegas, NV 89145

24 Tel: (702) 382-0711

25 Attorneys for Eleanor Connell Hartman Ahern

Submitted by:

THE RUSHFORTH FIRM, LTD.

By: 

JOSEPH J. POWELL, ESQ.

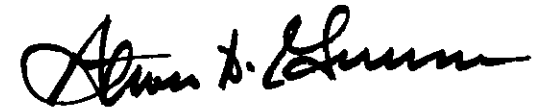
Nevada Bar No. 00875

P.O. Box 371655

Las Vegas, NV 89137-1655

Tel: (702) 255-4552

Attorneys for Jacqueline M. Montoya



CLERK OF THE COURT

1 **ROC**
2 JOSEPH J. POWELL
3 State Bar No. 8875
4 THE RUSHFORTH FIRM, LTD.
5 P. O. Box 371655
6 Las Vegas, NV 89137-1655
7 Telephone: (702) 255-4552
8 fax: (702) 255-4677
9 e-mail: probate@rushforthfirm.com
10 Attorneys for Jacqueline M. Montoya

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 In the Matter of

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

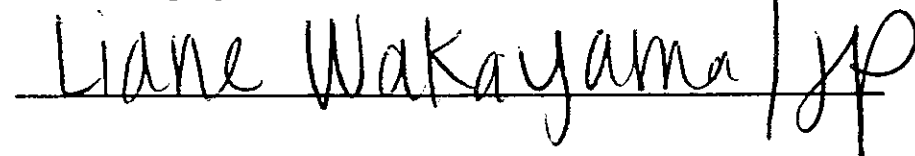
17 A non-testamentary trust.

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

18 **RECEIPT OF COPY**

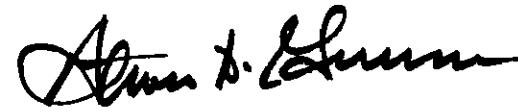
19 A RECEIPT OF COPY of the NOTICE OF ENTRY OF ORDER ON SUMMARY JUDGMENT
20 is hereby acknowledged this 17th day of April, 2015.

21 Liane K. Wakayama, Esq.
22 Marquis Aurbach Coffing
23 10001 Park Run Drive
24 Las Vegas, NV 89145
25 Attorneys for Eleanor Connell Harman Ahern

26 

27 APR 17 2015

28 Date



CLERK OF THE COURT

Marquis Aurbach Coffing
Dale A. Hayes, Esq.
Nevada Bar No. 3430
Liane K. Wakayama, Esq.
Nevada Bar No. 11313
Candice E. Renka, Esq.
Nevada Bar No. 11447
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
dhayes@maclaw.com
lwakayama@maclaw.com
crenka@maclaw.com
Attorneys for Eleanor Connell Hartman
Ahern, as Trustee

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

THE W.N. CONNELL AND MARJORIE T.
CONNELL LIVING TRUST DATED May 18,
1972, An Inter Vivos Irrevocable Trust.

Case No.: P-09-066425-T
Dept. No.: 26

Date of Hearing: March 20, 2015
Time of Hearing: 10:00 a.m.

**ORDER REGARDING THE ACCOUNTING, BREACH OF FIDUCIARY DUTY
CLAIMS AND AWARD OF ATTORNEY FEES**

This matter, having come before the Honorable Gloria Sturman on March 20, 2015, 2015 for summary judgment, Whitney B. Warnick, Esq. of the law firm Albright Stoddard, Warnick & Albright appearing on behalf of Kathryn A. Bouvier, Joseph J. Powell, Esq. of the Rushforth Firm, Ltd. appearing on behalf of Jacqueline M. Montoya, and Dale A. Hayes, Esq. and Liane K. Wakayama, Esq. of the law firm Marquis Aurbach Coffing appearing on behalf of Eleanor Connell Hartman Ahern, as Trustee of The W.N. Connell and Marjorie T. Connell Living Trust dated May 18, 1972, the Court having considered the Brief Regarding Pending Issues; the Brief Regarding Accounting, Fiduciary Duties, and Trust Administration; the Supplement to Brief Regarding Pending Issues; the Supplement to Brief Regarding Accounting, Fiduciary Duties, and Trust Administration; the Second Supplement to Brief Regarding Pending Issues, and the underlying papers and pleadings, as well as the oral arguments of counsel, and good cause appearing therefore, the Court FINDS and ORDERS as follows:

1. At a hearing held on January 30, 2015, the Court ordered that Eleanor Connell Hartman Ahern, as Trustee of The W.N. Connell and Marjorie T. Connell Living Trust dated May 18, 1972 (the "Trust"), to produce an Accounting. The Court further ordered the parties to submit simultaneous briefing on the removal of Eleanor as trustee, an award of attorney fees and the best way for the Trust's administration to continue.

2. The Court set a hearing on the remaining issues to be held on March 20, 2015.

UNDISPUTED FACTS
The Accounting

3. On March 13, 2015, Eleanor filed a Brief regarding the Accounting, fiduciary duties and trust administration ("Eleanor's Brief").

4. Attached to Eleanor's Brief was an Accounting prepared by Certified Public Accountants, Gamett and King, for the time period of June 2013 through January 2015 (the "Accounting").

5. All expenses identified in the Accounting except for the \$218,760.17 in Trustee fees are approved. The Court finds the Trustee fees unreasonable and not supported in any way. The Court further finds that it is improper for a Trustee to charge a 6% fee plus overhead expenses for staff and office space. The Court therefore finds that the easiest solution is to back out the Trustee's Fee from the Accounting as an unapproved expense; however, Eleanor may be entitled to compensation for her time in serving as Trustee.

6. The \$37,000 distribution to Jacqueline and Kathryn in June 2013 was for income earned and received by the Trust prior to June 2013. The Court therefore finds that the \$37,000 distribution should not be included in the Accounting as a credit to the 65% share that is to be held in trust for the benefit of Jacqueline and Kathryn.

7. Based on removing the \$218,760.17 in Trustee fees and not crediting the \$37,000 distribution, the Court finds that a total of \$2,163,758.88 shall be held in trust for the benefit of Jacqueline and Kathryn, which represents their 65% share of the total net income received by the Trust from June 1, 2013 through January 31, 2015.

1 8. The \$500,000 on deposit with Fidelity Capital Inc. ("Fidelity Capital") is not a
2 prudent investment. *NRS 164.640 et seq.*

3 9. Aside from the \$218,760.17 Trustee fees, the \$37,000 distribution and the
4 \$500,000 on deposit with Fidelity Capital, the Accounting is approved.

5 Cutting Off the 65% Income

6 10. As Trustee of the Trust, Eleanor owed fiduciary duties to Jacqueline and Kathryn
7 as beneficiaries of the Trust.

8 11. In June 2013, Eleanor cut off the 65% income stream of the net oil revenue in her
9 capacity as Trustee of the Trust, *without first seeking instruction from*
10 *the Court.*

11 CONCLUSIONS OF LAW

12 12. Pursuant to Nev. R. Civ. P. 56(b), "[a] party against whom a claim, counterclaim,
13 or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or
14 without supporting affidavits for a summary judgment in the party's favor as to all or any part
15 thereof." "The judgment sought shall be rendered forthwith if the pleadings . . . show that there
16 is no genuine issue as to any material fact that the moving party is entitled to judgment as a
17 matter of law." NRCP 56(c). The burden for demonstrating the absence of a genuine issue of
18 material fact lies with the moving party, and the material lodged by the moving party must be
19 viewed in the light most favorable to the non-moving party. Hoopes v. Hammargren, 102 Nev.
20 425, 429, 725 P.2d 238, 241 (1986). It is well settled in Nevada that the party opposing
21 summary judgment is entitled to all favorable inferences from the pleadings and documentary
22 evidence. See Mullis v. Nev. Nat'l Bank, 98 Nev. 510, 512, 654 P.2d 533, 535 (1982). The non-
23 moving party, however, "must, by affidavit or otherwise, set forth specific facts demonstrating
24 the existence of a genuine issue for trial or have summary judgment entered against him."
Bulbman, Inc. v. Nev. Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

25 13. To prevail on a breach of fiduciary duty claim in Nevada, Jacqueline and Kathryn
26 bear the burden of showing that: (1) Eleanor owed them a fiduciary duty; (2) Eleanor breached
27 that duty; and (3) Jacqueline and Kathryn sustained damages as a proximate cause of the breach.
28 See Mosier v. S. Cal. Physicians Ins. Exch., 74 Cal.Rptr.2d 550, 565 (Cal. Ct. App. 1998).

1 14. The Court concludes as a matter of law that Eleanor did not breach any fiduciary
2 duties as it relates to the Accounting.

3 15. The Court concludes as a matter of law that Eleanor breached her fiduciary duties
4 owed to Jacqueline and Kathryn by failing to retain a third-party trustee and petition the Court to
5 allow the 65% income stream to Jacqueline and Kathryn to be cut off. As a result of Eleanor's
6 breach of fiduciary duties, Eleanor shall be removed as Trustee only over the 65% share of the
7 Upton County, Texas oil assets. Eleanor shall remain as Trustee over her 35% share of the
8 Upton County, Texas oil assets; however, a temporary successor Trustee shall be appointed over
9 the entire Trust until this litigation is finally resolved.

10 16. Based on Eleanor breaching her fiduciary duties, the Court will award Jacqueline
11 and Kathryn their attorney fees and costs pursuant to NRS 153.031(3)(b). The Court reserves for
12 a later date the exact amount of attorney fees and costs to be awarded.

13 BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND
14 DECREED that:

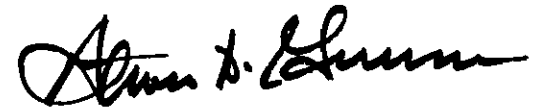
15 1. The \$500,000 currently on deposit with Fidelity Capital shall be deposited into an
16 FDIC insured bank account;

17 2. Jacqueline and Kathryn's claim for breach of fiduciary duty against Eleanor, as
18 Trustee of the Trust, is DENIED as it relates to the Accounting *based on the information*
available to the Court as of March 20, 2015;

19 3. Summary judgment on Jacqueline and Kathryn's claim for breach of fiduciary
20 duty against Eleanor, as Trustee of the Trust, is GRANTED as it relates to Eleanor cutting of
21 their 65% distributions of the oil income in June 2013;

22
23
24 ///

25
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28 ///



CLERK OF THE COURT

ORDR

Todd L. Moody (5430)
Russel J. Geist (9030)
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
(702) 385-2500
(702) 385-2086 FAX
tmoody@hutchlegal.com
rgeist@hutchlegal.com

Attorneys for Fredrick P. Waid Court-appointed Trustee

DISTRICT COURT

CLARK COUNTY, NEVADA

In the matter of

Case No.: P-09-066425-T
Dept. 26

THE W.N. CONNELL AND MARJORIE T.
CONNELL LIVING TRUST DATED May
18, 1972, an Inter Vivos Irrevocable Trust.

ORDER CONFIRMING ACTING SUCCESSOR TRUSTEE

Pursuant to the prior order of this Court dated March 30, 2015, appointing Fredrick P. Waid, Esq. as acting Successor Trustee of The W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972 (the "Trust"), and good cause appearing to issue an order clarifying Mr. Waid's position and authority,

IT IS HEREBY ORDERED that Fredrick P. Waid, Esq. is confirmed as acting Successor Trustee of the Trust until further order of this Court. Mr. Waid shall function as the sole acting Trustee of the Trust, with all the powers, authority, duties, rights, and responsibilities provided to him under the terms of the Trust instrument and under the applicable Nevada Revised Statutes relating to a trustee's powers. Consistent with Nevada law, Mr. Waid, as Trustee, shall also honor all fiduciary obligations owed to all the beneficiaries of the Trust.

Dated this 20 day of April, 2015.


District Court Judge

HUTCHISON & STEFFEN

A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

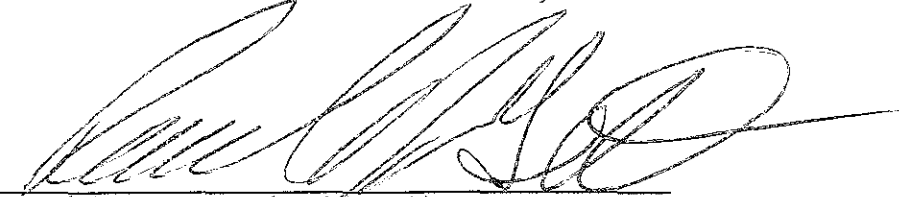
HUTCHISON & STEFFEN

A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

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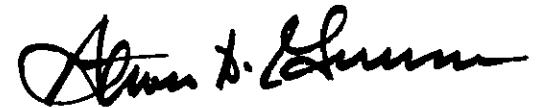
Submitted by:

HUTCHISON & STEFFEN, LLC



Todd L. Moody (5430)
Russel J. Geist (9030)
10080 W. Alta Dr., Ste 200
Las Vegas, NV 89145
Phone: (702) 385-2500
tmoody@hutchlegal.com
rgeist@hutchlegal.com

Attorneys for Fredrick P. Waid Court-appointed Trustee



CLERK OF THE COURT

ORDR

Todd L. Moody (5430)
Russel J. Geist (9030)
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
(702) 385-2500
(702) 385-2086 FAX
tmoody@hutchlegal.com
rgeist@hutchlegal.com

Attorneys for Fredrick P. Waid Court-appointed Trustee

DISTRICT COURT

CLARK COUNTY, NEVADA

In the matter of

Case No.: P-09-066425-T
Dept. 26

THE W.N. CONNELL AND MARJORIE T.
CONNELL LIVING TRUST DATED May
18, 1972, an Inter Vivos Irrevocable Trust.

**ORDER COMPELLING ELEANOR AHERN TO TURN OVER
TRUST RECORDS TO ACTING SUCCESSOR TRUSTEE**

Pursuant to the prior order of this Court dated March 30, 2015, appointing Fredrick P. Waid, Esq. as acting Successor Trustee of The W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972 (the "Trust"), and directing Eleanor Connell Hartman Ahern to "fully cooperate with Mr. Waid in providing him all pertinent information concerning the Trust's current business transactions and dealings and in making this transition in trusteeship of the Trust," and good cause appearing;

IT IS HEREBY ORDERED that Eleanor Connell Hartman Ahern shall direct attorney Jeffrey Johnston, Esq, of Midland, Texas (Texas Bar No. 10838480) to cooperate with Mr. Waid in making this transition, to turn over all records in Mr. Johnston's possession which relate to the Trust and its administration, including, but not limited to, all business transactions and dealings with the trust, and all records relating to billing and payments related to Mr. Johnston's services provided to the Trust. For the purposes of this Order, the term "records" includes documents in physical form, or words and symbols that are electronically stored on computer media of any kind and which, if printed on paper, would be the text of a document.

HUTCHISON & STEFFEN

A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

1 IT IS FURTHER ORDERED that Eleanor Connell Hartman Ahern shall execute a
2 release and authorization directed to Mr. Johnston to facilitate the transfer of records to Mr.
3 Waid, and to instruct Mr. Johnston to provide any additional information needed for his
4 assessment of the Trust and its current status.

5 Dated this 20th day of April, 2015.

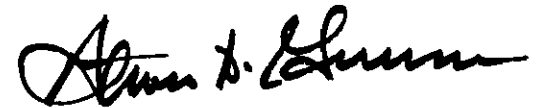
6
7 
8 District Court Judge

9 Submitted by:

10 HUTCHISON & STEFFEN, LLC

11 
12
13 Todd L. Moody (5430)
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15 10080 W. Alta Dr., Ste 200
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20 *Attorneys for Fredrick P. Waid Court-appointed Trustee*
21
22
23
24
25
26
27
28



CLERK OF THE COURT

Marquis Aurbach Coffing

Dale A. Hayes, Esq.
Nevada Bar No. 3430
Liane K. Wakayama, Esq.
Nevada Bar No. 11313
Candice E. Renka, Esq.
Nevada Bar No. 11447
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
dhayes@maclaw.com
lwakayama@maclaw.com
crenka@maclaw.com

Attorneys for 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, An Inter Vivos Irrevocable Trust.

Case No.: P-09-066425-T
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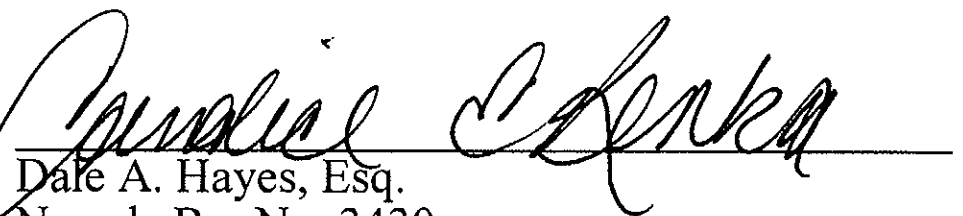
NOTICE OF ENTRY OF ORDER

Please take notice that an Order Regarding the Accounting, Breach of Fiduciary Duty Claims and Award of Attorney Fees was entered in the above-captioned matter on the 20th day of April, 2015, a copy of which is attached hereto.

Dated this 20th day of April, 2015.

MARQUIS AURBACH COFFING

By



Dale A. Hayes, Esq.
Nevada Bar No. 3430
Liane K. Wakayama, Esq.
Nevada Bar No. 11313
Candice E. Renka, Esq.
Nevada Bar No. 11447
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Eleanor Connell Hartman Ahern

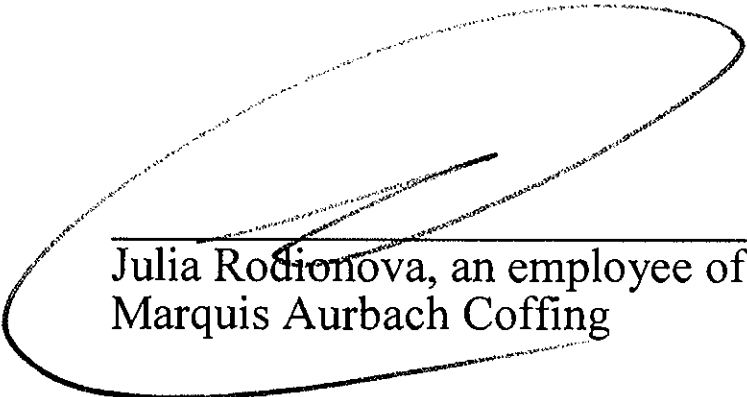
CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 20th day of April, 2015. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

Albright Stoddard Warnick & Albright		
Contact	Email	
Barbara Clark, Legal Assistant	bclark@albrightstoddard.com	
G. Mark Albright, Esq.	gma@albrightstoddard.com	
Whitney B. Warnick	wbw@albrightstoddard.com	
<hr/>		
Hutchison & Steffen		
Contact	Email	
Russel J. Geist	rgeist@hutchlegal.com	
<hr/>		
Hutchison & Steffen, LLC		
Contact	Email	
Amber Anderson	aanderson@hutchlegal.com	
Whitney Stockton	wstockton@hutchlegal.com	
<hr/>		
The Rushforth Firm		
Contact	Email	
Probate	probate@rushforthfirm.com	
<hr/>		
The Rushforth Firm, Ltd.		
Contact	Email	
Joseph J. Powell	probate@rushforthfirm.com	

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

Eleanor Connell Hartman Ahern
8635 W. Sahara Ave., #549
Las Vegas, Nevada 89117-5838


Julia Rodionova, an employee of
Marquis Aurbach Coffing

¹ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCF 5(b)(2)(D).



CLERK OF THE COURT

Marquis Aurbach Coffing
Dale A. Hayes, Esq.
Nevada Bar No. 3430
Liane K. Wakayama, Esq.
Nevada Bar No. 11313
Candice E. Renka, Esq.
Nevada Bar No. 11447
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
dhayes@maclaw.com
lwakayama@maclaw.com
crenka@maclaw.com
Attorneys for Eleanor Connell Hartman
Ahern, as Trustee

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of

THE W.N. CONNELL AND MARJORIE T.
CONNELL LIVING TRUST DATED May 18,
1972, An Inter Vivos Irrevocable Trust.

Case No.: P-09-066425-T
Dept. No.: 26

Date of Hearing: March 20, 2015
Time of Hearing: 10:00 a.m.

ORDER REGARDING THE ACCOUNTING, BREACH OF FIDUCIARY DUTY
CLAIMS AND AWARD OF ATTORNEY FEES

This matter, having come before the Honorable Gloria Sturman on March 20, 2015, 2015 for summary judgment, Whitney B. Warnick, Esq. of the law firm Albright Stoddard, Warnick & Albright appearing on behalf of Kathryn A. Bouvier, Joseph J. Powell, Esq. of the Rushforth Firm, Ltd. appearing on behalf of Jacqueline M. Montoya, and Dale A. Hayes, Esq. and Liane K. Wakayama, Esq. of the law firm Marquis Aurbach Coffing appearing on behalf of Eleanor Connell Hartman Ahern, as Trustee of The W.N. Connell and Marjorie T. Connell Living Trust dated May 18, 1972, the Court having considered the Brief Regarding Pending Issues; the Brief Regarding Accounting, Fiduciary Duties, and Trust Administration; the Supplement to Brief Regarding Pending Issues; the Supplement to Brief Regarding Accounting, Fiduciary Duties, and Trust Administration; the Second Supplement to Brief Regarding Pending Issues, and the underlying papers and pleadings, as well as the oral arguments of counsel, and good cause appearing therefore, the Court FINDS and ORDERS as follows:

2. The Court set a hearing on the remaining issues to be held on March 20, 2015.

3. On March 13, 2015, Eleanor filed a Brief regarding the Accounting, fiduciary duties and trust administration ("Eleanor's Brief").

4. Attached to Eleanor's Brief was an Accounting prepared by Certified Public Accountants, Gamett and King, for the time period of June 2013 through January 2015 (the "Accounting").

5. All expenses identified in the Accounting except for the \$218,760.17 in Trustee fees are approved. The Court finds the Trustee fees unreasonable and not supported in any way. The Court further finds that it is improper for a Trustee to charge a 6% fee plus overhead expenses for staff and office space. The Court therefore finds that the easiest solution is to back out the Trustee's Fee from the Accounting as an unapproved expense; however, Eleanor may be entitled to compensation for her time in serving as Trustee.

6. The \$37,000 distribution to Jacqueline and Kathryn in June 2013 was for income earned and received by the Trust prior to June 2013. The Court therefore finds that the \$37,000 distribution should not be included in the Accounting as a credit to the 65% share that is to be held in trust for the benefit of Jacqueline and Kathryn.

7. Based on removing the \$218,760.17 in Trustee fees and not crediting the \$37,000 distribution, the Court finds that a total of \$2,163,758.88 shall be held in trust for the benefit of Jacqueline and Kathryn, which represents their 65% share of the total net income received by the Trust from June 1, 2013 through January 31, 2015.

1 8. The \$500,000 on deposit with Fidelity Capital Inc. ("Fidelity Capital") is not a
2 prudent investment. *NRS 164.640 et seq.*

3 9. Aside from the \$218,760.17 Trustee fees, the \$37,000 distribution and the
4 \$500,000 on deposit with Fidelity Capital, the Accounting is approved.

5 Cutting Off the 65% Income

6 10. As Trustee of the Trust, Eleanor owed fiduciary duties to Jacqueline and Kathryn
7 as beneficiaries of the Trust.

8 11. In June 2013, Eleanor cut off the 65% income stream of the net oil revenue in her
9 capacity as Trustee of the Trust, *without first seeking instruction from*
10 *the Court.*

10 CONCLUSIONS OF LAW

11 12. Pursuant to Nev. R. Civ. P. 56(b), "[a] party against whom a claim, counterclaim,
12 or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or
13 without supporting affidavits for a summary judgment in the party's favor as to all or any part
14 thereof." "The judgment sought shall be rendered forthwith if the pleadings . . . show that there
15 is no genuine issue as to any material fact that the moving party is entitled to judgment as a
16 matter of law." NRCP 56(c). The burden for demonstrating the absence of a genuine issue of
17 material fact lies with the moving party, and the material lodged by the moving party must be
18 viewed in the light most favorable to the non-moving party. Hoopes v. Hammargren, 102 Nev.
19 425, 429, 725 P.2d 238, 241 (1986). It is well settled in Nevada that the party opposing
20 summary judgment is entitled to all favorable inferences from the pleadings and documentary
21 evidence. See Mullis v. Nev. Nat'l Bank, 98 Nev. 510, 512, 654 P.2d 533, 535 (1982). The non-
22 moving party, however, "must, by affidavit or otherwise, set forth specific facts demonstrating
23 the existence of a genuine issue for trial or have summary judgment entered against him."
24 Bulbman, Inc. v. Nev. Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

25 13. To prevail on a breach of fiduciary duty claim in Nevada, Jacqueline and Kathryn
26 bear the burden of showing that: (1) Eleanor owed them a fiduciary duty; (2) Eleanor breached
27 that duty; and (3) Jacqueline and Kathryn sustained damages as a proximate cause of the breach.
28 See Mosier v. S. Cal. Physicians Ins. Exch., 74 Cal.Rptr.2d 550, 565 (Cal. Ct. App. 1998).

1 14. The Court concludes as a matter of law that Eleanor did not breach any fiduciary
2 duties as it relates to the Accounting.

3 15. The Court concludes as a matter of law that Eleanor breached her fiduciary duties
4 owed to Jacqueline and Kathryn by failing to retain a third-party trustee and petition the Court to
5 allow the 65% income stream to Jacqueline and Kathryn to be cut off. As a result of Eleanor's
6 breach of fiduciary duties, Eleanor shall be removed as Trustee only over the 65% share of the
7 Upton County, Texas oil assets. Eleanor shall remain as Trustee over her 35% share of the
8 Upton County, Texas oil assets; however, a temporary successor Trustee shall be appointed over
9 the entire Trust until this litigation is finally resolved.

10 16. Based on Eleanor breaching her fiduciary duties, the Court will award Jacqueline
11 and Kathryn their attorney fees and costs pursuant to NRS 153.031(3)(b). The Court reserves for
12 a later date the exact amount of attorney fees and costs to be awarded.

13 BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND
14 DECREED that:

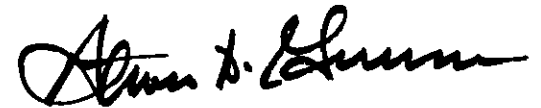
15 1. The \$500,000 currently on deposit with Fidelity Capital shall be deposited into an
16 FDIC insured bank account;

17 2. Jacqueline and Kathryn's claim for breach of fiduciary duty against Eleanor, as
18 Trustee of the Trust, is DENIED as it relates to the Accounting *based on the information*
available to the Court on March 20, 2015;

19 3. Summary judgment on Jacqueline and Kathryn's claim for breach of fiduciary
20 duty against Eleanor, as Trustee of the Trust, is GRANTED as it relates to Eleanor cutting of
21 their 65% distributions of the oil income in June 2013;

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28 ///



CLERK OF THE COURT

1 **NEOJ**
Todd L. Moody (5430)
2 Russel J. Geist (9030)
HUTCHISON & STEFFEN, LLC
3 10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
4 (702) 385-2500
(702) 385-2086 FAX
5 tmoody@hutchlegal.com
rgeist@hutchlegal.com

6 *Attorneys for Fredrick P. Waid Court-appointed Trustee*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9
10 In the matter of

Case No.: P-09-066425-T
Dept. 26

11 THE W.N. CONNELL AND MARJORIE T.
12 CONNELL LIVING TRUST DATED May
18, 1972, an Inter Vivos Irrevocable Trust.

13
14
15 **NOTICE OF ENTRY OF ORDER COMPELLING ELEANOR AHERN TO TURN**
16 **OVER TRUST RECORDS TO ACTING SUCCESSOR TRUSTEE**

17
18 NOTICE IS HEREBY GIVEN that an **ORDER COMPELLING ELEANOR AHERN**
19 **TO TURN OVER TRUST RECORDS TO ACTING SUCCESSOR TRUSTEE** was
20 entered in the above-entitled Estate on April 20, 2015. A copy of the Order is attached hereto.

21 Dated this 23 day of April, 2015.

22 HUTCHISON & STEFFEN, LLC



23
24
25 Todd L. Moody (5430)
Russel J. Geist (9030)
26 10080 W. Alta Drive, Ste 200
Las Vegas, NV 89145
27 Phone: (702) 385-2500
Fax: (702) 385-2086
28 tmoody@hutchlegal.com
Attorneys for Fredrick P. Waid, Court-Appointed Trustee

HUTCHISON & STEFFEN

A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC, and on this 24 day of April, 2015, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ to be served via facsimile; and/or
- ☒ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service submitted for the date and place of deposit in the mail; and/or
- ☐ to be hand-delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

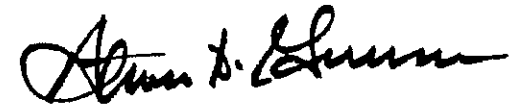
Whitney B. Warnick, Esq.
 Albright Stoddard Warnick & Albright
 801 S. Rancho Drive, Ste. D-4
 Las Vegas, NV 89106
Attorneys for Kathryn A. Bouvier

Joseph J. Powell, Esq.
 The Rushforth Firm
 1707 Village Center Circle, Ste. 150
 Las Vegas, NV 89134
Attorneys for Jacqueline M. Montoya

Kirk Lenhard
 Brownstein Hyatt Farber Schreck, LLP
 100 North City Parkway Suite #1600
 Las Vegas, NV 89106
Attorneys for Eleanor Connell Hartman Ahern

Whitney Stockton

An employee of Hutchison & Steffen, LLC



CLERK OF THE COURT

1 **ORDER**

2 Todd L. Moody (5430)
3 Russel J. Geist (9030)
4 HUTCHISON & STEFFEN, LLC
5 10080 West Alta Drive, Suite 200
6 Las Vegas, Nevada 89145
7 (702) 385-2500
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11 *Attorneys for Fredrick P. Waid Court-appointed Trustee*

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 In the matter of

Case No.: P-09-066425-T
Dept. 26

15 THE W.N. CONNELL AND MARJORIE T.
16 CONNELL LIVING TRUST DATED May
17 18, 1972, an Inter Vivos Irrevocable Trust.

18 **ORDER COMPELLING ELEANOR AHERN TO TURN OVER**
19 **TRUST RECORDS TO ACTING SUCCESSOR TRUSTEE**

20 Pursuant to the prior order of this Court dated March 30, 2015, appointing Fredrick P.
21 Waid, Esq. as acting Successor Trustee of The W.N. Connell and Marjorie T. Connell Living
22 Trust, dated May 18, 1972 (the "Trust"), and directing Eleanor Connell Hartman Ahern to
23 "fully cooperate with Mr. Waid in providing him all pertinent information concerning the
24 Trust's current business transactions and dealings and in making this transition in trusteeship of
25 the Trust," and good cause appearing;

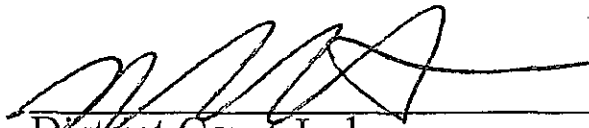
26 IT IS HEREBY ORDERED that Eleanor Connell Hartman Ahern shall direct attorney
27 Jeffrey Johnston, Esq, of Midland, Texas (Texas Bar No. 10838480) to cooperate with Mr.
28 Waid in making this transition, to turn over all records in Mr. Johnston's possession which
relate to the Trust and its administration, including, but not limited to, all business transactions
and dealings with the trust, and all records relating to billing and payments related to Mr.
Johnston's services provided to the Trust. For the purposes of this Order, the term "records"
includes documents in physical form, or words and symbols that are electronically stored on
computer media of any kind and which, if printed on paper, would be the text of a document.

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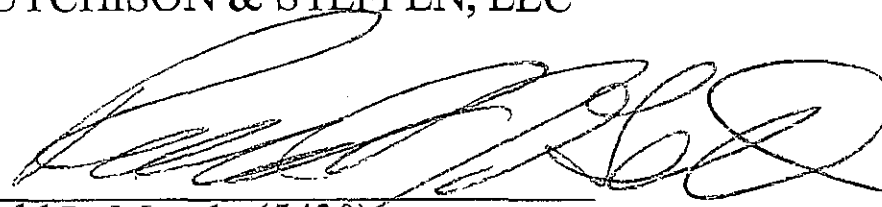
1 IT IS FURTHER ORDERED that Eleanor Connell Hartman Ahern shall execute a
 2 release and authorization directed to Mr. Johnston to facilitate the transfer of records to Mr.
 3 Waid, and to instruct Mr. Johnston to provide any additional information needed for his
 4 assessment of the Trust and its current status.

5 Dated this 20th day of April, 2015.

6
 7 
 8 District Court Judge

9 Submitted by:

10 HUTCHISON & STEFFEN, LLC

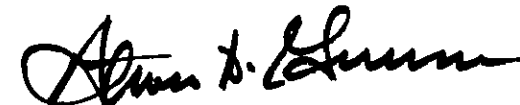
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20 *Attorneys for Fredrick P. Waid Court-appointed Trustee*

21
 22
 23
 24
 25
 26
 27
 28

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CLERK OF THE COURT

Attorneys for Fredrick P. Waid Court-appointed Trustee

DISTRICT COURT

CLARK COUNTY, NEVADA

In the matter of

Case No.: P-09-066425-T
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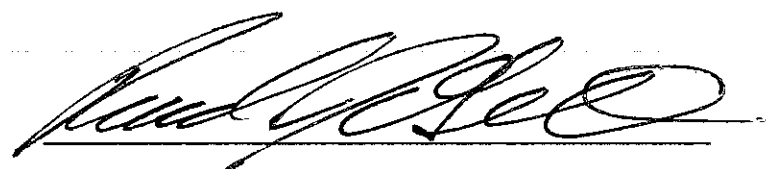
THE W.N. CONNELL AND MARJORIE T.
CONNELL LIVING TRUST DATED May
18, 1972, an Inter Vivos Irrevocable Trust.

NOTICE OF ENTRY OF ORDER CONFIRMING ACTING SUCCESSOR TRUSTEE

NOTICE IS HEREBY GIVEN that an **ORDER CONFIRMING ACTING SUCCESSOR TRUSTEE** was entered in the above-entitled Estate on April 20, 2015. A copy of the Order is attached hereto.

Dated this 23 day of April, 2015.

HUTCHISON & STEFFEN, LLC



Todd L. Moody (5430)
Russel J. Geist (9030)
10080 W. Alta Drive, Ste 200
Las Vegas, NV 89145
Phone: (702) 385-2500
Fax: (702) 385-2086
tmood@hutchlegal.com

Attorneys for Fredrick P. Waid, Court-Appointed Trustee

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC, and on this 24 day of April, 2015, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ to be served via facsimile; and/or
- ☒ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service submitted for the date and place of deposit in the mail; and/or
- ☐ to be hand-delivered;

to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

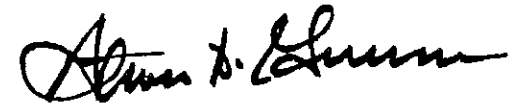
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Attorneys for Jacqueline M. Montoya

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Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway Suite #1600
Las Vegas, NV 89106
Attorneys for Eleanor Connell Hartman Ahern

Whitney Stockton

An employee of Hutchison & Steffen, LLC



CLERK OF THE COURT

ORDER

Todd L. Moody (5430)
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DISTRICT COURT

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CONNELL LIVING TRUST DATED May
18, 1972, an Inter Vivos Irrevocable Trust.

ORDER CONFIRMING ACTING SUCCESSOR TRUSTEE

Pursuant to the prior order of this Court dated March 30, 2015, appointing Fredrick P. Waid, Esq. as acting Successor Trustee of The W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972 (the "Trust"), and good cause appearing to issue an order clarifying Mr. Waid's position and authority,

IT IS HEREBY ORDERED that Fredrick P. Waid, Esq. is confirmed as acting Successor Trustee of the Trust until further order of this Court. Mr. Waid shall function as the sole acting Trustee of the Trust, with all the powers, authority, duties, rights, and responsibilities provided to him under the terms of the Trust instrument and under the applicable Nevada Revised Statutes relating to a trustee's powers. Consistent with Nevada law, Mr. Waid, as Trustee, shall also honor all fiduciary obligations owed to all the beneficiaries of the Trust.

Dated this 20th day of April, 2015.


District Court Judge

HUTCHISON & STEFFEN

A PROFESSIONAL LLC
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LAS VEGAS, NV 89145

HUTCHISON & STEFFEN

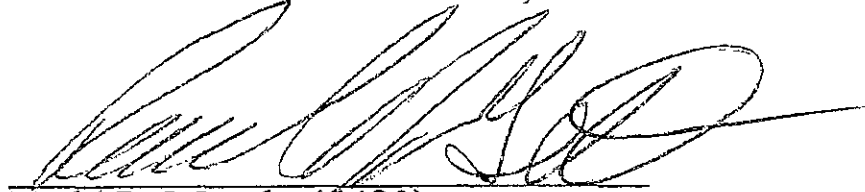
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1 Submitted by:

2 HUTCHISON & STEFFEN, LLC

3

4



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13 *Attorneys for Fredrick P. Waid Court-appointed Trustee*

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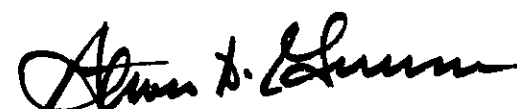
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CLERK OF THE COURT

AFF
Todd L. Moody (5430)
Russel J. Geist (9030)
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
(702) 385-2500
(702) 385-2086 FAX
tmoody@hutchlegal.com
rgeist@hutchlegal.com

Attorneys for Fredrick P. Waid Court-appointed Trustee

DISTRICT COURT
CLARK COUNTY, NEVADA

In the matter of

Case No.: P-09-066425-T
Dept. 26

THE W.N. CONNELL AND MARJORIE T.
CONNELL LIVING TRUST Dated May 18,
1972, an Inter Vivos Irrevocable Trust.

AFFIDAVIT OF FREDRICK P. WAID, TRUSTEE

STATE OF NEVADA)
) SS.
COUNTY OF CLARK)

1. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and as to those, I believe them to be true. I am competent to testify as to the facts stated herein in a court of law and will so testify if called upon.
2. On March 20, 2015, I was appointed by the Court as acting temporary successor Trustee of The W.N. Connell and Marjorie T. Connell Living Trust dated May 18, 1972, (the "Trust"). On that same day, and later confirmed in the Court's Order dated April 1, 2015, Eleanor Ahern was removed as Trustee, for breach of

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PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

1 her fiduciary duties.

- 2
- 3 3. During the hearing on March 20, 2015, the Court ordered Ms. Ahern to transfer
- 4 \$500,000, as reported in Ms. Ahern's accounting filed with the Court, from
- 5 Fidelity Capital Incorporated ("Fidelity"), a non-bank entity, to an FDIC insured
- 6 financial institution.
- 7
- 8 4. Within days after the hearing, Ms. Ahern's counsel at the time, Marquis Aurbach
- 9 Coffing ("MAC"), certified to the Court that the transfer of funds, as ordered,
- 10 was completed and that the funds from Fidelity were on deposit with US Bank.
- 11 After my appointment as Trustee, I discovered that the funds deposited with US
- 12 Bank, as reported to the Court, did not come from Fidelity, but came directly
- 13 from a cashier's check obtained by Eleanor from the Trust's account at Wells
- 14 Fargo Bank.
- 15
- 16 5. On April 14, 2015, at a hearing on Ms. Ahern's Motion for Stay Pending Appeal
- 17 on Order Shortening Time, I brought the Fidelity matter to the attention of the
- 18 Court and asked the Court to enforce its prior order regarding the return of the
- 19 \$500,000. The Court issued, from the bench, an Order to Show Cause with a
- 20 return hearing date set for the following week on Wednesday, April 22, 2015.
- 21 The Court further ordered Ms. Ahern, again, to return the Fidelity funds to the
- 22 Trust by 5:00 pm, Friday, April 17, 2015.
- 23
- 24 6. After the hearing on April 14, 2015, MAC coordinated a Court conference call
- 25 wherein they sought permission from the Court to withdraw from the case. The
- 26 Court instructed MAC to file an appropriate motion and the matter was set for a
- 27 hearing on Monday, April 20, 2015. On the record during the call, the Court
- 28

1 granted permission, with MAC's consent, for Ms. Ahern to communicate
2 directly with me in furtherance of her continued duty to cooperate, as previously
3 ordered by the Court.

4
5 7. I spoke with Ms. Ahern on Thursday April 16, 2015, and was informed by her
6 that she believed she "owed" the Trust \$800,000. I responded that she needed to
7 speak with counsel regarding her admission to me and that I did not have
8 sufficient financial information from the Trust to verify her admission.

9
10 8. On Friday April 17, 2015, Ms. Ahern did not comply with the Court's order
11 requiring the Fidelity funds to be returned to the Trust.

12
13 9. On Monday April 20, 2015, the Court granted Marquis' Motion to Withdraw.
14 At the hearing on the Order to Show Cause held on Wednesday April 22, 2015,
15 Tamara B. Peterson and Kirk B. Lenhard of Brownstein Hyatt Farber Schreck,
16 LLP, appeared on behalf of Ms. Ahern.

17
18 10. On Friday April 24, 2015, I met with Ms. Peterson and Mr. Lenhard to discuss
19 the case, including the Fidelity matter. Ms. Ahern's counsel informed me that
20 they had spoken with Fidelity's representative, who informed them that Fidelity
21 never had funds from the Trust on deposit. After counsel's disclosure, I
22 provided them with a copy of a letter filed with the Court by Ms. Ahern,
23 addressed to her as Trustee, wherein Fidelity confirms it has \$500,000 "on
24 deposit" for the Trust. I have attempted to contact Fidelity's representatives, but
25 have not been successful in communicating with anyone at the company.

26
27 11. On Tuesday May 5, 2015, Ms. Peterson provided to my counsel a copy of a letter
28

dated April 15, 2015 purportedly from Fidelity and addressed to "The William N. and Marjorie T. Connell Living trust dated 5/18/72" which refers to "accounting ending in 1734". The letter, with the salutation, "Dear Eleanor", is apparently signed by M. Perel, whom Ms. Peterson believes to be Martin Perel, and merely states, "Due to your misrepresentations the proposed funding has been withdrawn."

12. As of this date, the \$500,000, as ordered by the Court to be returned to the Trust, remains unaccounted for by Ms. Ahern.

13. Since my appointment as Trustee and in the course of my investigation of the financial affairs of the Trust for 2013, 2014 and 2015 year to date, I have discovered numerous potential violations of other Court orders by Ms. Ahern regarding the expenditure and use of Trust funds. These matters will be brought to the Court's attention after the completion of an audit of Ms. Ahern's tenure as Trustee.

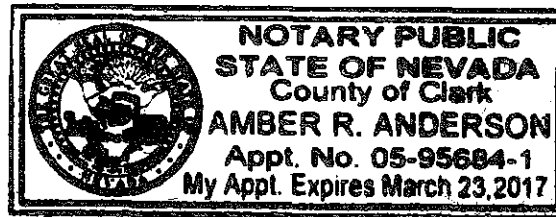
[Signature]

Fredrick P. Waid, Trustee

STATE OF NEVADA)
COUNTY OF CLARK) SS.

SUBSCRIBED and sworn to before
me this 6 day of May, 2015.

[Signature]
Notary Public



CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC, and on this 16 day of May, 2015, I caused the above and foregoing document entitled

AFFIDAVIT OF FREDRICK P. WAID, TRUSTEE to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ to be served via facsimile; and/or
- ☒ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service submitted for the date and place of deposit in the mail; and/or
- ☐ to be hand-delivered;

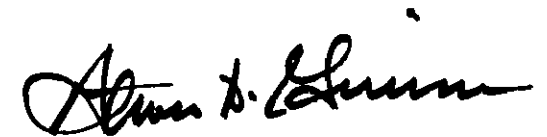
to the attorneys and/or parties listed below at the address and/or facsimile number indicated below:

Whitney B. Warnick, Esq.
Albright Stoddard Warnick & Albright
801 S. Rancho Drive, Ste. D-4
Las Vegas, NV 89106
Attorneys for Kathryn A. Bouvier

Joseph J. Powell, Esq.
The Rushforth Firm
1707 Village Center Circle, Ste. 150
Las Vegas, NV 89134
Attorneys for Jacqueline M. Montoya

Kirk Lenhard
Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway, Suite #1600
Las Vegas, NV 89106
Attorneys for Eleanor Connell Hartman Ahern


An employee of Hutchison & Steffen, LLC



CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

IN THE MATTER OF THE TRUST OF:)	
)	CASE NO. P-09-066425-T
THE W.N. CONNELL AND MARJORIE)	
T. CONNELL LIVING TRUST, DATED)	DEPT. XXVI
MAY 18, 1972)	
)	
)	

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE
WEDNESDAY, APRIL 22, 2015

TRANSCRIPT OF PROCEEDINGS
ORDER TO SHOW CAUSE

APPEARANCES:

For Fredrick Waid:	TODD MOODY, ESQ.
For Eleanor Ahern:	KIRK LENHARD, ESQ. TAMMY PETERSON, ESQ.
For Kathryn Bouvier:	WHITNEY B. WARNICK, ESQ.
For Jacqueline Montoya:	JOSEPH J. POWELL, ESQ.
Also appearing via CourtCall:	FREDERICK WAID, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 Wednesday, April 22, 2015 at 11:15 a.m.

2
3 THE COURT: -- for us. So if you'll give us just a minute and we'll let you
4 guys all check in.

5 MR. MOODY: Judge, I think he's on the phone.

6 THE COURT: Okay. So we just got to make sure he's there.

7 [Call placed]

8 THE CLERK: Mr. Waid?

9 MR. WAID: Hello?

10 THE CLERK: Yes.

11 THE COURT: Mr. Waid, we apologize that we weren't able to get to you at
12 10:30. One of the requests that you did make was that the -- I'm not sure if you
13 want the entire hearing sealed along with the minutes or if you just wanted the
14 courtroom sealed. I can represent that there's nobody else left in the courtroom
15 other than counsel and the parties in this case. So did you -- was it your request
16 that the hearing itself be sealed?

17 MR. WAID: I'll defer to Mr. Moody on that --

18 THE COURT: Okay.

19 MR. WAID: -- whatever he feels is most appropriate.

20 THE COURT: Okay, so just, you know, for the record, that was a request he
21 made, Mr. Moody, on Monday. And as I said for the record, we'll let everybody state
22 their appearances but there's nobody else in the courtroom. So if his --

23 MR. MOODY: Yeah.

24 THE COURT: -- concern was just that there be nobody in the audience --

25 MR. MOODY: That's correct.

1 THE COURT: -- that's addressed. It's just a question of whether he wants
2 the actual minutes and the actual hearing itself sealed.

3 MR. MOODY: No, I don't believe we need the minutes sealed. We just --
4 because of the sensitive nature of this --

5 THE COURT: Right.

6 MR. MOODY: -- we thought it wise to not have anyone else in the courtroom.

7 THE COURT: Okay. All right. Well so then, Mr. Lee, if you'll just make sure
8 that nobody else who's not present at this time doesn't come in, then we're good.

9 THE MARSHAL: All right.

10 THE COURT: Because as of now there's nobody else. So we'll just let
11 everybody state who's here, and that way Mr. Waid who's appearing telephonically
12 will know who's present. Okay?

13 MR. MOODY: Good morning. Todd Moody. I represent Fred Waid, the
14 court-appointed acting successor trustee of the Connell Trust.

15 THE COURT: Okay. And Mr. Waid's present with us on the phone.

16 Appreciate that Mr. Waid. Okay.

17 MR. POWELL: Good morning, Your Honor. Joey Powell --

18 MR. WAID: Thank you.

19 MR. POWELL: -- with Whitney Warnick, appearing on behalf of our
20 respective clients, Jacqueline Montoya and Kathryn Bouvier. Ms. Montoya is
21 present in the courtroom.

22 THE COURT: Okay.

23 MR. LENHARD: Good morning, Your Honor. Tammy Peterson and Kirk
24 Lenhard entering an appearance today on behalf of the former trustee.

25 THE COURT: And she's present?

1 MR. LENHARD: Yes.

2 MS. PETERSON: She is present, Your Honor.

3 MR. LENHARD: She is present in the first row.

4 THE COURT: Okay.

5 MR. LENHARD: I assume we sit on the far side?

6 THE COURT: Yes.

7 MR. LENHARD: I'm just trying to --

8 THE COURT: Actually, gentlemen, if you might want to move, it's up --

9 MR. LENHARD: Get the logistics here?

10 THE COURT: Yeah. Okay.

11 MR. WAID: Judge Sturman --

12 THE COURT: Yes?

13 MR. WAID: -- this is Fred. Before we begin, would you ask the counsel for

14 the parties to speak into the microphone?

15 THE COURT: Yes.

16 MR. WAID: It's very faint and I'm having a hard time hearing them.

17 THE COURT: Good point. The microphone is placed on this podium that

18 goes to the Polycom phone, so you can stand at the podium. Thank you.

19 Okay. Mr. Moody.

20 MR. MOODY: All right, thank you, Your Honor. We're here this morning on

21 Mr. Waid's motion for an order to show cause and that order to show cause was

22 granted which brings us here today. My goodness how things have changed in just

23 a few weeks time.

24 Judge, we came from just a few weeks ago where the trustee was

25 insistent that she was acting appropriately, that everything was accounted for and

1 fully accounted for to now former counsel not only withdrew but they couldn't
2 withdraw quickly enough because of the mess that has been uncovered since Mr.
3 Waid was appointed. The former trustee was to have all money returned to Mr.
4 Waid by last Friday. I can represent to the Court that that did not occur. By her own
5 admission, she owes the trust approximately \$800,000. We don't know if it's more
6 or less than that, but because of problems getting her cooperation and getting
7 access to a full accounting, we simply don't know that yet. Her own daughters are
8 involved in litigation against their mother because of this.

9 She has surrounded herself with a spiritual advisor and given power of
10 attorney to at least two individuals, one of which may be that spiritual advisor. Who
11 knows how much those people have bilked her for.

12 To be quite honest, Judge, there is a lot we just don't know. There are
13 things missing. We're worried about spoliation issues. We are worried about further
14 wasting of trust assets, and we're to the point where we believe that only the full
15 weight of this Court can explain and make clear to the former trustee that this Court
16 is serious about a full accounting and that proper access and full disclosure be
17 provided to Mr. Waid. We think that that's the only thing that is going to shake off
18 the grifters that have been hanging on, that will wake her up, that will gain her
19 cooperation and allow Mr. Waid to do his job.

20 THE COURT: Okay.

21 MR. MOODY: Judge, because of the former trustee's erratic and evasive
22 behavior, we're asking the Court to appoint a guardian ad litem for Eleanor's estate
23 and we think that by working with that guardian instead of her personally that it will
24 ease this whole process along.

25 We would recommend a professional guardian. We've already spoken

1 to Nevada Guardian Services. They are willing to step in with the Court's approval
2 and with that appointment. We think it'll help tremendously moving forward --

3 THE COURT: Isn't Nevada Guardian Services Mr. Shafer?

4 MR. MOODY: It's Susan Hoy.

5 THE COURT: Okay -- because I used to represent Mr. Shafer so I think I
6 have a conflict of interest anytime anybody asks to appoint him because he's a
7 former client.

8 MR. MOODY: Okay.

9 THE COURT: So --

10 MR. MOODY: You know, Judge --

11 THE COURT: -- as long as it's not his, then I can do it.

12 MR. MOODY: One of the real questions that we've had in this is -- you know,
13 besides what I've stated already is who and what is Fidelity Capital. There was a
14 half a million dollars that was established with Fidelity Capital. We can't even get an
15 address. There's a P.O. Box. We don't know what it is and there was a
16 representation that that money would be returned fully. It has not.

17 And so the -- it's just a -- it's a pattern of things in so many -- Mr. Waid,
18 thank goodness, has been able to recover significant amounts of money already, but
19 there's so much out there that remains unaccounted for. We can't even get the
20 cooperation of who was supposed to be the trust former counsel in Texas. It's
21 unclear whether he believes he was counsel for the trust or for Eleanor personally,
22 but he won't cooperate with us despite the Court's order.

23 I do have with me today and --

24 THE COURT: And I -- just for the record, I -- you know, I don't think
25 anybody's ever said that it was viewed that Mr. Johnston did anything -- didn't get a

1 good deal. You know, that's not been the issue.

2 MR. MOODY: Not at all.

3 THE COURT: In fact, these assets continue to produce a substantial income
4 stream and it's not really alleged that Mr. Johnston didn't -- you know, that that was
5 not as good a deal as it could have been. I mean we don't know that, but it's just the
6 -- just the fact that they won't provide the information such that the Court can make
7 the determination or that the trustee could --

8 MR. MOODY: That's exactly right.

9 THE COURT: -- that's a problem. I mean --

10 MR. MOODY: It looks like -- yeah, and --

11 THE COURT: I mean it seems like it's probably a good deal. I don't know.

12 MR. MOODY: We believe it was, and as the Court knows, one of those deals
13 is closed already --

14 THE COURT: Yeah.

15 MR. MOODY: -- and the Pioneer deal, you know, there's no real rush on it,
16 but we want to be involved. We want to know what's happening. We want to know
17 what representations were made, what the status is right now. I did bring --

18 THE COURT: And the specific --

19 MR. WAID: Mr. Moody?

20 THE COURT: Beg your pardon.

21 MR. MOODY: Yeah.

22 MR. WAID: Mr. Moody, this is Fred. Your Honor?

23 THE COURT: Yes.

24 MR. WAID: Your Honor, if I could just comment on that. I have not
25 completed my investigation into the representation by Mr. Johnston, but I will tell

1 you, notwithstanding the fact those deals are closed, in my discussions directly with
2 Apache and others, some of those transactions may actually need to be revisited.
3 There -- there was a historical joinder of -- an alignment of interests between all the
4 family members. These last series of transactions Mr. Johnston was very -- on a
5 very different track from the other family members. It was not explained by the
6 geological studies and other issues present.

7 So I'm going to hold on, Judge. I just want the record to reflect --

8 THE COURT: Okay.

9 MR. WAID: -- we're glad the deals are closed because it complied with the
10 Court's order --

11 THE COURT: Okay.

12 MR. WAID: -- but with respect to whether or not it was a good or a bad deal,
13 I'm not so certain yet until I get back --

14 THE COURT: I understand that --

15 MR. WAID: -- all the information that I'm looking for.

16 THE COURT: I understand that, Mr. Waid, and that's why I wanted to make
17 very clear is that we -- we've not alleged that. I mean it's not been something that
18 there's any finding on. It's just a question of the trustee as the trustee for everybody
19 has to be given access so the trustee can exercise his independent judgment as a --
20 not only as a trustee, but also as a Texas attorney. He -- that was why he was
21 appointed because he has his own independent judgment and the trustee's being
22 stymied in that and, you know, because we haven't really said anything about Mr.
23 Johnston. I don't know why he's taking this approach. So --

24 MR. WAID: Well --

25 THE COURT: -- it's odd.

1 MR. WAID: -- if I could explain one item. My concern now really comes to a
2 financial issue. He reported in the accounting -- in the Marquis and Aurbach's
3 pleadings that they filed showed there was a \$50,000 fee (indiscernible) and 70,000
4 in Mr. Johnston's trust account. In speaking with the family, the other members of
5 the family who are all in the same mineral deals together, their total legal fees were
6 a few thousand dollars. So I have some very serious concerns as to trust funds
7 being allocated to him to those large amounts. Mr. -- I asked Mr. Johnston if he's
8 owed anything else, can he return the balance of those funds which were obviously
9 paid by the trust and he refused. So something's not right there, but --

10 THE COURT: Okay.

11 MR. WAID: -- I don't -- I'll report later.

12 THE COURT: I appreciate that.

13 MR. MOODY: We also asked for an invoice from him which he refused to --

14 THE COURT: Right.

15 MR. MOODY: -- provide to us, so -- Judge, I did bring an authorization to
16 release information. This may help us in the interim, but we really think that one
17 remedy would be to appoint a guardian ad litem --

18 THE COURT: Okay.

19 MR. MOODY: -- for her estate.

20 THE COURT: And this really is a hearing on an order to show cause and so I
21 don't know if you've had a chance to talk to new counsel, but you know, the point is
22 -- has criminal sanctions.

23 MR. MOODY: Yeah.

24 THE COURT: And that was like I think particularly why Mr. Waid was
25 concerned that given the sensitive nature of this and he didn't want anybody present

1 -- I mean nobody wants to put a 77-year-old woman in jail, but that's what could
2 happen. And that just needs to be stated for the record.

3 I know Mr. Waid's very reticent to state it, so the Court will state it. This
4 has very serious repercussions. This is violation of the court order involving many
5 millions of dollars that were specifically directed over a year ago to be held pending
6 the outcome of the litigation. I appreciate the fact that she's not happy with the
7 outcome of the litigation and she wishes to appeal the outcome of the litigation, but
8 she has violated this Court's order. That appears to be a given.

9 There -- I understand Mr. Waid being reticent to comment on the deals
10 in Texas. That's not my concern. My concern is that the money that was supposed
11 to have been -- that was coming in was to have been sequestered. And I don't think
12 there can be any question that that order was violated and there are consequences.
13 Thank you.

14 MR. MOODY: Thank you.

15 THE COURT: Okay. Welcome Mr. Lenhard and Ms. Peterson. I know you
16 don't have the history the rest of us have, so --

17 MR. LENHARD: Well I feel like I do. I heard my name for the last 45 minutes
18 in the previous proceeding.

19 THE COURT: I know.

20 MS. PETERSON: There's no relation to that Mr. Lenhard.

21 THE COURT: I was going to say those people are from Missouri, so not
22 Oklahoma.

23 MR. LENHARD: Well I'm from Oklahoma, it's close.

24 THE COURT: I was going to say.

25 MS. PETERSON: Good morning, Your Honor. Tammy Peterson appearing

1 on behalf of the former trustee, Ms. Ahern, and I do want to say we are a little bit
2 late to all the --

3 THE COURT: Right.

4 MS. PETERSON: -- proceedings here. We are appearing on her behalf this
5 morning. I can advise the Court we were literally retained yesterday afternoon. It
6 was my understanding that this was set for an order to show cause and there was
7 no other request or motion or anything else on calendar today for a request to have
8 a guardian ad litem appointed, and so, Your Honor, just as a matter of fairness, I
9 would ask that you not consider that until it is properly before you.

10 What I wanted to address this morning, Your Honor, is the order to
11 show cause. And again, I'm probably not up to speed on all the facts as I wish I
12 would normally be when I appear in court, but what I have is an order to show cause
13 that appears to have been filed on April 16th with regards to this proceeding. What I
14 don't have is any sort of affidavit of any facts or request that this was ever made in
15 writing.

16 What I do have are some court minutes suggesting that the trustee at
17 the last hearing on April 14th had asked the Court to issue an order to show cause,
18 but as the Court stated, there's some serious repercussions with any sort of criminal
19 contempt proceeding that I believe your Court lists -- this Court thinks she can
20 proceed with on and I would caution the Court in proceeding on any sort of criminal
21 sanction at this time.

22 THE COURT: Well requires a hearing.

23 MS. PETERSON: Requires more than a hearing. Requires an affidavit
24 because the Court -- it was not -- the alleged contempt was not in your presence. It
25 was outside the immediate view and presence of the Court as is required by statute.

1 Requires an affidavit. It requires a hearing. And Your Honor, we would object to
2 you presiding over that hearing. So those --

3 THE COURT: Judge Gonzalez is the alternate probate judge and she would
4 hear the contempt.

5 MS. PETERSON: Okay. And what I wanted to make sure was that that
6 proceeding was not going forward today because I -- from the order to show cause
7 that was issued, I don't think that it would be a valid contempt proceeding to proceed
8 today. There's not enough in the record and we're certainly objecting to your --

9 THE COURT: Right.

10 MS. PETERSON: -- hearing any criminal contempt or any contempt hearing if
11 the remedies are civil or contempt.

12 So moving back again, Your Honor. As I said, we're catching up
13 slowly --

14 THE COURT: I just would like --

15 MS. PETERSON: -- to this and --

16 THE COURT: I just like to state though, Ms. Patterson (sic), that -- so that
17 you understand the real concern that is behind all of this, it was viewed by the
18 urgency with which Mr. Waid presented it as a crisis situation prompted by counsel
19 -- previous counsel for the trustee having withdrawn. And I'm very impressed by Ms.
20 Ahern's ability to retain the best attorneys in town. She has had a series of
21 wonderful legal advisors, who unfortunately she didn't listen to. She's had the best
22 attorneys work on her case, the best, and has -- every time a decision goes against
23 her, she reacts in a very oppositionally defiant manner to the Court and to counsel.

24 And it's unfortunate that we have reached this point, but there's a
25 history here and the -- specifically the issue is that there was a direction over a year

1 ago that Ms. Ahern hold the disputed 65 percent pending an outcome on the rights
2 to that money. When there was a request by the daughters to have access to some
3 portion of those funds for their living, that was opposed unless they could post a
4 bond. Couldn't post a bond because nobody knew how much it was. Mrs. Ahern
5 was controlling it. I mean they couldn't post a bond.

6 So it is shocking to the Court that knowing that she had denied access
7 to those funds to her daughters, even pending a resolution, on the grounds that it
8 would be impossible to claw that back, that she nevertheless right up until the
9 moment that she was removed was representing to her counsel, to this Court that
10 everything's fine, I've held it all, when the Court made a specific finding that Fidelity
11 Capital is not a prudent investment under the prudent investment rule, she violated
12 that statute, that we needed a third party in place for everybody's protection, and Mr.
13 Waid, who's only been in place for a few weeks, unraveled this mess.

14 But the clear outcome is that that order was not followed. And the only
15 leverage this Court has over Mrs. Ahern, who will not follow this Court's orders, is to
16 convey to her that there are consequences to not following this Court's orders to and
17 including, if I haven't made it clear, going to jail.

18 And as you pointed out, there's a procedure that must be followed.
19 Judge Gonzalez would hear the contempt proceeding. But I'm not sure that that has
20 ever been brought home to Mrs. Ahern that violating a Court's orders has
21 consequences. That's the purpose of this proceeding. She has, again, obtained the
22 best possible legal advisors. I hope that this time she will listen to them.

23 MS. PETERSON: Your Honor, thank you. I would hope so too. Most people
24 do listen to me, I think, but at any rate, there's a couple things I just want to address
25 with what the Court just said and that is my understanding that there was a concern

1 about a violation of a court order. I do know what's written in the order to show
2 cause about funds that were allegedly taken from the trust. I want to represent to
3 the Court today that we need to -- we, the -- her new counsel, would like to go over
4 and fully understand fully exactly what was taken and it will be returned.

5 I have learned a lot of things in the last 24, 48 hours, but I can't pin
6 everything down. I have some serious questions as to whether anything was ever
7 held by Fidelity Capital, but I can certainly --

8 THE COURT: They filed a pleading -- they filed some sort of a statement or --
9 and --

10 MS. PETERSON: And that is --

11 THE COURT: -- stating they held \$500,000.

12 MS. PETERSON: That is what I understand, Your Honor, but I'm telling you
13 I'm coming to this late --

14 THE COURT: Is that another lie to the Court?

15 MS. PETERSON: -- and I'm coming to with a lot of skepticism about
16 everything that's been presented here and that's all I can advise the Court that I am
17 as skeptical as you, maybe more so. But our intention is to work with the trustee
18 and the trustee's counsel and get that information to the current successor trustee
19 and to clear up whatever confusion there is.

20 THE COURT: I appreciate, as I said, that Mrs. Ahern's legal affairs are in the
21 hands of the very best counsel she could possibly hope to find. But it's -- she's in a
22 real serious hole. (Cough) It's just allergies. And I understand your position that
23 this is a very serious constitutional right that she has to due process on this order to
24 show cause, and we have to follow it correctly, and we have to refer it properly to
25 another attorney under the statute -- another judge under the statute. I understand

1 that. But I'm not hearing you say that the Court shouldn't do that.

2 MS. PETERSON: Well, Your Honor, if you think there's enough information --
3 what I don't have -- here, what I don't have, and I haven't heard any statements
4 otherwise, is an affidavit showing what the facts are for the alleged contempt. I
5 don't --

6 THE COURT: Okay.

7 MS. PETERSON: -- have that. She's entitled to that due process right as a
8 minimum --

9 THE COURT: Okay.

10 MS. PETERSON: -- before you refer this to anybody else. There's no basis
11 for you to issue an order to show cause under the statute. That in and of itself, that
12 order to show cause is not valid today.

13 THE COURT: Okay.

14 MS. PETERSON: And what I was trying to explain is we're trying to go down
15 to the facts themselves underlying what I understand was your previous order. I --
16 and what I heard you just say about statements made to the former trustee. But
17 frankly, I don't have those records before me and we're trying to determine exactly
18 what happened and she does have rights in the meantime.

19 THE COURT: Correct. All right. And so specifically with the request, and I
20 agree with you that this has never been raised before, I think Mr. Moody has
21 certainly raised a valid point that -- the Court has to question Mrs. Ahern's ability to
22 manage her own affairs. Again, there's track record here. So I appreciate though
23 that that -- if the trustee in the exercise of his discretion -- again, that's why we have
24 an independent third party there -- believes that's appropriate, then he should file a
25 written motion stating the basis for it. So yes, I agree we need to do that. So I will

1 reserve any ruling on that until it's properly before the Court.

2 We talked earlier today about *Landreth versus Malik*, 251 P.3d 163,
3 2011 case, about the jurisdiction of Family Court versus District Court which is a --
4 civil/criminal court which has jurisdiction over probate. Family Court has jurisdiction
5 over guardianship. I did not hear that the trustee was suggesting a guardian. In
6 other words that she placed under guardianship. I question whether she can handle
7 her own affairs. He only requested a guardian ad litem.

8 I do think that this Court has jurisdiction over guardian ad litem which
9 are just appointing somebody to represent the interests of a person in litigation.
10 That's a different matter. I think the Court has jurisdiction, even under *Landreth*
11 *versus Malik*, to hear the appointment of a guardian ad litem because the trustee did
12 not request that she be placed under any kind of a guardianship or conservatorship
13 at all. That's not the suggestion. Want to make that clear.

14 Even though I have issues, I just -- I think right now we're just talking
15 about for litigation purposes, you're entitled an opportunity to address that because I
16 -- we don't even know what the basis is, don't know if we can meet the standard, I
17 don't know. So we've got to -- we got to have that in writing. I agree with you.

18 Next issue. This hearing was set, again, because the Court understood
19 that Mrs. Ahern was going to be losing her then counsel and somebody needed to
20 give the message to her the seriousness of this -- the very real seriousness of where
21 we are. And there was no other way for the Court to do that when she was
22 unrepresented by counsel, absent having a hearing. But yet you are correct that the
23 process for contempt, which is the ultimate outcome on order to show cause, is a
24 statutory process. We have to follow that process.

25 So again, she's entitled to be put on notice. The trustee's told us

1 essentially what the concerns are that he has, but again, we should lay it all out in
2 writing so that (indiscernible) opportunity to respond. And it may be that there is in
3 fact an opportunity to return this money. That's awesome. That would be good
4 news for everybody involved and we would be happy to hear that because we have
5 to have the hearing on whether the -- have the contempt. The contempt itself would
6 be referred.

7 So how much time do you need? We'll -- Mr. Moody needs to know,
8 because Mr. Waid's out of town, how much -- how soon he can have an affidavit
9 from the trustee supporting this request, assuming -- as I say, it may not be
10 necessary. It may be a situation that maybe when Mr. Waid gets back to town if you
11 have an opportunity to all sit down, the information can be provided to him. He's just
12 been stonewalled up to this point --

13 MS. PETERSON: And we would --

14 THE COURT: -- and he's had no alternative.

15 MS. PETERSON: We would welcome that opportunity, Your Honor, as well.

16 THE COURT: And it may be that we don't have to go to that next step of even
17 having the hearing to determine whether we need to refer this for criminal contempt.

18 So given that -- well I -- Mr. Waid, I don't know if you've had a chance to
19 talk to Mr. Moody about what the schedule is on when you'd be available --

20 MR. WAID: No, I'm available. I'll be available on Friday. I return to Las
21 Vegas Thursday night.

22 But again, Your Honor, for the record, my concern is this order
23 regarding Fidelity has been in place long before I was involved --

24 THE COURT: Right.

25 MR. WAID: -- and it's been represented to the Court that that matter is cured.

1 I'm not really looking for information, I'm looking for the money. And I think that's
2 what the Court's concern is as well, but I will happily meet on Friday and see what
3 we can do.

4 THE COURT: And it may be as Mr. Moody has indicated, he brought a
5 release. He'll provide it to counsel. They can consult with their client, determine if
6 they're going to be able to sign that. They can meet with you on Friday. And maybe
7 that some of these issues can be resolved without any further -- the Court doesn't
8 need to be involved in this. This is -- there's a new trustee in place to protect the
9 rights of everybody and acting as an independent third party looking over the
10 interests of everybody. That's all I'm saying. Not prejudging this. I'm not saying
11 whether there is in fact, I'm just saying it's very disturbing to the Court that when
12 there are orders in place, I -- there's been no evidence that Mrs. Ahern's been able
13 to provide that she has in fact complied with them. Everything that Mr. Waid has
14 found has been disturbingly to the contrary. And that's a real problem.

15 So again, we just needed to make sure the message is delivered
16 through, again, as I've said many times, very competent counsel who I hope can
17 communicate this to Mrs. Ahern that there are consequences. There are real
18 consequences here. It's not about who's entitled to the money. It's bigger than that.

19 And I appreciate that she wants to go on ahead and litigate and appeal
20 and you know, may -- she may disagree with me. I'm okay with the fact that she
21 disagrees with me. People disagree with me everyday. That's the job. The point is
22 when there's an order in place, contempt of that order, which is what I have
23 witnessed -- again, not in my presence, but the record seems to indicate -- it's a real
24 problem and has consequences. And that's just what we wanted to convey here.

25 Mr. Waid has not had any contact outside of this courtroom about this

1 matter with this Court. Everything he has told me in court has been shocking.

2 There's no other word for it. And I don't know of any other way to deal with it. So --

3 MR. MOODY: So Judge, in the even that we can't --

4 THE COURT: It may be that you could do it amicably. I appreciate that. And
5 I appreciate counsel's good faith statement that that's what they want to do.

6 MR. MOODY: We've heard that before, with all due respect, from previous
7 counsel.

8 THE COURT: Right.

9 MR. MOODY: It seems to be an action of another delay after another delay,
10 and that's exactly why we came in on this was to prevent spoliation, to prevent more
11 wasting of resources. We want it to stop. And, you know, the Court has indicated
12 she seems to be able to find the best attorneys that money can buy. Who's paying
13 for that? If it's the trust money, we're concerned about that as well, but if we can't
14 work something out on Friday when Mr. Waid meets with counsel --

15 THE COURT: And Mr. Waid, I did understand that you are free to meet with
16 them on Friday? You could meet?

17 MR. WAID: Yes, ma'am, I am.

18 THE COURT: Okay. So yeah, it's not just that he's returning and he's back in
19 town, he's actually available. Okay, great.

20 MR. MOODY: He is available so they can set that up through Mr. Waid. I'll
21 be happy to provide his number --

22 THE COURT: And I'm sure they would need some amount of time in which
23 they can make their efforts. So --

24 MR. MOODY: Or me. Either one of us can --

25 THE COURT: Right.

1 MR. MOODY: -- can help set that up. And Judge, I'll just represent in the
2 event we're unable to do that, I will immediately turn around and file the affidavit so
3 that we can proceed with the contempt --

4 THE COURT: Start the process.

5 MR. MOODY: -- pursuant to the Court's direction.

6 THE COURT: And I understand Mr. Waid's concern for Mrs. Ahern. It's -- I
7 trust that this request for guardian ad litem comes from his role as her trustee. He
8 has never demonstrated anything but concern for all the beneficiaries that they all
9 be protected and his concern that Mrs. Ahern is being subjected to influences that
10 are not in her best interest and he has a real concern for her. But it's got to be --
11 counsel's right -- done with notice. So if you want to pursue that, that would be a
12 separate thing. Again, that I believe can be heard here because it's -- I did not
13 understand it to be a request for a guardian. That would have to go to the
14 guardianship commissioner. It's a request for a guardian ad litem, very different.

15 MR. MOODY: I was very specific in my --

16 THE COURT: Thank you.

17 MR. MOODY: -- request for that. We thought through that, considered a
18 general guardian, either --

19 THE COURT: No.

20 MR. MOODY: -- a person and/or estate, but we're simply asking for a
21 guardian ad litem and I'll be happy to file the appropriate motion making that
22 request.

23 THE COURT: Okay. So -- so they know that they've got some time to deal
24 with this, how much, you know -- you're meeting on Friday. One week from then to
25 have -- so you know that this is not going to work or it is, because I'm sure -- I'm

1 assuming that they won't be able to act immediately on Friday, but you know, once
2 Mr. Waid explains everything to them, lays it all out for them, tells them what tracing
3 he's been able to do because he's done some, then by the end of the following week
4 you either need to know that you've got movement or you're going to need -- he's
5 going to need to proceed.

6 MR. MOODY: Yeah. And is the Court asking for a follow-up hearing --

7 THE COURT: Well, I --

8 MR. MOODY: -- or a deadline for me to file --

9 THE COURT: That-s --

10 MR. MOODY: -- the motion?

11 THE COURT: I'm just -- so we have a timeframe so we know what we're
12 operating under. I'm assuming they -- they're going to need some time. They're not
13 going to be able to act immediately based on what Mr. Waid tells them on Friday
14 such that, you know -- but you need some time which you can say we're not getting
15 anywhere because you mentioned the problem of delay and spoliation the longer
16 things are gone. Who knows where these assets may -- it's money -- go.

17 MR. MOODY: I'd say by the following -- a week from this Friday if --

18 THE COURT: Okay.

19 MR. MOODY: -- if we don't have the money returned or have an assurance
20 that it's on it's way --

21 THE COURT: Some information that tracing that's in the works, something.

22 MR. MOODY: Yeah.

23 THE COURT: Then you can proceed to file whichever motions you deem
24 appropriate. And maybe after you've talked to counsel, Mr. Waid may feel he
25 doesn't need the guardian ad litem. I don't know. But it's -- you know, they need to

1 know what they're dealing with. They need timeframe. So no motions are going to
2 be filed like tomorrow. We're not doing this tomorrow. We're going to wait for the
3 meeting with Mr. Waid --

4 MR. MOODY: Right.

5 THE COURT: -- and give them some time to try to do what they say they
6 believe they can do, which is get some or all of this money returned.

7 MR. MOODY: How about --

8 THE COURT: They believe they can do that.

9 MR. MOODY: So I will file an affidavit and a motion to appoint a guardian ad
10 litem a week from Monday if we're unable --

11 THE COURT: Correct.

12 MR. MOODY: -- to work that out. What is that day?

13 THE COURT: By the close of business Friday.

14 Is that agreeable, Ms. Peterson?

15 MR. MOODY: Is that May 4th?

16 THE CLERK: Yes.

17 MR. MOODY: May 4th.

18 THE COURT: Is that agreeable, Ms. Peterson? One week from the meeting
19 on Friday you should know if you're going to be -- and may be that you can make
20 real progress. I'm not saying you have to have --

21 MS. PETERSON: I heard him say May 4th --

22 THE CLERK: I'm sorry.

23 MS. PETERSON: -- so I'm sorry, I don't know which date we're talking about
24 now.

25 THE CLERK: One week from the meeting on Friday or the Monday --

1 THE COURT: He -- they have until the close of business on Friday.
2 THE CLERK: The 1st.
3 THE COURT: So then he would file on Monday.
4 THE CLERK: On Monday, the 4th.
5 THE COURT: Right.
6 THE CLERK: Okay. That's what I thought.
7 THE COURT: So yeah, it shouldn't be filed -- it's -- we're in a holding pattern.
8 We're going to give everybody an opportunity to act on what we believe is legitimate
9 willingness to try to make this resolved, work, whatever.
10 MS. PETERSON: Thank you. And so --
11 THE COURT: I believe everybody wants that.
12 MS. PETERSON: And so that'll be filed Monday, May 4th. Is that what you
13 said?
14 MR. MOODY: Correct.
15 THE COURT: Correct.
16 MS. PETERSON: Okay. Thank you.
17 THE COURT: Yeah, no earlier than.
18 MS. PETERSON: All right.
19 THE COURT: Yeah. And one or both of those motions. And until then --
20 MR. WAID: Judge --
21 THE COURT: -- they have their opportunity to make their efforts which they
22 believe they can make some progress. And it may be Mr. Waid's satisfied -- I'm not
23 saying he has to have all the money back in his hands. I'm not saying that. I'm just
24 saying he has to be satisfied that he's got real cooperation is making real progress.
25 He can agree to give them more time.

1 MR. WAID: Your Honor --

2 THE COURT: So --

3 MR. WAID: -- just so --

4 THE COURT: Is that agreeable, Mr. Waid?

5 MR. WAID: It is. I just want to make one clarification for the record. I have to

6 be very careful as the trustee not to place myself in a conflict --

7 THE COURT: I understand.

8 MR. WAID: -- with respect to beneficiaries, which are now all three, Eleanor

9 and then the two daughters. My concern is I don't ever like to file motions --

10 THE COURT: Understand.

11 MR. WAID: -- seeking contempt for disobeying the Court's order. The reason

12 I brought that to the Court's attention is that so the Court sua sponte could take

13 appropriate action.

14 THE COURT: Right.

15 MR. WAID: So I would ask primarily that I'm going to inform the Court and I'm

16 going to defer the Court's action rather than me proceeding against any --

17 THE COURT: Okay.

18 MR. WAID: -- specific beneficiary.

19 THE COURT: Right, but --

20 MR. WAID: I just prefer that.

21 THE COURT: I understand but we have to have an affidavit of somebody and

22 you're the person with the knowledge. So we need an affidavit that the Court can

23 act on. And we don't have an affidavit, so we need an affidavit saying --

24 MR. WAID: And that's fine.

25 THE COURT: -- this is what I've been able to discover -- and you'll know by

1 May 4th what progress counsel are able to make. That gives them an opportunity to
2 try to mitigate this.

3 MR. WAID: Understood --

4 THE COURT: Because I understand -- I want to make it very clear. I think I
5 told Ms. Peterson earlier that this was something that the Court felt we had no
6 option to convey the seriousness of what's happened to Mrs. Ahern but through this
7 method because all that happened was what Mr. Waid in court, in open court had
8 advised the Court he had uncovered in the brief time he was acting as trustee. It
9 was not based on anything else. The Court acted to say this is enough concern.
10 We have to convey this message of the serious nature of what the trustee has
11 uncovered. I mean it's -- because it was in her capacity as trustee. And it may be --
12 I don't know that the other beneficiaries have a position on it.

13 So Mr. Powell?

14 MR. POWELL: I just want to clarify I think Mr. Wade did previously submit
15 with a previous moving paper an affidavit. So just to clarify for the record, he has
16 submitted an affidavit which I believe goes to part of it is the Fidelity Capital account.

17 THE COURT: I -- that --

18 MR. POWELL: So we do have written affidavit from Mr. Waid just for that
19 point.

20 THE COURT: I'm --

21 MR. POWELL: Your Honor --

22 THE COURT: -- not sure it's sufficient for --

23 MR. POWELL: Oh I understand. I just wanted to --

24 THE COURT: -- what we need --

25 MR. POWELL: -- make that clarification.

1 THE COURT: -- as -- because as Ms. Peterson's pointed out, there is a
2 specific statutory scheme --

3 MR. POWELL: Right.

4 THE COURT: -- for criminal contempt.

5 MR. POWELL: Understand. Understand.

6 THE COURT: And that's -- you know, when you're dealing with other people's
7 money, that's the remedy.

8 MR. POWELL: Right. Sure. Just two points I want to make for the record.
9 One is we would echo on behalf of our clients the same question and the same
10 concern as to given the fact the money has not been returned, how are the legal
11 fees -- what is the source of those legal fees for opposing counsel? So just --

12 THE COURT: Mrs. Ahern had --

13 MR. POWELL: -- wanted to make that sure on the record and so --

14 THE COURT: Sure.

15 MR. POWELL: -- opposing counsel knows as well, that is a concern we
16 have --

17 THE COURT: Right. Mrs. Ahern has 35 percent that's -- she's entitled to
18 outright, so --

19 MR. POWELL: She does. Your Honor, two, just so that you're aware and
20 foreshadowing what we intend to do in the future, even though there is a suggestion
21 right now of returning the money, as you've said, there's also other consequences
22 and other remedies that go along with that. So the Court's aware, we will be
23 pursuing those as well so that --

24 THE COURT: I understand.

25 MR. POWELL: -- is just out --

1 THE COURT: I'm not --

2 MR. POWELL: -- in the open and clear --

3 THE COURT: I'm not saying that this is the only remedy.

4 MR. POWELL: Oh, I understand. I understand.

5 THE COURT: I'm just saying that because it's the Court order --

6 MR. POWELL: Sure.

7 THE COURT: -- that's the remedy.

8 MR. POWELL: Sure. I just don't want to be accused -- and I'm not saying

9 opposing counsel's going to do this, but listening to the previous hearing --

10 THE COURT: Sure.

11 MR. POWELL: -- of sandbagging and not be fully forthright, we do intend to

12 seek other remedies --

13 THE COURT: I --

14 MR. POWELL: -- just so that's out in the open.

15 THE COURT: I understand.

16 MR. POWELL: The last --

17 THE COURT: Yeah, this was not based on anything requested by the other

18 beneficiaries. This was something the Court did specifically because it was -- the

19 Court was advised of a violation of the court order.

20 MR. POWELL: Correct. Right.

21 THE COURT: It was not done at the request as the remedy sought by --

22 absolutely not. That should be -- I -- thank you. Should be perfectly clear on the

23 record that neither Mr. Waid nor the other beneficiaries requested this remedy. This

24 was a remedy that the Court said this is the consequence of violating a Court's

25 order, based on the information provided by Mr. Waid. It was not that anybody

1 suggested this was the proper outcome. This is just dealing with violation of the
2 Court's order. That's all we're talking about.

3 MR. POWELL: Right. Thank you. I appreciate you clarifying that --

4 THE COURT: Yeah, and maybe as I said, they -- counsel believes in good
5 faith they can make real efforts there, so --

6 MR. POWELL: Sure.

7 THE COURT: -- terrific.

8 MR. POWELL: And the last point to go on record and just to set forth again,
9 somewhat for clarification, somewhat to get again your view of the issue. Our
10 interpretation of the *Hardesty* ruling is that there is a duty of complete candor and
11 disclosure to the Court and that would still apply to a former trustee as well.

12 THE COURT: Correct.

13 MR. POWELL: So I just wanted to make that representation now, and you've
14 confirmed, so this is not a situation of being able to protect, to be able to dance
15 around issues. If there's discovered information, it must be produced accurately to
16 this Court. We have a great concern, again, in the past that hasn't occurred. And
17 so just to make this clear, even though there are criminal consequences that would
18 apply, this Court and this -- these proceedings are not criminal proceedings.

19 THE COURT: No.

20 MR. POWELL: If there is knowledge of misconduct, it must be revealed and
21 put on the record. I just want to make that point clear.

22 THE COURT: Yeah, that -- very clear. This is a civil court, court of equity. I
23 don't -- but the only thing we're dealing with -- and this is not in any way meant to
24 prejudice or limit anybody's rights --

25 MR. POWELL: Correct.

1 THE COURT: -- under any other theory of recovery they may have. This was
2 just the Court's concern that a order that had been in place for a long time and --
3 and specifically you mentioned the more recent order, the \$500,000 order, were just
4 -- had been just flagrantly violated and there's no other option for the Court to
5 convey that that has consequences than through a proceeding.

6 So counsel's right, we have to follow the statute. We'll do it if it's
7 necessary. It may not be. It may be once the proper educational process takes
8 place that some good faith efforts can be expended and like I said, I'm not requiring
9 that all the money be in hand. I'm just saying Mr. Waid, in his independent
10 judgement, needs to be in a position of saying I feel satisfied that I can now recover
11 the funds.

12 MR. POWELL: Right.

13 THE COURT: He'll tell his counsel if -- and they'll put in an affidavit and then
14 we can proceed.

15 MR. POWELL: Absolutely. Thank you, Your Honor.

16 THE COURT: Okay. Thank you all. I appreciate everybody's time today.

17 MR. POWELL: Thank you.

18 THE COURT: Thank you for coming.

19 MR. WAID: Thank you, Your Honor.

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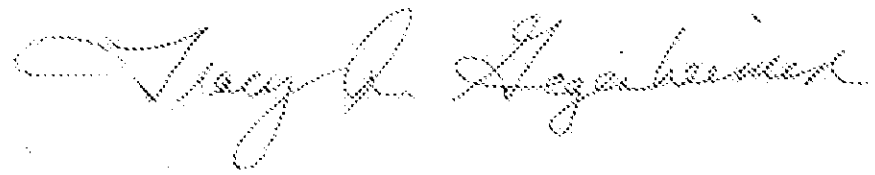
1 THE COURT: And putting up with my cough. And thank you, Mr. Waid.
2 Sorry to keep you waiting on the phone.

3 MR. WAID: Oh, you're just fine.

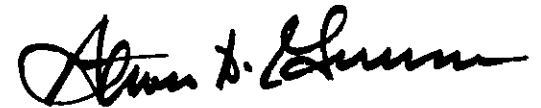
4 THE COURT: Okay. Thanks very much. Okay.

5 [Proceedings concluded at 11:58 p.m.]

6 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual
7 proceedings in the above-entitled case to the best of my ability.

8 

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10 Tracy A. Gegenheimer, CER-282, CET-282
11 Court Recorder/Transcriber
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CLERK OF THE COURT

1 **NOAS**
2 KIRK B. LENHARD, ESQ., Bar No. 1437
3 klenhard@bhfs.com
4 TAMARA BEATTY PETERSON, ESQ., Bar No. 5218
5 tpeterson@bhfs.com
6 BENJAMIN K. REITZ, ESQ., Bar No. 13233
7 breitz@bhfs.com
8 BROWNSTEIN HYATT FARBER SCHRECK, LLP
9 100 North City Parkway, Suite 1600
10 Las Vegas, NV 89106-4614
11 Telephone: 702.382.2101
12 Facsimile: 702.382.8135

13 *Attorneys for Eleanor Connell Hartman Ahern*

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 In the Matter of THE W.N.
17 CONNELL AND MARJORIE T.
18 CONNELL LIVING TRUST
19 DATED May 18, 1972, An Inter
20 Vivos Irrevocable Trust

CASE NO.: P-09-066425-T

DEPT. NO.: XXVI

NOTICE OF APPEAL

21 Notice is hereby given that Eleanor C. Ahern, a/k/a Eleanor Connell Hartman
22 Ahern ("Ms. Ahern"), as beneficiary and as trustee of The W.N. Connell and
23 Marjorie T. Connell Living Trust dated May 18, 1972 (the "Trust"), by and through
24 her counsel of record, the law firm of Brownstein Hyatt Farber Schreck, LLP,
25 hereby respectfully appeals to the Supreme Court of Nevada from this Court's
26 *Summary Judgment* order which was filed on April 16, 2015, and entered on April
27 17, 2015 (the "Summary Judgment Order"), and from this Court's *Order Regarding*
28 *The Accounting, Breach of Fiduciary Duty Claims and Award of Attorneys' Fees*
filed and entered on April 20, 2015 (the "Attorney Fee Order") (collectively, the
Summary Judgment Order and Attorney Fee Order are hereinafter referred to as the
"Orders"), as well as orders, rulings or decisions relating thereto, and any other

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1 order or decision made appealable by entry of the Orders. A copy of the Notice of
2 Entry of the Summary Judgment Order is attached hereto as Exhibit 1. A copy of
3 the Notice of Entry of the Attorney Fee Order is attached hereto as Exhibit 2.

4 DATED this 18th day of May, 2015.

5
6 **BROWNSTEIN HYATT FARBER SCHRECK, LLP**

7
8 By: /s/ Tamara Beatty Peterson
9 KIRK B. LENHARD, ESQ., Bar No. 1437
10 klenhard@bhfs.com
11 TAMARA BEATTY PETERSON, ESQ., Bar No. 5218
12 tpeterson@bhfs.com
13 BENJAMIN K. REITZ, ESQ., Bar No. 13233
14 breitz@bhfs.com
15 Las Vegas, NV 89106-4614
16 Telephone: 702.382.2101
17 Facsimile: 702.382.8135
18
19
20
21
22
23
24
25
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27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be submitted electronically for filing and service with the Eighth Judicial District Court via the Court's Electronic Filing System on the 18th day of May, 2015, to the following:

TODD L. MOODY, ESQ.
tmoody@hutchlegal.com
RUSSEL J. GEIST, ESQ.
rgeist@hutchlegal.com
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
*Attorneys for Fredrick P. Waid,
Court-appointed Trustee*

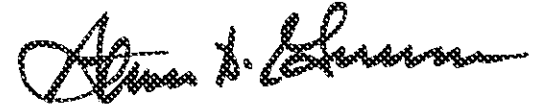
JOSEPH J. POWELL, ESQ.
probate@rushforthfirm.com
THE RUSHFORTH FIRM, LTD.
P.O. Box 371655
Las Vegas, NV 89137-1655
Attorneys for Jacqueline M. Montoya

WHITNEY B. WARNICK, ESQ.
wbw@albrightstoddard.com
ALBRIGHT, STODDARD,
WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
Attorneys for Kathryn A. Bouvier

/s/ Erin Parcels
an employee of Brownstein Hyatt Farber
Schreck, LLP

EXHIBIT 1

EXHIBIT 1



CLERK OF THE COURT

1 **NEOJ**

2 JOSEPH J. POWELL

3 State Bar No. 8875

4 THE RUSHFORTH FIRM, LTD.

5 P. O. Box 371655

6 Las Vegas, NV 89137-1655

7 Telephone: (702) 255-4552

8 fax: (702) 255-4677

9 e-mail: probate@rushforthfirm.com

10 Attorneys for Jacqueline M. Montoya

11 WHITNEY B. WARNICK, ESQ.

12 Nevada Bar No. 001573

13 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

14 801 South Rancho Drive, Suite D-4

15 Las Vegas, Nevada 89106

16 Tel: (702) 384-7111

17 Fax: (702) 384-0605

18 gma@albrightstoddard.com

19 Attorneys for Kathryn A. Bouvier

20 **DISTRICT COURT**

21 **CLARK COUNTY, NEVADA**

22 In the Matter of the

23 **THE W. N. CONNELL and MARJORIE**

24 **T. CONNELL LIVING TRUST**, dated

25 May 18, 1972,

26 A non-testamentary trust.

Case No. P-09-066425-T

Department XXVI, RJC

27 **NOTICE OF ENTRY OF**
28 **ORDER ON SUMMARY JUDGMENT**

NOTICE IS HEREBY GIVEN THAT:

The "Order On Summary Judgment" was entered April 15, 2015 and filed

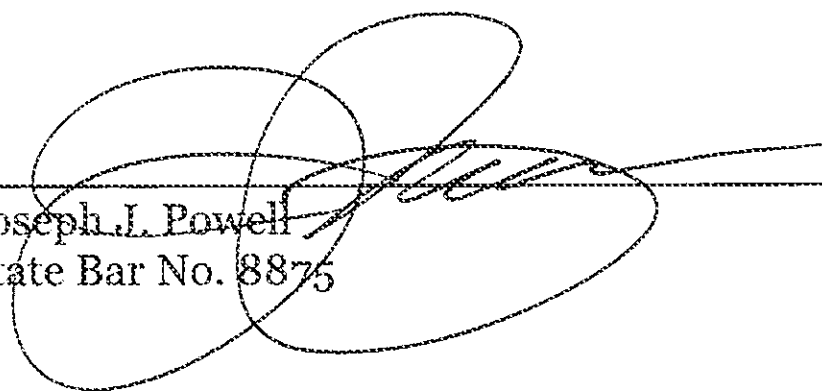
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PO Box 371655
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April 16, 2015 in the above entitled matter, a copy of which is attached hereto.

Respectfully submitted by:



Joseph J. Powell
State Bar No. 8875

4/17/15
Date

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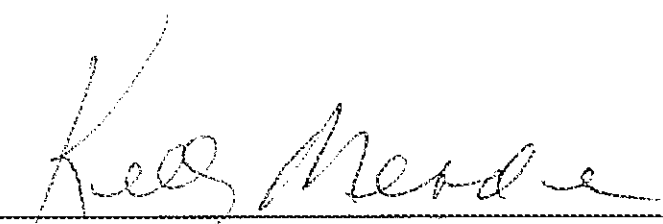
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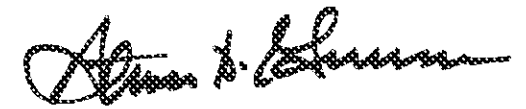
I, the undersigned, hereby certify that on April 17, 2015, I mailed a copy of the
"Notice of Entry of Order On Summary Judgment" that has been filed in this proceeding,
to each person named below by first-class mail, addressed as follows:

Dale A. Hayes, Esq.
Liane K. Wakayama, Esq.
Marquis Aurbach Coffing
10001 Park Run Drive
Las Vegas, NV 89145
Attorneys for Eleanor Connell Harman Ahern

Albright Stoddard Warnick & Albright
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Attorney for Kathryn A. Bouvier

Jacqueline M. Montoya
3385 Maverick Street
Las Vegas, NV 89108


An employee of,
THE RUSHFORTH FIRM, LTD.



CLERK OF THE COURT

1 JUDGE

JOSEPH J. POWELL, ESQ.

2 Nevada Bar No. 008875

THE RUSHFORTH FIRM, LTD.

3 9505 Hillwood Drive, Suite 100

Las Vegas, Nevada 89134

4 Tel: (702) 255-4552

Fax: (702) 255-4677

5 joey@rushforth.net

Attorneys for Jacqueline M. Montoya

6 WHITNEY B. WARNICK, ESQ.

7 Nevada Bar No. 001573

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

8 801 South Rancho Drive, Suite D-4

Las Vegas, Nevada 89106

9 Tel: (702) 384-7111

Fax: (702) 384-0605

10 gma@albrightstoddard.com

Attorneys for Kathryn A. Bouvier

11
12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

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

CASE NO. P-09-066425
DEPT NO. XXVI (26)

Date of Hearing: January 30, 2015
Time of Hearing: 10:00a.m.

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An Inter Vivos Irrevocable Trust.

SUMMARY JUDGMENT

The current proceedings were commenced with the filing on September 27, 2013, of a 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). This Petition was filed by Jacqueline M. Montoya ("Jacqueline") as Trustee of the MTC Living Trust, and on her behalf and that of Kathryn A. Bouvier ("Kathryn"), her sister, as beneficiaries under the MTC Living Trust. During these proceedings several other Petitions, Motions, and Pleadings have been filed by the parties, including those summarized in the chart attached hereto as Exhibit "A".

On December 23, 2014, Jacqueline and Kathryn filed an OPPOSITION TO ELEANOR C. AHERN'S MOTION TO DISMISS PETITION FOR DECLARATORY JUDGMENT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; AND, COUNTERMOTION OF KATHRYN A. BOUVIER AND JACQUELINE M. MONTOYA FOR SUMMARY JUDGMENT ON PETITION FOR DECLARATORY JUDGMENT, FOR DAMAGES AND ASSESSMENT OF PENALTIES. Thereafter, on January 2, 2015, Eleanor Connell Hartman Ahern ("Eleanor") filed an OMNIBUS OPPOSITION TO (1) PETITION FOR DETERMINATION OF CONSTRUCTION AND INTERPRETATION OF LANGUAGE RELATING TO TRUST NO. 2, AND (2) PETITION FOR CONSTRUCTION EFFECT OF PROBATE COURT ORDER; AND COUNTERMOTION FOR SUMMARY JUDGMENT. The parties agreed at the hearing on January 30, 2015, that their above-denominated Countermotions for Summary Judgment, and the claims and defenses asserted therein, subsumed all of the prior Petitions, Motions and Pleadings, and their defenses and claims asserted therein, as well as those briefed and discussed in the further replies, oppositions and supplements to their Countermotions, ~~as listed on the chart attached hereto as Exhibit "A"~~ (other than Jacqueline's and Kathryn's Motion for Leave to Amend Pleadings filed herein on January 12, 2015). Therefore, it was agreed, and the Court recognized, that the parties' claims and defenses in these proceedings could be resolved summarily by the Court in its adjudication of the parties' said Countermotions for Summary Judgment.

After reviewing the Countermotions for Summary Judgment, and the presentation of argument for and rebuttal against the Countermotions by the parties, the Court finds as follows:

1. A proceeding involving the subject Trust was initially commenced in 2009 by Eleanor, as Trustee of the W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972 (herein referred to as the "Trust"), with an unopposed Petition to

1 obtain a Court order clarifying to whom subtrust benefits would be paid upon her
2 death. The Court assumed jurisdiction over the Trust, recognizing that Eleanor, as
3 Trustee, was a Nevada resident, and the Trust provisions provided that it would be
4 administered pursuant to Nevada law. The unopposed Petition was consented to by
5 Jacqueline and Kathryn as contingent beneficiaries of subtrust No. 2 under the Trust,
6 and the Court approved the Petition by Order filed herein on September 4, 2009.
7 Pursuant to the Order, the Trust was reformed to provide that Jacqueline and Kathryn
8 were designated as the beneficiaries under subtrust No. 2 upon the death of Eleanor,
9 which had not theretofore been clearly delineated in the Trust provisions. In addition,
10 Jacqueline was designated as the successor Trustee under the Trust upon the death or
11 removal of Eleanor as the Trustee.

12 2. When the Trust was created in 1972, community property of W.N. Connell
13 ("William") and Marjorie T. Connell ("Marjorie"), along with two parcels of William's
14 separate real property, were transferred to the Trust. One parcel of William's separate
15 property was located in Clark County, Nevada. The other parcel consisted of a parcel
16 of real property and oil, gas and mineral rights relating thereto, located in Upton
17 County, Texas (hereinafter "Texas oil property"). In 1975, William and Marjorie, as
18 Trustees, deeded the Clark County, Nevada, separate property from their Trust to
19 Eleanor, personally, it having a ^{declared} value at the time, based upon the transfer tax paid, of
20 approximately \$55,000.00.

21 3. The dispute in these Trust proceedings relates to the ownership of and
22 entitlement to income from the Texas oil property. At the time of William's death on
23 November 24, 1979, the Texas oil property was the only remaining separate property
24 of William which had been titled in the Trust. The Trust provisions created two
25 subtrusts upon the death of William in 1979 (referred to in the Trust as Trust No. 2 and
26 Trust No. 3, and hereinafter referred to as "subtrust 2" and "subtrust 3"). Income
27 allocated to subtrust 2 was payable to Eleanor during her lifetime. Marjorie was the
28 beneficiary of the income and assets under subtrust 3, including the right during her

1 lifetime, at her election, to receive the assets outright free of trust. She was also given
2 the option of appointing the benefits under subtrust 3 in her Will to whomever she
3 desired. If she failed to remove the assets from subtrust 3 during her lifetime, or to
4 appoint them under her will, the benefits and assets under subtrust 3 would have
5 devolved by default to Eleanor.

6 4. Under the Trust provisions, Article SECOND, Section C.3, subtrust 3 was
7 to be funded with Marjorie's separate property, her share of the community property,
8 and a portion of William's separate property. The portion of William's separate
9 property to be allocated to subtrust 3 is determined by the provisions in Article THIRD
10 of the Trust. These provisions state:

11 "THIRD: MARITAL DEDUCTION. The Trustee shall allocate to Trust No. 3
12 from the Decedent's separate property the fractional share of the said assets which is
13 equal to the maximum marital deduction allowed for federal estate tax purposes . . . In
14 making the computations and allocations of the said property to Trust No. 3 as herein
15 required, the determination of the character and ownership of the said property and the
16 value thereof shall be as finally established for federal estate tax purposes."

17 5. Federal and Texas Estate Tax Returns were filed for William's estate
18 following his death. At the time of these proceedings, a copy of the Federal Estate Tax
19 Return could not be located, even the IRS no longer maintaining a copy thereof.
20 However, a copy of William's Texas Estate Tax Return, and a copy of the Closing
21 Letter for his Federal Estate Tax Return were available. The Texas Estate Tax Return
22 basically duplicated the information provided on the Federal Estate Tax Return, thereby
23 providing how William's estate was allocated and distributed on the Federal Estate Tax
24 Return. Daniel T. Gerety, CPA, an expert witness for Jacqueline and Kathryn, also
25 verified in his Report that the Texas Estate Tax Return used the property allocations
26 made on the Federal Estate Tax Return, and that the two Returns were consistent.

27 6. Under these two Estate Tax Returns, a 64.493% interest in the Texas oil
28 property was allocated to Marjorie, the beneficiary under subtrust 3, and the remaining
35.507% interest in the Texas oil property was allocated to Eleanor, the beneficiary
under subtrust 2. Further, as provided under Article THIRD, quoted above, this

1 allocation of interests in the Texas oil property determined the allocation of interests
2 in that property between subtrust 2 and subtrust 3 under the Trust. For purposes of
3 convenience, the interests in the Texas oil property are rounded to 65% and 35%. The
4 title to the Texas oil property has remained in the main Trust to the present day.

5 7. Upon William's death, Marjorie became the sole acting Trustee for the
6 main Trust, and the subtrusts thereunder. Pursuant to Article SECOND, Section C.6
7 of the Trust, and shortly after William's death in 1980, Eleanor was appointed by
8 Marjorie to be the co-trustee with her over William's separate property remaining in
9 the Trust; that is, over the Texas oil property which had been allocated between
10 subtrust 2 and subtrust 3. A copy of Eleanor's appointment as co-trustee, along with
11 a copy of the Trust, was recorded with the Upton County Texas Recorder's Office.

12 8. Thereafter, Marjorie sent letters to the oil companies with whom the Trust
13 had leases, advising them of William's death and that she and Eleanor were co-trustees
14 over the Texas oil property owned by the Trust. She directed that all further documents
15 which needed to be signed with the oil companies thereafter recognize the need for her
16 and Eleanor's signature.

17 9. From the time of William's death and the allocation of interests in the
18 Texas oil property between subtrust 2 and subtrust 3, until Marjorie's death on May 1,
19 2009, Eleanor was paid 35% of the Texas oil property income and Marjorie was paid
20 the remaining 65% of the income. Each was allocated a K-1 showing her receipt of her
21 share of the income, and each included the income in her annual Federal Income Tax
22 Returns.

23 10. Prior to her death, on January 7, 2008, Marjorie executed her last Will
24 and Testament, wherein she exercised her Power of Appointment over the assets and
25 benefits under subtrust 3, appointing them to Jacqueline and Kathryn as beneficiaries
26 under her MTC Living Trust. Following Marjorie's death, Eleanor, Jacqueline and
27 Kathryn met with David Strauss, Esq, Marjorie's estate planning attorney. Mr. Strauss
28 had previously provided Eleanor with a copy of Marjorie's Will containing the exercise

1 of her Power of Appointment over subtrust 3. In their meeting, he discussed with them
2 Marjorie's exercise of the Power of Appointment transferring to Jacqueline and
3 Kathryn the rights and interests of Marjorie under subtrust 3 of the Trust, thereby
4 entitling Jacqueline and Kathryn to receive the approximate 65% share of income being
5 generated by the Texas oil property going forward.

6 11. No one expressed any objection to what Mr. Strauss had advised them.
7 Thereafter, in the filing of Marjorie's Federal Estate Tax Return, the value of the 65%
8 interest in the Texas oil property allocated to Marjorie under the Trust was included
9 within her Federal taxable estate and Estate Tax Return, increasing the value of her
10 estate to a taxable estate, requiring the payment of over \$140,000.00 in Federal Estate
11 taxes. Most of Marjorie's estate at the time of her death, through her MTC Living
12 Trust, went to Jacqueline and Kathryn in equal shares. However, in addition to several
13 smaller bequests to friends, Marjorie also bequeathed to Eleanor, through the MTC
14 Living Trust, the sum of \$300,000.00.

15 12. From the time of Marjorie's death until approximately June, 2013, the
16 income from the Texas oil property was allocated with Eleanor continuing to receive
17 a 35% share, and Jacqueline and Kathryn receiving the remaining 65% share. In June,
18 2013, Eleanor as the sole acting Trustee of the Trust, stopped further income
19 distributions to Jacqueline and Kathryn, asserting at that time that she was entitled to
20 100% of the income from the Texas oil property. This led to the filing by Jacqueline
21 on September 27, 2013, of the PETITION FOR DECLARATORY JUDGMENT
22 REGARDING LIMITED INTEREST OF TRUST ASSETS PURSUANT TO NRS
23 30.040, NRS 153.031(1)(E), AND NRS 164.033(1)(A).

24 13. Prior to asserting her right to 100% of the income from the Texas oil
25 property in June, 2013, and the cutting off of any further income distributions from the
26 Trust to Jacqueline and Kathryn, Eleanor had never asserted a claim or right to more
27 than 35% of the Texas oil property income as the lifetime beneficiary to income under
28 subtrust 2. However, in her pleadings and documents filed in these proceedings, she

1 claims she was aware of an alleged mistake made in the allocation of the Texas oil
2 property between subtrust 2 and subtrust 3 shortly after the death of William in 1979.
3 However, rather than assert a claim to all of the income, or otherwise make a claim or
4 start a legal action, Eleanor testified that she decided to do nothing. At one point in
5 these proceedings she testified in her pleadings and documents filed that her inaction
6 was motivated by a fear that it would upset Marjorie if she made a claim to more than
7 a 35% interest. She also testified in these proceedings that her inaction was due to the
8 fact she was happy to allow Marjorie to have 65% of the Texas oil property income,
9 feeling she was being generous and helping to support her mother. She asserted the
10 same motivation of generosity as the basis for her allowing Jacqueline and Kathryn to
11 continue receiving a 65% share of the Texas oil property income following the death
12 of Marjorie in 2009, and until her stoppage of income distributions to them in June,
13 2013.

14 14. However, in 1983, as testified to by Robert Hartman in his affidavit, in the
15 course of Eleanor's divorce proceeding from him, her right to only 35% of the Texas
16 oil property income was asserted and relied upon by the Court in its division of
17 property and determination of his support rights and obligations to Eleanor and their
18 two children. Then, a few years later, as shown on an estate planning intake sheet,
19 when Eleanor met with her own estate planning attorney, she advised him that she was
20 only entitled to 35% of the Texas oil property income, and that Marjorie was the owner
21 of the remaining 65% interest.

22 15. Although Eleanor claims she was being generous in giving to Marjorie
23 65% of the Texas oil property income during the balance of Marjorie's life following
24 the death of William in 1979, Marjorie's communications and conduct supported her
25 belief that she owned the rights to 65% of the Texas oil property income as the
26 beneficiary under subtrust 3. This is confirmed in several memoranda/letters prepared
27 by Marjorie, and in the inclusion of the 65% interest in her taxable estate at the time
28 of her death.

1 16. To summarize, no evidence was produced by Eleanor of any claim or
2 assertion being made by her to anyone else to a right to more than 35% of the Texas oil
3 property income from the time of William's death until June, 2013, when she first
4 asserted her claim to 100% of the income by cutting off income distributions to
5 Jacqueline and Kathryn. Further, Marjorie never communicated or acknowledged to
6 anyone else that she was not entitled to 65% of the Texas oil property income, always
7 acting consistently with owning a right to the income under the Trust allocation of the
8 Texas oil property made following William's death in 1979.

9 17. As purported evidence supporting her claim to 100% of the Trust income
10 from the Texas oil property, Eleanor presented copies of Division Orders and Leases
11 between the oil companies and the Trust relating to the Texas oil property. From the
12 time that Eleanor was made co-trustee with Marjorie over William's separate property
13 owned by the Trust until approximately 1989, it appears that in signing the Division
14 Orders and Leases with the oil companies, Marjorie and Eleanor provided their
15 personal Social Security Numbers as a tax identification number when such a number
16 was requested by the oil companies. However, apparently after it was brought to their
17 attention by an oil company that the Trust was the owner of the Texas oil property and
18 not themselves personally, and the oil company requested and recommended that a tax
19 identification number for a Trust be provided, in approximately 1989, Marjorie and
20 Eleanor started providing a tax identification number to the oil companies which had
21 been assigned by the IRS to subtrust 2. They never provided the tax identification
22 number which had been assigned by the IRS to subtrust 3. However, the Court was not
23 provided with any dates on when subtrust 2 and subtrust 3 were first assigned tax
24 identification numbers.

25 18. Nevertheless, and notwithstanding a tax identification number for subtrust
26 2 was the only tax identification number apparently given to the oil companies from
27 and after 1989, in the actual allocation of income received from the Texas oil property,
28 and in the issuance of K-1's and the filing of their Federal Income Tax Returns,

1 Eleanor's share of the income was always a 35% share and Marjorie, while she was
2 alive, always received the remaining 65% share. Following Marjorie's death, the 65%
3 share went to Jacqueline and Kathryn until the cessation of distributions by Eleanor in
4 June, 2013.

5 19. Eleanor also asserted that the Trust was a special Trust created to retain
6 the Texas oil property for the benefit of only William and his blood descendants.
7 However, since at the time of William's death, the only separate property of his that
8 remained in the Trust was the Texas oil property, pursuant to the Trust provisions, a
9 portion of that property had to be allocated to subtrust 3 in order to obtain the
10 maximum Marital Deduction for Federal Estate Tax savings. In following the Trust
11 provisions, the Texas oil property could not all be allocated to subtrust 2. Further,
12 whatever William's intent may have been when he and Marjorie first created the Trust
13 in 1972, by their deeding the Clark County, Nevada, separate property to Eleanor in
14 1975, William knew that the only remaining separate property of his in the Trust at the
15 time of his death would be the Texas oil property.

16 20. Lastly, in support of her position, Eleanor asserted that Jacqueline and
17 Kathryn acknowledged that she owned rights to all of the income from the Texas oil
18 property by their consents to and verifications of the 2009 Petition Eleanor filed to
19 clarify ownership of subtrust 2 upon her death. Eleanor asserted that in this Petition
20 there are statements averring that she owned the rights to all of the Texas oil property
21 income. However, the Petition's language can also be read as asserting that Eleanor's
22 right to income from the Texas oil property only refers to her 35% interest. More
23 significantly, the 2009 Petition was not filed to clarify rights to the Texas oil property
24 income. Rather, it was a consentient Petition with the purpose only of clarifying
25 entitlement to the benefits of subtrust 2 upon Eleanor's death, and to designate a
26 successor Trustee for the Trust upon her death.

27 21. Based upon the foregoing undisputed facts presented to the Court with the
28 Affidavits and documentary evidence submitted by the parties with their

1 Countermotions and briefs, and from the argument of counsel at the hearing, the Court
2 finds that Eleanor's interest in the Texas oil property income, as the beneficiary under
3 subtrust 2 of the Trust, is limited to a 35% share, and her claim to all of the income is
4 not supported in any way by the facts in this case. The remaining 65% share belongs
5 to subtrust 3 and Jacqueline and Kathryn, equally, as the beneficiaries under the MTC
6 Living Trust, as bequeathed and appointed to them by Marjorie in her Will. While title
7 to the Texas oil property remains titled in the main Trust, in the event a division of the
8 title now needs to be made between the two subtrusts, such division should be made
9 as recognized in the Trust administration, with the filing of William's Estate Tax
10 Returns, and the allocation between the subtrusts resulting therefrom, with a 35%
11 interest being deeded to subtrust 2, and a 65% interest being deeded to subtrust 3 (and
12 thereafter said 65% interest being deeded to the MTC Living Trust, with Jacqueline and
13 Kathryn as equal beneficiaries, should that be their request). Accordingly, Jacqueline's
14 and Kathryn's Countermotion for Summary Judgment regarding ownership of the
15 Texas oil property should be granted; and, Eleanor's Countermotion for Summary
16 Judgment should be denied.

17 22. While the Court finds that Jacqueline's and Kathryn's claim to 65% of the
18 Texas oil property and income is supported by the facts and merits of the case, and that
19 Eleanor's claim to more than 35% is not supported by the facts and merits of the case,
20 regardless of the merits of Eleanor's position, her claim to more than 35% of the
21 income from the Texas oil property cannot be supported or allowed for equitable
22 reasons because she has been guilty of laches in asserting her claim. Her assertion of
23 a claim to 100% of the income in June, 2013, makes no sense after failing in anyway
24 to assert a claim to more than 35% of the income prior to that time. During
25 approximately 34 years, from the death of William and her admitted awareness of the
26 allocation of the Texas oil property under the Trust provisions, until her first assertion
27 of a claim to more than 35% of the income in June, 2013, Eleanor never filed a claim
28 in any court, or otherwise asserted a claim or right to more than 35% of the income.

1 During this time, material documentary evidence, such as William's Federal Estate Tax
2 Return has been lost. During this time key witnesses, such as the accountant and other
3 professionals who prepared and filed William's Estate Tax Returns, as well as Marjorie
4 herself, have died. During this time period Jacqueline and Kathryn, and Marjorie while
5 she was living, made decisions affecting their personal and financial well-being in
6 reliance upon Eleanor's acceptance of the Texas oil property allocation under the Trust,
7 based upon her conduct and failure to make any challenge of the allocation. Eleanor's
8 claim to all of the income first asserted in approximately June, 2013, is made far too
9 late and has caused prejudice to Jacqueline and Kathryn because of the loss of evidence
10 and testimony of key witnesses, clearly requiring a rejection of Eleanor's position and
11 claim in these proceedings under the equitable doctrine of laches.

12 23. Concern was expressed by Jacqueline and Kathryn to Eleanor, through
13 counsel, during 2014 as to the status of funds Eleanor was required to hold in trust on
14 their behalf should the Court rule in their favor in these proceedings. An accounting
15 was requested from Eleanor's former counsel, and they were in the process of preparing
16 the same when Eleanor dismissed her former counsel and engaged new counsel.
17 *is ordered to provide by March 2, 2015, an*
~~Eleanor needs to follow through with the providing of this accounting for the Texas oil~~
18 property income, including the providing of information to Jacqueline and Kathryn
19 showing the total income received, expenses incurred, and distributions made of the
20 income from the beginning of 2012 to the present. Any income which should have
21 been distributed to Jacqueline and Kathryn during this time period, shall be accounted
22 for and reimbursed to them by Eleanor within 30 days from the date this judgment is
23 entered.

24 24. As noted in the chart attached hereto as Exhibit "A", Jacqueline and
25 Kathryn filed a Motion for Leave to Amend Pleadings, which was set for hearing on
26 January 30, 2015. As noted in this Motion and the Supplement thereto, they filed their
27 Motion out of an abundance of caution in that Eleanor in her briefing in support of her
28 Countermotion indicated that she did not feel Jacqueline and Kathryn had properly

1 pleaded all of their claims for relief and defenses for consideration by the Court at the
2 scheduled hearing. While Jacqueline and Kathryn disagreed with Eleanor's pleading
3 concerns, the pleadings and hearings in these proceedings had become disjointed in that
4 a companion Will Contest case, filed with this Court by Eleanor in Case No. P-14-
5 080595-E, intervened to suspend and continue the Trust matters until after the Will
6 Contest case was resolved. The Will Contest was resolved with a Stipulation for
7 Dismissal in early January, 2015. Further, Eleanor has been represented by three
8 different sets of attorney's in these proceedings. Her current attorneys only
9 commencing representation in late November, 2014, and they were not initially familiar
10 with the prior proceedings in this case and the effect of the Will Contest case
11 intervention. In any event, the Court finds that the initial pleadings filed on behalf of
12 Jacqueline and Kathryn in these proceedings properly plead the claims for relief and
13 the defense that the Court has relied upon in granting Judgment to them in these
14 proceedings. Eleanor clearly had notice of the pleadings and in fact the parties
15 negotiated over all of the claims for relief and the affirmative defenses alleged by
16 Jacqueline and Kathryn in concerted settlement negotiations in October, 2014, and such
17 claims and defenses were contained in the several Petitions and Motions filed during
18 the proceedings. In particular the defense of laches was mentioned in the context of
19 equitable defenses mentioned in the initial pleading, and was the subject of a Motion
20 to Dismiss and resolve the case summarily both in late 2013 and in early 2014.
21 Accordingly, the Court finds that there is no reason to file an Amended Pleading in
22 these proceedings and Jacqueline and Kathryn's Motion seeking permission to file the
23 same is considered moot and resolved.

24 25. There are still some claims and issues that the Court is not resolving at this
25 time. Eleanor filed a counterclaim for wrongful interference with contract with her
26 Answer and Counterclaim filed herein on February 10, 2014. The Court finds that this
27 Counterclaim should be dismissed without prejudice at this time, since the issues
28 therein were not addressed by the Court in the January 30, 2015, hearing, but it seems

1 that the issues would be resolved with its decision herein on the Countermotions.
2 Nevertheless, if Eleanor believes she has a valid claim still against Jacqueline for
3 wrongful interference with contract, as asserted in her Answer and Counterclaim, she
4 is free to reassert the same.

5 26. Each of the parties asserted a claim against the other in these proceedings
6 seeking to have the Court enforce the no-contest clause contained in the Trust against
7 the other party. The Court finds that the positions of each of the parties, seeking the
8 correct interpretation of the Trust provisions as to entitlement to the Texas oil property,
9 were not asserted in bad faith, and that therefore good cause to impose the no-contest
10 penalties does not exist and such claims are denied with respect to both parties, Eleanor
11 on the one hand, and Jacqueline and Kathryn on the other hand.

12 27. There still remains the issues and concerns of who will serve hereafter as
13 the Trustee of the Trust, and whether or not the interests of subtrust 2 and subtrust 3
14 in the Texas oil property should now be formally split and allocated with deeds from
15 the main Trust to the subtrusts, so the parties can go their separate ways in dealing with
16 their interests in the Texas oil properties, subject to the terms of the Trust with respect
17 to subtrust 2. Clearly, under the Trust provisions, the beneficiaries under subtrust 3 are
18 granted the right to remove their interest in the Texas oil property out of the main Trust
19 and subtrust 3, to be owned independently by the MTC Living Trust and Jacqueline
20 and Kathryn as beneficiaries thereunder. However, the Court is directing the parties
21 to submit to the Court, on or before March 2, 2015, information regarding the
22 feasibility and effect of now splitting the Texas oil property between subtrust 2 and
23 subtrust 3 (or the MTC Living Trust), and whether or not such division of interests
24 could adversely affect the value and future ownership of the interests hereafter. The
25 Court will set a hearing to consider this issue on March 20, 2015, at 10:00a.m.

26 28. With respect to whether or not Eleanor should be able to continue serving
27 as Trustee, to address both Jacqueline's and Kathryn's position that she should be
28 removed for breach of her duties as Trustee, and Eleanor's position that she is not

1 disqualified from serving, the Court also is directing the parties to provide a brief in
2 support of their positions, filed on or before March 2, 2015, with the issue to then be
3 addressed by the Court at the hearing on March 20, 2015.

4 29. Lastly, with respect to the claim Jacqueline and Kathryn have made for an
5 award of attorney's fees against Eleanor, the Court is directing that the parties file with
6 their briefs due on or before March 2, 2015, their argument and basis for their positions
7 on the award of attorney's fees and costs against Eleanor for the Court to then resolve
8 at the hearing on March 20, 2015.

9 30. In addition to the matters addressed at the hearing on January 30, 2015,
10 there is a pending appeal to the Nevada Supreme Court, assigned Case No. 66231, filed
11 by Eleanor, appealing a portion of the Court's Order in these proceedings entered on
12 July 7, 2014. With the resolution of issues in this case as herein provided, the matter
13 on appeal is now rendered moot. Therefore, the parties should submit a stipulation to
14 the Nevada Supreme Court dismissing that appeal.

15 JUGMENT

16 Pursuant to NRCP Rule 56, the Court finds that the pleadings and other
17 documents filed herein, together with the affidavits and documentary evidence
18 presented, show there is no genuine issue as to any material fact and that Jacqueline
19 and Kathryn are entitled to judgment against Eleanor as a matter of law in these
20 proceedings. Therefore, and based upon the foregoing findings, good cause exists to
21 now render judgment against Eleanor, in favor of Jacqueline and Kathryn, as follows:

22 A. Jacqueline's and Kathryn's Countermotion for Summary Judgment is
23 granted in part as hereinafter provided. The Court hereby declares, adjudges and
24 determines that the allocation of interests in the Texas oil property between subtrust 2
25 and subtrust 3, under the W.N. Connell and Marjorie T. Connell Living Trust, dated
26 May 18, 1972, was properly made under the Trust provisions, with subtrust 2 receiving
27 a 35.507% interest in the Texas oil property and subtrust 3 receiving a 64.493%
28 interest in the Texas oil property.

1 B. The Court adjudges and determines that even if the allocation of the Texas
2 oil property made following the death of William in 1979, in conjunction with the
3 filing of his Federal and Texas Estate Tax Returns, was not properly or accurately made
4 between the two subtrusts, Eleanor's claim and effort to now challenge the allocation
5 and assert an interest greater than 35.507% in the Texas oil property being in subtrust
6 2, is too late and barred under the doctrine of laches, thereby making the actual division
7 made final and binding upon her.

8 C. Eleanor's Countermotion for Summary Judgment is hereby denied.

9 D. On or before March 2, 2015, Eleanor shall provide to Jacqueline and
10 Kathryn an accounting of the Texas oil property income received by the Trust from
11 January 1, 2012, through the entry of this Summary Judgment, showing the total
12 income received, expenses incurred, and any distributions made of the income. Within
13 30 days following the entry of this Summary Judgment, Eleanor shall reimburse and
14 pay to Jacqueline and Kathryn any portion of their 65% share of the Texas oil property
15 income which was not distributed to them during this period of time. From and after
16 the entry of this Summary Judgment, 35% of the Texas oil property income shall be
17 distributed to Eleanor as beneficiary under subtrust 2, and 65% of the income shall be
18 distributed equally between Jacqueline and Kathryn as beneficiaries under subtrust 3
19 and the MTC Living Trust.

20 E. Eleanor's Counterclaim for wrongful interference with contract asserted
21 with her Answer and Counterclaim filed herein on February 10, 2014, is hereby
22 dismissed without prejudice.

23 F. The Court adjudges and determines that the positions of each of the
24 parties, seeking the correct interpretation of the Trust provisions as to entitlement to
25 the Texas oil property, were not asserted in bad faith, and that therefore good cause to
26 impose the no-contest penalties does not exist and such claims, both Eleanor's claim
27 on the one hand, and Jacqueline's and Kathryn's claim on the other hand, are denied
28 with prejudice.

1 G. Each of the parties is directed to file further briefing on the following
2 issues with the Court on or before March 2, 2015, which issues and matters will be
3 resolved by the Court at the next hearing in these proceedings, hereby set on March 20,
4 2015, at 10:00a.m.:

5 1) In the event there is no formal splitting of the Texas oil property between
6 subtrust 2 and subtrust 3 at this time, is there cause to remove Eleanor as Trustee and
7 appoint Jacqueline as the successor Trustee of the Trust and the subtrusts thereunder?
8 If cause does not exist for Eleanor's removal, would it still be better to appoint a
9 neutral successor Trustee?

10 2) Should the interests of subtrust 2 and subtrust 3 in the Texas oil property
11 now be formally split and allocated with deeds from the main Trust to the subtrusts, so
12 the parties can go their separate ways in dealing with their interests in the Texas oil
13 properties, subject to the terms of the Trust with respect to subtrust 2? The Court wants
14 the parties to provide recommendations from qualified persons knowledgeable with
15 respect to the Texas oil and mineral rights and the potential harm or benefit that could
16 result in a splitting of the interests between the parties, and whether or not such
17 division of interests could adversely affect the value and future ownership of the
18 interests hereafter.

19 3) Lastly, with respect to the claim Jacqueline and Kathryn have made for an
20 award of attorney's fees against Eleanor, the Court directs the parties to provide their
21 argument and basis for their positions on the award of attorney's fees and costs against
22 Eleanor in briefing filed on or before March 2, 2015, for the Court to then resolve at
23 the scheduled hearing on March 20, 2015.

24 H. The parties shall each sign a Stipulation and Order for Dismissal of the
25 Appeal presently pending in Nevada Supreme Court Case No. 66231, filed by Eleanor,
26 appealing a portion of the Court's Order in these proceedings entered on July 7, 2014.

27 I. The Court retains jurisdiction over the Trust pending the finalization and
28 resolution of the remaining issues mentioned above, to be addressed hereafter at the

ASWA

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
ATTORNEYS AT LAW
10000 PARK RUN DRIVE
LAS VEGAS, NV 89145
(702) 382-0711

1 hearing scheduled on March 20, 2015, at 10:00a.m. Until that date, Eleanor shall
2 continue to exercise and fulfill her duties as Trustee of the Trust, and the parties shall
3 all cooperate, in the best interest of the Trust and its beneficiaries, in any dealings with
4 the oil companies affecting the Texas oil property.

5 SO ORDERED AND ADJUDGED this 15 day of April, 2015.

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28
DISTRICT COURT JUDGE

Submitted by:

ALBRIGHT, STODDARD,
WARNICK & ALBRIGHT

By:

WHITNEY B. WARNICK, ESQ.
Nevada Bar No. 001573
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111

Attorneys for Kathryn A. Bouvier

Approved by:

MARQUIS AURBACH COFFING

By:

LIANE K. WAKAYAMA, ESQ.

Nevada Bar No. 11313

CANDICE E. RENKA, ESQ.

Nevada Bar No. 11447

10001 Park Run Drive

Las Vegas, NV 89145

Tel: (702) 382-0711

Attorneys for Eleanor Connell Hartman Ahern

Submitted by:

THE RUSHFORTH FIRM, LTD.

By:

JOSEPH J. POWELL, ESQ.

Nevada Bar No. 00875

P.O. Box 371655

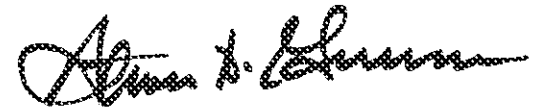
Las Vegas, NV 89137-1655

Tel: (702) 255-4552

Attorneys for Jacqueline M. Montoya

EXHIBIT 2

EXHIBIT 2



CLERK OF THE COURT

1 **Marquis Aurbach Coffing**

2 Dale A. Hayes, Esq.

3 Nevada Bar No. 3430

4 Liane K. Wakayama, Esq.

5 Nevada Bar No. 11313

6 Candice E. Renka, Esq.

7 Nevada Bar No. 11447

8 10001 Park Run Drive

9 Las Vegas, Nevada 89145

10 Telephone: (702) 382-0711

11 Facsimile: (702) 382-5816

12 dhayes@maclaw.com

13 lwakayama@maclaw.com

14 crenka@maclaw.com

15 Attorneys for Eleanor Connell Hartman Ahern

16 **DISTRICT COURT**

17 **CLARK COUNTY, NEVADA**

18 In the Matter of

Case No.: P-09-066425-T

Dept. No.: 26

19 THE W.N. CONNELL AND MARJORIE T.
20 CONNELL LIVING TRUST DATED May 18,
21 1972, An Inter Vivos Irrevocable Trust.

22 **NOTICE OF ENTRY OF ORDER**

23 Please take notice that an Order Regarding the Accounting, Breach of Fiduciary Duty
24 Claims and Award of Attorney Fees was entered in the above-captioned matter on the 20th day of
25 April, 2015, a copy of which is attached hereto.

26 Dated this 20th day of April, 2015.

27 **MARQUIS AURBACH COFFING**

28 By 

Dale A. Hayes, Esq.

Nevada Bar No. 3430

Liane K. Wakayama, Esq.

Nevada Bar No. 11313

Candice E. Renka, Esq.

Nevada Bar No. 11447

10001 Park Run Drive

Las Vegas, Nevada 89145

Attorneys for Eleanor Connell Hartman Ahern

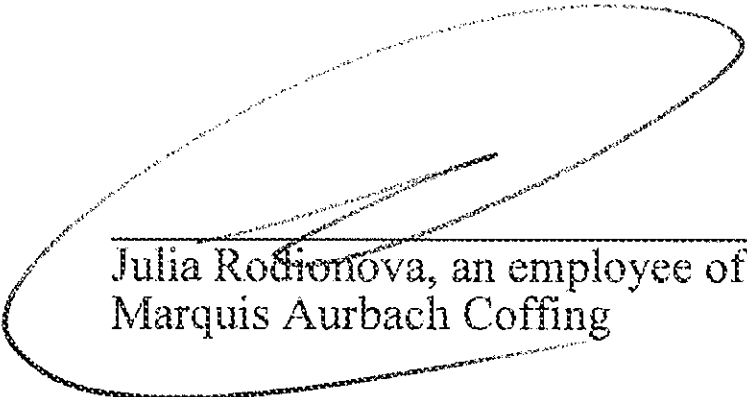
CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 20th day of April, 2015. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

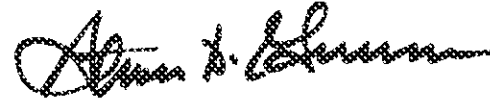
Albright Stoddard Warnick & Albright		
Contact	Email	
Barbara Clark, Legal Assistant	bclark@albrightstoddard.com	
G. Mark Albright, Esq.	gma@albrightstoddard.com	
Whitney B. Warnick	wbw@albrightstoddard.com	
<hr/>		
Hutchison & Steffen		
Contact	Email	
Russel J. Geist	rgeist@hutchlegal.com	
<hr/>		
Hutchison & Steffen, LLC		
Contact	Email	
Arriber Anderson	aanderson@hutchlegal.com	
Whitney Stockton	wstockton@hutchlegal.com	
<hr/>		
The Rushforth Firm		
Contact	Email	
Probate	probate@rushforthfirm.com	
<hr/>		
The Rushforth Firm, Ltd.		
Contact	Email	
Joseph J. Powell	probate@rushforthfirm.com	

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

Eleanor Connell Hartman Ahern
8635 W. Sahara Ave., #549
Las Vegas, Nevada 89117-5838


Julia Rodionova, an employee of
Marquis Aurbach Coffing

¹ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).



CLERK OF THE COURT

Marquis Aurbach Coffing
Dale A. Hayes, Esq.
Nevada Bar No. 3430
Liane K. Wakayama, Esq.
Nevada Bar No. 11313
Candice E. Renka, Esq.
Nevada Bar No. 11447
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
dhayes@maclaw.com
lwakayama@maclaw.com
crenka@maclaw.com
Attorneys for Eleanor Connell Hartman
Ahern, as Trustee

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of

THE W.N. CONNELL AND MARJORIE T.
CONNELL LIVING TRUST DATED May 18,
1972, An Inter Vivos Irrevocable Trust.

Case No.: P-09-066425-T

Dept. No.: 26

Date of Hearing: March 20, 2015

Time of Hearing: 10:00 a.m.

**ORDER REGARDING THE ACCOUNTING, BREACH OF FIDUCIARY DUTY
CLAIMS AND AWARD OF ATTORNEY FEES**

This matter, having come before the Honorable Gloria Sturman on March 20, 2015, 2015 for summary judgment, Whitney B. Warnick, Esq. of the law firm Albright Stoddard, Warnick & Albright appearing on behalf of Kathryn A. Bouvier, Joseph J. Powell, Esq. of the Rushforth Firm, Ltd. appearing on behalf of Jacqueline M. Montoya, and Dale A. Hayes, Esq. and Liane K. Wakayama, Esq. of the law firm Marquis Aurbach Coffing appearing on behalf of Eleanor Connell Hartman Ahern, as Trustee of The W.N. Connell and Marjorie T. Connell Living Trust dated May 18, 1972, the Court having considered the Brief Regarding Pending Issues; the Brief Regarding Accounting, Fiduciary Duties, and Trust Administration; the Supplement to Brief Regarding Pending Issues; the Supplement to Brief Regarding Accounting, Fiduciary Duties, and Trust Administration; the Second Supplement to Brief Regarding Pending Issues, and the underlying papers and pleadings, as well as the oral arguments of counsel, and good cause appearing therefore, the Court FINDS and ORDERS as follows:

2. The Court set a hearing on the remaining issues to be held on March 20, 2015.

3. On March 13, 2015, Eleanor filed a Brief regarding the Accounting, fiduciary duties and trust administration ("Eleanor's Brief").

4. Attached to Eleanor's Brief was an Accounting prepared by Certified Public Accountants, Gamett and King, for the time period of June 2013 through January 2015 (the "Accounting").

5. All expenses identified in the Accounting except for the \$218,760.17 in Trustee fees are approved. The Court finds the Trustee fees unreasonable and not supported in any way. The Court further finds that it is improper for a Trustee to charge a 6% fee plus overhead expenses for staff and office space. The Court therefore finds that the easiest solution is to back out the Trustee's Fee from the Accounting as an unapproved expense; however, Eleanor may be entitled to compensation for her time in serving as Trustee.

6. The \$37,000 distribution to Jacqueline and Kathryn in June 2013 was for income earned and received by the Trust prior to June 2013. The Court therefore finds that the \$37,000 distribution should not be included in the Accounting as a credit to the 65% share that is to be held in trust for the benefit of Jacqueline and Kathryn.

7. Based on removing the \$218,760.17 in Trustee fees and not crediting the \$37,000 distribution, the Court finds that a total of \$2,163,758.88 shall be held in trust for the benefit of Jacqueline and Kathyrn, which represents their 65% share of the total net income received by the Trust from June 1, 2013 through January 31, 2015.

1 8. The \$500,000 on deposit with Fidelity Capital Inc. ("Fidelity Capital") is not a
2 prudent investment. *NRS 164.640 et seq.*

3 9. Aside from the \$218,760.17 Trustee fees, the \$37,000 distribution and the
4 \$500,000 on deposit with Fidelity Capital, the Accounting is approved.

5 Cutting Off the 65% Income

6 10. As Trustee of the Trust, Eleanor owed fiduciary duties to Jacqueline and Kathryn
7 as beneficiaries of the Trust.

8 11. In June 2013, Eleanor cut off the 65% income stream of the net oil revenue in her
9 capacity as Trustee of the Trust, *without first seeking Instruction from*
10 *the Court.*

10 CONCLUSIONS OF LAW

11 12. Pursuant to Nev. R. Civ. P. 56(b), "[a] party against whom a claim, counterclaim,
12 or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or
13 without supporting affidavits for a summary judgment in the party's favor as to all or any part
14 thereof." "The judgment sought shall be rendered forthwith if the pleadings . . . show that there
15 is no genuine issue as to any material fact that the moving party is entitled to judgment as a
16 matter of law." NRCP 56(c). The burden for demonstrating the absence of a genuine issue of
17 material fact lies with the moving party, and the material lodged by the moving party must be
18 viewed in the light most favorable to the non-moving party. Hoopes v. Hammargren, 102 Nev.
19 425, 429, 725 P.2d 238, 241 (1986). It is well settled in Nevada that the party opposing
20 summary judgment is entitled to all favorable inferences from the pleadings and documentary
21 evidence. See Mullis v. Nev. Nat'l Bank, 98 Nev. 510, 512, 654 P.2d 533, 535 (1982). The non-
22 moving party, however, "must, by affidavit or otherwise, set forth specific facts demonstrating
23 the existence of a genuine issue for trial or have summary judgment entered against him."
24 Bulbman, Inc. v. Nev. Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

25 13. To prevail on a breach of fiduciary duty claim in Nevada, Jacqueline and Kathryn
26 bear the burden of showing that: (1) Eleanor owed them a fiduciary duty; (2) Eleanor breached
27 that duty; and (3) Jacqueline and Kathryn sustained damages as a proximate cause of the breach.
28 See Mosier v. S. Cal. Physicians Ins. Exch., 74 Cal.Rptr.2d 550, 565 (Cal. Ct. App. 1998).

1 14. The Court concludes as a matter of law that Eleanor did not breach any fiduciary
2 duties as it relates to the Accounting.

3 15. The Court concludes as a matter of law that Eleanor breached her fiduciary duties
4 owed to Jacqueline and Kathryn by failing to retain a third-party trustee and petition the Court to
5 allow the 65% income stream to Jacqueline and Kathryn to be cut off. As a result of Eleanor's
6 breach of fiduciary duties, Eleanor shall be removed as Trustee only over the 65% share of the
7 Upton County, Texas oil assets. Eleanor shall remain as Trustee over her 35% share of the
8 Upton County, Texas oil assets; however, a temporary successor Trustee shall be appointed over
9 the entire Trust until this litigation is finally resolved.

10 16. Based on Eleanor breaching her fiduciary duties, the Court will award Jacqueline
11 and Kathryn their attorney fees and costs pursuant to NRS 153.031(3)(b). The Court reserves for
12 a later date the exact amount of attorney fees and costs to be awarded.

13 BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND
14 DECREED that:

15 1. The \$500,000 currently on deposit with Fidelity Capital shall be deposited into an
16 FDIC insured bank account;

17 2. Jacqueline and Kathryn's claim for breach of fiduciary duty against Eleanor, as
18 Trustee of the Trust, is DENIED as it relates to the Accounting *based on the information*
available to the Court on March 20, 2015,

19 3. Summary judgment on Jacqueline and Kathryn's claim for breach of fiduciary
20 duty against Eleanor, as Trustee of the Trust, is GRANTED as it relates to Eleanor cutting of
21 their 65% distributions of the oil income in June 2013;

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4. Jacqueline and Kathryn shall submit an Application for their award of attorney fees and costs pursuant to NRS 153.031(3)(b), which shall include a proper analysis of the factors set forth in Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 455 P.2d 31 (1969) as well as their redacted billing statements. The deadlines for the briefing schedule shall comply with E.D.C.R. 2.20. The hearing on the Application shall be set for May 13, 2015 at 9:00 a.m.

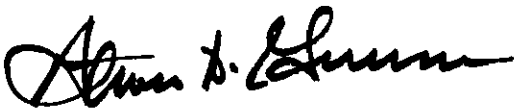
IT IS SO ORDERED this 7 day of April, 2015.

~~DISTRICT COURT JUDGE~~

Submitted by:

MARQUIS AURBACH COFFING

By Dale A. Hayes, Esq.
Nevada Bar No. 3430
Liane K. Wakayama, Esq.,
Nevada Bar No. 11313
Candice E. Renka, Esq.,
Nevada Bar No. 11447
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Eleanor Connell Hartman
Ahern, as Trustee


CLERK OF THE COURT

ASTA
KIRK B. LENHARD, ESQ., Bar No. 1437
klenhard@bhfs.com
TAMARA BEATTY PETERSON, ESQ., Bar No. 5218
tpeterson@bhfs.com
BENJAMIN K. REITZ, ESQ., Bar No. 13233
breitz@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135

Attorneys for 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, An Inter
Vivos Irrevocable Trust

CASE NO.: P-09-066425-T

DEPT. NO.: XXVI

CASE APPEAL STATEMENT

In accordance with Nevada Rule of Appellate Procedure 3(f)(1) and (3), Eleanor C. Ahern, a/k/a Eleanor Connell Hartman Ahern ("Ms. Ahern"), as beneficiary and as Trustee, by and through her counsel of record, the law firm of Brownstein Hyatt Farber Schreck, LLP, hereby submits this Case Appeal Statement:

(1) Name of appellant filing this Case Appeal Statement:

Eleanor C. Ahern, a/k/a Eleanor Connell Hartman Ahern

(2) Identify the judge issuing the decision, judgment or order appealed from:

Eighth Judicial District Court Judge Gloria Sturman.

(3) Identify each appellant and the name and address of counsel for each appellant:

Eleanor Connell Hartman Ahern

Kirk B. Lenhard, Esq.
Nevada Bar No. 1437
Tamara Beatty Peterson, Esq.
Nevada Bar No. 5218
Benjamin K. Reitz, Esq.
Nevada Bar No. 13233
klenhard@bhfs.com
tpeterson@bhfs.com
breitz@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
Telephone: (702) 382.2101
Facsimile: (702) 382.8135

(4) Identify each respondent and the name and address of appellate counsel, if known:

Jacqueline M. Montoya

Joseph J. Powell, Esq.
Nevada Bar No. 8875
THE RUSHFORTH FIRM, LTD.
P.O. Box 371655
Las Vegas, NV 89137-1655
probate@rushforthfirm.com
joey@rushforth.net
Telephone: (702) 255-4552
Fax: (702) 255-4677

Kathryn A. Bouvier

Whitney B. Warnick, Esq.
Nevada Bar No. 1573
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
wbw@albrightstoddard.com
Telephone: (702) 384-7111
Fax: (702) 384-0605

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///

(5) Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada:

Not applicable.

(6) Indicate whether appellant was represented by appointed or retained counsel in the District Court:

Appellant, Ms. Ahern, was represented by retained counsel in the District Court proceedings.

(7) Indicate whether appellant is represented by appointed or retained counsel on appeal:

Appellant, Ms. Ahern, is represented by retained counsel on appeal.

(8) Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the District Court order granting such leave:

Not applicable.

(9) Indicate the date the proceedings commenced in the District Court:

The trust proceedings commenced on August 17, 2009, from the Petition to Assume Jurisdiction of Trust, Confirm Trustee, and Construe and Reform Trust.

Respondent, Jacqueline M. Montoya, filed her 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), which is the subject of this appeal, on September 27, 2013.

(10) Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

In the underlying action, Ms. Montoya and Ms. Bouvier (the "Sisters") sought a declaration regarding the correct interpretation of certain Trust¹ provisions as to entitlement to income from Texas oil properties. The orders being appealed

¹ The term "Trust" herein refers to The W.N. Connell and Marjorie T. Connell Living Trust dated May 18, 1972.

1 from are the District Court's *Summary Judgment* order which was filed on April 16,
2 2015, and entered on April 17, 2015 (the "Summary Judgment Order"), and from
3 the District Court's *Order Regarding The Accounting, Breach of Fiduciary Duty*
4 *Claims and Award of Attorneys' Fees* filed and entered on April 20, 2015 (the
5 "Attorney Fee Order") (collectively, the Summary Judgment Order and Attorney
6 Fee Order are hereinafter referred to as the "Orders"). The District Court adopted
7 the Sisters' interpretation of the Trust documents, finding the Sisters are entitled to
8 65% of the income from the Texas oil properties while Ms. Ahern is entitled to
9 35%. The Court also found that Ms. Ahern, who was both the trustee and a
10 beneficiary of the Trust, had breached her fiduciary duty as trustee, and therefore is
11 personally liable for all of the Sisters' attorneys' fees and costs in this matter.

12 (11) Whether the case has previously been the subject of an appeal to or
13 original writ proceeding in the Supreme Court and, if so, the caption and Supreme
14 Court docket number of the prior proceeding:

15 This case is currently on appeal in two related matters:

- 16 • First Appeal: *In the Matter of: The W.N. Connell and Marjorie T.*
17 *Connell Living Trust, Dated May 18, 1972*, Supreme Court Case No. 66231.
- 18 • Second Appeal: *In the Matter of: The W.N. Connell and Marjorie T.*
19 *Connell Living Trust, Dated May 18, 1972*, Supreme Court Case No. 67782.

20 (12) Indicate whether the appeal involves child custody or visitation:

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1 (13) In civil cases, indicate whether the appeal involves the possibility of
2 settlement:

3 Presently, this appeal does not involve the possibility of settlement.

4 DATED this 18th day of May, 2015.

5
6 **BROWNSTEIN HYATT FARBER SCHRECK, LLP**

7 By: /s/ Tamara Beatty Peterson
8 KIRK B. LENHARD, ESQ., Bar No. 1437
klenhard@bhfs.com
9 TAMARA BEATTY PETERSON, ESQ., Bar No. 5218
tpeterson@bhfs.com
10 BENJAMIN K. REITZ, ESQ., Bar No. 13233
breitz@bhfs.com
11 Las Vegas, NV 89106-4614
Telephone: 702.382.2101
12 Facsimile: 702.382.8135
13
14
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **CASE APPEAL STATEMENT** to be submitted electronically for filing and service with the Eighth Judicial District Court via the Court's Electronic Filing System on the 18th day of May, 2015, to the following:

TODD L. MOODY, ESQ.
tmoody@hutchlegal.com
RUSSEL J. GEIST, ESQ.
rgeist@hutchlegal.com
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
*Attorneys for Fredrick P. Waid,
Court-appointed Trustee*

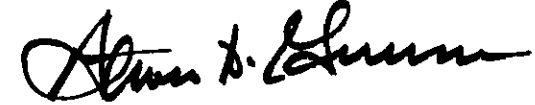
JOSEPH J. POWELL, ESQ.
probate@rushforthfirm.com
THE RUSHFORTH FIRM, LTD.
P.O. Box 371655
Las Vegas, NV 89137-1655
Attorneys for Jacqueline M. Montoya

WHITNEY B. WARNICK, ESQ.
wbw@albrightstoddard.com
ALBRIGHT, STODDARD,
WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
Attorneys for Kathryn A. Bouvier

/s/ Erin Parcels
an employee of Brownstein Hyatt Farber
Schreck, LLP

MTN
WHITNEY B. WARNICK, ESQ.
Nevada Bar No. 001573
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
Attorneys for Kathryn A. Bouvier

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JOSEPH J. POWELL, ESQ.
Nevada Bar No. 008875
THE RUSHFORTH FIRM, LTD.
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134
Tel: (702) 255-4552
Fax: (702) 255-4677
joey@rushforth.net
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,

CASE NO. P-09-066425-T
DEPT NO. XXVI (26)

Date of Hearing: ~~June~~ ^{July} 22, 2015
Time of Hearing: 9:00am

An Inter Vivos Irrevocable Trust.

**MOTION FOR ASSESSMENT OF DAMAGES AGAINST ELEANOR
AHERN; ENFORCEMENT OF NO-CONTEST CLAUSE; AND
SURCHARGE OF ELEANOR'S TRUST INCOME**

Jacqueline M. Montoya ("Jacqueline") and Kathryn A. Bouvier ("Kathryn"), by
and through their undersigned counsel, submit the following Motion for Assessment
of Damages against Eleanor Ahern; Enforcement of No-Contest Clause; and, Surcharge
of Eleanor's Trust Income.


This Motion is based upon the Affidavits and Points and Authorities submitted
herewith, the pleadings and documents filed in this proceeding, and the argument of

counsel at the hearing to consider this Motion.

DATED this 3rd day of June, 2015.

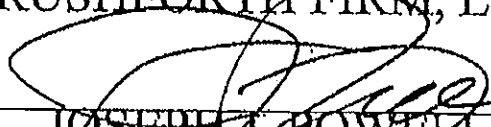
ALBRIGHT, STODDARD, WARNICK &
ALBRIGHT

By


WHITNEY B. WARNICK, ESQ.
Nevada Bar No. 001573
801 S. Rancho Drive, Suite D-4
Las Vegas, Nevada 89016
Attorneys for Kathryn A. Bouvier

THE RUSHEORTH FIRM, LTD.

By


JOSEPH J. POWELL, ESQ.
Nevada Bar No. 008875
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134
Attorneys for Jaqueline M. Montoya


NOTICE OF MOTION

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing **MOTION FOR ASSESSMENT OF DAMAGES AGAINST ELEANOR AHERN; ENFORCEMENT OF NO CONTEST CLAUSE; AND SURCHARGE OF ELEANOR'S TRUST**, on for hearing before the above entitled Court on the 22 day of July, 2015, at the hour of 9:00 o'clock am on said date, or as soon thereafter as counsel can be heard.

DATED this 3rd day of June, 2015

ALBRIGHT, STODDARD, WARNICK &
ALBRIGHT

By


WHITNEY B. WARNICK, ESQ.
Nevada Bar No. 001573
801 S. Rancho Drive, Suite D-4
Las Vegas, Nevada 89016
Attorneys for Kathryn A. Bouvier

OVERVIEW

When Jacqueline, as trustee of the MTC Living Trust, filed her initial Petition in this proceeding to recover the 65% share of trust income she and her sister, Kathryn, were entitled to receive from The W. N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972 (the "Trust"), she and Kathryn were not aware of the extensive damages that Eleanor Connell Hartman Ahern ("Eleanor") would be causing them to incur. Now that nearly two years have elapsed since the filing of the Petition, the damages that Eleanor has caused to them far exceed the loss of their use and benefit of their 65% share of Trust income. In addition to the loss of interest they could have earned on the 65% share, as well as other financial losses and detriment they suffered due to being deprived of the income in meeting their living needs, they now are faced with a loss of most of the actual funds making up their 65% share, due to Eleanor's tortious and criminal conversion thereof. It is also apparent that the total amount due them as their 65% share has been mis-reported by Eleanor and she has failed to account for all Trust income and properly resolve the tax liability relating thereto with the IRS. Added to this is the extensive litigation fees and costs Eleanor forced Jacqueline and Kathryn to incur due to her filing and asserting frivolous claims and positions in this proceeding, including appealing several Court decisions to the Nevada Supreme Court without a justifiable basis for her appeals. All this has been done by Eleanor, while acting as trustee of the Trust for most of the time period in question, in an attempt to cower and force Jacqueline and Kathryn to either accept unfair settlement terms dictated by Eleanor, or face financial ruin due to the cost of continual litigation.

The Court has helped to rectify some of the damages Jacqueline and Kathryn have suffered due to Eleanor's wrongful conduct, in the Court's Summary Judgment rendered herein on April 16, 2015, in its Order entered on April 20, 2015, determining Eleanor breached her duties and should therefor be removed as trustee of the Trust, and in awarding them judgment against Eleanor for attorney's fees they have incurred in these proceedings. However, Eleanor's defiant and contemptuous behavior is still

1 impacting Jacqueline and Kathryn adversely, due to her refusal to cooperate with the
2 new trustee, Fredrick P. Waid, in recovering Trust funds she converted, and in
3 accounting for all of the Trust income received while she was trustee. Mr. Waid, as
4 noted in his reports, has also discovered that Eleanor has mismanged the Trust assets,
5 spent Trust funds improperly to pay her own litigating attorney fees, and has invested
6 or spent Trust funds on her own personal ventures in association with her cadre of close
7 personal advisors. Her perjurious misrepresentations to the Court made during the
8 course of these proceedings continues to mount as well.

9 In summary, Eleanor has made a complete mockery of the position of a trustee
10 with her tortious and criminal behavior. Eleanor, in complete bad faith and without any
11 justification whatsoever, unilaterally decided to cut off the income stream that was due
12 and payable to Jacqueline in her capacity as trustee of the MTC Living Trust, which is
13 the rightful owner of an approximate 65% interest in land located in Upton County,
14 Texas, together with the oil, gas, and mineral rights located in and on such land.
15 Eleanor took such action with the sole motive of financially crippling Jacqueline and
16 Kathryn, by cutting off and blocking the flow through of the income that rightfully
17 belonged to the MTC Living Trust, in hopes that she could then procure a favorable
18 settlement from Jacqueline and Kathryn which would reward her despicable behavior.

19 As light has been shed on this matter through the investigation of Fredrick P.
20 Waid, who this Court appointed after its removal of Eleanor, it has now been
21 established that Eleanor has wrongfully stolen and converted assets that did not belong
22 to her and which were mandated by this Court to be held in trust until her behavior
23 could be sorted through and the frivolous, bad faith nature of her actions could clearly
24 be seen by this Court. Eleanor has violated multiple orders of this Court, and in so
25 doing has also perjured herself on multiple occasions in a blatant attempt to cover her
26 misdeeds. While Eleanor may be facing criminal penalties for her actions, she must
27 also face the music from a damages perspective as well for her conversion and theft of
28 assets that did not belong to her. Not only should it now be declared that Eleanor has

1 forfeited her income interest share of the Trust as her conduct has directly violated the
2 terms of the Trust's no-contest clause, but she must also be held liable for treble
3 damages as well as punitive damages for her conduct.

4 The most reprehensible theft is theft which is the result of an "inside job" and
5 in this case Eleanor has not only financially harmed her own daughters, but she has
6 attempted as well to thwart the intentions and desires of her parents (who established
7 the Trust) by directly seeking to inflict damage on her daughters, the beloved
8 granddaughters of the Connells, in direct contravention of what her mother, Mrs.
9 Connell, expressly wanted. When a trustee, who is placed in such a position because
10 of an abundance of trust and faith that she will honor the wishes and directions of the
11 trust's creators, steals assets that do not belong to her, action must be taken to restore
12 and honor the intentions of the grantors and to fulfill the purpose of the Trust they
13 created. To leave such tortious behavior unpunished would encourage others to defy
14 their fiduciary duties and be contrary to public policy.

15 RELEVANT PROCEDURAL HISTORY

16 As this Court is intimately familiar with the complete procedural history that
17 has occurred in this matter, it is unnecessary to once again go through the whole history
18 of these proceedings. Rather, only the relevant history will be discussed herein.

19 In this Court's Order, titled "Order Denying Motion to Refer Contested Probate
20 Matter to Master-probate Commissioner per Edcr 4.16; Directing Payment of All Oil,
21 Gas, Mineral and Interest Roy a Ties and Rent to Eleanor C. Hartman, Also Known as
22 Eleanor C. Ahern, as Trustee of Trust No.2 of the W. N. Connell and Marjorie T.
23 Connell Living Trust Dated May 18, 1972; and Setting Calendar Call and Hearing",
24 which was signed on December 20, 2013, this Court ordered the following:

25 *IT IS FURTHER ORDERED, ADJUDGED AND DECREED that ELEANOR C.*
26 *AHERN as beneficiary shall be entitled to thirty-five percent (35%) of such oil, gas,*
27 *mineral and interest royalties and surface rent and the remaining sixty-five percent*
28 *(65%) of such oil, gas, mineral and interest royalties and surface rent shall be held*
in the Trust by ELEANOR C. HARTMAN, also known as ELEANOR C. AHERN, as
Trustee, until final resolution of this matter. [Emphasis Added]

1 Eleanor has clearly violated this Court's mandate and directive, by not only
2 misappropriating 65% of the funds which were to be locked up and simply held in trust
3 until a final case resolution, but by directly using the funds for her own personal
4 benefit. Mr. Waid, in taking over as the court appointed trustee of the Trust, and based
5 upon the still incomplete accounting made by Eleanor, has estimated that the gross sum
6 of monies that should have been held in the Trust's bank account, representing 65% of
7 the Trust income, should be in the neighborhood of \$2,660,000. Instead, Mr. Waid has
8 discovered that only \$10,000 was being held in the Trust's bank account with Wells
9 Fargo, thereby representing an approximate shortfall of \$2,650,000. Therefore, it
10 appears that Eleanor has converted or otherwise misappropriated approximately
11 \$2,650,000, in direct violation of this Court's order. The actual sum will ultimately
12 be determined by Mr. Waid when he has finally obtained access to all of the records
13 relating to the Trust income and the Trust account, which conveniently, but
14 contemptuously, Eleanor has declined to produce to him.

15 Eleanor during the course of these proceedings up to the time of her removal
16 as trustee, always represented to this Court and to the attorneys for Jacqueline and
17 Kathryn, that the monies that she was ordered to hold in trust were completely safe and
18 secure. It was only after Mr. Waid's appointment that he immediately began
19 discovering the fraud that has been perpetrated by Eleanor on this Court and Jacqueline
20 and Kathryn. Eleanor, herself, finally confessed that she misappropriated and owes to
21 the Trust (actually to Jacqueline and Kathryn) \$800,000. See "Affidavit of Fredrick
22 P. Waid, Trustee", executed May 6, 2015, which states in relevant part that "*I spoke*
23 *with Ms. Ahem on Thursday April 16, 2015, and was informed by her that she believed*
24 *she "owed" the Trust \$800,000.*" However, it appears her own estimate of funds she
25 converted and misappropriated is understated, and that as of the date of this filing,
26 despite orders compelling her to return all funds to the Trust immediately, Mr. Waid
27 still has not been able to recover over \$1,100,000 of missing Trust funds.

28 ///

LAW AND ARGUMENT

1
2 1. *Eleanor breached her duties as trustee toward the Trust in accordance with*
3 *NRS 163.115 by misappropriating Trust assets for her personal benefit and relief is*
4 *sought pursuant to NRS 164.010 and 164.015.*

5 This Court has previously assumed jurisdiction of this Trust in accordance with
6 NRS 164.010.

7 Under the laws of the state of Nevada, a trustee of a trust has a fiduciary duty
8 towards the trust and its beneficiaries. See *Bank of Nevada v. Speirs*, 603 P. 2d 1074,
9 1076 (1979) ("*A . . . trustee is a fiduciary who must act in good faith and with fidelity*
10 *to the beneficiary of the trust. He should not place himself in a position where it would*
11 *be for his own benefit to violate his duty to the beneficiary.*"). For that reason, the law
12 discourages self-dealing and interested transactions by the trustee in which the trustee
13 personally benefits to the detriment of the trust and its beneficiaries. See *Hoopes v.*
14 *Hammargren*, 725 P. 2d 238, 242 (1986) ("*The essence of a fiduciary . . . is that the*
15 *parties do not deal on equal terms, since the person in whom trust and confidence is*
16 *reposed and who accepts that trust and confidence is in a superior position to exert*
17 *unique influence.*")

18 The Court has expressly found that Eleanor breached her trustee duties. She
19 not only tortiously converted Trust funds to her own use, but she also violated the
20 prudent investor rule by investing Trust funds improperly. Pursuant to NRS 164.740,
21 "*a trustee who invests and manages trust property owes a duty to the beneficiaries of*
22 *the trust to comply with the prudent investor rule as set forth in NRS 164.700 to*
23 *164.775, inclusive.*" Furthermore, NRS 164.715 states that a "*trustee shall invest and*
24 *manage the trust property solely in the interest of the beneficiaries.*" The damages
25 caused to the Trust and its other beneficiaries (Jacqueline and Kathryn) includes the
26 loss of income which could have been earned by the Trust through wise and proper
27 investment of Trust funds.

28 ///

2. *The No-Contest provision of the Trust requires this Court to reduce Eleanor's share in the Trust to \$1.00.*

The Trust contains a No-Contest Clause in Article TENTH, that states as follows:

*TENTH: NON-CONTEST PROVISION. The Grantors specifically desire that these trusts created herein be administered and distributed without litigation or dispute of any kind. If any beneficiary of these trusts or any other person, whether stranger, relatives or heirs, or any legatees or devisees under the Last Will and Testament of the Grantors or the successors in interest of any such persons, including any person who may be entitled to receive any portion of the Grantors' estates under the intestate laws of the State of Nevada, seek or establish to assert any claim to the assets of these trusts established herein, or **attack**, oppose or seek to set aside **the administration and distribution of the said trusts**, or to have the same declared null and void or diminished, or to defeat or change any part of the provisions of the trust established herein, then in any and all of the above mentioned cases any events, such person or persons shall receive One Dollar (\$1.00) and no more in lieu of any interest in the assets of the trusts. [Emphasis Added]*

With the tortious conversion of the assets constituting 65% of the trust income, rightfully belonging to Jacqueline and Kathryn, Eleanor has made a substantial “attack” on the administration of the Trust. This wrongful taking of assets was also done directly in contravention to a court order mandating the opposite. Eleanor’s wrongful misappropriation of Trust assets has contravened the distribution provisions of the Trust as established and intended by the grantors, W.N Connell and Marjorie T. Connell. There should be no question whatsoever that reasonable and right minded grantors, such as the Connells, would never want a beneficiary who, while acting as trustee of the Trust, has stolen assets they placed into their Trust, depriving other beneficiaries thereof, to remain as a beneficiary of their trust. By stealing assets that did not belong to her, and failing to distribute the assets to the rightful beneficiaries, Eleanor has reprehensibly attacked and set aside the grantors’ wishes and intended administration and distribution of the Trust. When grantors state that they wish that the administration of their trust shall run smoothly, they obviously have in mind that theft of the Trust assets by the trustee is simply intolerable.

With this said, the Connells as grantors, and specifically Mrs. Connell who directly gifted the 65% of Upton County, Texas, land and income to the MTC Living

1 Trust for the benefit of Jacqueline and Kathryn, would want action taken to rectify the
2 breaches in the Trust administration by enforcement of the Trust's no-contest clause.
3 Otherwise, the Trust's no-contest clause would be rendered entirely toothless,
4 superfluous and of no effect.

5 A no-contest clause, like all other provisions contained in a trust or a will, is
6 to be interpreted in a logical and sensible manner. The Trust's no-contest provision,
7 quoted above, uses broad, expansive terms to convey the grantors' desire that "any
8 person" who "attacks" and disrupts the Trust administration and distribution shall
9 forfeit his or her benefits under the Trust. The Trust's no contest clause, as typically
10 do all such no-contest clauses, is intended to deter all misconduct which threatens the
11 proper administration and distribution of the Trust assets intended by the grantors. For
12 this reason, a laundry list of unacceptable actions is never given in a no-contest clause
13 because it is not intended to be viewed as a restrictive measure that is narrowly
14 construed.

15 With the discovery of the theft and conversion of the assets mandated to be
16 held by Eleanor in trust by this Court, the deceitful and fraudulent "accounting"
17 rendered by Eleanor to this Court in March of 2015, together with Eleanor's refusal to
18 cooperate with Mr. Waid, and in light of this Court's mandate for the immediate return
19 of assets, it has become crystal clear that Eleanor has attacked and intends to continue
20 to attack and oppose the proper administration of this Trust. Further, Eleanor has done
21 nothing but subject the Trust to ongoing administrative hassle, litigation, and game
22 playing both before and since being removed as trustee. Eleanor also now refuses to
23 cooperate in accounting for and tracing back all of the Trust income and expenditures
24 by her during her tenure as trustee of the Trust.

25 As the Court is aware, Jacqueline and Kathryn are also ultimate beneficiaries,
26 upon Eleanor's death, of the present entitlement Eleanor has to 35% of the Trust
27 income under subtrust 2. While terminating Eleanor's right to receive income at this
28 time may cause some financial issues for her, she has admitted that she has substantial

1 other assets, including monthly Social Security income of approximately \$1,800.00, to
2 meet her support needs. However, if the Court deemed it best to not declare a total
3 forfeiture of Eleanor's Trust income benefits, it could order that a sufficient amount of
4 her benefits be forfeited to Jacqueline and Kathryn until they have been fully
5 reimbursed for all the damages they have suffered due to her misconduct.

6 **3. Nevada Law Requires Enforcement of No-Contest Provisions to Carry Out the**
7 **Grantors' Intent**

8 NRS 163.00195, titled "Enforcement of no-contest clauses; exceptions",
9 provides for the following:

10 *1. Except as otherwise provided in subsections 3 and 4, a no-contest clause*
11 *in a trust must be enforced by the court.*

12 *2. A no-contest clause must be construed to carry out the settlor's intent.*
13 *Except to the extent the no-contest clause in the trust is vague or ambiguous,*
14 *extrinsic evidence is not admissible to establish the settlor's intent concerning*
15 *the no-contest clause. The provisions of this subsection do not prohibit such*
16 *evidence from being admitted for any other purpose authorized by law. Except*
17 *as otherwise provided in subsections 3 and 4, a beneficiary's share may be*
18 *reduced or eliminated under a no-contest clause based upon conduct that is*
19 *set forth by the settlor in the trust. Such conduct may include, without*
20 *limitation:*

21 *(a) Conduct other than formal court action; and*

22 *(b) Conduct which is unrelated to the trust itself, including, without*
23 *limitation:*

24 *(1) The commencement of civil litigation against the settlor's probate*
25 *estate or family members;*

26 *(2) Interference with the administration of another trust or a*
27 *business entity;*

28 *(3) Efforts to frustrate the intent of the settlor's power of*
attorney; and

(4) Efforts to frustrate the designation of beneficiaries related to
a nonprobate transfer by the settlor.

3. Notwithstanding any provision to the contrary in the trust, a beneficiary's
share must not be reduced or eliminated if the beneficiary seeks only to:

(a) Enforce the terms of the trust, any document referenced in or
affected by the trust, or any other trust-related instrument;

(b) Enforce the beneficiary's legal rights related to the trust, any
document referenced in or affected by the trust, or any trust-related

instrument; or

(c) Obtain a court ruling with respect to the construction or legal effect of the trust, any document referenced in or affected by the trust, or any other trust-related instrument.

4. Notwithstanding any provision to the contrary in the trust, a beneficiary's share must not be reduced or eliminated under a no-contest clause in a trust because the beneficiary institutes legal action seeking to invalidate a trust, any document referenced in or affected by the trust, or any other trust-related instrument if the legal action is instituted in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude that the trust, any document referenced in or affected by the trust, or other trust-related instrument is invalid.

5. As used in this section:

(a) "No-contest clause" means one or more provisions in a trust that express a directive to reduce or eliminate the share allocated to a beneficiary or to reduce or eliminate the distributions to be made to a beneficiary if the beneficiary takes action to frustrate or defeat the settlor's intent as expressed in the trust or in a trust-related instrument.

(b) "Trust" means the original trust instrument and each amendment made pursuant to the terms of the original trust instrument.

(c) "Trust-related instrument" means any document purporting to transfer property to or from the trust or any document made pursuant to the terms of the trust purporting to direct the distribution of trust assets or to affect the management of trust assets, including, without limitation, documents that attempt to exercise a power of appointment.

As established, in Nevada, a no-contest clause *"must be enforced by the court."* NRS 163.00195(1). With a few narrow exceptions, addressed below, *"a beneficiary's share may be reduced or eliminated under a no-contest clause based upon conduct that is set forth by the settlor in the trust."* Id. at (2).

Nevada law is not unique. The majority of states hold that *"no-contest clauses are not only valid but also favored as a matter of public policy - because they discourage litigation and give effect to the purposes expressed by the testator or trustor."* *Colburn v. N Trust Co.*, 151 Cal. App. 4th 439,447,59 Cal. Rptr. 3d 828,834 (2007); see also *Burch v. George*, 7 Cal. 4th 246,255,866 P.2d 92,97 (1994) (*"[I]t is the testator's intentions that control, and a court must not rewrite the testator's will in such a way as to immunize legal proceedings plainly intended to frustrate the testator's unequivocally expressed intent from the reach of the no-contest clause."*) (internal

1 quotations omitted).

2 As noted above, Nevada has narrow safe harbor provisions that allow a trust
3 beneficiary to seek some court intervention without violating no-contest provisions.
4 See NRS 163.00195(3) and (4). However, none of these exceptions apply to Eleanor's
5 breaches of the no-contest provisions. NRS 163.00195(3) (a), (b), (c) and (4) provide
6 four exceptions to enforcing a no- contest clause. The four exceptions are as follows:

7 *(3) Notwithstanding any provision to the contrary in the trust, a*
8 *beneficiary's share must not be reduced or eliminated if the beneficiary seeks only to:*

9 *a) Enforce the terms of the trust, any document referenced in or affected by the*
10 *trust, or any other trust-related instrument;*

11 *b) Enforce the beneficiary's legal rights related to the trust,*
12 *any document referenced in or affected by the trust, or any*
13 *trust-related instrument; or*

14 *c) Obtain a court ruling with respect to the construction or*
15 *legal effect of the trust, any document referenced in or*
16 *affected by the trust, or any other trust-related instrument.*

17 *(4) Notwithstanding any provision to the contrary in the trust, a*
18 *beneficiary's share must not be reduced or eliminated under a no contest*
19 *clause in a trust because the beneficiary institutes legal action seeking to invalidate*
20 *a trust, any document referenced in or affected by the trust, or any other trust-related*
21 *instrument if the legal action is instituted in good faith and based on probable cause*
22 *that would have led a reasonable person, properly informed and advised, to conclude*
23 *that the trust, any document referenced in or affected by the trust, or other*
24 *trust-related instrument is invalid.*

25 Eleanor's actions of theft and conversion of trust funds for her personal use that
26 were mandated to be held in trust by this Court most certainly do not fall within any of
27 the three exceptions quoted above under NRS 163.00195(3) (a), (b) and (c). Further,
28 Eleanor cannot claim an exception to enforcement of the no-contest clause under the
good faith and probable cause exception of NRS 163.00195(4) because that provision
is strictly limited to "*legal action seeking to invalidate a trust, any document*
referenced in or affected by the trust, or any other trust-related instrument." This
statutory provision is primarily intended to carve out good faith challenges to a
trustor's capacity and competency in establishing the trust, and is also a codification
of the exception to enforcement previously recognized and set forth in *Hannam v.*
Brown, 956 P. 2d 794 (1998), prior to the Legislature's passage of the statute.

1 The "probable cause" exception to enforcement of no-contest provisions found
2 in NRS 163.00195(4), as explained in *Hannam v. Brown*, excepts "good faith actions
3 based on probable cause." *Id.* at 798. Clearly, however, there is simply no good faith
4 reason or any probable cause to justify Eleanor's disturbing and tortious behavior with
5 regard to the Trust and the administration thereof.

6 Accordingly, Jacqueline and Kathryn respectfully submit that proper
7 enforcement of the Trust's provisions requires this Court to enforce the no-contest
8 provision against Eleanor, in compliance with the explicit desires of Grantors, the
9 Connells, reducing her share in the Trust to \$1.00.

10 ***4. Damages incurred by the Trust and its beneficiaries due to Eleanor's***
11 ***conversion of Trust assets should be trebled.***

12 The Supreme Court of Nevada, in *Evans v. Dean Witter Reynolds, Inc.*, 116
13 Nev. 598 (2000), discussed conversion as follows:

14 *Conversion is "a distinct act of dominion wrongfully exerted over another's personal*
15 *property in denial of, or inconsistent with his title or rights therein or in derogation,*
16 *exclusion, or defiance of such title or rights." Wantz v. Redfield, 74 Nev. 196, 198,*
17 *326 P.2d 413, 414 (1958). Further, conversion is an act of general intent, which does*
18 *not require wrongful intent and is not excused by care, good faith, or lack of*
19 *knowledge. 116 Nev. 598, 606*

20 Eleanor has clearly committed conversion against the Trust and its beneficiaries by
21 converting assets of the Trust in an amount believed to be approximately \$2,650,000
22 for her own personal benefit and use. In addition to having committed a serious tort,
23 Eleanor's misconduct also constitutes the crime of embezzlement as defined in NRS
24 205.300.

25 NRS 143.120(2) provides that a personal representative may seek to recover
26 treble damages against a person who has converted property belonging to the estate of
27 the personal representative. The definition of a "personal representative" under NRS
28 132.265 includes not only executors and administrators, but also a person "who
performs substantially the same function under the law governing their status" as that
of an executor or administrator. In the instant case, current trustee, Mr. Waid,

1 functioning in a capacity similar to that of a personal representative, has the right to
2 seek treble damages against Eleanor for her refusal and failure to return and reimburse
3 to the Trust the funds she has misappropriated and converted to her own use. His
4 office as trustee involves the same fiduciary duties over management of assets of
5 another for the benefit of another. If Eleanor's damages to the trust, which at present
6 it is believed total approximately \$2,650,000 which she has converted, are reduced to
7 judgment and trebled, that amount would equal approximately \$7,950,000. This
8 amount should be used to surcharge Eleanor's share in the Trust, for the benefit of
9 Jacqueline and Kathryn, if Eleanor's share is not otherwise reduced to \$1.00 through
10 the enforcement of the no-contest clause, which as previously stated is mandatory
11 under Nevada law based on the actions taken by Eleanor and the circumstances
12 surrounding such action.

13 ***5. Imposition of Punitive Damages against Eleanor***

14 Punitive damages are also warranted against Eleanor as she intentionally and
15 fraudulently breached her fiduciary duty and committed tortious and criminal acts in
16 converting and embezzling Trust funds. This Court has the authority to award punitive
17 damages "*in an action for the breach of an obligation not arising from contract, where*
18 *it is proven by clear and convincing evidence that the defendant has been guilty of*
19 *oppression, fraud, or malice.*" See, NRS 42.005(1). Once shown, a petitioner, "*in*
20 *addition to the compensatory damages, may recover damages for the sake of example*
21 *and by way of punishing the defendantan amount equal to three times the amount*
22 *of compensatory damages awarded to [Petitioner] if the amount of compensatory*
23 *damages is \$100,000 or more.*" Id.

24 In this context, fraud is defined as "*an intentional misrepresentation, deception*
25 *or concealment of a material fact known to the person with the intent to deprive*
26 *another person of his or her rights or property or otherwise injure another person.*"
27 See, NRS 42.001(2).

28 As such, Jacqueline and Kathryn request that this Court treble the approximate

1 \$2,650,000 that was improperly stolen and converted by Eleanor, resulting in the
2 amount now owed to them to be approximately \$7,950,000. This amount should be
3 used to offset Eleanor's share in the Trust, if Eleanor's share is not reduced to \$1.00
4 through the enforcement of the no-contest clause.

5 **6. *In the event Eleanor's Trust Benefits are not Forfeited under the Trust's No-***
6 ***Contest Provisions, Surcharging Eleanor's Trust Income to Reimburse the Damages***
7 ***she has Caused would be Proper***

8 NRS 21.320 provides that "a judge or master may order property of the
9 judgment debtor not exempt from execution, in the hands of such debtor or any other
10 person, or due to the judgment debtor, to be applied toward the satisfaction of the
11 judgment." Thus, Jacqueline and Kathryn do not need to obtain and serve a Writ of
12 Execution and a Writ of Garnishment upon the trustee in order to have Eleanor's Trust
13 income benefits paid over to them towards satisfaction of the debts she now owes to
14 them. Rather, the Court is authorized to enter and order directing this equitable relief.
15 While the "spendthrift" provision in the Trust and NRS 21.090(dd) and NRS 21.080(2)
16 would normally prevent any execution upon her Trust income rights by general
17 creditors, under the facts of this case said clause and statutes should not prevent the
18 Court from ordering that restitution to Jacqueline and Kathryn of all damages caused
19 to them by Eleanor be made by surcharging Eleanor's Trust income benefits, assuming
20 such benefits were not otherwise forfeited under the Trust's no-contest provisions as
21 discussed above.

22 In the present case, it would be highly inequitable to allow the "spendthrift"
23 clause in the Trust to protect Eleanor from her tortious and criminal behavior. She has
24 clearly breached her duties as a trustee, and illegally converted Trust funds to her own
25 use. While the intent of a spendthrift clause is to ensure that the grantors' bequest goes
26 to those the grantors wish to benefit, a spendthrift clause is not intended by the grantors
27 to be used as a shield by a trustee, who is also a beneficiary, to thumb her nose at the
28 other beneficiaries that she has harmed and effectively say "You can't touch me!". No

1 right minded grantor would ever tolerate such a result.

2 Jacqueline and Kathryn submit that the present case of Eleanor's tortious and
3 criminal behavior justifies overriding the exemption from execution otherwise provided
4 under NRS 21.090(dd) and NRS 21.080(2). While the issue of a spendthrift trust's
5 exemption in cases where the beneficiary has committed a tortious or criminal act has
6 not come before the Nevada Supreme Court, case law from other jurisdictions where
7 this issue has arisen and the opinions of legal scholars on the issue, hold that execution
8 may proceed under public policy considerations.

9 In *Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 588 (App. Ct.
10 1989), the Court held a statutory exemption from attachment did not protect a
11 beneficiary healthcare provider against attachment by a judgment creditor of Medicare
12 payments. In numerous cases through the United States, and based upon public policy
13 reasons, the Courts have held that a statutory exemption from execution does not
14 protect a beneficiary from having his or her benefits garnished to pay child support or
15 alimony obligations. See, *Sokolsky v. Kuhn*, 405 So. 2d 975 (Fla. 1981); and, *Ward v.*
16 *Ward*, 164 N. J. Sup;er 354 (Sup. Ct. N.J. 1978. Jacqueline and Kathryn submit that
17 public policy would also bar Eleanor from attempting to isolate her Trust income
18 benefits from execution and garnishment, because Eleanor stole monies from them and
19 committed serious breaches of her fiduciary duties owing to them while acting as
20 trustee of the same Trust whereunder they all are beneficiaries.

21 Therefore, in the event the Court does not determine that Eleanor has forfeited
22 her Trust income benefits as above requested, Jacqueline and Kathryn respectfully
23 request that the Court enter an order, pursuant to NRS 21.320, directing that Fredrick
24 P. Waid, as trustee of the Trust pay over to Jacqueline and Kathryn the 35% share of
25 Trust income otherwise payable to Eleanor hereafter, until such time as full restitution
26 has been made to them of all the damages Eleanor has caused them as adjudged by the
27 Court.

28 This concept of not allowing a beneficiary to receive further assets from a trust

1 where the beneficiary has misappropriated trust assets, until the adversely affected
2 other beneficiaries are back to square one is not a foreign concept. As a court of
3 equity, this Court is empowered with the authority to right the wrong and make things
4 just and equitable. A good analysis of this authority is found in the early case of
5 *Koerner v. Pfaff*, 15 Ohio Dec. 81 (1904), the Court of Common Pleas of Ohio,
6 Franklin County, where the court of equity concluded that a trustee/beneficiary, who
7 had wrongfully taken assets not belonging to him, would receive no further entitlement
8 to trust assets until the other, innocent beneficiaries were made whole and received
9 what they were entitled to receive under trust. Following are relevant excerpts from
10 that case:

11 *"Where there are several beneficiaries and one of them takes a part in a breach of*
12 *trust, whereby a loss is occasioned, his interest in the trust property may be reached,*
13 *retained, and applied to make good the loss for the benefit of the other beneficiaries;*
14 *and this equity extends, not only to the interest while in the hands of the wrongdoing*
15 *cestui que trust, but also to those claiming it under or through him."* 2 Pomeroy, Eq.
16 *Jurisp. Sec. 1083, note.*

17 *"If a cestui que trust, whether tenant for life, or other person having a partial interest,*
18 *be responsible for having joined in a breach of trust, all the benefit that would have*
19 *accrued to him either directly or derivatively, either from that trust fund or in any*
20 *other estate comprised in the same settlement, may be stopped by the cestui que trust*
21 *or other person having a similar equity as against him, his assignees in bankruptcy,*
22 *or judgment creditors, the general creditors, and (except so far as the defense of*
23 *purchase for value without notice may be applicable) against all who claim under him,*
24 *until the amount impounded, with the accumulations has compensated the trust estate*
25 *for the loss for which that cestui que trust is responsible."* 2 Hill's Lewin, Trusts 112.

26 Underhill says:

27 *"The rule that a beneficiary in default shall take nothing out while in default applies*
28 *all the more to the case of a beneficiary who is also a trustee. In both cases he must*
29 *make good his indebtedness to the trust estate before he can obtain a share in it."*
30 Underhill, Trusts 36.

31 *Any other conclusion in my opinion would not only be contrary to the best*
32 *authorities both in this country and England, but it would be unjust and inequitable,*
33 *and would in addition defeat the purpose and intention of said testator, which was*
34 *to give each cestui que trust the full one-fourth of his estate remaining at the death*
35 *of Mrs. Bruck. To permit Philip to take out more than one-fourth of said entire estate*
36 *before the date of Mrs. Bruck's death, no part of which he has paid back to the*
37 *estate, and now to permit him to take in addition one-fourth of that which remains*
38 *of the estate, would not only give him a decided advantage over the others, but would*

1 *be giving him more than his father by express terms bequeathed and devised to him*
2 *in his said will, and would be giving to the other three beneficiaries much less than*
3 *was devised to them by said will.* [Emphasis Added]

4 The logic applied in the *Koerner v. Pfaff* case could not be more appropriately
5 stated by Jacqueline or Kathryn. Jacqueline and Kathryn implore this Court, as a court
6 of equity to apply the same logic and conclusion to this matter and reach the only
7 reasonable conclusion that can be made which is that, to the extent Eleanor's share is
8 not completely forfeited under the Trust's no-contest clause, her trust share should then
9 be surcharged, and Eleanor receive no further Trust income, until Jacqueline and
10 Kathryn have been fully reimbursed for the damages she has caused them.

11 **7. The Trust's "no-contest" provisions supersede the Trust's "spendthrift"**
12 **provisions.**

13 In addition to the public policy reasons for overriding Nevada's exemption laws,
14 should the Court deem it best to not fully enforce the no-contest provisions causing a
15 total forfeiture of Eleanor's benefit, then the Court should still use the "no-contest"
16 provisions against Eleanor to override the Trust's spendthrift provisions, and order a
17 surcharge of her income benefits to provide the means for Jacqueline and Kathryn to
18 recover the damages Eleanor has caused to them.

19 Enforcement of "no-contest" clauses in Wills and Trusts was well recognized
20 in the United States, prior to the enactment of NRS 137.005 and NRS 163.00195.
21 These statutes did not overturn the common law recognition of no-contest clauses in
22 Nevada as approved in *Hannam v. Brown*, 114 Nev. 350, 956 P.2d 794, 798 (1998).
23 Eleanor in her own briefing to the Court has previously noted that by law, the intent of
24 the grantors establishing the Trust should provide the guideline for how Trust
25 provisions are interpreted and applied. See, also, *Hannam v. Brown*, at 798, where the
26 Court states: "This court has historically construed trusts in a manner effecting the
27 apparent intent of the settlor." While W.N. Connell and Marjorie T. Connell in
28 establishing their Trust included a "spendthrift" clause in Article SIXTH of the Trust
to protect the Trust beneficiaries from creditor claims, they also most clearly and

1 forcibly declared that no beneficiary or other person associated with the Trust should
2 create litigation and disputes, or attacks upon the Trust management and distribution.
3 In weighing the importance of the “spendthrift” clause versus the “no-contest”
4 provisions in the Trust, it is submitted that the grantors would in no way sanction
5 Eleanor’s tortious and criminal behavior and would want the “no-contest” provisions
6 to be given precedence.

7 Further, although spendthrift provisions in trusts are normally given great
8 recognition and enforcement, several equitable exceptions to their enforcement have
9 developed under the law, even without recourse to a no-contest clause. A good treatise
10 on the exceptions to their enforcement is found in the Restatement (Second) of Trusts,
11 Section 157 (1959). Therein it states:

12 “Although a trust is a spendthrift trust . . . , the interest of the beneficiary can be reached
13 in satisfaction of an enforceable claim against the beneficiary,

- 14 (b) for necessary services rendered to the beneficiary or necessary supplies
15 furnished him;
16 (c) for services rendered and materials furnished which preserve or benefit
17 the interest of the beneficiary . . .

18 In particular, one of the cases cited in the treatise is *Kirkpatrick v. United States*
19 *National Bank*, 502 P.2d 579 (Or. 1972), where the Court declared that a beneficiary’s
20 trust benefit could, for public policy considerations, be held liable for a tort committed
21 and damages caused by the beneficiary, notwithstanding the trust had a spendthrift
22 provision otherwise insulating the benefits from creditor claims. *Id.* at 581. The Court
23 noted that while there are few court decisions on the issue, and some courts have held
24 otherwise, “legal writers contend that provisions of a spendthrift trust which would
25 prohibit recovery from trust funds for torts committed by the beneficiary are invalid as
26 against public policy (citing “Scott on Trusts” (3d ed.); “Griswold, Spendthrift Trusts
27 (2d ed.) And Restatement (Second) of Trusts, Section 157).

28 The obvious applicability of the exceptions to enforcement of “spendthrift”
clauses for public policy reasons is clearly present in the case of Eleanor and her
misconduct. It would be a great affront to public policy interests to allow Eleanor to

1 not lose her Trust income benefits where she has caused serious financial damages to
2 other Trust beneficiaries in breaching her duties as trustee and in converting funds
3 belonging to the other trust beneficiaries. Certainly insulating Eleanor from losing her
4 Trust income where she has been guilty of tortious and criminal behavior was not
5 intended by the Grantors of the Trust in providing a spendthrift clause in the Trust.
6 The spendthrift provision in the Trust, while broad in scope, does not mention being
7 exculpated from the beneficiary's own tortious or criminal conduct. And even if it did,
8 such would be contrary to public policy and should not be enforceable. But, in this
9 case, the Court does not need to address this yet unresolved legal issue in Nevada.
10 Rather, in conjunction with the "no-contest" provision in the Trust, the Court has full
11 authority to now declare Eleanor's Trust income benefits as forfeited or surcharged,
12 and to order that such benefits now be payable to Jacqueline and Kathryn.

13 **RESERVATION OF RIGHT TO SUPPLEMENT**

14 The discussion of Eleanor's acts and the damage amounts referenced herein are
15 based on information that has currently been discovered, but which is still subject to
16 further investigation by the current trustee, Fredrick P. Waid. As such, Jacqueline and
17 Kathryn expressly reserve the right to include further claims for damages and to adjust
18 the calculated amount of such damages as further needed once a final and conclusive
19 reporting has been submitted by Mr. Waid. This would include assessing Eleanor with
20 the fees and costs incurred by the trustee and his counsel.

21 **CONCLUSION**

22 Eleanor has breached her fiduciary duties owing to the Trust beneficiaries. She
23 repeatedly violated the prudent investor rule during her tenure as Trustee. Eleanor
24 maliciously and fraudulently converted approximately \$2,650,000 of Trust funds
25 for her own personal benefit. She frivolously has litigated in this case claims having
26 no merit and causing thousands of dollars of unnecessary litigation expense. Even after
27 being judicially removed as trustee, Eleanor persistently attacks, hinders, and opposes
28 the administration of the Trust by failing to be cooperative with Mr. Waid's

1 investigation, and she continues to fail to turn over assets belonging to the Trust that
2 she stole and converted for own personal use. For these reasons, the relief requested
3 herein is proper.

4 WHEREFORE, Jacqueline and Kathryn respectfully pray that this Court grant
5 the relief sought in this Petition in full, specifically determining and ordering that:

6 1. Eleanor Connell Hartman Ahern be personally liable for all costs reasonably
7 incurred by Jacqueline and Kathryn, including reasonable attorneys fees, court costs,
8 successor trustee fees, and any other costs due to Eleanor's misconduct, and in having
9 to be forced to account for and explain the Trust transactions for the time in question;

10 2. Eleanor is personally liable to the Trust and Jacqueline and Kathryn in the
11 amount of approximately \$2,650,000, or in such other amount as this Court shall deem
12 she converted from the Trust assets;

13 3. The No-Contest Clause, contained in Article TENTH of the Trust, applies to
14 Eleanor; that Eleanor violated the No-Contest Clause without any probable cause to do
15 so; and, that Eleanor's sole remaining interest in the Trust be reduced to \$1.00;

16 4. The amount of damages caused by Eleanor should be trebled as a result of
17 Eleanor's conversion, pursuant to NRS 143.120(3) and pursuant to NRS 42.005,
18 resulting in damages in the total amount of approximately \$7,950,000, which Eleanor
19 now owes to the Trust and Jacqueline and Kathryn;

20 5. That in the event a total forfeiture of Eleanor's Trust benefits is not declared
21 under the Trusts "no-contest" provisions, Eleanor's Trust income benefits should still
22 be surcharged, and it be ordered that her said benefits be paid over to Jacqueline and
23 Kathryn until such time as they have recovered from her all of the damages she has
24 caused to them as ordered by this Court; and

25 6. For such other and further relief as, to this Court, seems just and equitable

26 ///


27 ///

28 ///

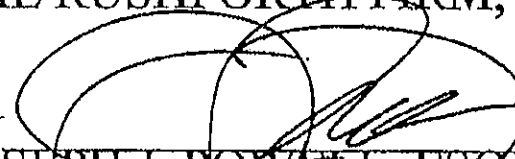
under these circumstances.

DATED this 3rd day of June, 2015.

ALBRIGHT, STODDARD, WARNICK
& ALBRIGHT

By 
WHITNEY B. WARNICK, ESQ.
Nevada Bar No. 001573
801 S. Rancho Drive, Suite D-4
Las Vegas, Nevada 89016
Attorneys for Kathryn A. Bouvier

THE RUSHFORTH FIRM, LTD.

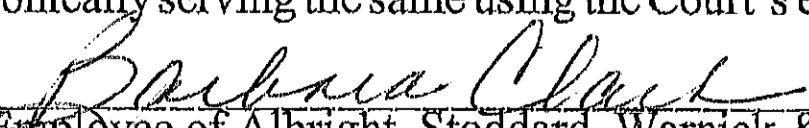
By 
JOSEPH J. POWELL, ESQ.
Nevada Bar No. 008875
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134
Attorneys for Jaqueline M. Montoya

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on the 3 day of June, 2015, I placed a true and correct copy of the foregoing **MOTION FOR ASSESSMENT OF DAMAGES AGAINST ELEANOR AHERN AND ENFORCEMENT OF NO CONTEST CLAUSE** in the United States Mail, at Las Vegas, Nevada, enclosed in a sealed envelope with first class postage thereon fully prepaid, and addressed to the following:

Kirk B. Lenard, Esq.
Tamara Beatty Peterson, Esq.
Brownstein Hyatt Farber Schreck
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614

(On the same date, I also served a true and correct copy of each of the foregoing documents upon all counsel of record by electronically serving the same using the Court's electronic filing system.)


An Employee of Albright, Stoddard, Warnick & Albright

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEVADA)
)ss
COUNTY OF CLARK)

JACQUELINE M. MONTOYA, being first duly sworn, states as follows:

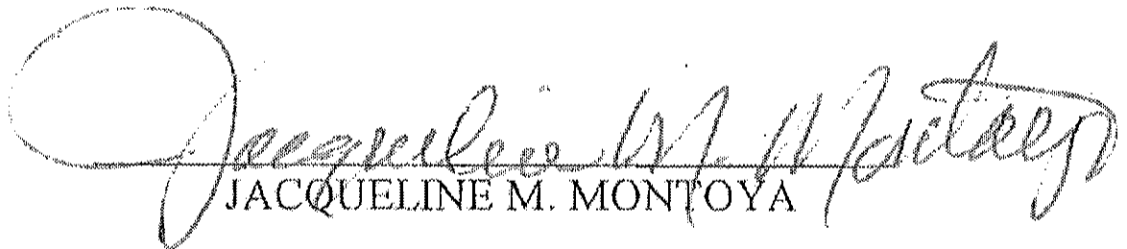
1. I have personal knowledge of the facts stated herein and I am competent to testify of them in a Court of law.
2. I have reviewed the factual assertions in the foregoing Motion and state that they are true and accurate to the best of my knowledge and information.
3. While these proceedings have caused me a great amount of grief and pain, in that I have been litigating with my mother whom I love, her actions and decisions have caused me, my family and my sister, Kathryn's family a great amount of suffering, both financially and emotionally.
4. As I have previously testified in these proceedings, I and my husband have been required to borrow monies from investment accounts set up for future support needs to meet ongoing living expenses for our family. Further, a great amount of money has been spent and wasted on litigation costs, crippling efforts to otherwise invest the funds used in beneficial areas.
5. I am also aware that my sister, Kathryn's damages and losses caused by our mother's wrongful conduct are even more egregious than mine, due to her not having adequate funds to deal with storm damages to her home and other creditor issues caused by her not receiving the trust income she was supposed to receive.
6. However, the damages we have suffered far exceed the litigation costs and loss of funds caused by my mother's wrongful conduct. We are still learning practically each day the adverse consequences which are resulting and happening from my mother's wrongful handling of the trust administration, failure to properly account for and pay income taxes, and

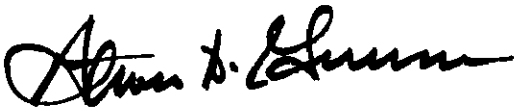
failure to properly safeguard and invest trust assets. The ramifications of her conduct have led, and will likely lead to more complicated dealings with the IRS, and other litigations issues. The time and cost it will take to resolve these issues will greatly magnify the total damages Eleanor has caused to us by her breaches of fiduciary duties and frivolous and harassing conduct towards us and our legal rights and interests.

7. If I felt my mother had any justifiable reason for her conduct in these proceedings, I would accept the fact that we had a difference of opinion on various issues. However, it has been clear from the start that my mother has not been acting properly, has been making frivolous and selfish claims, and has been duped into abandoning her family in favor of individuals who prey upon her tendency to be exploited for their own greed and self interest.
8. I know from the close association I had with my grandmother, Marjorie T. Connell, that the things my mother has done in causing and promoting this litigation violate her wishes and intentions, and those of my grandfather, W.N. Connell, in setting up their 1972 Trust.

I declare under penalty of perjury pursuant to the law of the State of Nevada that the foregoing statements are true.

Dated this 2nd day of June, 2015


JACQUELINE M. MONTOYA


CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

)
In the Matter of the Trust of:) CASE NO. P-09-066425
)
THE W. N. CONNELL AND MARJORIE) DEPT. NO. XXVI
T. CONNELL LIVING TRUST, DATED)
MAY 18, 1972.) **Transcript of Proceedings**
)

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE
EVIDENTIARY HEARING: CONTEMPT OF COURT

MONDAY, JUNE 22, 2015

APPEARANCES:

For Eleanor Ahern: KIRK B. LENHARD, ESQ.
TAMMY PETERSON, ESQ.

For the Trustee: TODD MOODY, ESQ.

For Beneficiaries: JOSEPH J. POWELL, ESQ.

RECORDED BY: KERRY ESPARZA, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

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

1 MONDAY, JUNE 22, 2015 AT 1:48 P.M.

2

3 THE COURT: P066425. We'll let everybody state
4 their appearances for the record and who's here. And, I
5 guess, a question is, since this is an evidentiary hearing,
6 if there are any nonparties who are going to be testifying,
7 do you want them excluded? I mean, --

8 MR. LENHARD: Is this an evidentiary hearing?

9 THE COURT: Well we have to have an evidentiary
10 hearing on a contempt motion.

11 MR. LENHARD: Well it's -- we've talked about this
12 with Mr. Waid and counsel.

13 THE COURT: Okay.

14 MR. LENHARD: Our understanding today is this is a
15 preliminary inquiry to determine --

16 THE COURT: They have to --

17 MR. LENHARD: -- whether a contempt hearing is
18 necessary.

19 THE COURT: Okay.

20 MR. LENHARD: So I had promised Mr. Waid --

21 THE COURT: Because the evidentiary hearing would
22 be before whoever it gets assigned to.

23 MR. LENHARD: Correct. Because I promised Mr.
24 Waid that I was not calling him as a witness today and --

25 THE COURT: Okay. So then we don't need to worry

1 about whether we need to exclude witnesses or anything?

2 MR. LENHARD: Right. And there are exhibits that
3 Mr. Moody is going to admit. We're not objecting to any of
4 them because they're all in the record anyway. So, --

5 THE COURT: Okay.

6 MR. MOODY: Judge, I was planning on --

7 THE COURT: In that case, then -- we'll just let
8 everybody state appearances then and we don't have to worry
9 about anybody in the courtroom that shouldn't be here. So
10 we're good. So, everybody can make their appearances and
11 we're ready to go.

12 MR. MOODY: Todd Moody for Fred Waid, acting
13 temporary successor trustee of the W. N. Connell and
14 Marjorie T. Connell Living Trust dated May 18, 1972. Mr.
15 Waid is here in the courtroom with me.

16 THE COURT: Thank you.

17 MR. POWELL: Good afternoon, Your Honor. Joey
18 Powell appearing on behalf of Jacqueline Montoya, who is
19 present in the courtroom. Also present is Kathy Bouvier as
20 well.

21 THE COURT: And are we expecting your --

22 MR. POWELL: Mr. Warnick won't be here.

23 THE COURT: Okay.

24 MR. POWELL: Okay.

25 THE COURT: Great.

1 MR. LENHARD: Your Honor, Kirk Lenhard and Tammy
2 Peterson on behalf of Eleanor Ahern.

3 I will -- let me question something real quickly.
4 The trustee is, of course, jurisdictionally bringing this
5 Complaint through his affidavit. The Court is, of course,
6 the party determining whether the contempt will go forward.

7 THE COURT: Right.

8 MR. LENHARD: What standing does counsel for one
9 of the daughters have to appear here today? He's not a
10 special deputy.

11 THE COURT: All right.

12 MR. LENHARD: He's not appearing on behalf of the
13 trustee and I don't think he has the right to argue and I
14 will object to any argument besides anybody besides Mr.
15 Waid, or his counsel, or, of course, the Court.

16 THE COURT: Right. And I don't know that Mr.
17 Powell, in fact, is not sitting at counsel table. I don't
18 know, Mr. Powell, that you were planning on participating.
19 You're just here with your clients --

20 MR. POWELL: I was under the impression this was
21 also kind of a reporting from Mr. Waid, and so this was a
22 broader scope of what we were doing here today. And so,
23 part of it is wanting to observe and, other part, if,
24 again, I can interject, I would like to, again, I -- I
25 think this is kind of -- this has culminated in a point

1 where we've all -- are waiting for answers --

2 THE COURT: Right. Well I think --

3 MR. POWELL: -- effectively here.

4 MR. LENHARD: This is not a report. This is a --

5 THE COURT: I --

6 MR. LENHARD: -- preliminary hearing on contempt.

7 THE COURT: Right. And I think that what we had

8 was -- the next thing that we have on calendar is July 22nd,

9 which is the Motion for --

10 MR. POWELL: Correct. That is our --

11 THE COURT: -- Damages.

12 MR. POWELL: -- Motion which I don't know if you

13 want to address it now.

14 THE COURT: Yeah.

15 MR. POWELL: We're going to --

16 MS. PETERSON: Well --

17 MR. POWELL: -- move that hearing. So --

18 THE COURT: Okay.

19 MR. POWELL: -- I don't know if we can set that up

20 before we leave here today.

21 THE COURT: Okay.

22 MR. POWELL: It will be an alternative date for

23 you.

24 THE COURT: Yeah.

25 MR. LENHARD: We'll be happy to accommodate him

1 on dates and so forth.

2 THE COURT: Okay.

3 MR. LENHARD: So --

4 THE COURT: All right. So, one thing I wasn't
5 sure because we had this notice that you required --
6 requested transcripts. If you felt you could go forward
7 today without the transcripts? I wasn't clear on --

8 MR. LENHARD: We're able to go forward, yes.

9 THE COURT: Okay. All right. So this is just a
10 courtesy copy for us then. Okay. All right.

11 So, just so it's clear and we -- I'll lay out the
12 procedure here. We -- I mean, in order to determine if
13 there is going to be an evidentiary hearing, as Mr. Lenhard
14 pointed out, with civil contempt, you have to have a
15 hearing to say I believe there's been contempt. Somebody
16 has to hear the evidentiary hearing on contempt. That's
17 where Judge Gonzalez would find somebody to hear the
18 contempt, if it goes that far.

19 So, the basis -- the original objection that was
20 raised by Mrs. Ahern's counsel was that we needed an
21 affidavit so they could, you know, go forward and know what
22 they were defending on. So then we got the affidavit from
23 Mr. Waid and that's when we scheduled this part -- this
24 hearing.

25 So, now we're ready to go forward on this hearing

1 and, as Mr. Lenhard pointed out, that's why I wasn't sure
2 if we were going to have testimony today or just argument,
3 but if it's just argument, then I think we're ready to
4 proceed and I assume that you've got the response to the
5 affidavit of Mr. Waid.

6 MR. MOODY: We did, Your Honor.

7 THE COURT: Okay. So --

8 MR. MOODY: We do have that.

9 THE COURT: Okay. Okay. So --

10 MR. MOODY: We see this slightly differently.

11 THE COURT: Okay.

12 MR. MOODY: Although I don't -- I'm not sure it's
13 an evidentiary hearing. I am planning on asking Mr. Waid
14 some questions under oath to establish some foundation for
15 his affidavit to lay out some facts for this Court.

16 And I do want to correct -- I think we see this
17 differently from opposing counsel. We don't see the
18 affidavit of Mr. Waid as the initiation of the contempt.
19 That affidavit was supplied by Mr. Waid pursuant to the
20 Court's request after Ms. Ahern's counsel said you can't
21 consider contempt without an affidavit on file. So, it's
22 our position that the contempt is Court-initiated, not on
23 behalf of the trustee. We're simply here to offer some
24 evidence to the Court about what Mr. Waid's observations
25 have been.

1 MR. LENHARD: Your Honor, I'm a little perplexed
2 here.

3 THE COURT: Okay.

4 MR. LENHARD: In our discussions with Mr. Waid,
5 and Mr. Waid's been acting as his counsel at times, which
6 is always a very difficult situation, but the understanding
7 was that we were not to engage or going to engage in
8 vigorous cross-examination. If Mr. Waid is going to
9 testify here today on detailed facts -- it's one thing to
10 lay a foundation. I don't have any problem with that. In
11 fact,,] as I said -- told Mr. Moody, I agree to the
12 admission of these exhibits. If Mr. Waid's going to start
13 detailing detailed facts, I have a right to cross-examine.

14 I'm a little bit sandbagged here. I have a right
15 to prepare my cross-examination and be vigorous and
16 aggressive in that cross-examination. I'm not prepared to
17 do that today. I'm prepared to argue, yes. I'm not
18 prepared to chase Mr. Waid around and if that's what we're
19 going to do, I intend on chasing him around aggressively.

20 THE COURT: Okay. Well, looking again at Chapter
21 22, Civil Contempt, and I guess just -- we should sort of
22 state the history of this.

23 A contempt that occurs in the presence of a judge,
24 I think the judge can initiate, and that's not what this
25 was, however, the Court became very concerned when -- in

1 that interim when one set of counsel is withdrawing from
2 Ms. Ahern and a new counsel is coming in, Mr. Waid, who had
3 recently been appointed to be the trustee for everybody,
4 and tried to track down where the money was and in order to
5 make a report that we've never gotten on the funds, as Mr.
6 Powell is talking about, he raised -- he had enough concern
7 that it caused the Court to be concerned because very --
8 there were very specific orders that were put in place and
9 it sounded to the Court as if those had just not been
10 complied with and that was my concern.

11 So I asked for detail and were given an initial
12 report. As Mr. Moody indicated, this isn't -- this is an
13 awkward position, I'm sure, to be in when you're the
14 trustee for somebody and you have to say something like has
15 been said in this affidavit because it's not the position
16 he wants to be in. He is her trustee, but he's also got to
17 protect the other beneficiaries.

18 So, it's -- it puts the trustee in an awkward
19 position, but when he's -- when the specific beneficiary
20 was also previously a trustee and he's got to report on
21 what happened during the previous administration, he's just
22 wearing a lot of hats and that's why, you know, we felt
23 like we needed a third party in here in the first place is
24 we needed somebody independent and when the independent
25 person comes in and says, I'm really worried, I can't find

1 the money, the Court became concerned.

2 So, that's why I asked for more specifics and
3 that's what led us to this point and Judge Gonzalez said:
4 Well, before you can get to the point where I appoint
5 somebody to have that evidentiary hearing, you first have
6 to have a hearing to determine that you want it referred to
7 a third party because somebody else has to hear whether
8 there's contempt. So, the actual facts of it -- and which
9 we've all discussed and we all knew all along, but we have
10 to go through this next -- this step of saying do -- is it
11 necessary to refer it to a third party because that's the
12 person who would hear the evidence.

13 So, --

14 MR. LENHARD: I agree with you as far as you've
15 gone, but let me remind everybody that we're here under 22
16 -- NRS 22.030, paren 2:

17 If a contempt is not committed in the immediate
18 view and presence of the Court or judge at chambers,
19 which is the case here, an affidavit must be presented
20 to the Court or judge of the facts constituting the
21 contempt, or a statement of the facts by the masters or
22 arbitrators.

23 I'm going to object to anything going outside the
24 four corners of that affidavit in today's proceedings
25 because if you go outside those four corners, we've been

1 denied -- Ms. Ahern's been denied her due process rights.

2 THE COURT: Okay. I think that's probably true
3 and I do view this, as I said, more -- in the context of
4 somebody who is like a special master or a -- as -- it
5 specifically takes that into consideration that somebody
6 who has been appointed by the Court because he's -- he was
7 wearing, as I said, multiple hats, and it sort of puts him
8 more in that status of a master because he was specifically
9 instructed, you know, go out there, marshal all of the
10 assets for all of the beneficiaries, and tell us what you
11 found and then we can go forward.

12 Technically, he's not a master. He wasn't
13 appointed as a master, but it -- he's a trustee, but it's -
14 - it sort of puts him in that position where when he's
15 trying to marshal assets, he sort of falls under that
16 portion of the statute I thought. So, it's just -- as I
17 said, I feel for Mr. Waid's concern here that he's in this
18 awkward position, having to report something about somebody
19 for whom he's the beneficiary -- he's the trustee, but he
20 also had this obligation to the Court to marshal the assets
21 for all of the beneficiaries and to report.

22 And so, he, as I said, although may not
23 technically be that title, wore a lot of hats and, you
24 know, specifically, the Court did ask him: You need to put
25 this all in writing so we can have a hearing and determine

1 whether we need to have some third party judge actually
2 have an evidentiary hearing on contempt.

3 So we've got the affidavit and we've got the
4 response. So we're ready now, I think, Mr. Moody, for the
5 argument on, you know, is this serious enough that it needs
6 to be referred for an evidentiary hearing because that's
7 the next step?

8 MR. MOODY: So is Your Honor asking me to make
9 argument without Mr. Waid testifying?

10 THE COURT: You know, I think that --

11 MR. MOODY: Because what I can do, Judge, and --

12 THE COURT: I don't think Mr. Lenhard is going to
13 challenge the foundation of anything --

14 MR. MOODY: That's really all I'm --

15 THE COURT: -- the documents you're admitting.

16 MR. MOODY: -- asking is foundational stuff to put
17 things into chronological order and establish the
18 foundation for some documents that have been provided, but
19 most of them, actually, are filings with the Court.

20 THE COURT: Okay.

21 MR. MOODY: So --

22 THE COURT: So we probably don't need it.

23 MR. MOODY: Okay.

24 THE COURT: If, at some point, it's determined
25 that, you know, there's a question about something, I think

1 maybe at that point in time we could ask Mr. Waid if he
2 could lay a foundation for it, but it sounds to me, at this
3 point, that there's not going to be a challenge to that,
4 but we would just reserve the right if necessary to decide
5 whether or not he should be allowed to do that or not
6 because --

7 MR. LENHARD: I have a list here of seven items -
8 -

9 THE COURT: -- I think we're going to be going
10 forward.

11 MR. LENHARD: -- and I've already told Mr. Moody
12 that I'm not objecting to any of them.

13 THE COURT: Okay. So we're probably okay. If,
14 for some reason, there's something that counsel don't know,
15 we don't understand, we don't have the knowledge, only Mr.
16 Waid would have it, I mean, we can consider whether we need
17 some testimony on certain issues, but for right now, I
18 think we can probably just proceed.

19 MR. MOODY: Okay. Very good.

20 THE COURT: And, again, this isn't an evidentiary
21 hearing and it's not like we have to exclude -- ask anybody
22 to leave the courtroom because they're going to be
23 testifying later. I mean, ultimately, I suppose if it does
24 go to the next step, they might be called to testify, but I
25 don't think that means that they can't be in here listening

1 now. I think everyone can stay.

2 MR. MOODY: Okay. Your Honor, the first document
3 I'm going to refer to is the declaration of the Eleanor C.
4 Ahern's brief regarding accounting, fiduciary duties, and
5 trust administration.

6 So, Mr. Waid was appointed as acting temporary
7 successor trustee of the W. N. Connell and Marjorie T.
8 Connell Living Trust, Dated May 18, 1972 on March 20th,
9 2015. That happened in court without Mr. Waid being
10 present. That appointment of Mr. Waid was confirmed by an
11 order that also removed Eleanor as trustee. One week
12 before the March 20 hearing when Mr. Waid was appointed, on
13 March 13th, Eleanor's prior counsel, Marquis Aurbach and
14 Coffing, filed a brief that I've referred to in this
15 declaration.

16 And, Your Honor, I would like to turn to -- well,
17 let me just read it because it's already a part of the
18 record. Page 7 of that brief reads:

19 The accounts currently have a total of \$1,999,700
20 -- sorry, \$997,573.16 which is \$143,983.87 more than the 65
21 percent to be held in trust. Specifically as of January
22 31, 2015, there are funds in three separate interest
23 bearing Wells Fargo accounts on account with Fidelity
24 Capital, Incorporated and on deposit with Johnston and
25 Associates, being held in their trust account.

1 Footnote 19 in that paragraph references a
2 declaration of Ms. Ahern, which was attached to the brief
3 and filed under seal and that exhibit is Exhibit 5 to that
4 brief, but for purposes of today's hearing, I have had this
5 marked as Exhibit 1. I'd be happy to approach Your Honor
6 to give --

7 THE COURT: Okay.

8 MR. MOODY: -- the Court a copy of this.

9 THE COURT: All right.

10 MR. LENHARD: Mr. Moody, what's the exhibit?

11 MR. MOODY: This is Exhibit 1.

12 MR. LENHARD: Okay. Thank you.

13 MR. MOODY: So, Your Honor, on page 3 of Exhibit 1
14 of Ms. Ahern's declaration under paragraph 12, it reads:

15 A true and correct copy of a letter regarding my
16 balance on deposit with Fidelity Capital, Incorporated
17 received and maintained by me in the ordinary course of
18 business as trustee of the trust is attached to the
19 brief as Exhibit 14.

20 I had marked as Exhibit 2 that exhibit.

21 THE COURT: Thank you. And, again, there's no
22 objection to the --

23 MR. LENHARD: So we're clear, for purposes of this
24 hearing and the contempt hearing, there's --

25 THE COURT: Right.

1 MR. LENHARD: -- certainly no objection. I guess
2 when we get to a trial on the merits, --

3 THE COURT: Right.

4 MR. LENHARD: -- I'll -- we have hearsay
5 objections and so forth.

6 THE COURT: Okay.

7 MR. LENHARD: Thank you.

8 THE COURT: Yeah, we'll admit them then, yes. So
9 --

10 THE CLERK: Is the [indiscernible] --

11 THE COURT: That's a good question as to how we
12 would label this.

13 MR. LENHARD: I don't know. It's a good question.

14 THE COURT: He's not really --

15 MR. LENHARD: It's a Court's Exhibit.

16 THE COURT: He -- it's really a Court's Exhibit
17 because he doesn't really hold a position as a party. He's
18 not a party. He's the trustee.

19 MR. MOODY: Correct.

20 THE COURT: So he's a third party. So, --

21 THE CLERK: We'll admit them as Court's Exhibits.

22 THE COURT: We'll do Court Exhibits? We'll do
23 them as Court Exhibits 1 and 2. Okay?

24 MR. MOODY: So, Judge, the content of this letter,
25 it's dated March 5th, 2015. Fidelity Capital, Incorporated

1 is the title of the letterhead. It's addressed to the
2 trust and references a specific account ending in 1734.
3 Addressed to Eleanor at the time:

4 The purpose of this letter is to confirm that we
5 have \$500,000 on deposit for the W. N. Connell and
6 Marjorie T. Connell Living Trust, Dated May 18, 1972.
7 It is the cumulative total today on the account that
8 was opened in 2014 by Eleanor Ahern as the sole
9 trustee. This is available on demand. Your statement
10 reissues will come from our California office.

11 So, this letter came into Mr. Waid's possession
12 following his appointment as trustee when he received a
13 copy of that brief that was filed with the Court under
14 seal. He entered this case and gained a quick
15 understanding that \$500,000 was on deposit with Fidelity
16 Capital.

17 I want to show the Court what has been marked as
18 Exhibit 3.

19 MR. LENHARD: Exhibit 3, Todd?

20 MR. MOODY: Exhibit, thanks. May I approach the
21 Court?

22 THE COURT: Thank you. And that -- that does
23 raise a good point, Mr. Moody, that I should discuss with
24 Mr. Lenard and Ms. Beatty. Portions -- some documents have
25 been sealed, others haven't. I mean, was there a reason

1 why these should or should not be sealed? As is indicated,
2 we'll make them Court Exhibits, but the next question is do
3 we seal any of these because if they're taken from a sealed
4 brief, then, you know, do we need to -- they wouldn't
5 otherwise be visible to the public.

6 MR. LENHARD: I hate to admit it. I'm not sure
7 what was sealed and what wasn't.

8 THE COURT: And that's a concern for me in that,
9 you know, assuming -- if it's sealed, does it need to
10 remain sealed? If it remains sealed, if this were to be
11 referred on, would that person be able to see it? So, I
12 guess that's kind of my concern is that we want to make
13 sure that we have a record that anybody looking at this and
14 saying was this a proper proceeding can follow what we're
15 doing and, you know, this is how -- you know, I'm aware of
16 all of this because --

17 MR. MOODY: Well, sure.

18 THE COURT: -- you know, I had it, and we knew
19 about it.

20 MR. LENHARD: Do you know what was sealed and what
21 --

22 MR. MOODY: Well, I think the brief and all
23 exhibits are sealed, to be honest, --

24 THE COURT: Yeah.

25 MR. MOODY: -- and we have no problem with these

1 remaining under seal for the time being for purposes of
2 this hearing.

3 THE COURT: If it is sealed, is --

4 MR. LENHARD: With that, I guess, too --

5 THE COURT: -- can the Judge see it?

6 MR. LENHARD: -- obviously if she's -- I'll use
7 the old preliminary hearing term, held to answer, these
8 documents would go up to the referring judge. Correct?

9 THE COURT: Yeah. Correct.

10 MR. LENHARD: So the referring judge would be able
11 to see them under seal or not is the --

12 THE COURT: That's why I'm consulting with the
13 technical expert here.

14 MR. LENHARD: So, I don't know.

15 THE CLERK: We have that question a lot.
16 [Indiscernible] in the vault.

17 MR. LENHARD: I would think so.

18 THE COURT: Okay. Yeah. Yeah, they would be
19 available. They would be in the vault. Yeah, so -- yeah.
20 We -- I just want to make sure that if this goes any
21 further that we haven't like set up a record here that
22 nobody can look at and say: What did you do?

23 So, just so we have a procedure in place, and
24 everybody understands, we'll seal them again because they
25 were from a sealed brief, but they would be on file and

1 anybody, if they have to look at this, could get them out
2 of the -- even though they're under seal, they're --
3 they'll be available. So, if this goes any further, we
4 aren't creating like a black hole that nobody is going to
5 understand what we were talking about.

6 MR. MOODY: Sure.

7 THE COURT: Okay. So thanks.

8 MR. MOODY: Thank you, Judge.

9 THE COURT: I appreciate that.

10 MR. MOODY: Okay. So, Judge, referring to Exhibit
11 3, the first paragraph of this exhibit reads:

12 Pursuant to the Court's instruction made at the
13 March 20, 2015 hearing, Eleanor Ahern, as trustee,
14 transferred the 500,000 on deposit with Fidelity
15 Capital Incorporated into an FDIC insured money market
16 account held at U. S. Bank.

17 And attached to that Notice of Compliance, as
18 Exhibit 1, is a transaction history from U. S. Bank printed
19 on April 8th of 2015 and that transaction or history
20 purports to show that a deposit was made with U. S. Bank
21 for \$500,000.

22 THE COURT: So, for the record, there being no
23 objection, this document was not sealed so --

24 MR. MOODY: It was not.

25 THE COURT: Yeah. That will be Court's Exhibit

1 Number 3. But it's not sealed.

2 MR. MOODY: So, Your Honor, one of the first
3 things that Mr. Waid did was he investigated to confirm
4 that, in fact, 500,000 was transferred from the Fidelity
5 Capital to U. S. Bank and that investigation revealed that
6 the funds deposited with U. S. Bank, as reported to the
7 Court, did not come from Fidelity, but came directly from a
8 cashier's check obtained by Eleanor from the trust's
9 account at Wells Fargo Bank.

10 And with that information, Judge, Mr. Waid
11 contacted current counsel for Ms. Ahern, Marquis Aurbach
12 and Coffing, and let them know --

13 THE COURT: Prior counsel.

14 MR. MOODY: Prior counsel. I'm sorry. Did I say
15 current?

16 MS. PETERSON: You did.

17 MR. MOODY: I'm sorry. Prior counsel. Let them
18 know about his findings and, as a result of that, Judge,
19 the very next day, on April 14th, Ms. Ahern's former counsel
20 filed a Notice of Withdrawal.

21 THE COURT: All right.

22 MR. MOODY: That is withdrawal of the Notice of
23 Compliance regarding the \$500,000 deposit.

24 THE COURT: Again, a Court's -- a court document
25 not under seal. So it will be Court's Exhibit Number 4.

1 MR. MOODY: So, Mr. Waid came to court on April
2 14, 2015 at a hearing on Ms. Ahern's Motion for Stay
3 Pending Appeal on Order Shortening Time and brought this
4 information to the Court's attention and asked the Court to
5 enforce its prior order regarding the return of that
6 \$500,000 and maybe this is where we get -- we have a
7 difference of opinion about whether Mr. Waid initiated a
8 contempt. Really what he was doing was simply asking for
9 the Court to enforce its order so that that \$500,000 would
10 be returned to the trust.

11 And the Court issued from the bench an order to
12 show cause with a return hearing date set for the following
13 week on Wednesday, April 22nd, 2015 and directed Ms. Ahern
14 again to return the Fidelity funds to the trust by 5 p.m.
15 on Friday, April 17, 2015.

16 THE COURT: I think, Mr. Moody, as I recall, Mr.
17 Waid wasn't even in town. He called in from another case.
18 He was out of town on business and specifically on the 14th,
19 he had asked for an order to enforce and I guess the
20 question is, you know, what are the options for the Court
21 in enforcing its orders? I -- short of civil contempt, I
22 don't know what other options there are for the Court.

23 So, I would concur that your history is correct in
24 that he did not come into court and say: I wish to
25 initiate a contempt proceeding. He specifically came in

1 and said: I wish the Court to enforce its orders. But
2 that leaves the Court then with a -- with the kind of
3 begging the question of: How else does a Court enforce its
4 orders?

5 MR. MOODY: And just to remind the Court, Mr. Waid
6 was here on April 14th.

7 THE COURT: He was.

8 MR. MOODY: He appeared telephonically on --

9 THE COURT: The following week.

10 MR. MOODY: -- April 22nd.

11 THE COURT: Correct. Yeah. So he was not here
12 the following week and, in fact, made it very clear that he
13 was very uncomfortable taking any action against -- or
14 being perceived to take any action against somebody who --
15 to whom he held a fiduciary capacity. It wasn't his intent
16 to do that, but, you know, the Court was left kind of with
17 -- as I said, I don't really know what other procedure the
18 Court has.

19 So, an order to show cause that you've marked here
20 as Exhibit 5, another court document which was not sealed.
21 So it will be Court's Exhibit Number 5.

22 MR. MOODY: Thank you, Judge.

23 So, Exhibit 5 is the Order to Show Cause that
24 issued following the April 14, 2015 hearing and this order
25 requires:

1 Ms. Ahern to appear before this Court on the 26th
2 located at the Regional Justice Center, 200 Lewis
3 Avenue, Las Vegas, Nevada, 89155, courtroom 3H at 10:30
4 a.m. on April 22nd, 2015 then and there to show cause if
5 any you have why you should not be adjudicated guilty
6 of contempt of court and punished accordingly for
7 failing to comply with this Court's order from the
8 March 20, 2015 hearing and return to Frederick P. Waid,
9 court appointed trustee of the W. N. Connell and
10 Marjorie T. Connell Living Trust, Dated May 18, 1972,
11 an inter vivos irrevocable trust by the close of
12 business, 5 p.m. pacific standard time, on Friday,
13 April 17, 2015, the \$500,000 held by Fidelity Capital,
14 Incorporated, the \$100,000 cashier check dated March
15 23rd, 2015 made payable to Eleanor Ahern and any other
16 trust funds held by Fidelity Capital, Incorporated.

17 There is another paragraph but it's really not
18 relevant to why we're here today.

19 Your Honor, it's our position that that was a very
20 clear and direct order of this Court asking Ms. Ahern for
21 compliance. To remind the Court, almost immediately after
22 that hearing, in fact, I believe it was that same
23 afternoon, at 4:30 that Marquis Aurbach and Coffing set up
24 an emergency or very quick conference call to tell the
25 Court that they wish to withdraw from the case and I raise

1 that only to explain to the Court that as a result of that
2 conversation, Mr. Waid was in a position where he felt like
3 he needed to do his best as trustee to recover and protect
4 funds. And so asked this Court for permission to speak
5 with Ms. Ahern directly and that permission was granted.

6 So you'll see in Mr. Waid's affidavit that on
7 Thursday, April 16, 2015, he spoke to her, and during that
8 conversation, he was informed by Ms. Ahern that she
9 believed she owed the trust \$800,000. He told her after
10 learning that information that she needed to speak with
11 counsel regarding that admission and that he did not have
12 sufficient information from the trust to verify that
13 information.

14 Ms. Ahern did not comply with the Court's order.
15 The 500,000 allegedly on deposit with Fidelity Capital,
16 Incorporated was never returned to the trust.

17 This Court granted the Motion of her former
18 counsel to withdraw and at that hearing on an Order to Show
19 Cause held on Wednesday, April 22nd, 2015, Ms. Peterson and
20 Mr. Lenhard appeared on behalf of Ms. Ahern.

21 The next thing that happened, Your Honor, was that
22 we -- well, not the next thing that happened, but for
23 purposes of this hearing, counsel for Ms. Ahern forwarded
24 to us a letter --

25 THE COURT: By this time, did Ms. Ahern have new

1 counsel.

2 MR. MOODY: I'm sorry?

3 THE COURT: Did -- by this time, did Ms. Ahern
4 have new counsel?

5 MR. MOODY: She did.

6 THE COURT: Okay. Just --

7 MR. MOODY: She did.

8 THE COURT: I just want to make it clear. You
9 know, we've had a change in counsel.

10 MR. MOODY: Can I approach?

11 THE COURT: Okay.

12 MR. LENHARD: Mr. Moody, this letter actually
13 hasn't been filed with the Court yet?

14 MR. MOODY: This has not been filed.

15 MR. LENHARD: I don't have any problem with it
16 being filed, just so we're clear.

17 MR. MOODY: Okay.

18 THE COURT: So, again, --

19 MR. LENHARD: Well, wait. Was the -- I'm sorry,
20 Judge. Was the first letter, the first Fidelity letter,
21 under seal? Do you recall?

22 MR. MOODY: It was under seal.

23 THE COURT: The --

24 MR. LENHARD: Then maybe we should put this one
25 under seal to be --

1 THE COURT: First --

2 MR. LENHARD: -- consistent.

3 THE COURT: Yes. The first Fidelity letter was.

4 I believe, Mr. Moody, I've seen this. This was attached to

5 something.

6 MR. LENHARD: It's -- it was probably attached to

7 a pleading somewhere, the question is was it under seal or

8 not?

9 THE COURT: Yeah.

10 MR. LENHARD: I don't know.

11 THE COURT: I have seen this letter.

12 MR. LENHARD: Well that means it's been --

13 MR. POWELL: I can clarify if the Court --

14 THE COURT: If we can allow Mr. Powell, He's got

15 information.

16 MR. POWELL: That letter was attached to their

17 accounting, which it does say under here: Filed under

18 seal. So I would assume the whole thing was --

19 THE COURT: Okay.

20 MR. POWELL: -- and that letter would be part of

21 it.

22 THE COURT: Thank you for your assistance, Mr.

23 Powell.

24 MR. POWELL: Sure.

25 THE COURT: So, yes, Mr. Lenhard, this was

1 attached to --

2 MS. PETERSON: I think he's actually confused.

3 MR. MOODY: He is. He's talking about the first

4 letter.

5 THE COURT: The first letter. This is the second

6 letter.

7 MR. POWELL: The letter to you?

8 THE COURT: I've seen -- no. I've seen --

9 MR. LENHARD: Hang on just a second here.

10 THE COURT: Yeah, if we can just have a moment.

11 We can clarify. I'll look. This is the one sentence

12 letter.

13 MR. LENHARD: Right.

14 MS. PETERSON: Correct.

15 THE COURT: And I've seen this attached to

16 something somewhere but I'd have to look through and see if

17 it's one of our sealed documents.

18 [Colloquy between counsel]

19 MR. WAID: It was not attached to my exhibit.

20 MR. LENHARD: No, no. I wasn't saying that.

21 THE COURT: I have seen it. I've seen this

22 somewhere.

23 MR. LENHARD: Well I'm sure if you think you've

24 seen it, you probably have.

25 THE COURT: Because I remember it. I remember

1 this letter. I'm just trying to see if it's in one of our
2 sealed documents. I don't -- to reiterate Mr. Lenhard's
3 point that it probably should be sealed, I seem to recall
4 this was attached to some pleading. So I'm -- if -- not
5 being able to confirm whether I've seen it somewhere before
6 and whether it was sealed or not, since it is related to
7 the previous document, I think it was 1 or 2, the letter
8 from Fidelity. Since it's related, we'll seal this one as
9 well. So we'll admit this as 6 and it will be sealed. I
10 mean, it just isn't viewable by the public.

11 MR. MOODY: Okay. Thank you, Judge.

12 So, Your Honor, this is the second letter that we
13 now have from Fidelity Capital, Incorporated. It's a month
14 and 10 days following the first letter. This one is also
15 addressed to the trust and specifically to Eleanor with
16 simply one sentence:

17 Due to -- it says: Due to your
18 misrepresentations, the proposed funding has been
19 withdrawn, signed by M. Perrill [phonetic], Vice
20 President, and provides a phone number.

21 So, Your Honor, with that information, Mr. Waid
22 attempted to contact Fidelity Capital and I can represent
23 to the Court that there was no answer at that phone number.
24 We could not establish a legitimate entity at that address
25 and the best that we could do was find an M. Perrill

1 [phonetic] who is an attorney out of California that may
2 have had some prior dealings with Ms. Ahern, but I -- we
3 don't need to get into all of that. I can just tell the
4 Court that we have not been able to speak with anyone at
5 Fidelity Capital.

6 Mr. Waid then filed an affidavit with this Court.
7 I marked this as Exhibit 7. This is our last exhibit, if I
8 can approach?

9 And, Judge, before I discuss the affidavit, I just
10 wanted to remind the Court that this second letter from
11 Fidelity Capital came from Eleanor's -- Ms. Ahern's current
12 counsel.

13 THE COURT: Right.

14 MR. MOODY: That's where -- that's how that letter
15 came into our possession.

16 THE COURT: That's what's in the affidavit.
17 That's what --

18 MR. MOODY: Yes.

19 THE COURT: -- I understood.

20 MR. MOODY: So, Your Honor, --

21 THE COURT: That --

22 MR. MOODY: -- Mr. Waid's affidavit --

23 THE COURT: Was it attached to the affidavit?

24 MR. MOODY: It was not.

25 THE COURT: Somewhere I -- somehow -- maybe in the

1 hearing it was provided but I just -- I remember that
2 letter.

3 MR. MOODY: So Mr. Waid filed an affidavit with
4 this Court dated May 6th -- well, filed on May 6th, 2015. I
5 can report to the Court that there have been no changes in
6 any of Mr. Waid's representations to the Court regarding
7 the \$500,000 that was allegedly on deposit with Fidelity
8 Capital. That money has not been returned to the trust.
9 It has not been accounted for by Ms. Ahern or her attorneys
10 and, quite frankly, Your Honor, she has been less than
11 cooperative in Mr. Waid's efforts to get a handle on where
12 that money is and get an accounting for it. He takes his
13 role seriously as trustee in this case. He's doing
14 everything he can to put monies back into the account and
15 to provide an accounting to this Court and that's what
16 brings us here today. So, that's where we are with respect
17 to that and the Court's order.

18 Your Honor, I guess the only other thing I would
19 do, and I was going to do this with Mr. Waid on the stand,
20 but in paragraph 10 of his affidavit, Mr. Waid made a
21 statement that:

22 Ms. Ahern's counsel informed me that they had
23 spoken with Fidelity's representative who informed them
24 that Fidelity never had funds for the trust on deposit.

25 And it's the one thing that we would correct in

1 his entire affidavit is he's some -- he's a little vague on
2 whether or not he recalls that Ms. Peterson or Mr. Lenhard
3 actually telling him that they had spoken with Fidelity's
4 representative. It may have been that they told him that
5 they attempted contact with that representative. Other
6 than that, Your Honor, I can represent to the Court that
7 all of these statements are true and accurate to the best
8 of Mr. Waid's knowledge.

9 THE COURT: Okay. Just a recap. How we got here
10 was Mr. Waid, when he was instructed as the temporary
11 trustee for all -- for everybody to marshal the assets,
12 reported to the Court very soon thereafter that this major
13 representation that had been made was incorrect, that the
14 funds had not come from this Fidelity Capital but had just
15 been moved from another trust account, that Mr. Waid just
16 asked the Court to enforce its order and the Court, being
17 left with not a lot of options to enforce an order, and
18 that order being that the request that was originally made,
19 that was made by Mr. Powell on behalf of his clients, if
20 I'm remembering back this far correctly, was that they had
21 been cut off from the 65 percent and that the payments be
22 restarted to them.

23 But, as I've said before, Ms. Ahern has always had
24 the very best attorneys who did the very best job arguing
25 for her and they convinced the Court that this would be

1 improper to start distributing the money to the other
2 beneficiaries because there's no way to claw it back. If
3 it was distributed to them, this was before you got
4 involved, if it was distributed to them, there would be no
5 way to get it back from them.

6 So the Court said: You're right. They should
7 post security for that. So if they can post security, they
8 can start getting their 65 percent. They weren't able to
9 post security. So the Court said: In the alternative
10 then, we have to hold those funds until we determine who
11 should get the 65 percent. It may be Ms. Ahern's, it may
12 have been her all along. Hold the funds, they're drawing
13 interest, just hold the funds. That's the order that has
14 been violated.

15 The options were: Pay the money to the other
16 beneficiaries. When she didn't want to do that, because
17 she felt it was money that she was entitled, the Court
18 said: Well, okay, fine then. You know, because you've got
19 no way to get it back, if they can post a bond for it so
20 that you can be reimbursed, then you can distribute those
21 funds to them, but if you can't -- if they can't post that,
22 then you have to hold it until we can make a determination
23 one way or the other. I mean, that's where we were. I
24 mean, as I said, she's always had the very best counsel who
25 have gotten the very best outcome for her and so, she was

1 successful there.

2 The order specifically that Mr. Waid said, please
3 enforce your order, Judge, was the order saying that she
4 needed to hold the funds until it was determined who was
5 the beneficiary to those funds. So that's the order and
6 that's the question when you came in. It -- I mean, it
7 seemed to fall under NRS 22.010(2): A breach of the peace.
8 It -- I beg your pardon.

9 (3): Disobedience or resistance to any lawful
10 writ, order, rule, or process issued the Court or judge
11 at chambers.

12 That was the concern that -- how else is the Court
13 going to enforce this order that she hold the funds other
14 than saying you've breached that order? That was where I
15 was left.

16 As I've said, not something specifically that --
17 Mr. Waid did not request an Order to Show Cause. The Court
18 initiated that because that's the only option open to the
19 Court to enforce that order.

20 MR. MOODY: So, Judge, the only other thing that I
21 would point out is I would go back to the transcript of the
22 hearing on March 20th, which really started this process and
23 on page 67 of that transcript, Your Honor says:

24 Well, I think Ms. Wakayama has indicated that, you
25 know, if you have a problem with the \$500,000 being in

1 what appears to not qualify as a prudent investment
2 under our -- you know, the one thing we have adopted,
3 the Uniform Prudent Investor Act. So, you know, if
4 that's not a prudent investment because it doesn't --
5 we don't have anything to indicate that it is, then she
6 can put it in an FDIC insured account and there you go.

7 A Court order followed that and whether you look
8 all the way back to March 20th or you look at the resulting
9 order, we're here today and there has not been compliance
10 with that order.

11 THE COURT: Okay. So, in addition to the previous
12 order, the one that was -- okay. We're going to direct
13 that these funds be distributed because they can't post
14 security for it, hold the funds in the interim. So,
15 specifically, and then the order was, this -- as I've said,
16 we haven't adopted the Uniform Trust Act in its entirety,
17 unfortunately, but we do have the Uniform Prudent
18 Investment Act and that just did not appear to be anything
19 that would be defined under anybody's interpretation of the
20 rule as prudent.

21 So, there's -- the second order then is: Deposit
22 the funds in a FDIC insured account so that we know that
23 they're being held. And so there's a second order that's
24 possibly also violated and that's the order saying: Put
25 the money in there.

1 The representation initially being made from
2 Marquis Aurbach that this has been done, but, in fact, Mr.
3 Waid's investigation revealed that that was an untrue
4 representation and this came as a surprise to counsel who
5 withdrew as a result of having made that representation to
6 the Court that was untrue.

7 Okay. So we have two potential orders.

8 MR. MOODY: We do.

9 THE COURT: Okay. As I said, I know that the
10 first one was before Mr. Waid's time, before his
11 involvement, but Mr. Powell is here and I know Mr. Lenhard
12 is objecting to his presence here, but that was from that
13 era of -- you know, early in the litigation there was an
14 order there that Mr. Waid's, I'm sure, not even aware of
15 because it predates his involvement. Okay. Thank you.

16 MR. MOODY: Thank you, Your Honor.

17 THE COURT: Okay. All right. So, Mr. Lenhard.

18 MR. LENHARD: Good afternoon, Your Honor. So as I
19 begin my remarks, let me make one point perfectly clear.
20 We've worked with Mr. Waid the last four to six weeks. We
21 actually like him a great deal and we have enjoyed working
22 with him. We think he's very professional. We have a
23 disagreement here today, but it's not personal, but we are
24 professionals and we have to act as professionals. And
25 therefore, I have to raise the objections that I do.

1 You have been making -- in your brief discussion
2 with Mr. Moody a few moments ago, you discussed a previous
3 order, an order that predates my involvement in this case,
4 Ms. Peterson's involvement in this case, and apparently Mr.
5 Waid's involvement in this case. We must remember that the
6 subject matter of that order is not before you today for
7 purposes of determination of whether a contempt has been
8 committed, whether this individual is to be bound over.

9 I say that because I'm now wearing what I call my
10 criminal hat. I was a public defender for a number of
11 years and I think the Court is aware.

12 THE COURT: Right.

13 MR. LENHARD: And I'm very familiar with the
14 criminal processes. And one of the key criminal processes
15 is notice and due process.

16 The contempt that you're talking about, whether it
17 be your first order or the order that's discussed in Mr.
18 Waid's affidavit, was not committed in your presence. As a
19 result, the legislative requirements set out in NRS 22.030,
20 paren 2, come into play and I will repeat it. I read it
21 once and I'll repeat it again:

22 If a contempt is not committed in the immediate
23 view and presence of the Court or judge at chambers, an
24 affidavit must be presented to the Court or judge of
25 the facts constituting the contempt or a statement of

1 the facts by the masters or arbitrators.

2 So, this affidavit has to set forward what are the
3 facts constituting the contempt. That is the affidavit, as
4 defense counsel, that we are expected to defend. That is
5 what we are here to defend today and that affidavit, if you
6 look at paragraph 3, the charging portion of that affidavit
7 reads as follows:

8 During the hearing on March 20, 2015, the Court
9 ordered Ms. Ahern to transfer \$500,000 as reported in
10 Ms. Ahern's accounting filed with the Court.

11 That's the subject matter of the contempt here
12 today, not any previous orders, and that's what we're here
13 to defend and are prepared to defend.

14 That being said, it starts with the order of March
15 20th because now Ms. Ahern has to be on notice of what it is
16 she has violated. If you look at the Waid affidavit again,
17 you start with the March 20th hearing. And what is stated
18 at the March 20th hearing? This is found at page 71 of the
19 transcript:

20 I do have a serious problem with 5 -- with the
21 500,000 in this, you know, Fidelity Capital. I don't
22 know what Fidelity Capital is. We have nothing to
23 indicate to us that it satisfies any of the standards
24 of the Uniform Prudent Investment Act. I think that's
25 probably pretty clear. I do think it needs to be

1 immediately placed into some, you know, insured
2 investment appropriate investment.

3 That's the discussion of the Fidelity account on
4 March 20th. Mrs. Ahern is not told what to do or when to do
5 it. The March -- the April 20 order, the first written
6 order, on the subject matter, prepared by Marquis and
7 Aurbach, and I'm assuming approved -- and I don't know if
8 it was approved by opposing counsel or not, but it was
9 signed by the Court. Page 4 of the 5-page order:

10 Based on the foregoing, it is hereby ordered,
11 adjudged, and decreed 500,000 currently on deposit with
12 Fidelity Capital shall be deposited into an FDIC
13 insured bank account.

14 It doesn't say by whom, it doesn't say when.
15 That's the order we're here today on.

16 We then move to the hearing of April 22nd where the
17 Court commented:

18 This was just the Court's concern that an order
19 had been in place for a long time and specifically you
20 mention the more recent order, the \$500,000 order,
21 where -- had just been flagrantly violated and there's
22 no other option to the Court to convey that it has
23 consequences than through a proceeding.

24 Following those comments, Mr. Waid filed his
25 affidavit on May 6th, 2015. The affidavit is based solely

1 on the inability or the failure to transfer the funds from
2 Fidelity Capital.

3 Again, you have to have specificity for due
4 process [indiscernible] whether it be an Indictment, a
5 criminal Complaint, or a Complaint for a civil contempt
6 where you're seeking incarceration. In order for this
7 contempt to hold at this stage, you have to name Eleanor
8 Ahern, you have to state Eleanor Ahern is required to take
9 the money out of Fidelity Capital, put it into another
10 account, define the account, and define the date. These
11 things have not yet occurred. The specificity required for
12 these orders don't exist.

13 I'm suggesting -- and I'm not suggesting my client
14 has done right. Obviously we have problems with an
15 affidavit, we have problems with an accounting, we have a
16 number of problems that may lead to another contempt
17 citation, a contempt citation that I may not be able to get
18 around, but for purposes of today, the affidavit doesn't
19 meet the requirements of due process.

20 Now, there's also been a reference here to what
21 happened in Fidelity Capital, specifically this Mr. Perrill
22 [phonetic] and the two letters going back and forth. Like
23 Mr. Moody, I attempted to located Mr. Perrill [phonetic]
24 because I wanted to dump a subpoena on him, have him come
25 visit us at the courthouse. I went to his office location.

1 It doesn't exist. I checked the landlord at Hughes Center.
2 It doesn't exist. Mr. Perrill [phonetic] has never been a
3 client, never been a -- what do you call it?

4 THE COURT: Tenant

5 MR. LENHARD: Tenant. We were doing that to try
6 to fulfill our obligations on behalf of Mrs. Ahern to
7 attempt to comply with Court's desires. We were unable to
8 do so.

9 What I'm getting at is for purposes of what you
10 have ordered, to place the money in an FDIC insured
11 account, it's an impossibility because the money does not
12 exist to be transferred.

13 Now there may be other violations, there may be
14 other violations of Court orders, there may be other
15 misconduct. All I'm suggesting and asking, pursuant to
16 Chapter 22 of the Nevada Revised Statutes, that we have
17 sufficient notice of exactly what it is that Mrs. Ahern has
18 done to violate the orders of the Court, exactly what it is
19 that she is being held in contempt for so that we can
20 prepare the appropriate defense.

21 At this point in time, the oral order of March 20,
22 the written order of April 20, I don't think meet those
23 requirements. Thank you.

24 THE COURT: Okay. Let me ask Mr. Lenhard, for
25 purposes of -- just the same -- first, the same rhetorical

1 question I asked Mr. Moody and then I want to ask you
2 specifically about your argument.

3 First, on the rhetorical question, when the Court
4 is appointed a trustee, specifically to take the place of a
5 previous trustee and to represent the interest of all of
6 the beneficiaries, and when that trustee comes in and says,
7 I'm unable to trace some funds, I would like you to enforce
8 your order, what are the Court's options in enforcing an
9 order? I don't have a lot of options.

10 MR. LENHARD: I think the option is very clear.
11 You instruct the trustee who is the neutral here to prepare
12 an affidavit as to what of my orders have been violated to
13 meet the -- be in compliance with the statute, specifically
14 define what Ms. Ahern has done wrong, serve it on counsel,
15 we set a preliminary hearing like we have today.

16 All I'm suggesting is I'm entitled, as counsel,
17 especially as counsel with a client facing jail time, to
18 have absolute notice of the nature of the charges against
19 her.

20 So what I'm saying is when the Court instructs Mr.
21 Waid, I think my orders have been violated, we have to have
22 a definition of what order. Mr. Waid does his
23 investigation as the neutral. He tell the Court in his
24 affidavit which of the orders have been violated, how
25 they've been violated, when they've been violated, and then

1 I'm on notice to defend my client.

2 THE COURT: Okay. So then we'll discuss that,
3 which is the -- what is it about the record that has failed
4 to provide notice to your client because while I understand
5 your argument that we can't rely on the previous orders,
6 again, Mr. Powell might be able to assist me. I recall
7 this being an order that the funds have to be held.

8 The reason this all came up, in context of coming
9 up in March 20th, was once this Fidelity issue came to
10 light, as I recall, the other beneficiaries were very
11 alarmed because there was no -- nothing to indicate that
12 that was a -- anything that would qualify as a prudent
13 investment and they raised that objection and that -- at
14 that point, the Court said: You know, we need to have this
15 in a properly insured account so that we know that it is
16 there. That was a concern.

17 So, I appreciate your argument that we can't
18 really talk about the earlier order, that the funds be
19 sequestered, and then there's this whole issue that taxes
20 had to be paid and, you know, the funds -- I think they may
21 have been frozen and that was a problem because then Ms.
22 Ahern couldn't pay the taxes.

23 So, I mean, it -- this was an ongoing -- there's
24 an ongoing history of what was going to be going on with
25 this 65 percent. Okay, so we're -- I understand your

1 position that predates Mr. Waid. He didn't make any
2 complaint about that. So that's not the issue today.

3 What about the record of what happened at the
4 hearing where the Court said we need to put this in an FDIC
5 insured account? It makes it impossible for Ms. Ahern to
6 defend herself. I mean, I think anybody reading the record
7 has notice of what the problem was and why we had a concern
8 for it that then when Mr. Waid came in and said we need you
9 to enforce this order, that's the order we were enforcing.

10 MR. LENHARD: That makes the affidavit a moving
11 target and that is what's not appropriate in purposes of
12 incarceration and due process notice. I mean, --

13 THE COURT: Okay.

14 MR. LENHARD: -- it's easy enough to say in the
15 affidavit the Court's comments on X date, Y date, and Z
16 date are incorporated in my affidavit. That's not the case
17 here.

18 To the contrary, we have a reference to a March 20
19 hearing when there's really nothing to justify contemptuous
20 conduct at that point in time. We have an April 20th order,
21 which is somewhat vague. And that's what we have as far as
22 references to the affidavit. We have a reference to an
23 April 17th hearing but then we have the order on April 20th.
24 We have a reference to an April 22 hearing, but then we
25 have the affidavit on May 6th. The affidavit is the final

1 document in the chain. That's the document we have a right
2 to rely on.

3 It's not incumbent on a defendant to peel through
4 the record page by page and try to figure out what the
5 basis of a contempt citation is. That's why the
6 Legislature in Chapter 22 defined what is to be in the
7 affidavit, to help out counsel. And what is necessary in
8 the affidavit is in this affidavit, it's just not enough
9 for contempt at this point in time.

10 And let me remind the Court, that a party can
11 disobey an order without being in contempt. A party can
12 misconstrue an order without being in contempt. A party
13 can goof up a response to an order without being in
14 contempt.

15 So, again, I'm just stating -- I am being highly
16 technical? Yes. But you know what? Criminal defense is
17 highly technical and this is --

18 THE COURT: I --

19 MR. LENHARD: -- criminal defense.

20 THE COURT: I understand. And I guess -- like I
21 said, what about this record doesn't put Ms. Ahern on
22 notice? Because then the next step that we have is a
23 notice is filed with the Court saying the \$500,000 has been
24 transferred into U. S. Bank from Fidelity. That's a
25 representation that prior -- your prior counsel made to

1 this Court. Here it is. Mr. Waid does the investigations
2 and says: Wait a minute, that's not been transferred from
3 Fidelity. That was transferred from another trust account.

4 So, a misrepresentation was made to the Court.
5 Counsel withdraws that representation and then withdraws as
6 counsel telling the Court: Our client lied to us.

7 MR. LENHARD: I understand. And it may be that
8 filing a false accounting is a basis for a contempt
9 hearing, but it's not what's alleged in here. That's not
10 the basis of the contempt here and what I'm saying is,
11 again, it's just like -- how many times as a judge -- I
12 don't know if you ever had a criminal docket but --

13 THE COURT: No.

14 MR. LENHARD: You're lucky, but let me tell you
15 something. How many Indictments are dismissed and have to
16 be refiled because they fouled up a fact of the Indictment?

17 And what we're talking about here -- when you're
18 talking about incarceration, your charging document has to
19 be 100 percent accurate. And what I'm saying is it does
20 not require a defendant to go back and research the record
21 and decide which Court hearing, which comment from the
22 Court, which comment from counsel put together results in
23 contemptuous conduct. We're not required to do that as a
24 defendant facing incarceration.

25 Unfortunately -- or fortunately, I should say, the

1 burden is on Mr. Waid to put it in detail in his affidavit
2 and it's lacking.

3 THE COURT: Okay. Thank you. Mr. Moody.

4 MR. MOODY: I can be brief, Your Honor.

5 So, just a few things. Number one, as trustee, I
6 would disagree that Mr. Waid is neutral. I would rather
7 use the word independent. He comes in -- as he may start
8 neutral, he certainly starts independently and he does his
9 investigation and in his role, he is doing his very best
10 job to protect the trust and to account for those funds.
11 So what does he find? He finds a declaration from Ms.
12 Ahern saying this money is on deposit with Fidelity.

13 He then gets word in a Notice of Compliance that
14 this money has been transferred from Fidelity to U. S.
15 Bank. As he goes on, he finds out that that's not true.
16 So the technicality in this is: Can the Court not hold Ms.
17 Ahern in contempt or recommend contempt because her
18 representations to the Court is not true? She can't --
19 basically what she's saying is: Judge, I know I told you
20 that the 500,000 was here. It's really not there, so how
21 can I be in contempt?

22 Mr. Waid is not a prosecutor. Mr. Waid is a
23 trustee. He has done his job. He has brought those facts
24 to the Court. What the Court chooses to do with that is
25 the Court's decision, but I just have to remind the Court

1 and everybody else that we are still in the position that
2 we were back on March 20th when we started this. The bottom
3 line is \$500,000 is still unaccounted for. It was not
4 where she said it was. It has not been transferred. It's
5 missing along with a lot of other money and we're looking
6 for ways to get that back so that he can do his role and
7 account for all of those funds.

8 So, you know, whatever the Court chooses to do
9 with that, whether it goes on or not, would be entirely
10 with this Court and we'll respect that decision.

11 THE COURT: Okay. I think, again, I'm not sure if
12 Mr. Waid was present. And I'm pretty sure that Mr. Lenhard
13 and Ms. Beatty weren't present, but at the point in time
14 when the Court was advised that Marquis Aurbach wished to
15 withdraw, that they believed that Ms. Ahern was consulting
16 with Mr. Lenhard, I think I said on the record: That's a
17 really good thing because he has experience with criminal
18 law and that's the help that she's going to need.

19 So, as I've said, she's always had the best
20 attorneys and they've always gotten a great result for her
21 and I appreciate Mr. Lenhard's argument because I
22 understand that this is -- this takes it to the next level
23 of a criminal proceeding. I'm not sure that this -- at
24 this level it is a criminal proceeding because I have to
25 refer it to somebody to take evidence.

1 And so the question is, at this point in time,
2 what does this Court have to have before it in order to say
3 I think somebody needs to hear this? Because I'm not
4 allowed to. Somebody else has to look at this and say:
5 Was a criminal contempt -- did it occur here? And I'm not
6 sure that at this point in time, other than we have an
7 affidavit. I appreciate the argument that perhaps it's not
8 drafted the way a criminal Indictment would be. Mr.
9 Waid's, as you said, not a criminal attorney. Nobody
10 involved in this case is. It's an unusual case for all of
11 us involved in this case to be in. It doesn't happen in
12 probate very much, but it's a serious concern and the
13 question is: What's the nature of the affidavit that I
14 have to have in order to say please find somebody to listen
15 to this and make a determination as to whether some crime
16 has been committed here in the form of a criminal contempt?

17 That, I think, is the judge to whom Mr. Lenhard's
18 arguments would find the most weight, which is: Do we meet
19 the standard of due process? All I'm being asked to do at
20 this point is to refer it to somebody else to say:
21 Somebody needs to listen to the evidence and say do we meet
22 the standard. We may not. Ultimately, it may not, but
23 that's why it's referred to somebody else for that hearing.

24 As I said, I appreciate the argument that Mr.
25 Lenhard has made. It's a technical argument that there has

1 to be an affidavit saying something has happened, but I
2 think the record is relevant and I think that the record as
3 a whole shows why this is such a problem because I --
4 understanding the background of why the Court said you have
5 to hold this money, when the representation has been made
6 that there is \$500,000 at Fidelity Capital who nobody could
7 identify. That started -- I appreciate Mr. Lenhard's
8 frustration. I -- as I recall, it was -- as Mr. Powell and
9 his cocounsel who initially said: We can't find these
10 people. We can't identify them. We don't know who they
11 are. And that started us on this path. So the Court
12 indicated: Put this in an FDIC account.

13 I appreciate Mr. Lenhard's argument that she
14 needed to be specifically directed to Mr. Lenhard -- to Ms.
15 Ahern telling her by such and such a date, this much had to
16 be done, but I'm -- would submit, I think she knew that
17 because a representation has been made to the Court that
18 she had done it, which Mr. Waid very quickly proved to be a
19 lie, triggering her counsel to withdraw because they had
20 been lied to and had filed a lie with the Court. I don't
21 know what more I need to say that somebody needs to look at
22 this and, as I said, it's not me.

23 I think the technical argument as to whether we
24 meet the standard for -- the due process standard for
25 criminal contempt is one that a judge who is assigned to

1 hear the matter would make that ruling and not this Court.

2 So, I think there is a sufficient amount here on
3 the record to ask somebody to take a look at it and, as I
4 said, that's an independent person, not me, that would be
5 assigned by the Presiding Judge Gonzalez and so I will
6 simply refer this matter to Judge Gonzalez to schedule a
7 hearing on contempt.

8 I know of one other one that's happened in the
9 last year. So it's not that it never happens, but she does
10 handle it through -- essentially she'll ask for somebody
11 who's got the time to hold the hearing and I can't tell you
12 who it's going to be, I can't tell you when it's going to
13 be, but Judge Gonzalez will coordinate it.

14 So, I think that on the record before me, the
15 affidavit is adequate to put the Court on notice of a
16 problem with the order of March 20th -- March 20th is -- I
17 think the formal order was actually entered in April. Of
18 that order, directing that the funds be deposited because
19 even prior to the day of the order, we had this
20 misrepresentation, a clear misrepresentation, and I --
21 nobody has presented to this Court an alternative by which
22 this Court could enforce its order. Nobody wants this.
23 This is not something that was requested by Mr. Waid. He
24 just asked that I enforce the order and I know of no other
25 way to enforce my order.

1 So, I'm going to refer it to Judge Gonzalez to
2 find counsel -- find a judge who can hear it and make this
3 determination as to whether there's adequate notice and a
4 record here to make that finding.

5 So I don't know if we need a formal order with
6 that. It's not typically a winner, but if you could
7 prepare that, Mr. Moody, and just indicating that over the
8 objections of Ms. Ahern and her counsel, the Court believes
9 there's an adequate record here, between the affidavit and
10 the record, to refer it, that's all we're doing is
11 referring it.

12 MR. LENHARD: Can he run it by us just to approve
13 the content -- I mean, form, Your Honor, --

14 THE COURT: Absolutely. Absolutely.

15 MR. LENHARD: Okay.

16 THE COURT: Absolutely.

17 The affidavits, exhibits, letters that have been
18 previously been admitted, as I indicated, that's why I
19 wanted to make sure we made it clear whether we were
20 sealing all of this or not, only those portions that were
21 previously sealed are going to be sealed going forward, but
22 they will be viewable by whoever this matter is referred to
23 and we'll go forward from there.

24 We still do have in the interim the hearing. I
25 believe Mr. Powell indicated that he was going to ask to

1 have it moved. Starting in August, the Court's calendar is
2 going to be 50 percent civil, 50 percent probate. So we'll
3 have one day of civil, one day of probate per week. So
4 we've got a little bit more flexibility to where we move
5 you starting in August. So if you want to move it into
6 August, we can do that. Our probate days will remain
7 Wednesdays. It will be every Wednesday. Every Wednesday,
8 so --

9 MR. POWELL: Your Honor, if we could have the
10 earliest available that you have after the 22nd, --

11 THE COURT: Okay.

12 MR. POWELL: -- we would appreciate it.

13 THE COURT: Is that the week of the 5th?

14 THE CLERK: Yeah. [Indiscernible] --

15 THE COURT: Okay. I -- does your -- do you have a
16 preference on when we go to the -- the next available
17 probate date is going to be the -- our first August probate
18 day, Wednesday, August 5th.

19 MR. LENHARD: Which is what day in August? I'm
20 sorry.

21 THE COURT: It's a Wednesday. We're going to go
22 to every Wednesday.

23 MR. LENHARD: Oh, Wednesday the 5th?

24 MS. PETERSON: Wednesday, August 5th.

25 THE COURT: Yeah. And instead of two Wednesdays a

1 month, it's not every Wednesday.

2 MR. LENHARD: I'm sure -- I can -- with that much
3 warning, I'm sure I can be there.

4 MS. PETERSON: That's [indiscernible].

5 MR. POWELL: Did the Court say 1:30?

6 THE COURT: No. It's going to be a regular
7 calendar --

8 MR. POWELL: Okay.

9 THE COURT: -- and that's the motion -- again,
10 that's unrelated to this hearing, as you pointed out, Mr.
11 Lenhard. Unrelated to this hearing, there is another
12 hearing on. It was on for July 22nd, which is the Motion
13 for Damages. So --

14 MR. LENHARD: What does that make our response
15 date now?

16 [Colloquy between Mr. Lenhard and Ms. Peterson]

17 MS. PETERSON: Yeah, can we have an additional
18 time --

19 THE COURT: Does everybody want to work out a --
20 agree upon a --

21 MR. LENHARD: Well let's work out the -- our
22 briefing schedule --

23 THE COURT: Yeah. Because we're moving -- we're
24 only moving it two weeks, but --

25 MR. LENHARD: Right, but if we filed our response,

1 that gives them two additional weeks to reply which is
2 totally unfair.

3 THE COURT: Right. Exactly. So if you want to
4 work out a briefing schedule with Mr. Powell, I'm sure he's
5 -- he will accommodate.

6 MR. LENHARD: Can we just do -- we'll take an
7 additional week and they get an additional week on the
8 Reply.

9 THE COURT: Okay.

10 MR. LENHARD: Let's split the time. How's that?

11 THE COURT: Agreeable? All right.

12 MR. LENHARD: Okay.

13 THE COURT: Okay. So that way everything is
14 briefed in advance. Okay.

15 Exactly when can they -- yeah, that's the only
16 other pending here and I have no idea how quickly Judge
17 Gonzalez can address this.

18 MR. LENHARD: Does Judge Gonzalez contact us or
19 somebody contacts us, I assume?

20 THE COURT: Yes. Yes. So, by -- as soon as I can
21 get an order saying, you know, having heard enough and over
22 these objections, it's referred.

23 MR. LENHARD: All right.

24 THE COURT: I'm not making a finding that there's
25 an adequate notice of due process. I don't think I make

1 that finding. I think that finding is made by the judge
2 who hears the contempt. So I don't rule on it. So I
3 think there's enough here for somebody to take a look at it
4 though. So that's where it's going to go.

5 Judge Gonzalez will -- and I'll let her know
6 sooner. I won't wait for the order. I'll let her know
7 that we did have a hearing and -- because she's going to --
8 again, there's nobody who is assigned to hear these kinds
9 of things. She looks for somebody who can do it and
10 schedules with counsel because it's an unusual proceeding,
11 it's not something that comes up on somebody's regular
12 calendar or stack. It's just scheduled at the convenience
13 of everybody.

14 So, unless there's anything else -- Mr. Powell,
15 you --

16 MR. POWELL: I just want to clarify just for
17 expectation, procedure, that whole sort of thing, on the
18 5th, given what's at stake and the relief that's being
19 requested and I'm just conceptualizing. It's probably
20 going to be a lengthy hearing. Is that going to be
21 something you're going to have a time on that date to
22 handle or more than likely, are you looking to put us --

23 THE COURT: Would you want your own time?

24 MR. POWELL: I'm thinking yeah because --

25 THE COURT: Do we have anything on on that day?

1 MR. POWELL: -- just so we're not coming back
2 again for --

3 [Colloquy between the Court and the Clerk]

4 THE COURT: Okay. So we could put them at 10?

5 THE CLERK: Sure. We only have one thing set
6 right now, which is just a status check.

7 THE COURT: So can I do 10?

8 THE CLERK: Yeah.

9 THE COURT: Do you think an hour or hour and a
10 half? How much do you think you need, Mr. Powell? Because
11 we could put you at 10 or 10:30. We do have a 1:30
12 evidentiary already that day. So --

13 MR. POWELL: Oh, okay. I mean, I'll take as much
14 time as you can get us. I just --

15 THE COURT: Right now, I'm --

16 MR. POWELL: -- don't know how it's going to play
17 out. So I'm always hesitant to --

18 THE COURT: Right. There's only one other thing
19 before you. So maybe 10 o'clock.

20 MR. POWELL: Okay.

21 THE COURT: Because that -- like I said, that's
22 our very first probate --

23 MR. POWELL: That's fine. We can see if we can
24 get through it all.

25 THE COURT: Yeah.

1 MR. POWELL: And if not, I guess continue it to -
2 -

3 THE COURT: Yeah. So schedule it.

4 MR. POWELL: Okay.

5 THE COURT: And, again, I -- as I'm saying, you
6 all will be able to figure this out for yourselves. Given
7 the nature of the relief that's requested there, I don't
8 know how you view the contempt proceeding in the context of
9 the relief requested there. I'm not ruling -- I haven't
10 looked at his motion. I don't know anything about his
11 motion. Once you look at it and done your Opposition, if
12 you feel you're going to need some more time, if we haven't
13 had the contempt hearing, you guys have to work that out
14 amongst yourself because I have not looked at that motion,
15 I don't know anything about it. I only know the title of
16 it and that's why I just raised it as a question if you're
17 going to be ready to go.

18 But one of the extra weeks is theirs to reply.
19 You get the extra week imposed [indiscernible] --

20 MR. POWELL: So, --

21 THE COURT: -- on the Reply.

22 MR. POWELL: -- just to confirm, the 5th at 10
23 o'clock is when we'll go on that?

24 THE COURT: So it's 10. Well they're at 10 a.m.
25 and, in other words, it would allow you to be the only

1 thing on --

2 MR. POWELL: Okay.

3 THE COURT: -- at that time.

4 MR. POWELL: Thank you, Your Honor.

5 THE COURT: That gives you adequate time.

6 Okay. Is that everything? I don't know if there
7 -- were there any other deadlines or dates? I don't know
8 if Mr. Waid had -- I don't think Mr. Waid had any specific
9 -- I think that was Mr. Lenhard's point. We don't have any
10 specific date by which Mr. Lenhard would -- Mr. Waid was
11 having to report or anything. I mean, there's nothing
12 pending.

13 MR. WAID: Still gathering information.

14 THE COURT: All right. Yeah. So then there's
15 nothing else in the interim. Well, great. Then we'll see
16 you back here on August 5th unless you --

17 MR. LENHARD: Thank you, Judge.

18 THE COURT: -- feel otherwise. Okay. Thanks very
19 much. I appreciate everybody's time today.

20

21 PROCEEDING CONCLUDED AT 3:00 P.M.

22 * * * * *

23

24

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

6 above-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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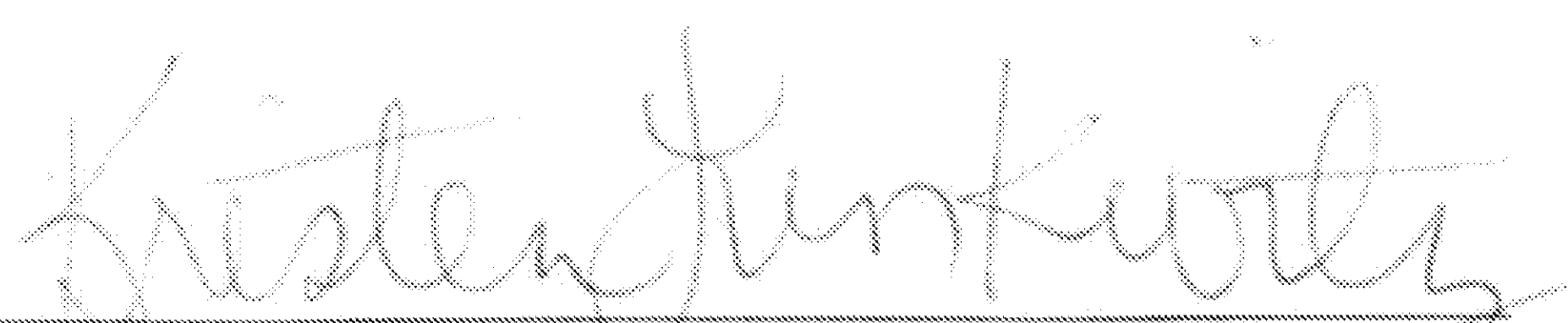
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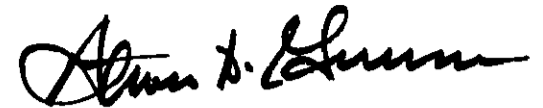
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22 A handwritten signature in cursive script, appearing to read 'Kristen Lunkwitz', is written over a horizontal dotted line.

23 KRISTEN LUNKWITZ

24 INDEPENDENT TRANSCRIBER

25



CLERK OF THE COURT

JUDG

JOSEPH J. POWELL, ESQ.
Nevada Bar No. 008875
THE RUSHFORTH FIRM, LTD.
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134
Tel: (702) 255-4552
Fax: (702) 255-4677
joey@rushforth.net
Attorneys for Jacqueline M. Montoya

WHITNEY B. WARNICK, ESQ.
Nevada Bar No. 001573
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
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, 2015
Time of Hearing: 9:00a.m.

An Inter Vivos Irrevocable Trust.

JUDGMENT AND ORDER APPROVING AWARD OF ATTORNEY'S FEES

The MOTION IN SUPPORT OF AWARD OF ATTORNEY'S FEES AND COSTS filed herein by Movants, Jacqueline M. Montoya and Kathryn A. Bouvier, having come on for hearing before the Honorable Gloria Sturman on May 13, 2015; Movants being represented by their counsel, Whitney B. Warnick, Esq., of the law firm Albright, Stoddard, Warnick & Albright, and Joseph J. Powell, Esq., of The Rushforth Firm, Ltd.; Eleanor Connell Hartman Ahern, being represented by her counsel, Kirk B. Lenard, Esq., and Tamara Beatty Peterson, Esq., of the law firm of Brownstein Hyatt Farber Schreck, LLP; and, the Trustee, Fredrick P. Waid, being present and represented by his counsel, Russel J. Geist, Esq., of the law firm of Hutchison & Steffen, LLC; the Court having reviewed the Motion filed and the Opposition thereto, and having heard oral argument from counsel, and being fully advised in the matter, the Court finds and Orders as follows:

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

1 The Court finds that Movants' Motion provides the information for evaluating an award of
2 attorney's fees under *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).
3 These factors are: 1) the advocate's professional qualities; 2) the nature of the litigation; 3) the work
4 performed; and, 4) the result.

5 The Court finds that all of the fees requested by Movants' Nevada counsel, including the sum
6 of \$122,260.00 incurred by Kathryn A. Bouvier ("Kathryn"), and the sum of \$269,733.80 incurred
7 by Jacqueline M. Montoya ("Jacqueline"), were incurred as a result of the breach by Eleanor Connell
8 Hartman Ahern ("Eleanor") of her duties as Trustee of the W. N. Connell and Marjorie T. Connell
9 Living Trust Dated May 18, 1972 ("Trust"); and, therefore, pursuant to NRS 153.031(3)(b), Eleanor
10 is personally liable to Kathryn and Jacqueline to reimburse to them the fees they incurred and judgment
11 should be entered against Eleanor and in favor of Kathryn and Jacqueline for that purpose. These fee
12 amounts are for services rendered to Kathryn and Jacqueline by their counsel through March 20, 2015,
13 and they are not precluded from seeking an additional award of fees for legal services rendered on their
14 behalf in these proceedings after that date.

15 The Court finds that the reimbursement of costs to Kathryn and Jacqueline sought in their
16 Motion, including the amount of \$5,373.70 sought by Kathryn, and the amount of \$20,488.05 sought
17 by Jacqueline, should not be awarded at this time, until further proof and corroboration thereof is
18 provided to the Court, consistent with the guidelines provided by the Nevada Supreme Court in the
19 case of *Cadle Company v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049 (2015).

20 The Court further finds that reimbursement to Kathryn and Jacqueline of fees and costs they
21 incurred with Texas counsel, prior to the commencement of these proceedings, as requested in their
22 Motion, totaling \$82,349.23, cannot be awarded to them under NRS 153.031(3)(b), because said fees
23 and costs were not incurred in these proceedings, or as a direct consequence of Eleanor's breach of her
24 fiduciary duties.

25 Therefore, based upon these findings and good cause appearing:

26 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** as follows:

27 1. Judgment is hereby entered against Eleanor Connell Hartman Ahern and in favor of
28 Kathryn A. Bouvier, for attorney's fees she incurred through March 20, 2015, in the amount of

1 \$122,260.00, together with interest accruing on said principal amount at the legal rate of interest in
2 Nevada, from the date of the entry of this Judgment until paid in full.

3 2. Judgment is hereby entered against Eleanor Connell Hartman Ahern and in favor of
4 Jacqueline M. Montoya, for attorney's fees she incurred through March 20, 2015, in the amount of
5 \$269,733.80, together with interest accruing on said principal amount at the legal rate of interest in
6 Nevada, from the date of the entry of this Judgment until paid in full.

7 3. Kathryn's and Jacqueline's requests for an award of costs incurred, including the
8 amount of \$5,373.70 sought by Kathryn, and the amount of \$20,488.05 sought by Jacqueline, are
9 denied at this time without prejudice. If they reapply for an award of costs incurred herein, they must
10 provide further proof and corroboration thereof to the Court, consistent with the guidelines provided
11 by the Nevada Supreme Court in the case of *Cadle Company v. Woods & Erickson, LLP*, 131 Nev.
12 Adv. Op. 15, 345 P.3d 1049 (2015).

13 4. Kathryn's and Jacqueline's request for an award of fees and costs incurred by their

14 ///

21 ///

28 ///

Texas counsel, prior to the commencement of these proceedings, totaling the sum of \$82,349.23, is hereby denied.

IT IS SO ADJUDGED AND ORDERED this 4th ^{June} day of ~~May~~, 2015.


DISTRICT COURT JUDGE

Submitted by:

ALBRIGHT, STODDARD, WARNICK
& ALBRIGHT

THE RUSHFORTH FIRM, LTD

By 

WHITNEY B. WARNICK, ESQ
Nevada Bar No. 001573
801 S. Rancho Dr. #D-4
Las Vegas, NV 89106
Attorneys for Kathryn A. Bouvier

By 

JOSEPH J. POWELL, ESQ.
Nevada Bar No. 008875
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134
Attorneys for Jacqueline M. Montoya

Approved by:

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

HUTCHISON & STEFFEN, LLC

By 

KIRK B. LENHARD, ESQ
Nevada Bar No. 1437
TAMARA BEATTY PETERSON
Nevada Bar No. 5218
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
*Attorneys for Eleanor Connell
Hartman Ahern*

By 

RUSSEL J. GEIST, ESQ.
Nevada Bar No. 9030
10080 W. Alta Dr., Suite 200
Las Vegas, NV 89145
*Attorneys for Trustee,
Fredrick P. Waid*

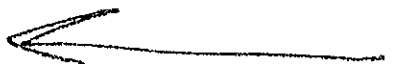
1 Texas counsel, prior to the commencement of these proceedings, totaling the sum of \$82,349.23, is
2 hereby denied.

3 **IT IS SO ADJUDGED AND ORDERED** this _____ day of ~~May~~, 2015.

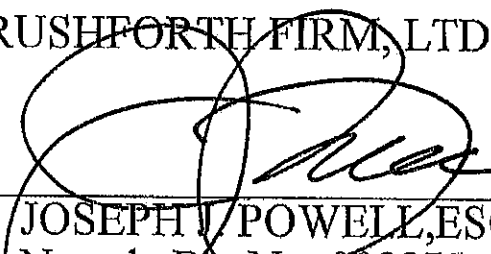
4 
5 DISTRICT COURT JUDGE

6 Submitted by:

7 ALBRIGHT, STODDARD, WARNICK
& ALBRIGHT


8 By 
9 WHITNEY B. WARNICK, ESQ
Nevada Bar No. 001573
801 S. Rancho Dr. #D-4
10 Las Vegas, NV 89106
Attorneys for Kathryn A. Bouvier

THE RUSHFORTH FIRM, LTD


By 
11 JOSEPH POWELL, ESQ.
Nevada Bar No. 008875
9505 Hillwood Drive, Suite 100
12 Las Vegas, Nevada 89134
Attorneys for Jacqueline M. Montoya

13 Approved by:

14 BROWNSTEIN HYATT FARBER
SCHRECK, LLP

By 
15 KIRK B. LENHARD, ESQ
Nevada Bar No. 1437
TAMARA BEATTY PETERSON
16 Nevada Bar No. 5218
100 North City Parkway, Suite 1600
17 Las Vegas, NV 89106-4614
*Attorneys for Eleanor Connell
Hartman Ahern*

HUTCHISON & STEFFEN, LLC

By 
18 RUSSEL J. GEIST, ESQ.
Nevada Bar No. 9030
10080 W. Alta Dr., Suite 200
19 Las Vegas, NV 89145
*Attorneys for Trustee,
Fredrick P. Waid*

Texas counsel, prior to the commencement of these proceedings, totaling the sum of \$82,349.23, is hereby denied.


IT IS SO ADJUDGED AND ORDERED this ____ day of ~~May~~, 2015.



DISTRICT COURT JUDGE

Submitted by:

ALBRIGHT, STODDARD, WARNICK
& ALBRIGHT

THE RUSHFORTH FIRM, LTD


By 
WHITNEY B. WARNICK, ESQ
Nevada Bar No. 001573
801 S. Rancho Dr. #D-4
Las Vegas, NV 89106
Attorneys for Kathryn A. Bouvier

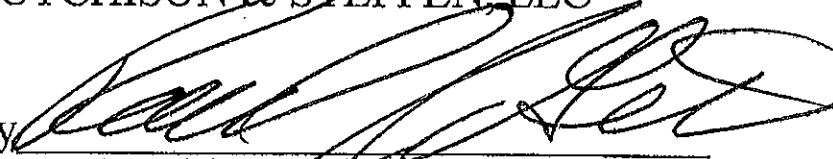
By 
JOSEPH J. POWELL, ESQ.
Nevada Bar No. 008875
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134
Attorneys for Jacqueline M. Montoya

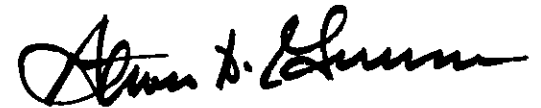
Approved by:

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

HUTCHISON & STEFFEN, LLC

By 
KIRK B. LENHARD, ESQ
Nevada Bar No. 1437
TAMARA BEATTY PETERSON
Nevada Bar No. 5218
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
*Attorneys for Eleanor Connell
Hartman Ahern*

By 
RUSSEL J. GEIST, ESQ.
Nevada Bar No. 9030
10080 W. Alta Dr., Suite 200
Las Vegas, NV 89145
*Attorneys for Trustee,
Fredrick P. Waid*



CLERK OF THE COURT

OPPM

KIRK B. LENHARD, ESQ., Bar No. 1437

klenhard@bhfs.com

TAMARA BEATTY PETERSON, ESQ., Bar No. 5218

tpeterson@bhfs.com

BENJAMIN K. REITZ, ESQ., Bar No. 13233

breitz@bhfs.com

BROWNSTEIN HYATT FARBER SCHRECK, LLP

100 North City Parkway, Suite 1600

Las Vegas, NV 89106-4614

Telephone: 702.382.2101

Facsimile: 702.382.8135

Attorneys for 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, An Inter
Vivos Irrevocable Trust

CASE NO.: P-09-066425-T

DEPT. NO.: XXVI

**OPPOSITION TO MOTION FOR
ASSESSMENT OF DAMAGES
AGAINST ELEANOR AHERN,
ENFORCEMENT OF NO-CONTEST
CLAUSE, AND SURCHARGE OF
ELEANOR'S TRUST INCOME**

Date of Hearing: August 5, 2015

Time of Hearing: 10:00 a.m.

Eleanor Ahern, by and through her counsel of record, the law firm of Brownstein Hyatt Farber Schreck, LLP, hereby files this Opposition to Kathryn Bouvier and Jacqueline Montoya's (collectively, the "Sisters") Motion for Assessment of Damages, Enforcement of No-Contest Clause, and Surcharge of Eleanor's Trust Income (the "Motion"). This Opposition is made and based upon

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1 the attached Memorandum of Points and Authorities, the pleadings and papers on
2 file herein, and any argument by counsel at the hearing of this matter.

3 DATED this 29th day of June, 2015.

4
5 **BROWNSTEIN HYATT FARBER SCHRECK, LLP**

6 By: /s/ Tamara Beatty Peterson
7 KIRK B. LENHARD, ESQ., Bar No. 1437
8 klenhard@bhfs.com
9 TAMARA BEATTY PETERSON, ESQ., Bar No. 5218
10 tpeterson@bhfs.com
11 BENJAMIN K. REITZ, ESQ., Bar No. 13233
12 breitz@bhfs.com
13 Las Vegas, NV 89106-4614
14 Telephone: 702.382.2101
15 Facsimile: 702.382.8135
16
17
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I. INTRODUCTION

The Sisters' meritless and procedurally improper Motion seeks to circumvent due process by seeking punitive damages before issues of liability have been tried or even argued. By assuming as fact rulings that this Court has never made (i.e. with regard to conversion), the Sisters ask the Court for the extraordinary and breathtaking remedy of extinguishing Ms. Ahern's life estate in Trust income and seek to impose millions of dollars in punitive damages based on the conjecture that some indeterminate amount of compensatory damages exist. Despite well-settled law in Nevada that "the law abhors a forfeiture," the Sisters seek exactly that, along with a pound of flesh for good measure. Fortunately, due process and the rule of law require the occurrence of certain substantive and procedural safeguards before an elderly woman's livelihood is taken from her by her dissatisfied children.

As a preliminary matter, it is difficult to decipher the procedural basis for the Sisters' Motion or the legal standard of review. This declaratory action began with a petition by the Sisters for a "straightforward declaration of rights and interests" under the Trust. (*See* Petition for Declaratory Judgment Regarding Limited Interest of Trust Assets Pursuant to 30.040, NRS 153.031(1)(e), and NRS 164.033(1)(A), p. 17:5, on file herein.) However, the Motion seems now to request summary judgment (supported by mere allegations) on Ms. Ahern's liability for conversion, punitive damages, and loss of her interest in the Trust. Ms. Ahern was never put on notice of such allegations against her. Rather than file an "additional and related petition" to assert these allegations, (*id.* at 17:1), the Sisters filed this Motion containing numerous unsubstantiated accusations against Ms. Ahern and improperly expanded the scope of their request for declaratory relief. The Sisters point to no rule or statute authorizing the filing of this motion on the coattails of a declaratory judgment that is currently on appeal.

1 For the time being, the Sisters’ Motion simply assumes that the Court will or
2 has already ruled that Trust income withheld from the Sisters constitutes
3 conversion, and on that basis seeks punitive measures against Ms. Ahern.
4 Acknowledging that there are no such findings in the record, nor any evidence
5 attached to the premature Motion whatsoever, the Sisters “expressly reserve the
6 right” to supplement the Motion at a later time. (Mot. at 20:17.) The Court should
7 not condone this procedural posture. Ms. Ahern has a due process right to defend
8 against such accusations and to know the evidence against her prior to the Court’s
9 determination on these issues. Indeed, Ms. Ahern should not have been required to
10 respond to the Sisters’ Motion until the underlying facts—which will surely be
11 disputed—have been developed and presented.¹

12 Secondly, the Court has already found that Ms. Ahern maintained a good
13 faith belief that she was the sole beneficiary of the Trust income, stating that “the
14 positions of each of the parties seeking the correct interpretation of the Trust
15 provisions as to entitlement to the Texas oil property, were not asserted in bad faith,
16 and that therefore good cause to impose the no-contest penalties does not exist.”
17 (Summ. J. dated April 16, 2015, p. 15:24-26, on file herein.) Thus, to the extent
18 the Sisters rely on Ms. Ahern’s posture in this litigation or her interpretation of the
19 plain Trust language to bolster their argument for forfeiture, the Sisters’ request
20 must be denied.

21 In seeming acknowledgement of this fact, the Sisters now allege instead that
22 Ms. Ahern should lose her interest because she allegedly converted “65% of the
23 trust income,” or “\$2,650,000,” while she acted as trustee, and is now refusing to
24 cooperate with the newly appointed successor trustee, Fred Waid. (Mot. at 8:12,
25 20:22-28.) Notwithstanding the irrational notion that Ms. Ahern could have

26
27 ¹ In this basis, Ms. Ahern moves to strike the Motion and requests an award of attorneys’
28 fees incurred to provide this opposition. Should the Court permit the Sisters to refile the Motion
in the future at a more appropriate time, Ms. Ahern requests discovery on the issues raised in the
allegations.

1 maliciously converted funds while she in good faith believed that she was the sole
2 beneficiary of the Trust, the Sisters allege that such actions would constitute an
3 “attack” on the administration of the Trust for purposes of the no-contest clause.
4 (*Id.*) Such accusations do not implicate the no-contest clause, which must be
5 strictly construed², and do not give rise to punitive damages for at least four
6 reasons: (1) there is absolutely no admissible evidence before the Court that Ms.
7 Ahern converted any funds; (2) Ms. Ahern has been diligent in complying with Mr.
8 Waid’s requests (documentation of Ms. Ahern’s compliance is attached hereto as
9 Exhibit A); (3) the Sisters cannot assert a cognizable claim for conversion as a
10 matter of law; and (4) even assuming Ms. Ahern technically converted funds, she
11 did so under the good faith belief that she was the sole beneficiary of the Trust
12 income, and therefore there is no “oppression, fraud, or malice” to support the
13 imposition of punitive damages.³

14 Finally, the Sisters have not identified any damage to the Trust that would
15 warrant a surcharge against Ms. Ahern’s interest. As stated above and discussed
16 further herein, there is no evidence that Ms. Ahern converted any Trust assets.
17 Furthermore, the Sisters’ alleged damage for unspecified inconveniences caused by
18 the withholding of the income from the Texas oil property is not damage to the
19 Trust, (Mot. 3:7-22), and attorneys’ fees that have already been awarded against
20 Ms. Ahern personally cannot constitute damage against the Trust that would
21 warrant imposition of a surcharge. The Sisters further state without support that
22 “[t]he damages caused to the Trust and its other beneficiaries (Jacqueline and
23 Kathryn) includes the loss of income which could have been earned by the Trust
24

25 ² *In re Miller's Estate*, 212 Cal. App. 2d 284, 297-98, 27 Cal. Rptr. 909, 917 (Ct. App.
26 1963) (“The policy against forfeitures is so strong that our courts, following the universal rule in
27 this country, insist upon a clear and unequivocal attack upon the will before invoking the penalty
28 contained in the in terrorem clause.”)

³ And addition, even assuming Ms. Ahern, *as trustee*, poorly managed the funds of the
Trust in a manner that might implicate the tort of conversion, such a finding does not mean per se
that Ms. Ahern “attacked” the trust administration for purposes of the no-contest clause.

1 through wise and proper investment of Trust funds.” (Mot. at 7:24-27.) The Sisters
2 cite to no law in support of these wholly speculative damages. In fact, the Sisters
3 could have posted a bond to receive their alleged portion of the income from the
4 Texas oil property. They elected not to do so, and therefore cannot blame Ms.
5 Ahern for these wholly speculative and non-existent damages. In light of the
6 foregoing, and the additional arguments set forth herein, the Court should deny the
7 Sisters’ Motion in its entirety.

8 **II.** 9 **DISCUSSION**

10 **A. The Issues Raised In The Motion Are Premature And A Decision In** 11 **Their Favor Would Violate Due Process.**

12 The Sisters’ Motion contains a section erroneously titled “Relevant
13 *Procedural* History” in which the Sisters assert numerous factual allegations
14 against Ms. Ahern. The Sisters provide no support for these allegations, other than
15 a single citation to the “Affidavit of Fredrick P. Waid, Trustee,” executed on May
16 6, 2015, which was filed independently of the Motion, and the affidavit of
17 Jacqueline Montoya which alludes to costs incurred by Ms. Montoya in litigating
18 this action and her feelings toward this case. The Sisters do not identify the
19 undisputed facts (or include evidence thereof) which would allow the Court to rule
20 on the issues set forth in the Motion (assuming that the Motion is one for summary
21 judgment). Yet, throughout the Motion, the Sisters ask the Court to apply alleged
22 “facts” to the law and rule that Ms. Ahern should pay punitive damages and lose
23 her interest in the Trust.

24 The Nevada Revised Statutes set forth the procedure for prosecuting the
25 Sisters’ claims. NRS 153.031 states that “a beneficiary may petition the court
26 regarding any aspect of the affairs of the trust.” Here, there is no petition on file
27 presenting the issues discussed in the Motion.⁴

28 ⁴ Notwithstanding the arguments set forth herein, it is unclear whether this is the proper
forum for claims of conversion against Ms. Ahern. This claim appears to be separate from “the

Secondly, once a petition is filed, NRS 155.150 requires that “[a]ll issues of fact in matters of an estate must be disposed of in the same manner as is by law provided upon the trial of issues of fact in a common-law action.” *See also* NRS 155.180; *Cord v. Second Judicial Dist. Court Dep’t No. 3*, 91 Nev. 260, 262, 533 P.2d 1355, 1356 (1975); *State v. Langan*, 32 Nev. 176, 105 P. 568, 569 (1909). That is, if the Sisters’ allege that Ms. Ahern has violated the law, they must prove it by a preponderance of the evidence, or clear and convincing evidence where applicable, and Ms. Ahern is entitled to a trial on all disputed facts. Here, there has been no evidence presented on the issues raised in the Motion, and the Sisters have wholly failed to meet their burden.

In fact, the entire Motion, including the estimated amount of punitive and treble damages, is based on the following factual contention: “[I]t appears that Eleanor has converted or otherwise [*sic*] misappropriated approximately \$2,650,000 in direct violation of this Court’s order.” (Mot. at 6:9-11.) Based on the Sisters’ contention alone, the Court is now asked to enter judgment that Ms. Ahern did in fact convert such funds, to assess punitive damages against her, and to strip all her interest in the Trust. Because this is both substantively and procedurally improper, is not ripe for this Court’s review, and for the reasons discussed herein and in consideration of due process, the Court must deny the Motion.

B. Punitive and/or Treble Damages Are Not Available.

1. *The Sisters Admit They Do Not Have Standing To Request Treble Damages.*

The Sisters admit that, “[i]n the instant case, current trustee, Mr. Waid, functioning in a capacity similar to that of a personal representative, has the right to seek treble damages against Eleanor.” (Mot. at 13:28-14:2.) However, the Sisters point to no statute that would authorize them personally to request treble damages.

affairs of the trust,” entitling Ms. Ahern to a jury before her peers.

1 Accordingly, and in addition to the general procedural deficiencies in the Motion,
2 the Sisters request for treble damages to punish Ms. Ahern must be denied these
3 grounds.

4 **2. *Punitive Damages Are Not Available In This Action for Declaratory***
5 ***Relief.***

6 In addition to the fact that conversion has not been proven, this is a
7 declaratory relief action in which neither compensatory nor punitive damages were
8 sought. Thus, not only did the Sisters file this motion prematurely, before they
9 have any evidence to support their claims, but the claims themselves are brought
10 improperly as a dovetail to this action for declaratory relief. Even the statute cited
11 by the Sisters on Page 7 which may serve of the basis for the Motion—NRS
12 163.115—requires that “[a] proceeding under this section must be commenced by
13 filing a petition under NRS 164.010 and 164.015.” Because the Sisters have
14 asserted these new claims as arguments in this Motion, rather than as allegations in
15 a petition giving Ms. Ahern adequate notice and due process, the Motion must be
16 denied.

17 **3. *The Sisters Do Not Have A Cognizable Claim For Conversion.***

18 In order to properly present a claim of conversion, the Sisters must show that
19 Ms. Ahern wrongfully exerted an act of dominion *over plaintiffs’ property*, that the
20 act was in denial of the plaintiffs’ rights therein, or the act was in the exclusion of
21 plaintiffs’ rights in the property. *Ferreira v. P.C.H Inc.*, 105 Nev. 305, 704 P.2d
22 1041 (1989); *Wantz v. Redfield*, 74 Nev. 196, 326 P.2d 413 (1958). “[I]t is not
23 essential that the plaintiff shall be the absolute owner of the property converted but
24 she must show that she was *entitled to immediate possession* at the time of the
25 conversion.” *Bastanchury v. Times-Mirror Co.*, 68 Cal. App. 2d 217, 236, 156 P.2d
26 488 (1945) (emphasis added). However, “a mere contractual right of payment,
27 without more, does not entitle the obligee to the immediate possession necessary to
28 establish a cause of action for the tort of conversion.” *See In re Bailey*, 197 F.3d

1 997 (9th Cir. 1999); *see also Imperial Valley Co. v. Globe Grain & Milling Co.*,
2 187 Cal. 352, 202 P. 129 (Sup. Ct. 1921). In addition, although Nevada has not
3 addressed the issue, numerous states do “not recognize a cause of action for
4 conversion of money unless it can be described or identified as a specific
5 chattel...The rule therefore is that an action for conversion of money will lie only
6 where there is an obligation to return the identical money delivered by the plaintiff
7 to the defendant.” *See In re Wal-Mart Wage & Hour Employment Practices Litig.*,
8 490 F. Supp. 2d 1091, 1102 (D. Nev. 2007).

9 Here, the Sisters did not have a right to immediate possession of the funds for
10 which they now seek recovery. Under their theory of the case, the Sisters were
11 beneficiaries of a separate trust which was entitled to payments from the Trust,
12 which itself was entitled to payments from income derive from the Texas oil
13 properties. At most, this is a contractual right, and therefore a claim for conversion
14 cannot lie.

15 In addition, the monies sought have not been described or identified as
16 specific chattel. The Sisters seek some unidentified amount of funds derived from
17 the Texas oil property, an amount which appears to fluctuate depending on the
18 production from the oil fields. The Sisters’ Motion cannot even identify the total
19 amount they believe to be in dispute. Accordingly, because unjust enrichment
20 would be the only potentially cognizable claim, there is no basis for the imposition
21 of punitive or treble damages.

22 **4. *The Sisters Cannot Establish Ms. Ahern Acted With “Oppression,***
23 ***Fraud, or Malice” Necessary For An Award Of Punitive Damages.***

24 The Court has found that Ms. Ahern held a good faith belief that she was
25 rightfully entitled to 100% of the income from the Texas oil properties. (*See*
26 *Summ. J. dated April 16, 2015, p. 15:24-26.*) In light of this finding, clearly there
27 can be no finding the Ms. Ahern acted with oppression, fraud or malice to justify
28 punitive remedies. NRS 42.005(1) requires the Sisters to “*prov[e]* by *clear and*

1 *convincing evidence* that a defendant has been guilty of *oppression, fraud or*
2 *malice...in addition to the compensatory damages.*” (Emphasis added.)

3 The Sisters have not even proven that Ms. Ahern is guilty of conversion or
4 that they are entitled to any compensatory damages, much less proven *by clear and*
5 *convincing evidence* that Ms. Ahern acted with oppression, fraud or malice. In fact,
6 the Sisters have not provided *any* evidence. They simply suggest that it possible
7 that at some point in the remote future the Trust may be entitled to a speculative
8 sum of money, estimated by the Sisters to be several million dollars, and on that
9 basis request several million dollars more in punitive damages.

10 Ms. Ahern, based on the plain language of the Trust documents, believed in
11 good faith that she was the sole beneficiary of the Trust income. Indeed, the Trust
12 documents specifically state that “all income from the Oil Assets is to be paid to
13 [Ms. Ahern] as the ‘Residual Beneficiary’ during her lifetime,” and in 2009 the
14 Sisters signed a consent which stated that, *upon the death of Ms. Ahern*, they would
15 receive equal shares of such funds. (See Motion to Dismiss dated Oct. 9, 2014, pp.
16 17:18-19, 7:16-18.)

17 The Sisters fail to explain, much less prove by clear and convincing
18 evidence, how Ms. Ahern could possibly have acted with oppression, fraud or
19 malice, given her subjective state of mind and the support of the written Trust
20 documents. Without more, much more, the Court cannot permit the Sisters to
21 bypass the procedural safeguards established by Nevada law and, thereby, strip Ms.
22 Ahern of her right to due process and her rights under the Trust.⁵

23 **C. The No-Contest Clause Is Not Implicated.**

24 The Sisters’ argument for enforcement of the no-contest clause is based on an
25 alleged “theft” from the Trust while Ms. Ahern acted as trustee. These new
26

27 ⁵ In addition to the issues of procedure and proof discussed throughout this opposition, the
28 Sisters have presented no evidence that the Trust has suffered any damage that would warrant a
surcharge. (See Section I, *supra*, p. 5:14-6:7.)

1 allegations against Ms. Ahern are not only nonsensical, given Ms. Ahern's belief
2 that she was the sole beneficiary, but have never been proven and the Sisters
3 provide no evidence in their Motion. Ms. Ahern would at minimum be entitled to
4 discovery on these issues and the opportunity to view the evidence against her and
5 present a defense.

6 Moreover, it is well-settled in Nevada that "[t]he law abhors a forfeiture."
7 *Organ v. Winnemucca State Bank & Trust Co.*, 55 Nev. 72, 26 P.2d 237, 238
8 (1933). Consistent with this view, no-contest provisions are looked upon with
9 disfavor and have been strictly construed. *See Estate of Kaila*, 94 Cal. App. 4th
10 1122, 114 Cal. Rptr. 2d 865 (2001) ("Although no-contest clauses are valid and
11 favored by the public policies of discouraging litigation and giving effect to the
12 testator's intent, they are also disfavored by the policy against forfeitures and
13 therefore are strictly construed and may not extend beyond what plainly was the
14 testator's intent."); *Saier v. Saier*, 366 Mich. 515, 520, 115 N.W.2d 279, 281 (1962)
15 ("[A]ll authorities agree that, even in those jurisdictions where conditions against
16 contest are held valid, such conditions are punitive and construable strictly.");
17 *Ivancovich v. Meier*, 122 Ariz. 346, 352, 595 P.2d 24, 30 (1979) (finding that in
18 terrorem clauses are strictly construed). It is Ms. Ahern's position that upon proper
19 presentation of any evidence against her, ultimately, her actions would fall outside
20 the scope of the Trust's no-contest clause, strictly construed, and that any such
21 actions did not constitute an "attack" on the Trust.

22 **III.** 23 **CONCLUSION**

24 Based upon their "reservation of right to supplement," the Sisters desire to
25 file this Motion and, at their leisure, present evidence to the Court on an ongoing
26 and rolling basis to support their extraordinary requests for relief. The Court cannot
27 permit this tactic. The fact is that this motion is premature. The Court should not
28 permit the Sisters to sidestep procedural and evidentiary requirements to prove their

1 allegations and give Ms. Ahern an opportunity to defend against such allegations.
2 Accordingly, because the Sisters' Motion fails to present any evidence supporting
3 their accusations and, even if evidence were presented, fails on its merits, the
4 Motion should be denied.

5 DATED this 29th day of June, 2015.

6
7 **BROWNSTEIN HYATT FARBER SCHRECK, LLP**

8 By: /s/ Tamara Beatty Peterson
9 KIRK B. LENHARD, ESQ., Bar No. 1437
klenhard@bhfs.com
10 TAMARA BEATTY PETERSON, ESQ., Bar No. 5218
tpeterson@bhfs.com
11 BENJAMIN K. REITZ, ESQ., Bar No. 13233
breitz@bhfs.com
12 Las Vegas, NV 89106-4614
Telephone: 702.382.2101
13 Facsimile: 702.382.8135
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **OPPOSITION TO MOTION FOR ASSESSMENT OF DAMAGES AGAINST ELEANOR AHERN, ENFORCEMENT OF NO-CONTEST CLAUSE, AND SURCHARGE OF ELEANOR'S TRUST INCOME** to be submitted electronically for filing and service with the Eighth Judicial District Court via the Court's Electronic Filing System on the 29th day of June, 2015, to the following:

TODD L. MOODY, ESQ.
tmoody@hutchlegal.com
RUSSEL J. GEIST, ESQ.
rgeist@hutchlegal.com
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
*Attorneys for Fredrick P. Waid,
Court-appointed Trustee*

JOSEPH J. POWELL, ESQ.
probate@rushforthfirm.com
THE RUSHFORTH FIRM, LTD.
P.O. Box 371655
Las Vegas, NV 89137-1655
Attorneys for Jacqueline M. Montoya

WHITNEY B. WARNICK, ESQ.
wbw@albrightstoddard.com
ALBRIGHT, STODDARD,
WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, NV 89106
Attorneys for Kathryn A. Bouvier

/s/ Erin Parcels
an employee of Brownstein Hyatt Farber
Schreck, LLP

1 **NOEJ**

2 G. MARK ALBRIGHT, ESQ.

3 Nevada State Bar No. 001394

4 WHITNEY B. WARNICK, ESQ.

5 Nevada State Bar No. 001573

6 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

7 801 South Rancho Drive, Suite D-4

8 Las Vegas, NV 89106

9 Tel: (702) 384-7111

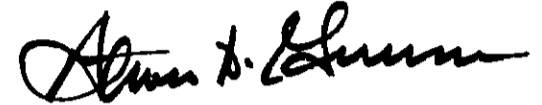
10 Fax: (702) 384-0605

11 gma@albrightstoddard.com

12 wbw@albrightstoddard.com

13 Attorneys for Jacqueline M. Montoya
14 and Kathryn A. Bouvier

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CLERK OF THE COURT

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)

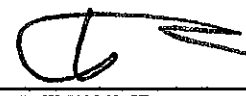
**NOTICE OF ENTRY OF JUDGMENT
AND ORDER APPROVING AWARD OF
ATTORNEY'S FEES**

18 PLEASE TAKE NOTICE that an **JUDGMENT AND ORDER APPROVING AWARD**
19 **OF ATTORNEY'S FEES** was entered with this Court on June 23, 2015.

20 A copy of said Order is attached hereto.

21 DATED this 29 day of June, 2015.

22 ALBRIGHT, STODDARD, WARNICK
23 & ALBRIGHT

24 By 
25 WHITNEY B. WARNICK, ESQ.

26 Nevada Bar No. 001573

27 801 South Rancho Drive, Suite D-4

28 Las Vegas, Nevada 89106

Attorneys for Kathryn A. Bouvier

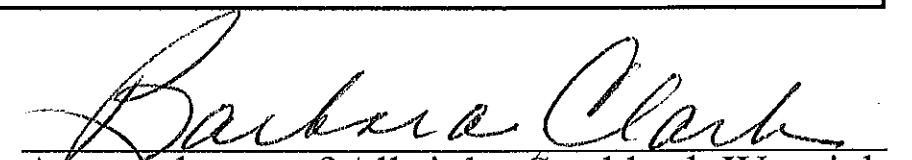
CERTIFICATE OF SERVICE

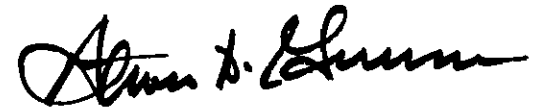
Pursuant to NRCP 5(b), I certify that I am an employee of Albright, Stoddard, Warnick & Albright and that on this 30 day of June, 2015, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF JUDGMENT AND ORDER APPROVING AWARD OF ATTORNEY'S FEES** upon all counsel of record by electronically serving the document using the Court's electronic filing system, as follows:

Kirk B. Lenhard, Esq.
Tamara Beatty Peterson, Esq.
Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
Attorneys for Eleanor Connell Hartman
Ahern

Joseph J. Powell, Esq.
The Rushforth Law Firm, Ltd.
Suite 100
9505 Hillwood Drive
Las Vegas, Nevada 89134
Attorneys for Jacqueline M. Montoya
Bouvier

Russel J. Geist, Esq.
Hutchison & Steffen, LLC
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Trustee, Fredrick P. Waid


An employee of Albright, Stoddard, Warnick
& Albright



CLERK OF THE COURT

ANOT
KIRK B. LENHARD, ESQ., Bar No. 1437
klenhard@bhfs.com
TAMARA BEATTY PETERSON, ESQ., Bar No. 5218
tpeterson@bhfs.com
BENJAMIN K. REITZ, ESQ., Bar No. 13233
breitz@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135

Attorneys for 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, An Inter
Vivos Irrevocable Trust

CASE NO.: P-09-066425-T

DEPT. NO.: XXVI

AMENDED NOTICE OF APPEAL

Eleanor C. Ahern, a/k/a Eleanor Connell Hartman Ahern ("Ms. Ahern"), as beneficiary and as trustee of The W.N. Connell and Marjorie T. Connell Living Trust dated May 18, 1972 (the "Trust"), by and through her counsel of record, the law firm of Brownstein Hyatt Farber Schreck, LLP, hereby amends the Notice of Appeal filed May 18, 2015, which has been designated by the Nevada Supreme Court as Case Number 68046 ("Notice of Appeal"). The Notice of Appeal is hereby amended to include this Court's *Judgment and Order Approving Award of Attorney's Fees* ("Order Approving Fees") which was filed on June 23, 2015, and entered on June 30, 2015, as well as orders, rulings or decisions relating thereto. The Order Approving Fees clarified the amount of attorneys' fees awarded pursuant to this Court's *Order Regarding The Accounting, Breach of Fiduciary Duty Claims*

018177\0001\12499942.1

1 *and Award of Attorneys' Fees* filed and entered on April 20, 2015, which is in part
2 the subject of the original appeal hereby amended. A copy of the Notice of Entry of
3 the Order Approving Fees is attached hereto as Exhibit 1.

4 DATED this 29th day of July, 2015.

5
6 **BROWNSTEIN HYATT FARBER SCHRECK, LLP**

7
8 By: /s/ Tamara Beatty Peterson
9 KIRK B. LENHARD, ESQ., Bar No. 1437
10 klenhard@bhfs.com
11 TAMARA BEATTY PETERSON, ESQ., Bar No. 5218
12 tpeterson@bhfs.com
13 BENJAMIN K. REITZ, ESQ., Bar No. 13233
14 breitz@bhfs.com
15 Las Vegas, NV 89106-4614
16 Telephone: 702.382.2101
17 Facsimile: 702.382.8135
18
19
20
21
22
23
24
25
26
27
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **AMENDED NOTICE OF APPEAL** to be submitted electronically for filing and service with the Eighth Judicial District Court via the Court's Electronic Filing System on the 29th day of July, 2015, to the following:

TODD L. MOODY, ESQ.
tmoody@hutchlegal.com
RUSSEL J. GEIST, ESQ.
rgeist@hutchlegal.com
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
*Attorneys for Fredrick P. Waid,
Court-appointed Trustee*

JOSEPH J. POWELL, ESQ.
probate@rushforthfirm.com
THE RUSHFORTH FIRM, LTD.
P.O. Box 371655
Las Vegas, NV 89137-1655
*Attorneys for Jacqueline M. Montoya and
Kathryn A. Bouvier*

/s/ Erin Parcels
an employee of Brownstein Hyatt Farber
Schreck, LLP

EXHIBIT 1

EXHIBIT 1

1 **NOEJ**

2 G. MARK ALBRIGHT, ESQ.

3 Nevada State Bar No. 001394

4 WHITNEY B. WARNICK, ESQ.

5 Nevada State Bar No. 001573

6 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

7 801 South Rancho Drive, Suite D-4

8 Las Vegas, NV 89106

9 Tel: (702) 384-7111

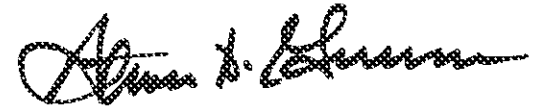
10 Fax: (702) 384-0605

11 gma@albrightstoddard.com

12 wbw@albrightstoddard.com

13 Attorneys for Jacqueline M. Montoya
14 and Kathryn A. Bouvier

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CLERK OF THE COURT

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 In the Matter of the Estate of:
14 THE W. N. CONNELL AND MARJORIE T.
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16 1972,

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CASE NO. P-09-066425
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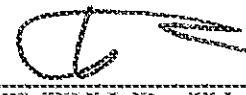
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19 **OF ATTORNEY'S FEES** was entered with this Court on June 23, 2015.

20 A copy of said Order is attached hereto.

21 DATED this 29 day of June, 2015.

22 ALBRIGHT, STODDARD, WARNICK
23 & ALBRIGHT

24 By 
25 WHITNEY B. WARNICK, ESQ.

26 Nevada Bar No. 001573

801 South Rancho Drive, Suite D-4

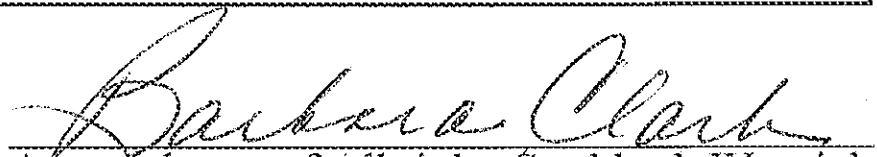
Las Vegas, Nevada 89106

Attorneys for Kathryn A. Bouvier

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Albright, Stoddard, Warnick & Albright and that on this 30 day of June, 2015, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF JUDGMENT AND ORDER APPROVING AWARD OF ATTORNEY'S FEES** upon all counsel of record by electronically serving the document using the Court's electronic filing system, as follows:

Kirk B. Lenhard, Esq. Tamara Beatty Peterson, Esq. Brownstein Hyatt Farber Schreck, LLP 100 North City Parkway, Suite 1600 Las Vegas, Nevada 89106 Attorneys for Eleanor Connell Hartman Ahern	Joseph J. Powell, Esq. The Rushforth Law Firm, Ltd. Suite 100 9505 Hillwood Drive Las Vegas, Nevada 89134 Attorneys for Jacqueline M. Montoya Bouvier
Russel J. Geist, Esq. Hutchison & Steffen, LLC 10080 West Alta Drive, Suite 200 Las Vegas, Nevada 89145 Attorneys for Trustee, Fredrick P. Waid	


 An employee of Albright, Stoddard, Warnick & Albright


CLERK OF THE COURT

JUDGE
JOSEPH J. POWELL, ESQ.
Nevada Bar No. 008875
THE RUSHFORTH FIRM, LTD.
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134
Tel: (702) 255-4552
Fax: (702) 255-4677
joe@rushforth.net
Attorneys for Jacqueline M. Montoya

WHITNEY B. WARNICK, ESQ.
Nevada Bar No. 001573
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
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, 2015
Time of Hearing: 9:00a.m.

An Inter Vivos Irrevocable Trust.

JUDGMENT AND ORDER APPROVING AWARD OF ATTORNEY'S FEES

The MOTION IN SUPPORT OF AWARD OF ATTORNEY'S FEES AND COSTS filed herein by Movants, Jacqueline M. Montoya and Kathryn A. Bouvier, having come on for hearing before the Honorable Gloria Sturman on May 13, 2015; Movants being represented by their counsel, Whitney B. Warnick, Esq., of the law firm Albright, Stoddard, Warnick & Albright, and Joseph J. Powell, Esq., of The Rushforth Firm, Ltd.; Eleanor Connell Hartman Ahern, being represented by her counsel, Kirk B. Lenard, Esq., and Tamara Beatty Peterson, Esq., of the law firm of Brownstein Hyatt Farber Schreck, LLP; and, the Trustee, Fredrick P. Waid, being present and represented by his counsel, Russel J. Geist, Esq., of the law firm of Hutchison & Steffen, LLC; the Court having reviewed the Motion filed and the Opposition thereto, and having heard oral argument from counsel, and being fully advised in the matter, the Court finds and Orders as follows:

<input type="checkbox"/> Voluntary Dismissal	<input checked="" type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

1 The Court finds that Movants' Motion provides the information for evaluating an award of
2 attorney's fees under *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).
3 These factors are: 1) the advocate's professional qualities; 2) the nature of the litigation; 3) the work
4 performed; and, 4) the result.

5 The Court finds that all of the fees requested by Movants' Nevada counsel, including the sum
6 of \$122,260.00 incurred by Kathryn A. Bouvier ("Kathryn"), and the sum of \$269,733.80 incurred
7 by Jacqueline M. Montoya ("Jacqueline"), were incurred as a result of the breach by Eleanor Connell
8 Hartman Ahern ("Eleanor") of her duties as Trustee of the W. N. Connell and Marjorie T. Connell
9 Living Trust Dated May 18, 1972 ("Trust"); and, therefore, pursuant to NRS 153.031(3)(b), Eleanor
10 is personally liable to Kathryn and Jacqueline to reimburse to them the fees they incurred and judgment
11 should be entered against Eleanor and in favor of Kathryn and Jacqueline for that purpose. These fee
12 amounts are for services rendered to Kathryn and Jacqueline by their counsel through March 20, 2015,
13 and they are not precluded from seeking an additional award of fees for legal services rendered on their
14 behalf in these proceedings after that date.

15 The Court finds that the reimbursement of costs to Kathryn and Jacqueline sought in their
16 Motion, including the amount of \$5,373.70 sought by Kathryn, and the amount of \$20,488.05 sought
17 by Jacqueline, should not be awarded at this time, until further proof and corroboration thereof is
18 provided to the Court, consistent with the guidelines provided by the Nevada Supreme Court in the
19 case of *Cadle Company v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049 (2015).

20 The Court further finds that reimbursement to Kathryn and Jacqueline of fees and costs they
21 incurred with Texas counsel, prior to the commencement of these proceedings, as requested in their
22 Motion, totaling \$82,349.23, cannot be awarded to them under NRS 153.031(3)(b), because said fees
23 and costs were not incurred in these proceedings, or as a direct consequence of Eleanor's breach of her
24 fiduciary duties.

25 Therefore, based upon these findings and good cause appearing:

26 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** as follows:

27 1. Judgment is hereby entered against Eleanor Connell Hartman Ahern and in favor of
28 Kathryn A. Bouvier, for attorney's fees she incurred through March 20, 2015, in the amount of

1 \$122,260.00, together with interest accruing on said principal amount at the legal rate of interest in
2 Nevada, from the date of the entry of this Judgment until paid in full.

3 2. Judgment is hereby entered against Eleanor Connell Hartman Ahern and in favor of
4 Jacqueline M. Montoya, for attorney's fees she incurred through March 20, 2015, in the amount of
5 \$269,733.80, together with interest accruing on said principal amount at the legal rate of interest in
6 Nevada, from the date of the entry of this Judgment until paid in full.

7 3. Kathryn's and Jacqueline's requests for an award of costs incurred, including the
8 amount of \$5,373.70 sought by Kathryn, and the amount of \$20,488.05 sought by Jacqueline, are
9 denied at this time without prejudice. If they reapply for an award of costs incurred herein, they must
10 provide further proof and corroboration thereof to the Court, consistent with the guidelines provided
11 by the Nevada Supreme Court in the case of *Cadle Company v. Woods & Erickson, LLP*, 131 Nev.
12 Adv. Op. 15, 345 P.3d 1049 (2015).

13 4. Kathryn's and Jacqueline's request for an award of fees and costs incurred by their

14 ///

21 ///

28 ///

1 Texas counsel, prior to the commencement of these proceedings, totaling the sum of \$82,349.23, is
2 hereby denied.

3 IT IS SO ADJUDGED AND ORDERED this 4th ^{June} day of ~~May~~, 2015.

4
5 
DISTRICT COURT JUDGE

Submitted by:

6 ALBRIGHT, STODDARD, WARNICK
7 & ALBRIGHT

THE RUSHFORTH FIRM, LTD

8 By 

WHITNEY B. WARNICK, ESQ.
Nevada Bar No. 001573
801 S. Rancho Dr. #D-4
Las Vegas, NV 89106
Attorneys for Kathryn A. Bowler

By 

JOSEPH J. POWELL, ESQ.
Nevada Bar No. 008875
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134
Attorneys for Jacqueline M. Montoya

11 Approved by:

12 BROWNSTEIN HYATT FARBER
13 SCHRECK, LLP

HUTCHISON & STEFFEN, LLC

14 By 

KIRK B. LENHARD, ESQ.
Nevada Bar No. 1437
TAMARA BEATTY PETERSON
Nevada Bar No. 5218
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
*Attorneys for Eleanor Connell
Hartman Ahern*

By 

RUSSEL J. GEIST, ESQ.
Nevada Bar No. 9030
10080 W. Alta Dr., Suite 200
Las Vegas, NV 89145
*Attorneys for Trustee,
Fredrick P. Wald*

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A PROFESSIONAL CORPORATION

1 Texas counsel, prior to the commencement of these proceedings, totaling the sum of \$82,349.23, is
2 hereby denied.

3 IT IS SO ADJUDGED AND ORDERED this _____ day of ~~May~~, 2015.

4
5 DISTRICT COURT JUDGE

6 Submitted by:

7 ALBRIGHT, STODDARD, WARNICK
& ALBRIGHT

8 By _____
9 WHITNEY B. WARNICK, ESQ.
Nevada Bar No. 001573
801 S. Rancho Dr. #D-4
10 Las Vegas, NV 89106
Attorneys for Kathryn A. Bouvier

THE RUSHFORTH FIRM, LTD

By _____
11 JOSEPH T. POWELL, ESQ.
Nevada Bar No. 008875
9505 Hillwood Drive, Suite 100
12 Las Vegas, Nevada 89134
Attorneys for Jacqueline M. Montoya

13 Approved by:

14 BROWNSTEIN HYATT FARBER
SCHRECK, LLP

By _____
15 KIRK B. LENHARD, ESQ.
Nevada Bar No. 1437
TAMARA BEATTY PETERSON
16 Nevada Bar No. 5218
100 North City Parkway, Suite 1600
17 Las Vegas, NV 89106-4614
*Attorneys for Eleanor Connell
Hartman Ahern*

HUTCHISON & STEFFEN, LLC

By _____
18 RUSSEL J. GEIST, ESQ.
Nevada Bar No. 9030
10080 W. Alta Dr., Suite 200
19 Las Vegas, NV 89145
*Attorneys for Trustee,
Fredrick P. Wald*

ASWA

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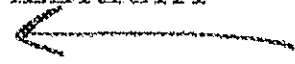
1 Texas counsel, prior to the commencement of these proceedings, totaling the sum of \$82,349.23, is
2 hereby denied.


3 IT IS SO ADJUDGED AND ORDERED this _____ day of ~~May~~, 2015.

4
5 Submitted by: 
DISTRICT COURT JUDGE

6 ALBRIGHT, STODDARD, WARNICK
7 & ALBRIGHT

THE RUSHFORTH FIRM, LTD

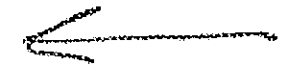
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9 WHITNEY B. WARNICK, ESQ
Nevada Bar No. 001573
801 S. Rancho Dr. #D-4
10 Las Vegas, NV 89106
Attorneys for Kathryn A. Bouvier


By 
JOSEPH J. POWELL, ESQ.
Nevada Bar No. 008875
9505 Hillwood Drive, Suite 100
Las Vegas, Nevada 89134
Attorneys for Jacqueline M. Montoya

11 Approved by:

12 BROWNSTEIN HYATT FARBER
13 SCHRECK, LLP

HUTCHISON & STEFFEN, LLC

14 By 
15 KIRK B. LENHARD, ESQ
Nevada Bar No. 1437
TAMARA BEATTY PETERSON
16 Nevada Bar No. 5218
100 North City Parkway, Suite 1600
17 Las Vegas, NV 89106-4614
Attorneys for Eleanor Connell
18 Hartman Ahern

By 
RUSSEL J. GEIST, ESQ.
Nevada Bar No. 9030
10080 W. Alta Dr., Suite 200
Las Vegas, NV 89145
Attorneys for Trustee,
Fredrick P. Wald