

NRAP 26.1 DISCLOSURE


The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant Jacqueline M. Montoya is an individual. Ms. Montoya has been represented throughout this matter by THE RUSHFORTH FIRM, LTD.

Appellant Kathryn A. Bouvier is an individual. Ms. Bouvier has been represented in this matter by the following law firms: (1) ALBRIGHT, STODDARD, WARNICK, & ALBRIGHT, and (2) THE RUSHFORTH FIRM, LTD.

Respectfully submitted this 3rd day of May 2017.

THE RUSHFORTH FIRM, LTD.

By: 
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

JURISDICTIONAL STATEMENT

This appeal arises from the district court's Order Regarding Motion for Assessment of Damages; Enforcement of No Contest Clause; and Surcharge of Trust Income (the "Surcharge Order") entered on September 19, 2016 (8 AA 1617-20). The Notice of Entry for the Surcharge Order was filed on September 28, 2016 (8 AA 1621-25). The Appellants' Notice of Appeal was filed in the district court on October 19, 2016. (8 AA 1626-33). Among other things, the Surcharge Order declines to enforce the subject trust's no contest clause against the Respondent. The Surcharge Order's failure to enforce the no contest clause was immediately appealable pursuant to NRS 155.190(1)(k), (m), and (n).¹

¹ The corpus of the subject trust consists of valuable lease rights associated with oil rich land in the State of Texas. These leases have already produced millions of dollars in trust income, making the Surcharge Order immediately appealable. *See* NRS 155.190(1)(n) (making "any decision [related to trusts or estates] wherein the amount in controversy equals or exceeds, exclusive of costs, \$10,000" immediately appealable.). Additionally, the enforcement of a no contest clause results in forfeiture of beneficial rights. Accordingly, the Surcharge Order is also immediately appealable on this ground. *See* NRS 155.190(1)(k) (making a decision that determines "to whom distribution must be made or trust property must pass" immediately appealable). Finally, the district court's Surcharge Order acts as a refusal to issue an order disinheriting the Respondent. As such, it is immediately enforceable. *See* NRS 155.190(1)(m) (making the district court's refusal "to make any order mentioned in [NRS 155] immediately appealable).

ROUTING STATEMENT

Upon information and belief, the subject trust has a corpus valued in excess of \$5,430,000.² *See* NRAP 17(a)(1) and (b)(9). Accordingly, this case is presumptively assigned to the Supreme Court. *Id.* Nevertheless, even if this case were presumptively assigned to the Court of Appeals, it should be retained by the Supreme Court because “the principle issue³ is a question of statewide importance.”⁴ NRAP 17(a)14; *see also* NRAP40B(a)(3). Finally, considering the Supreme Court has already examined and interpreted portions of the subject trust (as well as many facts which overlap with the present appeal) as part of its determination regarding the parties’ prior consolidated appeal, it is likely most efficient for the Supreme Court to retain assignment of the present appeal.

² Over the years, the oil leases from which the trust obtains its income have produced well in excess of \$5,430,000. Given the historical performance of these leases, there is little reason to doubt that similar production will continue in the future.

³ This principle issue is: whether NRS 163.00195 requires mandatory enforcement against the violator of a no contest clause.

⁴ As a trust-friendly state, Nevada encourages the formation of new trusts within its borders. Before deciding where, and under which law, to establish a trust, a settlor needs certainty regarding the enforcement of her intentions, especially as it relates to a trust’s no contest/forfeiture clause.

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I. STATEMENT OF ISSUES PRESENTED

1. May a trustee—who is also a beneficiary of the trust she administers—shield herself from the enforcement of a no-contest clause by claiming her inappropriate conduct was performed only while acting in her role as trustee?

2. May the district court refuse to enforce a broad no-contest clause pursuant to NRS 163.00195 while simultaneously holding that the contesting party has: (1) breached her duty of loyalty to the beneficiaries, (2) violated a court order by stealing millions of dollars from trust accounts which were to be segregated and preserved for the benefit of the trust’s other beneficiaries, and (3) attempted to conceal her bad acts by filing an incomplete and intentionally inaccurate accounting with the court?

3. Does NRS 163.00195 provide the district court with discretion to refuse to enforce a no-contest clause based on a determination that enforcement would be a “harsh remedy”?

II. STATEMENT OF THE FACTS

A. The Settlers Create the Trust

W.N. Connell, also known as William N. Connell (“William”), and Marjorie T. Connell (“Marjorie,” and together with William, the “Settlers”) established The W.N. Connell and Marjorie T. Connell Living Trust (the “Trust”) by executing a written trust agreement on May 18, 1972 (the “Trust Agreement”). (1 AA 20). The Trust was set up for the benefit of: (1) the Settlers (2) William’s daughter, Eleanor C. Ahern (“Ms. Ahern”), and (3) Ms. Ahern’s children. (1 AA 21). Jacqueline Montoya (“Jacqueline”) and Kathryn Bouvier (together with Jacqueline, the “Beneficiaries”) are Ms. Ahern’s daughters. (1 AA 69).

During the Settlers’ joint lifetime, all Trust income and principal was to be administered for their benefit. (1 AA 21). Upon the death of one of the Settlers, the Trust allocated its assets between two sub-trusts, identified in the Trust Agreement as “Trust No. 2” (“Subtrust 2”) and “Trust No. 3” (“Subtrust 3”) (1 AA 22-25).

B. The Settlers Include a No Contest Clause in the Trust Agreement

The Trust Agreement includes an *in terrorem* provision, or no contest clause (the “No Contest Clause”) (1 AA 0031). The Trust’s No Contest Clause reads 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 and 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.

(*Id.*). The plain language of the No Contest Clause makes clear that its provisions apply to “all trusts” created under the Trust Agreement (i.e. the Trust and Subtrusts).

(*Id.*).

C. The Texas Property

The Trust’s main asset is real property located in Upton County, Texas (the “Texas Property”) (3 AA 712-13). The Texas Property has certain oil, gas, and mineral rights associated with it. (3 AA 712). The Texas Property produces income in the form of oil royalties and lease payments. (*Id.*).

D. William Dies and the Subtrusts Are Created

William died on November 24, 1979. (1 AA 42; 3 AA 712). Upon his death, Subtrust 2 and Subtrust 3 were created. (3 AA 712). As the surviving Settlor, Marjorie became the beneficiary of Subtrust 3 and Ms. Ahern became the beneficiary of Subtrust 2. (3 AA 712-13). Subtrust 3 provided Marjorie with the

ability to exercise a testamentary power of appointment over trust assets in favor of anyone she desired (the “Power of Appointment”). (1 AA 25; 3 AA 712-13).

The allocation of Trust assets between Subtrusts was made in a manner which maximized the marital estate tax deduction for Marjorie. (3 AA 713). This resulted in a 65% allocation of Trust assets to Subtrust 3, and 35% to Subtrust. 2.⁵ (3 AA 713-14).

After William’s death, Marjorie acted as sole trustee of the Trust. (3 AA 714). However, on May 6, 1980, Marjorie and Ms. Ahern executed a Substitution of Trustee which added Ms. Ahern as a co-trustee of the Trust. (1 AA 39-40; 3 AA 714). Ms. Ahern served as a co-trustee of the Trust with Marjorie for a period of twenty-nine years (the “Co-Trustee Period”) (3 AA 714-15). During the Co-Trustee Period, all Trust distributions were made to the Subtrusts in accordance with the 65/35 allocation described above. (3 AA 714).

E. Marjorie Executes Her Power of Appointment and Dies Shortly Thereafter

On January 7, 2008, Marjorie exercised her Power of Appointment through the execution of a will. (1 AA 53; 3 AA 714-15). Marjorie’s exercise caused Subtrust 3’s allocation of Trust assets, including the income derived therefrom (i.e. the 65%), to transfer to the MTC Living Trust (the “MTC Trust”) upon her death.

⁵ As more fully detailed below, the precise split was 64.493%/35.507%.

(*Id.*). The beneficiaries of the MTC Trust are Marjorie's granddaughters (i.e. the Beneficiaries) (1 AA 69, 79-88; 3 AA 714). Jacqueline is the sole trustee of the MTC Trust. (1 AA 70).

Marjorie died on May 1, 2009, and the 65% interest in Trust assets, including all income derived therefrom, vested in the MTC Trust. (3 AA 714). As a result of Marjorie's death, Ms. Ahern became the sole trustee of the Trust. (3 AA 714-15).

F. Ms. Ahern Abruptly Stops All Distributions to the MTC Trust

Between May 2, 2009 (the date of Marjorie's death, which ended the Co-Trustee Period) and the close of May 2013, Ms. Ahern made all applicable distributions to the MTC Trust and Subtrust 2 in accordance with the 65/35 allocation (3 AA 714-15). In June of 2013, after 33 years of the Trust making 65/35 distributions, Ms. Ahern inexplicably ceased making distributions to the MTC Trust. (3 AA 715). Prior to ceasing all distributions, Ms. Ahern did not seek any instruction from any court. (3 AA 715; 4 AA 750).

III. STATEMENT OF THE CASE

A. Litigation Commences

Shortly after Ms. Ahern abruptly ceased payment of the required Trust distributions to the MTC Trust, Jacqueline, as trustee of the MTC Trust, filed her petition seeking declaratory relief pursuant to NRS 30.040, NRS 153.031(1)(e), and

NRS 164.033(1)(a) (the “Distribution Petition”).⁶ (1 AA 1-18). Simply stated, the Distribution Petition sought declaratory relief regarding the longstanding 65/35 split of Trust income between the Subtrusts. (*Id.*).

B. The District Court Orders Ms. Ahern to Protect the Beneficiaries’ Interest

On November 12, 2013, the district court held an interim hearing on the Distribution Petition. (2 AA 274). At this hearing, the Beneficiaries asked that the district court issue an order requiring Ms. Ahern to resume the distribution *status quo* (i.e. resume 65% payments to the MTC Trust) pending the court’s final determination of the Distribution Petition. (2 AA 316). At the urging of Ms. Ahern’s counsel (2 AA 321-22), the district court declined to reinstate the *status quo*, and instead ordered Ms. Ahern, as trustee, to impound and safeguard the Beneficiaries’/MTC Trust’s 65% interest until an ultimate determination could be made after an evidentiary hearing. (2 AA 322; 324; 328; 335).

On January 6, 2014, the district court entered its Order Denying Motion to Refer Contested Probate Matter to Master-Probate Commissioner Per EDCR 4.16; Directing Payment of All Oil, Gas, Mineral and Interest Royalties and Rent to Eleanor C. Hartman, Also Known as Eleanor C. Ahern, as Trustee of Trust No. 2 of the W.N. Connell and Marjorie Connell Living Trust Dated May 18, 1972; and

⁶ Although this matter began in 2009, the events relevant to this appeal began when the Distribution Petition was filed.

Setting Calendar Call and Hearing (the “Segregation Order”), which memorialized its oral ruling at the November 12, 2013 hearing. (2 AA 344-48). Specifically, the Segregation Order required the Beneficiaries’ 65% interest in “oil, gas, mineral, and interest royalties and surface rent” from the Texas Property, “*shall* be held in the Trust” pending final resolution of the Distribution Petition. (2 AA 347-48) (emphasis added).

Ms. Ahern’s duty to safeguard the Beneficiaries’ 65% interest outlined in the Segregation Order was reiterated by the district court at subsequent hearings held on January 14, 2014 (2 AA 365), January 24, 2014 (2 AA 383), and May 13, 2014 (2 AA 426-30). On July 7, 2014, the district court memorialized its oral ruling from the May 13, 2014 hearing with its Order: Re Pending Motions and Scheduling (the “July 2014 Order”) (2 AA 456-63). The July 2014 Order reiterated Ms. Ahern’s duty to safeguard the Beneficiaries’ 65% interest unless, and until: (1) a final determination was made regarding the Distribution Petition, or (2) the Beneficiaries posted a bond. (2 AA 461-62).

At an April 22, 2014 hearing, Ms. Ahern (through counsel) acknowledged her duties under the Segregation Order and ensured the court the Beneficiaries’ interest was being “isolated” and “not touched” in accordance with the Segregation Order (2 AA 391).

///

C. Summary Judgment, the False Accounting, and Ms. Ahern's Removal

On January 14, 2015, the district court again reiterated Ms. Ahern's obligations to hold and protect the Beneficiaries' monies under the Segregation Order. (3 AA 563-64). The court also explained that although Ms. Ahern had clear obligations to safeguard these funds, the only way to ensure that Ms. Ahern was meeting these duties was through the production of a Trust accounting. (*Id.*).

On January 30, 2015, the district court heard arguments on the parties' competing motions for summary judgment related to the relief requested in the Distribution Petition. (3 AA 711). The court granted summary judgment in favor of the Beneficiaries and determined that the MTC Trust was entitled to 65% of the Trust's income. (3 AA 723). As part of its summary judgment ruling, the court ordered Ms. Ahern to produce an accounting for the Trust related to relevant portions of 2013, 2014, and 2015. (3 AA 724)

On March 13, 2015, Ms. Ahern filed the required accounting (albeit false) with the court (the "False Accounting"). (8 AA 1632). Ms. Ahern attested to the accuracy and veracity of the financial information set forth in the False Accounting under penalty of perjury (*Id.*).

The district court later addressed the False Accounting at a hearing on March 20, 2015. (3 AA 606). The court was troubled by Ms. Ahern's: (1) use of Trust funds to rent office space, (2) improper allocation of Trust expenses, (3) excessive

trustee fees, and (4) inappropriate Trust investments (Ms. Ahern deposited \$500,000 with an unknown, uninsured, third-party). (3 AA 664-68). As a result of Ms. Ahern's actions, the court announced: "[Ms. Ahern] cannot be trusted to maintain control over this [Trust] money because who knows what other inappropriate investments she'll put it in." (3 AA 669). At this same hearing, the court determined that Ms. Ahern could not remain in control of the Trust (i.e. she had to be replaced as trustee) (3 AA 668). The court also announced that Ms. Ahern's deliberate cessation of Trust distributions without seeking or obtaining prior court approval was a breach of Ms. Ahern's fiduciary duties. (3 AA 683-84; *see also* 4 AA 750).

On April 1, 2015, the district court entered its Order Appointing New Temporary Trustee (the "Temporary Trustee Order") (3 AA 686). The Temporary Trustee Order replaced Ms. Ahern as trustee of the Trust with Frederick P. Waid, Esq. (the "Court-Appointed Trustee"). (*Id.*). The Temporary Trustee Order also admonished Ms. Ahern to "fully cooperate with [the Court-Approved Trustee] in providing to him all pertinent information concerning the Trust's current business transactions and dealings and in making this transition in trusteeship of the Trust." (3 AA 687).

D. The Court-Appointed Trustee's Affidavit

On May 6, 2015, the Court-Appointed Trustee, submitted an affidavit to the district court which detailed his preliminary findings regarding Ms. Ahern's actions

in relation to the administration of the Trust. (4 AA 772- 76). The Court-Appointed Trustee's affidavit concluded:

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.

(4 AA 775).

On June 3, 2015, the Beneficiaries filed their Motion for Assessment of Damages Against Eleanor Ahern; Enforcement of No-Contest Clause; and Surcharge of Eleanor's Trust Income (the "Surcharge Petition"). (4 AA 845). Among other things, the Surcharge Petition sought enforcement of the Trust's No Contest Clause against Ms. Ahern based on her breach of fiduciary duty, multiple violations of numerous court orders, theft of the Beneficiaries' money, and submission of the False Accounting. (4 AA 845-57).

E. The Evidentiary Hearing

On February 22, 2016 and March 3, 2016, the district court conducted an evidentiary hearing regarding the allegations contained in the Surcharge Petition. (7 AA 1305; 8 AA 1521). At the evidentiary hearing, the Court-Appointed Trustee offered extensive testimony regarding his investigation into Ms. Ahern's actions. (7 AA 1360-1468). Among other things, the Court-Appointed Trustee testified that:

- There were a variety of discrepancies in the False Accounting (7 AA 1397-98);
- The segregated Trust account *should* have held approximately \$2 million in Trust assets at the time the Court-Appointed Trustee took office, but they contained less than \$10,000 (7 AA 1398);
- Ms. Ahern withdrew in excess of \$400,000 from a Wells Fargo branch in Orange County, California hours after being removed by the court as trustee (7 AA 1400);
- Ms. Ahern withdrew an additional \$500,000 from a Wells Fargo branch in St. George, Utah three days after being removed by the court as trustee (7 AA 1401-03);
- On April 14, 2015, almost one month after being removed as trustee, Ms. Ahern withdrew another \$100,000 from a Trust bank account (7 AA 1404-05);
- Ms. Ahern failed to safeguard the MTC Trust's 65% interest between December 2013 and March 20, 2015 as required by the Segregation Order (7 AA 1406);
- During this same period, Ms. Ahern "treated the Trust and its income as her own. She lived lavishly [and] used Trust money to hire professionals between Texas and California." (*Id.*); and

- An estimated \$2.1 million properly payable as distributions to the MTC Trust had been taken by Ms. Ahern for her personal use (7 AA 1416; 1420-21).

Ms. Ahern did not testify at the evidentiary hearing; nor did she present any witnesses to refute or rebuff the Court-Appointed Trustee's findings relating to her actions. (7 AA 1306).

In light of the Court-Appointed Trustee's unrefuted testimony, the district court explained that:

- It was "troubled" by Ms. Ahern's "very gross misuse" of Trust funds (8 AA 1595-97);
- Ms. Ahern's "shocking" actions likely justified "criminal prosecution" (8 AA 1596);
- Ms. Ahern's actions were "very willful and malicious," and "something that needs to be punished" (8 AA 1597-98)
- Ms. Ahern's failure to abide by the Segregation Order constituted contempt (*Id.*); and
- Ms. Ahern was "lying to the court about how much money she was holding" (8 AA 1610).

F. The Surcharge Order

On September 19, 2016, the district court released its official ruling on the Surcharge Petition by filing its Order Regarding Motion for Assessment of

Damages; Enforcement of No Contest Clause; and Surcharge of Trust Income (the “Surcharge Order”). (8 AA 1617). Based on the evidence presented at the evidentiary hearing, the district court found:

1. Ms. Ahern, as Trustee, ***did not comply with the Court order*** to protect the 65% share of the Trust that was to be segregated under the terms of the Trust for the Movants, Ms. Montoya and Ms. Bouvier.
2. Ms. Ahern’s ***failure to properly apply her duties as a Trustee*** does not warrant imposition of the harsh remedy of imposition of the no-contest clause, specifically her failure to seek Court approval before ceasing payments to the Movants. Therefore, the Court will not enforce the no-contest clause as against Ms. Ahern as beneficiary.
3. Ms. Ahern's failure to comply with the Courts Order to protect the Movants 65% share however, resulted in a ***misapplication of the Trust income, which deprived the Movants of funds owed to them under the terms of the Trust***. Ms. Ahern’s misapplication of Trust funds warrants a surcharge against Ms. Ahern’s 35% share of the Trust, to be paid to the Movants, in an amount to be determined at a future hearing to be set by this Court.
4. Additional briefing and argument is needed on the issues of punitive and treble damages. It is expected that the additional briefing on such damages and the hearing on the total ***amount owed to Movants***, will be scheduled after the Successor Trustee, Fredrick P. Waid (“Mr. Waid”) finalizes his accounting for the Court.
5. Until such time as the Court decides the total amounts owed by Ms. Ahern, it is ***necessary to withhold all distributions to Ms. Ahern***, other than those amounts previously approved as advancements by the Court’s *Order Instructing Trustee to Advance Funds* dated December 29, 2015, which was entered on January 5, 2016. The suspension of Ms. Ahern’s share under this order will be effective thirty (30) days after Notice of Entry is filed with respect to this Order. This ruling does not suspend or modify the Court’s

Order on Petition for Instructions Regarding Allocations of Eleanor Ahern's 2015 Trust Unpaid Distributions

6. In further ***violation of this Court's Orders, Ms. Ahern removed some funds from Trust accounts before turning those accounts over to the Successor Trustee***, Mr. Waid. Some funds have since been turned over to the Successor Trustee, however, until such time as Mr. Waid can provide an Accounting the Court cannot rule on Ms. Ahern's potential liability. The exact amount of any damages resulting from these ***serious breaches of fiduciary duty*** will be determined at a later evidentiary hearing.

7. NRS Chapter 165 imposes a fiduciary duty on Ms. Ahern[;] as Trustee, [she] had to account for all assets and income received by her and for all distributions made by her. Although Ms. Ahern has been removed or suspended from her role as Trustee, she has not [been] discharged from her fiduciary duties pending her compliance, and the Court's approval of the accounting to be filed by the successor Trustee, Mr. Waid. The Court found that ***the account Ms. Ahern filed, under penalty of perjury on March 13, 2015 titled "Brief Regarding Accounting Fiduciary Duties, and Trust Administration," was incomplete and intentionally inaccurate.*** Ms. Ahern, therefore, remains statutorily obligated to cooperate with the successor Trustee, Mr. Waid, in furtherance of Mr. Waid's accounting, until such time as the Court enters a full and complete discharge of Ms. Ahern.

8. Movant's seek punitive damages, which requires a finding of willful and malicious conduct. In the alternative, Movants seek treble damages for breach of fiduciary duty. ***Ms. Ahern's conduct was shocking and needs to be dealt with in a serious fashion***, but the final decision on whether punitive and/or treble damages should be awarded in addition to restitution will be made at the evidentiary hearing to be scheduled after Mr. Waid concludes discovery and prepares his report and accounting to the Court.

(8 AA 1618-20) (emphasis added).

In other words, the district court found that Ms. Ahern's conduct was: (1) "serious," (2) "shocking," and (3) in violation of multiple court orders (i.e. contemptuous). Additionally, the court determined that Ms. Ahern: (1) failed to safeguard (and misallocated) Trust assets, (2) owed the Beneficiaries a substantial amount of money,⁷ (3) lied about her conduct (i.e. the False Accounting), and (4) breached various fiduciary duties. Ms. Ahern's conduct was determined so egregious that the district court ordered the Court-Appointed Trustee to stop providing her Trust distributions.

In essence, the Surcharge Order finds that Ms. Ahern was a lying, thieving, rule breaker, who owed the Beneficiaries a lot of money. Yet despite all these findings, the district court refused to enforce the Trust's No Contest Clause, considering it too "harsh" a remedy.

The Beneficiaries now appeal the district court's refusal to enforce the No Contest Clause against Ms. Ahern. (8 AA 1626).

IV. SUMMARY OF THE ARGUMENT

In the face of undisputed evidence which demonstrates that Ms. Ahern lied, stole, and defied all court orders she did not like, the district court refused to enforce the No Contest Clause against her. As justification for its refusal, the district court

⁷ The Court-Appointed Trustee later reported to the district court that Ms. Ahern had taken in excess of \$2.5 million dollars of the Beneficiaries' money before her removal as trustee. (8 AA 1638)

pointed to Ms. Ahern's dual role as trustee and beneficiary, insisting that Ms. Ahern's wrongful conduct as trustee could not be the basis for a forfeiture of her beneficial right. The court also noted that enforcement of the Trust's No Contest Clause would be too "harsh."

Plainly stated, the district court erred by refusing to enforce the No Contest Clause because: (1) Ms. Ahern's actions taken for her own benefit as trustee do not insulate her from forfeiture as a beneficiary, (2) the Settlers' clearly intended Ms. Ahern's conduct to result in disinheritance, (3) enforcement of the No Contest Clause is mandatory under NRS 163.00195, and (4) Ms. Ahern's conduct does not apply to any recognized exception to enforcement (i.e. "harshness" and "acting as a trustee" are not exceptions).

Ms. Ahern's Status as Former Trustee Is a Red Herring

Every misconduct in which Ms. Ahern engaged was done for one of two purposes: either to (1) increase her monetary interest as a beneficiary, or (2) disguise her fraud. Unfortunately, Ms. Ahern's deception and theft were more easily achieved, not in spite of her role as trustee, but because of it.

While serving as trustee, Ms. Ahern had full access to all trust accounts, direct communications with parties providing payment under the oil leases, and complete control of distributions. In other words, Ms. Ahern had complete power and authority to control every aspect of the Trust. Neither law, nor logic, allow a bad

actor to escape liability as a beneficiary by hiding behind the breach of a higher, fiduciary obligation.

Ms. Ahern's Actions Violate the Broad Prohibitions of the No Contest Clause

Ms. Ahern's actions, whether taken as trustee, beneficiary, or both, violated the broad restrictions set forth in the No Contest Clause. The settlor's intent is paramount when construing a no contest clause; and intent follows the plain language of the provision. In this case, the Settlers intended the Trust's No Contest Clause to be very broad and prohibit a large variety of behavior, including informal challenges to the Trust's administration. This is evident by the Settlers' prohibition against any party seeking to "attack, oppose, or set aside" the "administration and distribution" of the Trust.

Common sense dictates that (1) unjustifiably ceasing Trust distributions, (2) failing to segregate and protect Trust funds despite a court order to do so, (3) stealing money for personal use, and (4) repeatedly lying to a court of law to conceal wrongdoing all constitute a clear attack, opposition, or attempt to set aside the administration and distribution of the Trust.

Enforcement under NRS 163.00195 Is Mandatory

If a beneficiary's actions violate a no contest clause (as Ms. Ahern's do), enforcement under NRS 163.00195 is not optional. The specific language employed in the statute is critical. By incorporating the phrase "must be enforced," the Nevada

Legislature made NRS 163.00195 a mandatory enforcement statute. Accordingly, relief from enforcement can only occur if: (1) no violation of the no contest clause has occurred, or (2) a violation has occurred, but a codified exception applies. Neither of these circumstances apply to Ms. Ahern. Therefore, the No Contest Clause must be enforced against her.

Ms. Ahern Has No Valid Exception

The Surcharge Order does not examine whether Ms. Ahern's actions violate the No Contest Clause. Instead, it jumps directly to a discussion of exceptions (albeit exceptions that the district court created out of whole cloth). This discussion, in the absence of any analysis of the language employed in the No Contest Clause, constitutes an implied ruling that Ms. Ahern's conduct violates the No Contest Clause. Accordingly, unless an exception to enforcement applies, NRS 163.00195 requires forfeiture.

NRS 163.00195 provides the exclusive list of exceptions to enforcement, none of which apply to Ms. Ahern. First, the district court's "acting as trustee" exception is not found in NRS 163.00195. This is not surprising considering relevant trust law dictates that a trustee who is also a beneficiary may be disinherited under a no contest clause *based on actions taken as trustee*. Second, the "harshness" exception outlined in the Surcharge Order is not found in NRS 163.00195. The reason for its exclusion is simple: no contest clauses are intended to be harsh, thus providing the desired

deterrent/prophylactic effect. Finally, the codified exceptions outlined in NRS 163.00195 all relate to innocuous actions, taken by a beneficiary good faith, to enforce or determine her basic rights. Consequently, none of these statutory exceptions sanitize Ms. Ahern's lying, stealing, or cheating.

Ms. Ahern is without excuses. Accordingly, the district court was without discretion to withhold enforcement of the No Contest Clause.

V. LEGAL ARGUMENT

A. **The Appropriate Standard of Review Is De Novo.**

1. ***The Standard of Review for the Interpretation and Application of a No Contest Clause is De Novo.***

Generally, this Court reviews a district court's determination whether a beneficiary violated a trust's no contest clause for clear error. *See Hannam v. Brown*, 114 Nev. 350, 357, 956 P.2d 794, 799 (1998). However, the standard of review shifts to de novo when "there are no disputed facts." *Bradley v. Gilbert*, 91 Cal.Rptr.3d 680, 686 (Ct. App. 2009) ("The standard of review where the applicability of a no contest clause is at issue and there are no disputed facts is de novo.") (quotation omitted).

Such a shift makes logical sense as issues of trust interpretation are questions of law reviewed de novo. *See Hearst v. Ganzi*, 145 Cal.App.4th 1195, 1209 (Ct. App. 2006) (explaining that when an appellate court is presented with "a legal question with respect to the applicability of [a] no contest clause," the standard of

review is de novo); *In re Trusts Created by Ferguson*, 929 P.2d 33, 35 (Colo. App. 1996) (“The interpretation of a written instrument, such as a trust, is a question of law.”).

As none of the underlying facts which relate to enforcement of the No Contest Clause are in dispute,⁸ the Court must simply determine whether the district court correctly applied the Trust’s No Contest Clause to Ms. Ahern’s undisputed conduct. This is a matter of trust interpretation, which presents a question of law subject to de novo review.

2. *The Standard of Review for the Interpretation and Application of NRS 163.00195 is De Novo*

This Court reviews questions of statutory interpretation de novo. *See Zohar v. Zbiegien*, 130 Nev. Adv. Op. 74, 334 P.3d 402, 405 (2014).

B. Ms. Ahern Cannot Avoid Enforcement of the No-Contest Clause Based on Her Status as Trustee

The district court justified its nonenforcement of the No Contest Clause against Ms. Ahern by creating an “acting as trustee” exemption. More specifically, the district court opined that Ms. Ahern’s actions as trustee could not be attributed to her in her beneficiary role:

Ms. Ahern’s failure to properly apply *her duties as a Trustee* does not warrant imposition of the harsh remedy [] of the no-contest clause, specifically her failure to seek Court approval before ceasing

⁸ The district court’s factual findings are not being challenged by the Beneficiaries, nor has Ms. Ahern filed any appeal regarding the same.

payments to the [Beneficiaries]. Therefore, the Court will not enforce the no-contest clause as against Ms. Ahern *as beneficiary*.

(8 AA 1618) (emphasis added).

The district court's logic is flawed for two important reasons: (1) Ms. Ahern's inappropriate conduct as trustee was undertaken solely to benefit herself as a beneficiary—thus, any alleged distinction between her actions as trustee and beneficiary is meaningless; and (2) actions taken by a beneficiary while serving in a representative/fiduciary capacity still give rise to violations of a no contest clause.

1. Ms. Ahern Acted in Her Own Interest

This Court said it best in its January 26, 2017 Order Dismissing Appeal (Docket No. 66231) and Order of Affirmance (Docket Nos. 67782 and 68046) (“Order of Affirmance”):

[Ms. Ahern] breached her fiduciary duties of impartiality and to avoid conflicts of interest when she unilaterally ceased distributions to [the Beneficiaries] without seeking court instructions and when she *advocated as trustee* for a trust interpretation *favoring herself as beneficiary*.

Matter of Connell, 388 P.3d 970, 2017 WL 398516, *3 (Jan. 26, 2017) (emphasis added). Ms. Ahern's “breaches” as trustee—i.e. withholding distributions from the Beneficiaries without court approval, violating the Segregation Order by removing the Beneficiaries' money, and filing the False Accounting with the district court—were undertaken to ensure that Ms. Ahern could take as much money as possible from the Trust without detection. Importantly, these breaches did not arise from

neglect nor inadvertent mistake. Instead, they were willful; and resulted from Ms. Ahern's monetary gluttony.

Significantly, beneficiaries owe a common duty to all co-beneficiaries to "refrain[] from instigating a breach of trust, persuading the trustee to violate [her] trust, or taking part with the trustee in a breach." *See* George Gleason Bogert et al., LAW OF TRUSTS AND TRUSTEES § 191 (3rd ed. Rev. 2008); *see also* Restatement (third) of Trusts, § 104, cmt. f (2007) ("A beneficiary owes a duty to the other beneficiaries not to participate in a breach of trust.").

Despite this, the Surcharge Order implies that if Ms. Ahern had undertaken the same actions—i.e. removed funds out of a segregated account earmarked for the Beneficiaries—only in her capacity as beneficiary (a role which is only accompanied by common duties and not fiduciary obligations), her beneficial interest *would be* forfeited. In other words, Ms. Ahern's actions as trustee are somehow divorced from her role as beneficiary.

This reasoning is defective and worrisome. It rewards the breach of a *heightened duty* with a *decreased punishment*. It is often said that a trustee who is also a beneficiary has two hats. The common misconception, of course, is that only one hat can be worn at a time. What Ms. Ahern did as a trustee, she did as a beneficiary. Therefore, her fiduciary breaches as trustee are also breaches of her more basic duties as a beneficiary.

2. *Actions Taken in a Representative Capacity Can Give Rise to Forfeiture Under a No Contest Clause*

Normally, when “a person in a representative capacity institutes a proceeding contesting the donative document or any of its provisions, the failure of that contest or challenge should have no effect on his or her own gift.” RESTATEMENT (THIRD) OF PROPERTY (Wills & Don. Trans.) § 8.5, cmt. f (2003). However, when “the representative status is being used as a means of presenting personal views,” this general rule no longer applies. *Id.* Accordingly, “a trustee who is also a beneficiary might violate a no contest clause by taking action to reverse a settlor's exercise of rights conferred by the trust, if the action would effectively nullify or alter the estate plan set out in the trust.” *See Johnson v. Greenelsh*, 217 P.3d 1194, 1202 (Cal. 2009).

Although Ms. Ahern breached her fiduciary duties as a trustee, her sole motivation to do so was based on advancing a “trust interpretation favoring herself as beneficiary.” *Connell*, 2017 WL 398516, at *3. Because Ms. Ahern used her fiduciary role as a platform for “personal views,” while seeking to “nullify or alter the estate plan set out in the [Trust],” her status as trustee offers her no protection against enforcement of the No Contest Clause.

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C. Ms. Ahern's Conduct Violates the Trust's No-Contest Clause

1. *The Settlor's Intent Is Paramount in Interpreting a No Contest Clause*

When interpreting Trust provisions this Court focuses on the intent of the settlor. *See Hannam*, 114 Nev. at 356, 956 P.2d at 798. This is because the “paramount” goal in construing trust provisions is effectuating and preserving the settlor’s intent. *See L’Argent v. Barnett Bank, N.A.*, 730 So.2d 395, 397 (Fla. Dist. Ct. App. 1999) (“The polestar of trust interpretation is the settlors’ intent.”); *Matter of Myers*, 45 A.D.3d 955, 957 (N.Y. App. Div. 2007) (explaining that the “most important consideration” in trust interpretation is the settlor’s intent); *Aycock Pontiac, Inc. v. Aycock*, 983 S.W.2d 915, 919 (Ark. 1998) (describing the settlor’s intent as “paramount”); *In re Frank*, 910 N.E.2d 523, 525 (Ohio Ct. App. 2009) (describing the settlor’s intent as “paramount”); *see also* NRS 163.00195(2) (“A no-contest clause must be construed to carry out the settlor's intent.”).

This chief goal applies to all trust provisions, including forfeiture clauses (like the No Contest Clause):

While it is true that a forfeiture clause is to be strictly construed, the courts, in interpreting no-contest clauses, ***recognize the paramount rule in the construction of [trusts] that the ascertainment and effectuation of the [settlor's] intention is controlling.***

Claudia G. Catalano, *What Constitutes Contest or Attempt to Defeat Will within Provision thereof Forfeiting Share of Contesting Beneficiary*, 3 A.L.R.5th 590, § 2(a) (1992) (emphasis added).

2. Intent Is Determined by the Specific Language Used

When interpreting no contest clauses, “the meaning of a particular no-contest clause depends upon the factual circumstances of the case **and the language of the clause.**” *Cook v. Cook*, 177 Cal.App.4th 1436, 1442 (Ct. App. 2009) (emphasis added). Specifically, the Court must give “careful regard for the phrasing or language” employed by the settlor. *Tobias v. Korman*, 141 S.W.3d 468 (Mo.Ct. App. 2004). Consequently, “a no contest clause that is extremely broad evidences a purpose on the part of the settlor **to expansively prohibit any attempt to set aside any provision of a trust.**” 76 Am. Jur. 2d TRUSTS § 267 (Updated 2017) (emphasis added). Because of this, the interpreting court may not “rewrite the [trust] in such a way as to immunize legal proceedings plainly intended to frustrate [the settlor’s] unequivocally expressed intent.” *Birch v. George*, 866 P.2d 92, 97 (Cal. 1994) (quotation omitted).

3. The Words Employed by the Settlers Must Be Given Their Plain and Ordinary Meaning

Trust agreements are interpreted and construed in accordance with contract principles. See *Shriners Hospitals for Children v. First Northern Bank of Wyoming*, 373 P.3d 392, 405-06 (Wyo. 2016); *Makoff v. Makoff*, 528 P.2d 797, 798 (Utah

1974); *Storkan v. Ziska*, 94 N.E.2d 185, 188 (Ill. 1950). This Court construes unambiguous contracts according to their plain language. *See Love v. Love*, 114 Nev. 572, 580, 959 P.2d 523, 529 (1998). This means that “the words of the contract must be taken in their usual and ordinary signification.” *Dickenson v. State, Dep’t of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994).

The Court’s analysis must consider context, including the application of any relevant grammatical rules. *Rankin v. New England & N. Silver Min. Co.*, 84 Nev. 781 (1868). When possible, “[e]very word must be given effect.” *Royal Indem. Co. v. Special Serv. Supply Co.*, 82 Nev. 148, 149, 413 P.2d 500, 502 (1966). Accordingly, the “court should not interpret a contract so as to make meaningless its provisions.” *Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978)).

In other words, courts take a “common-sense” approach to interpreting contractual (and trust) language. *Broome v. Broome*, 231 P.2d 171, 176 (Cal. Ct. App. 1951); *A Tumbling–T Ranches v. Flood Control Dist. of Maricopa County*, 204 P.3d 1051, 1058 (Ariz. Ct. App. 2008).

4. *The Settlers Intended the No Contest Clause to Be Very Broad*

A common sense reading of the No Contest Clause makes clear that the Settlers intended its prohibitions to be far reaching.

a. “Litigation or dispute” is an all-encompassing phrase

The first line of the No Contest Clause reads as follows: “The Grantors *specifically desire* that these trusts created herein be administered and distributed *without litigation or dispute.*” (emphasis added). The Settlers’ prohibition against “litigation,” *and* “dispute” is telling. The U.S. Supreme Court has explained that the ordinary use of the word “or” is “almost always disjunctive, that is, the words it connects are to be given separate meanings.” *U.S. v. Woods.*, 134 S.Ct. 557, 567 (2013). In essence, the “or” in between “litigation” and “dispute” tells the reader that these two words are meant to identify different/separate conduct.

This makes sense given the respective definitions found BLACK’S LAW DICTIONARY. BLACK’S defines “litigation” as the “process of carrying on a lawsuit.” (10th ed. 2014). It defines “dispute” as a “conflict or controversy, [especially] one that has given rise to a particular lawsuit.” *Id.* This means that not all disputes lead to litigation. In other words, by including “or dispute” after the word “litigation,” the Settlers were evidencing their clear intent to stop *all* conflicts and controversies regarding the Trust, regardless of whether such conflict or controversy ultimately resulted in a formal court proceeding.

b. The Settlers wanted strong protections related to Trust administration and distribution

The No Contest Clause expressly cautions all interested persons not to “attack, oppose or seek to set aside the administration and distribution of [the] [Trust]” or

risk having their interests reduced to \$1. In plain English, this provision would read: “if you interfere with the Trust, you will lose your interest.”

The Merriam-Webster’s online dictionary explains that to “attack” something is “to set upon or work against [it] forcefully.”⁹ To “oppose” something is to “offer resistance” against it.¹⁰ And, to set something aside is to “put [it] to one side,” or “discard” it.¹¹

A trust has two main functions: administration and distribution. Administration deals with management of the trust,¹² while distribution relates to the benefits disseminated to the trust’s beneficiaries.¹³

By linking the phrase “attack, oppose, or seek to set aside,” with the Trust’s seminal functions (administration and distribution), the Settlers were sending a powerful “hands-off” warning: If any interested person—whether trustee or

⁹ Def. 1 “attack.” Found at <https://www.merriam-webster.com/dictionary/attack>

¹⁰ Def. 3 “oppose.” Found at <https://www.merriam-webster.com/dictionary/oppose>

¹¹ Def. 1 “set aside.” Found at <https://www.merriam-webster.com/dictionary/set>

¹² See George Gleason Bogert et al., LAW OF TRUSTS AND TRUSTEES § 296, n. 29 (3rd ed. Rev. 2008) (*citing* RESTATEMENT (Second), Conflict of Laws § 271, cmt. a (1971)) (“Matters of trust administration have been defined to include those relating to management of the trust such as the powers, duties, and liabilities of the trustee.”).

¹³ Distribution deals with “cash or other property paid or credited to a trust beneficiary.” See BLACK’S LAW DICTIONARY, *Trust Distribution*, (10th ed. 2014).

otherwise—impedes upon the Trust in a manner contrary to the Settlers’ express intent, she does so at her own peril.

5. *Ms. Ahern’s Conduct Is the Very Type of Behavior the Settlers Sought to Avoid*

To be clear, nothing in the Surcharge Order indicates that the district court found Ms. Ahern’s misconduct fell outside the application of the No Contest Clause.¹⁴ In fact, the district court’s reluctance to enforce the No Contest Clause was based entirely on its creation of two unrecognized and uncoded exceptions (“acting as trustee” and “harshness”). Nevertheless, to ensure that all issues related to the enforcement of the No Contest Clause are fully resolved by this appeal, the sections below fully explain why Ms. Ahern’s undisputed conduct falls squarely within the No Contest Clause.

a. *Ms. Ahern created a dispute which disrupted the Trust*

For the last four years, Ms. Ahern has done everything in her power to keep Trust monies out of the Beneficiaries’ hands. Even court orders did not stop her covetous pursuit of the Beneficiaries’ money. Stunningly, throughout this process, Ms. Ahern has clung to a list of flimsy legal justifications which she believes sanitize her massive larceny. However, with this Court’s Order of Affirmance entered, Ms.

¹⁴ Nor has there been any cross appeal filed by Ms. Ahern which indicates that the district court erroneously found that Ms. Ahern’s conduct applies to the No Contest Clause.

Ahern's actions have been fully adjudicated as the indefensible misconduct they constitute. As evidenced by a four-year litigation costing hundreds of thousands of dollars in attorneys' fees, Ms. Ahern's conduct created the very type of "conflict or controversy"¹⁵ the Settlers "specifically desired" to avoid.

b. Ms. Ahern attacked, opposed, and sought to set aside the administration and distribution of the Trust

The Surcharge Order made various findings regarding Ms. Ahern's conduct in relation to the Beneficiaries and the Trust. Specifically, the district court made five core findings regarding Ms. Ahern's misbehavior:

- (1) She failed to "protect the [Beneficiaries'] 65% share," which "resulted in a misapplication of the Trust income, which deprived the [Beneficiaries] of funds owed to them under the terms of the Trust" (3 AA 1618, ¶ 3);
- (2) She "filed an accounting and summary of Trust administration with the district court under penalty of perjury, which "was incomplete and intentionally inaccurate." (3 AA 1619, ¶ 7).
- (3) She "did not comply with the [Segregation Order] to protect the 65% share of the Trust that was to be segregated under the terms of the Trust for the [Beneficiaries]" (3 AA 1619, ¶ 1);

¹⁵ BLACK'S LAW DICTIONARY, *Dispute* (10th ed. 2014).

- (4) She “removed some funds from Trust accounts before turning those accounts over to the Successor Trustee, Mr. Waid” (3 AA 1619, ¶ 6); and
- (5) She breached her fiduciary duties by ceasing Trust payments to the Beneficiaries without first seeking court approval (3 AA 1618, ¶ 2);

In sum, the district court found that Ms. Ahern violated the Trust itself, as well as the Segregation Order, by stealing millions of dollars in Trust money; and then lied to disguise the same. In legal terms, Ms. Ahern committed conversion and fraud.

Conversion, or civil theft, “is a distinct act of dominion wrongfully exerted over another’s personal property in denial of, or inconsistent with his title *or* rights therein or in derogation, exclusion, or defiance of such title or rights.” *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008) (internal quotations omitted). Fraud is a “knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.” BLACK’S LAW DICTIONARY, *fraud* (10th ed. 2014).

When understood in their correct legal context (i.e. as conversion and fraud), it is clear that Ms. Ahern’s deliberate acts of rebellion constitute a direct attack on the Trust’s administration and distribution. While undertaking her immense conversion of Trust assets, Ms. Ahern worked against and disregarded, the Beneficiaries’ vested right to Trust distributions (i.e. she undertook a “distinct act of

dominion wrongfully exerted”) in favor of herself. And to ensure her resistance to proper Trust administration and distribution was not discovered, Ms. Ahern knowingly filed a falsified accounting (i.e. fraudulent inducement).

It is hard to imagine that the Settlers’ employed such a broad No Contest Clause, only to see the most basic of abhorrent behaviors (lying, cheating, and stealing) go unpunished. Allowing Ms. Ahern’s conduct to go unchecked by forfeiture provision of the No Contest Clause would lead to an absurd result as it fails to punish the most fundamental of wrongs (lying, cheating, stealing). *Reno Club v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d 1011, 1017 (1947) (“A contract should not be construed so as to lead to an absurd result.”).

D. Enforcement of a No Contest Clause Under NRS 163.00195 Is Mandatory

NRS 163.00195 plainly states that unless one of the specific exemptions outlined within that section is triggered, “a no-contest clause in a trust *must* be enforced by the court.” (emphasis added). Deciding whether a rule is intended to impose a mandatory or directory obligation is a question of statutory interpretation. *Markowitz v. Saxon Special Servicing*, 129 Nev. Adv. Op. 69, 310 P.3d 569, 572 (2013) (citations omitted). The objective when interpreting such a statute “is to determine and implement its purpose.” *Id.* (citations omitted). When the language used in a statute “has a certain and clear meaning, [the] [Court] will not look beyond it.” *Washoe Cnty. v. Otto*, 128 Nev. Adv. Op. 40, 282 P.3d 719, 725 (2012) (citation

omitted).

This Court has continually held that the word “must,” just like the word “shall,” “imposes a *mandatory requirement*.” *Id.* (emphasis added); *In re Nevada State Engineer Ruling No. 5823*, 128 Nev. Adv. Op. 22, 277 P.3d 449, 454 (2012); *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011). In *Pasiallas*, the Court explained this straightforward logic: “BLACK’S LAW DICTIONARY defines ‘shall’ as meaning ‘imperative or mandatory . . . inconsistent with a concept of discretion.’ And as it is used here, ‘must’ is a synonym of ‘shall.’” *Id.* (internal citation omitted).

The language set forth at NRS 163.00195(1) is not cryptic. Unless a relevant statutory exception applies, the violator of a no-contest clause *must* be punished in accordance with the settlor’s intention (which is determined by the language of the no contest clause). Simply stated, if the Nevada Legislature did not intend the effects of NRS 163.00195 to be mandatory, it would have used the word “may” instead of “must,” *See In re Ruling 5823*, 277 P.3d at 454 (distinguishing “must,” which is mandatory, from “may,” which is permissive); *see also State v. Lucero*, 163 P.3d 489, 491 (N.M. Ct. App. 2007) (“Our goal is to give effect to the Legislature’s intent, which is best achieved by following the plain reading of the statute.”). Without evidence that at least one codified exception applies, a district court cannot withhold enforcement of a no contest clause against a violating

beneficiary.

E. There Are No Applicable Exceptions to the Enforcement of NRS 163.00195

1. There Is No “Harshness” Exception

The district court’s attempt to save Ms. Ahern from the Trust’s No Contest Clause based on harshness fails for two reasons: (1) NRS 163.00195 contains no harshness exception, and (2) such exception would destroy the whole purpose and effect of no contest clauses.

a. The list of exceptions at NRS 163.00195 is exhaustive and contains no mention of harshness

NRS 163.00195(1) states: “*Except as otherwise provided in subsections 3 and 4*, a no-contest clause in a trust must be enforced by the court.” (emphasis added). The language of section 1 is clear and straightforward. It instructs the court to look *only* to sections 3 and 4 of the same statute to find applicable exceptions to the enforcement of a no contest clause. In other words, if a proposed exception is not found within sections 3 and 4, Nevada law does not recognize such exception. Nowhere in sections 3 and 4 is there any mention of the word “harsh,” “difficult,” “cruel,” “draconian,” “unfair,” “unjustified,” or any other applicable synonym.

b. No contest clauses are intended to be harsh

“The obvious purpose of no-contest (in terrorem) clauses is to discourage [trust] contests *by imposing a penalty of forfeiture* against beneficiaries who challenge the [trust].” *Estate of Black*, 160 Cal.App.3d 582, 586 (Ct. App. 1984)

(emphasis added). Indeed, the “harsh result” of forfeiture “*is precisely what is contemplated by every trustor or testator who chooses to employ a no contest clause.*” *Birch*, 866 P.2d at 117 (dissenting opinion of Justice Kennard) (emphasis added); see also *Matter of Andersen Family Trust*, 2015 WL 7736703, *0 (Cal. Ct. App. Dec. 1, 2015) (“Despite their harshness, no contest clauses long have been held valid because they promote the public policies of discouraging litigation and effectuating the intent of the donor”).¹⁶

The Settlers intended the No Contest Clause to be far-reaching, as evidenced by the broad language and phrases employed therein. They also intended the consequences for violating the No Contest Clause to be severe—a violation results in the beneficiary’s multi-million-dollar interest being reduced to one dollar. A settlor has complete freedom to dispose of his property in any legally appropriate manner he sees fit. RESTATEMENT (THIRD) OF PROPERTY (Wills & Don. Trans.) § 8.5, cmt. b (2003) (“The starting point for analyzing the validity of no-contest clauses is *the policy in favor of the freedom of disposition.*”) (emphasis added). Accordingly, a settlor has every right to condition receipt of Trust assets on a beneficiary’s willingness to comply with the express language of a no contest clause.

Plainly stated, the district court had no authority to second guess the Settlers’ intent as clearly expressed in the plain language of the No Contest Clause; nor is the

¹⁶ This is an unpublished opinion.

district court's opinion regarding the No Contest Clause's "harshness" relevant to enforcement of the same.

2. *None of the Codified Exceptions Apply*

In no way does the Surcharge Order identify a relevant statutory exception that would exempt Ms. Ahern from enforcement of the No Contest Clause. As stated above, the district court's reluctance to enforce the No Contest Clause was based entirely on its creation of two unrecognized and uncoded exceptions ("acting as trustee" and "harshness"). Nevertheless, to ensure that all issues related to the enforcement of the No Contest Clause are fully resolved by this appeal, the sections below fully explain why Ms. Ahern's conduct does not qualify for any of the statutory exceptions outlined at NRS 163.00195(3) and (4).

a. *Ms. Ahern was not seeking to enforce the terms of the Trust*

NRS 163.00195(3)(a) exempts a beneficiary from enforcement of a no contest clause when the beneficiary sought only to "[e]nforce the terms of the trust, any document referenced in or affected by the trust, or any trust-related instrument." Ms. Ahern did not bring an action to enforce the Trust. Instead, she ceased making beneficiary distributions, used the money for herself, and continued looting the Beneficiaries' money even after the district court issued several orders requiring the Beneficiaries' funds be safeguarded. Even after Ms. Ahern was suspended as

trustee, she continued to remove funds from the Trust which she had no authority to hold.

b. Ms. Ahern was not seeking to enforce her legal rights related to the Trust

NRS 163.00195(3)(b) exempts a beneficiary from enforcement of a no contest clause when the beneficiary sought only to “[e]nforce the beneficiary’s legal rights related to the trust, any document referenced in or affected by the trust, or any trust-related instrument.” Ms. Ahern did not bring an action to enforce her rights in relation to the trust. Indeed, she did nearly the opposite. She increased her beneficial rights by stealing the Beneficiaries’ share of Trust income *without* seeking court instruction; and continued to do so even after the court ordered summary judgment in favor of the Beneficiaries and removed her as trustee.

c. Ms. Ahern was not seeking a court ruling with respect to the construction or legal effect of the Trust (NRS

NRS 163.00195(3)(c) exempts a beneficiary from enforcement of a no contest clause when the beneficiary sought only to “[o]btain 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.” Ms. Ahern did not bring an action seeking declaratory relief related to the interpretation of the Trust. As detailed above, her actions were taken either: (1) in the absence of court instruction, or (2) contrary to court instruction.

d. Ms. Ahern was not seeking to invalidate the Trust by commencing a civil action in good faith

NRS 163.00195(4) states:

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.

Although this provision calls for a determination of “good faith” and “probable cause,” such analysis is unnecessary as Ms. Ahern has never instituted an action seeking to invalidate the Trust. Ms. Ahern invalidated the Trust all on her own.

F. NRS 163.00195 Was Enacted to Ensure that Settlor’s Intentions Are Respected

NRS 163.00195 was first enacted by the Nevada Legislature in 2009 through the passage of S.B. 277 (75th Leg. Sess. 2009). At a Senate hearing on S.B. 277, Mark Solomon, Chair, Legislative Subcommittee, Trust and Estate Section, State Bar of Nevada explained the purpose of NRS 163.00195 as follows:

We have codified the issue of the validity of no-contest laws, both in a will and a trust. We have tried to follow, fairly closely, the Nevada Supreme Court’s pronouncements on the subject. We have tried to codify it so everybody understands what Nevada law is with respect to an attempt by a testator in a will, or trustor in a trust, to set forth what they consider to be a contest and how somebody should be written out of that instrument if they try to defeat any of the intention.

Minutes of the Meeting of the Assembly Committee on Judiciary, 75th Session, May 6, 2009, page 9.

Several years later, the Nevada Legislature amended portions of NRS 163.00195(2) through the passage of S.B. 221 (76th Leg. Sess. 2011). Specifically, the statute was revised to ensure that a settlor, through the use of a no contest clause, could prohibit “[c]onduct other than formal court action,” as well as “[c]onduct which is unrelated to the trust itself.” NRS 163.00195(2)(a) and (b). These additions were made to “amplify existing law” and “to make clear that . . . [a] beneficiary’s share may be reduced or eliminated under a no-contest clause *by conduct contrary to the express wishes of the [settlor] . . . even if that conduct does not specifically relate to a formal contest of the [trust]*.” Comprehensive Summary of S.B. 221, March 17, 2011, page D-3 (emphasis added).

The express wishes of the Settlers are clear from the plain language of the No Contest Clause. They did not want any disputes or any unwarranted interference with Trust’s administration and distribution. Ms. Ahern has lied, cheated, and stolen her way to millions of extra dollars at the expense of the Beneficiaries. This is the exact type of conduct the No Contest Clause was meant to prevent; and the No Contest Clause is the exact type of provision NRS 163.00195 is intended to preserve.

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G. Sound Public Policy Requires Enforcement of the No-Contest Clause

Allowing Ms. Ahern to walk away from the No Contest Clause unscathed would defeat the very purpose of NRS 163.00195, and the No Contest Clause itself. No contest clauses are intended to have a deterrent, even prophylactic, effect. *See Rafalko v. Georgiadis*, 777 S.E.2d 870, 880 (Va. 2015) (“When the sons learned of the no contest clause, the provision had its intended prophylactic effect and the sons committed no further action in preparation for a contest.”) In short, a no contest clause is intended to give a beneficiary pause before he or she engages in conduct prohibited by the settlor.

Of course, the desired prophylactic effect can only occur if there is a viable threat of enforcement. To measure the viability of a threat of enforcement, one looks to examples of actual enforcement. Ms. Ahern would be a fine example of enforcement. She lied, cheated, and stole, all while violating numerous court orders. Her actions are egregious, willful, and motivated solely by greed. The quickest way to establish a law’s deterrent effect, is to meet misconduct with appropriate punishment. The quickest way to lose it is by meeting severe malfeasance with limited punishment. A failure to enforce the No Contest Clause against Ms. Ahern will clearly result in the latter.

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VI. CONCLUSION

For the reasons outlined above, the Beneficiaries respectfully request that this Court overrule the district court's refusal to enforce the No Contest Clause in the Surcharge Order and issue an order requiring the immediate enforcement of the No Contest Clause against Ms. Ahern pursuant to NRS 163.00195.

Respectfully submitted this 3rd day of May 2017.

THE RUSHFORTH FIRM, LTD.

By: 
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

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains **9,671 words**.

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3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 3rd day of May 2017.

THE RUSHFORTH FIRM, LTD.

By: 

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

CERTIFICATE OF SERVICE

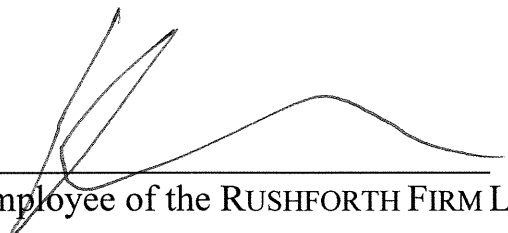
I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 3rd day of May 2017, Electronic service of the foregoing APPELLANTS' OPENING BRIEF shall be made in accordance with the Master Service List as follows:

KIRK B. LENHARD (SBN 1437)
BROWNSTEIN HYATT FARBER SCHRECK, LLP
klenhard@bhfs.com
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614


Attorney for Eleanor Connell Hartman Ahern

MICHAEL K. WALL, ESQ.
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145

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


An employee of the RUSHFORTH FIRM LTD.

**ADDENDUM TO APPELLANTS' OPENING BRIEF
(NRS 163.00195)**

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Nevada Revised Statutes Annotated Title 13. Guardianships; Conservatorships; Trusts (Chapters 158-167) Chapter 163. Trusts (Refs & Annos) General Provisions
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N.R.S. 163.00195

163.00195. Enforcement of no-contest clauses; exceptions

Effective: October 1, 2011
Currentness

1. Except as otherwise provided in subsections 3 and 4, a no-contest clause in a trust must be enforced by the court.
2. A no-contest clause must be construed to carry out the settlor's intent. Except to the extent the no-contest clause in the trust is vague or ambiguous, extrinsic evidence is not admissible to establish the settlor's intent concerning the no-contest clause. The provisions of this subsection do not prohibit such evidence from being admitted for any other purpose authorized by law. Except as otherwise provided in subsections 3 and 4, 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. Such conduct may include, without limitation:
 - (a) Conduct other than formal court action; and
 - (b) Conduct which is unrelated to the trust itself, including, without limitation:
 - (1) The commencement of civil litigation against the settlor's probate estate or family members;
 - (2) Interference with the administration of another trust or a business entity;
 - (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.

Credits

Added by Laws 2009, c. 358, § 35. Amended by Laws 2011, c. 270, § 177.

N. R. S. 163.00195, NV ST 163.00195

Current through the 79th Regular Session (2017) of the Nevada Legislature with all legislation operative or effective up to and including March 30, 2017 subject to change from the reviser of the Legislative Bureau.