IN THE SUPREME COURT OF THE STATE OF NEVADA

*** * ***

IN THE MATTER OF: THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST, DATED MAY 18, 1972, JACQUELINE M. MONTOYA; AND KATHRYN A. BOUVIER, Appellants, vs. ELEANOR C. AHERN A/K/A ELEANOR CONNELL HARTMAN AHERN, Respondent.	Supreme Court No.: 71577 District Court Case No.: P-09-066425-T Appeal from the Eighth Judicial District Court, The Honorable Gloria Sturman Presiding

RESPONDENT'S ANSWERING BRIEF

BROWNSTEIN HYATT FARBER SCHRECK, LLP
Kirk B. Lenhard, Esq., NV Bar No. 1437
klenhard@bhfs.com
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135

Attorneys for Respondent
Ms. Eleanor Connell Hartman Ahern

SUPREME COURT OF NEVADA
NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to Nevada Rule of Appellate Procedure 26.1, 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 so that the judges of this court may evaluate possible disqualification or recusal:

1. There are no corporations or entities subject to disclosure; and

2. The following law firms have represented Respondent Eleanor C. Ahern a/k/a Eleanor Connell Hartman Ahern ("Ms. Ahern"), in this case:

   (a) Brownstein Hyatt Farber Schreck, LLP;

   (b) Marquis Aurbach Coffing; and

   (c) Jeffrey Burr Law Office

Dated this 3rd day of August, 2017.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: */s/ Kirk B. Lenhard*
Kirk B. Lenhard, Esq., NV Bar No. 1437
klenhard@bhfs.com
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. JURISDICTIONAL STATEMENT

This is an appeal from the District Court's Order Regarding Motion for Assessment of Damages; Enforcement of No Contest Clause; and Surcharge of Trust Income entered on September 19, 2016 ("Surcharge Order"). (8 AA[1] 1617-1620.) As is relevant to this appeal, the Surcharge Order denied Appellants' request to enforce the no-contest clause in the trust at issue against Ms. Ahern. (8 AA 1620.) The Notice of Entry of Order of the Surcharge Order was entered on September 28, 2016. (8 AA 1621-25.) Appellants filed their Notice of Appeal on October 19, 2016. (8 AA 1626-33.) According to Appellants' Case Appeal Statement, Appellants are contesting the District Court's Surcharge Order with respect to the denial of their request for the Court to enforce the no-contest clause of the trust against Ms. Ahern. As such, the Surcharge Order is immediately appealable under NRS 155.190(1)(k), (m), and (n).

II. ROUTING STATEMENT

Consistent with the statement in Appellants' Opening Brief ("OB"), this case is presumed to be one that should be heard by the Nevada Supreme Court.

[1] Appellants' Appendix is identified herein as "AA".

III. INTRODUCTION

This is a case with an overabundance of evidence that leads to an inescapable and unfortunate conclusion. Ms. Ahern was the elderly trustee of the trust at issue here. She was the victim of undue influence and manipulation from third parties that led to her removal has trustee. From the record, it is clear that these third parties did not have the best interest of Ms. Ahern at heart. Ms. Ahern has been subjected to significant compensatory and punitive damages as a result of her acts as a trustee. The question before the Court is simple. Should Ms. Ahern be punished further and be removed as a beneficiary of the trust. The answer – based on the law as well as basic policy – is no.

It is hard to imagine that Ms. Ahern's parents – the settlors here – would have wanted such a punishment for their daughter who has been taken advantage of. In fact, because the issue before the Court is the application of a no-contest clause, that is precisely the Court's focus: What did the settlors intend when drafting the clause at issue? Certainly they did not intend for conduct their daughter engaged in at the orchestration of others to disinherit her. Similarly, they could not have intended for breaches in her capacity as trustee to strip her of her interests as a beneficiary of the trust. Further, they would not have wanted Ms. Ahern's conduct, which was engaged in without the intention to harm the trust, to result in her being left with nothing. If the foregoing had been

the settlors' intent, they would have expressed such intentions in the trust. They simply did not. Consequently, the no-contest clause is not triggered. Any finding to the contrary would cut against the settlors' wishes and fly in the face of public policy. As such, the Surcharge Order should be affirmed in its entirety.

IV. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Did the District Court err in not enforcing the No-Contest Clause against Ms. Ahern as a beneficiary for conduct that she was found to have engaged in as a Trustee, *i.e.*, a breach of her fiduciary duties, when the Court recognized that the proper punishment for such conduct as a Trustee is a surcharge?

B. Based upon a strict construction of the No-Contest Clause, does Ms. Ahern's conduct, which was not willful and was engaged in due to the undue influence of others, trigger the No-Contest Clause?

C. Is it against public policy to enforce a No-Contest Clause against an elderly woman who was improperly influenced by another to engage in certain conduct and is being punished by way of a surcharge of her distributions, as well as a future assessment of damages, including significant punitives?

V. STATEMENT OF THE CASE/FACTS

A. The Trust Is Created And Contains A No-Contest Clause.

William N. Connell and Marjorie T. Connell (collectively referred to as the "Settlors") established the W.N. Connell and Marjorie T. Connell Living Trust ("Trust") on May 18, 1972. (1 AA 20.) The Trust benefitted the Settlors, Ms. Ahern (their daughter), and the Appellants (Ms. Ahern's daughters). (1 AA 21.) As it relates to this appeal, the Trust contains a no contest clause ("No-Contest Clause") that provides 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 or 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.

(1 AA 31.)

B. Ms. Ahern Is Added As A Co-Trustee Of The Trust, Is The Remaining Trustee After Mrs. Connell Passes, And Distributions To The Appellants Cease.

Ms. Ahern's father passed away on November 24, 1979, and, thereafter, per the Trust, two subtrusts were created – "Subtrust 2" and "Subtrust 3". (1 AA 42; 3 AA 712.) Mrs. Connell was the beneficiary of Subtrust 3 and Ms. Ahern was the beneficiary of Subtrust 2. (3 AA 712-13.) Thereafter, Ms. Ahern, by way of a Substitution of Trustee, was added as a co-trustee of the Trust with Ms. Connell. (1 AA 39-40; 3 AA 714.) During this time, the Trust distributions were made to the Subtrusts with a 65/35 split. (3 AA 714.)

Through various courses of events, including the death of Mrs. Connell, Ms. Ahern became the sole trustee of the Trust. (3 AA 714-15.) Thereafter, all appropriate allocations were made from the Trust in the 65/35 split. (*See id.*) However, in June of 2013, prior to seeking the court's order, distributions to the Appellants ceased. (3 AA 715; 4 AA 750.)

C. Ms. Montoya Testifies Regarding Concerns With Those Influencing Her Mother's Life And Files A Report With Elderly Protective Services.

Around July 2012, Appellants Jaqueline Montoya and Kathryn Bouvier filed a report with Clark County Elder Protection Services ("EPS"), alleging that Suzanne Noonan a/k/a Suzanna Nounna was "exploit[ing]" their elderly mother,

Ms. Ahern. (1 RA[2] 42-49.) According to Ms. Montoya's deposition testimony, it was around that time that Ms. Ahern "disappeared" from her daughters' lives. (1 RA 23.) Despite their efforts to protect their mother, Ms. Ahern ceded increasing control of her life, including her finances, to Suzanne. (1 RA 29-32.) Appellant Ms. Montoya testified that she could not "understand Suzanne's influence" on her mom, or "how [Suzanne] manipulated [Ms. Ahern] to the point that [Ms. Ahern] could no longer trust [her daugther]." (1 RA 55-56.)

Consistent with the behavior Ms. Montoya testified regarding, the EPS' written assessment on Ms. Ahern notes that she "often comes into the bank requesting large sums of cash, $50,000 or more. When asked why she needs so much cash, client would state that God told her to withdraw the money or Sue told her to withdraw the money." (1 RA 62.) By Ms. Montoya's account, in filing their report with EPS, the Appellants' "goal was not to have [their] mom checked on. [Their] goal was to have Suzanne checked on." (1 RA 67.)

In her deposition in this case, Appellant Ms. Montoya set forth numerous facts which, from the viewpoint of any neutral observer, can be described as nothing less than alarming. The following excerpt is emblematic:

> Q. You mentioned in your testimony that you were concerned that Suzanne Nounna was a horrible friend and not basically a good influence on your mom. Do you recall that testimony?

[2] "RA" as referred to herein is Respondent's Appendix.

A. Uh-huh.

Q. Yes?

A. Yes, I do.

Q. How did you reach that conclusion and when did you come to that conclusion?

A. When you're close to somebody and you know how they react and how they handle things and how much they care for their family and you start seeing things that are happening that an outside person is responsible for, that's how I came to that conclusion, and by sitting there talking with my mom and having her say to me, "I'm going to have to make a choice between you and Suzanne," that was an indication that this person is not -- is not doing positive things for my mom.

Q. Aside from your mom's comment to you, what other specific examples do you have that would raise concern about Suzanne Nounna?

A. There was a -- my sister and I had done some research online and had found that Suzanne had multiple businesses, multiple names, and many of them dissolved. My mom had mentioned that Suzanne was her Realtor, was also her financial advisor.

My mom had a security man -- I'm trying to remember his name now -- he did computers for my mom, and he ended up installing computers throughout the house, and one day I actually reached out to him after my mom left, and I asked him, "Is my mom okay? Have you seen her?"

And he kind of went into a lot of history, and he said, "Your mom is on diabetic medicine. I found her one day in the middle of the floor where she had gotten sick." I didn't -- I didn't know that she had -- she was on medicine. That Suzanne told my mom -- this gentleman was sharing this with me -- that she had to live off her Social Security so that she would not be able to spend the money coming in from the oil income, but she was only allowed to spend

> the money from her Social Security, which I think is maybe 1800 a month.
>
> Being the Realtor, Suzanne was commissioned for receiving the houses that my mom purchased, which beyond the Elton house, I think there were two or three others.
>
> Further than that -- something just flashed in my mind, and I'm sorry, I have to take a minute to remember it -- my mom had shared with me on one of our last trips together that Suzanne had begun my mom's foundation.
>
> And at the time I remembered thinking that that was kind of strange because my understanding from our accountants was that to start a foundation, California might need 25 million, Las Vegas 10 million. So it would be strange for my mom to start a foundation. My grandmother never started a foundation, and she didn't have half of that amount of income. So I didn't think my mom had it. So I thought that was strange.
>
> Suzanne was also the director of my mom's foundation so she received monthly income for running my mom's foundation, and then my mom had shared with me on this trip that Suzanne brought the people to my mom that needed help from the foundation, and all of this seemed to be a red flag. This didn't seem right that she would be running her checking account, telling her how much to spend, telling her to live off her Social Security, running her foundation, being her Realtor. These things just didn't seem right. So that's where I came to that conclusion that she just wasn't a good person.

(1 RA 29-32.)

Ms. Montoya also testified regarding what the EPS report evidenced – that Ms. Nounna had also attempted to withdraw $50,000 from her mother's bank accounts, when the bank refused, Ms. Nounna returned to the bank shortly thereafter with Ms. Ahern in tow, in a wheelchair from a broken leg, and Ms.

Ahern withdrew the money. (1 RA 64.) This makes sense, because, Ms. Ahern regularly and repeatedly withdrew large sums in the form of cashier's checks made out to the Trust and then re-deposited those funds a few weeks later. (1 RA 79-81.)

Ms. Montoya also testified that in July 2012, Ms. Nounna borrowed Ms. Ahern's car for six weeks, only to return it with a bow, claiming that she had put $5,000 into the vehicle for repairs and/or paint. (1 RA 341.) Yet, as Ms. Montoya noted, the car was only one year old. (1 RA 342.) Based on the foregoing, it is clear that (at least) Appellant Ms. Montoya had serious concerns regarding the influence Ms. Nounna was having on her mother.

D. <u>The Appellants File A Petition For Declaratory Relief.</u>

Following Appellants' efforts to investigate the undue influence and manipulation their mother was being subjected to, on September 27, 2013, the Appellants filed their petition against her seeking declaratory relief under NRS 30.040, NRS 153.031(1)(e) and NRS 164.033(1)(a) ("Petition"). (1 AA 1-18.) As admitted by Appellants, this Petition simply sought declaratory relief regarding the 65/35 split, and did not seek to enforce the No-Contest Clause against Ms. Ahern. (*See id*; *see also* OB at 6.)

Thereafter, the Court ordered Ms. Ahern, as Trustee, to set aside 65% of the Trust income for the Appellants pending resolution of the Petition. (2 AA

347-48.) In January, 2015, the District Court determined that the Appellants were entitled to 65% of the Trust income and ordered Ms. Ahern to produce an accounting of the Trust. (3 AA 723-24.) Importantly, in its written order on summary judgment, the Court found that the No-Contest Clause does not apply and that this was a good faith dispute between the parties regarding their respective rights to distributions from the relevant trusts:

> 26. Each of the parties asserted a claim against the other in these proceedings seeking to have the Court enforce the no-contest clause contained in the Trust against the other party. The Court finds that the positions of each of the parties, seeking the correct interpretation of the Trust provisions as to entitlement to the Texas oil property, were not asserted in bad faith, and that therefore good cause to impose the no-contest clause penalties does not exist and such claims are denied with respect to both parties, [Ms. Ahern] on one hand, and [Appellants] on the other hand.

(6 AA 1242.)

Ms. Ahern subsequently submitted the accounting in compliance with the Court's order, and the Court raised concerns about some of the expenses therein. (8 AA 1632; 3 AA 606.) Due to these concerns, the Court appointed a temporary trustee, Mr. Frederick P. Waid, Esq. ("Temporary Trustee"). (3 AA 686.) This appointment also coincided with the Court's finding that Ms. Ahern had breached her fiduciary duties as a Trustee. (3 AA 683-84.) Thereafter, Mr. Waid submitted an affidavit identifying additional concerns he had regarding Ms. Ahern and the accounting she submitted. (4 AA 772-76.)

E. Mr. Waid, A Neutral Third-Party, Also Expresses Concerns Regarding The Undue Influence Ms. Ahern Was Under.

Not only were the Appellants concerned regarding other individuals unduly influencing or manipulating Ms. Ahern, but Mr. Waid, the Court Appointed Temporary Trustee – with nothing to gain in this dispute – also expressed to the District Court that he was concerned about outside influences exerted over Ms. Ahern. That is, during a hearing on April 22, 2015, Mr. Waid's counsel argued to the Court on his behalf that Ms. Ahern had "surrounded herself with a spiritual advisor and given power of attorney to at least two individuals, one of which may be that spiritual advisor. Who knows how much these people have bilked her for." (4 AA 781.)

Counsel then asked for the Court's intervention to appoint a guardian ad litem because of, among other things, Mr. Waid's belief that "that's the only thing that is going to shake off the grifters that have been hanging on" and "wake her up…" (*See id*.) In considering Mr. Waid's request, the District Court explained that it understood "Mr. Waid's concern for Ms. Ahern" that she is "being subjected to influences that are not in her best interest and he has a real concern for her." (4 AA 796.) Even with this understanding, the District Court would not appoint a guardian ad litem because it would need to be done with notice and a proper hearing. (*See id*.)

F. The Appellants Seek To Kick Their Mother Out Of The Trust By Way Of The No-Contest Clause, In Addition To Seeking Punitive Damages And A Surcharge.

On June 3, 2015, the Appellants filed a motion with the District Court asking, among other things, for their elderly mother, whom they admittedly were concerned for because of the undue influence of others, to be stripped of her interest in the Trust for actions she took while under such influence. Specifically, the Appellants asked the District Court to enforce the No-Contest Clause against their mother in light of the breaches of her fiduciary duties ("No-Contest Motion"). (4 AA 845-57.) Ms. Ahern opposed the No-Contest Motion, based on its premature nature (*i.e.*, no factual findings supporting such a request), the violation of due process that would result, and that the No-Contest Clause is not implicated, among other things. (4 AA 935-47.)

G. The Appellants File A Supplement Wherein They Voice Additional Concerns Relating To Ms. Nounna's Influence On Their Mother.

On July 31, 2015, in a "Supplement" to the Appellants' No-Contest Motion, the Appellants wished to "set the record straight." (1 RA 90-138.) In telling their story, the Appellants recounted strange incidents beginning around 2009—around the time Ms. Nounna began to appear on the scene with more frequency—following the passing of Ms. Ahern's mother. (1 RA 38-41, 91-21, 141-142.) Appellants represented that after several years of relative calm in the

family, in mid-2012, Ms. Ahern's behavior became erratic, and she "disappeared." (1 RA 97.) After the Appellants learned that "Ms. Nounna took over Ms. Ahern's books," Ms. Montoya called Elder Protection Services, reporting that "she was concerned [] about an advisor in Ms. Ahern's life that seemed to be controlling her financial decisions, as well as those of a personal nature." (1 RA 98.)

Later, in 2014, Ms. Montoya spoke to a woman who was familiar with Ms. Ahern's living arrangements at that time, and who explained that "Ms. Ahern had a person in her life [named Suzanne] that really worried" her. (1 RA 99.) The woman said that Ms. Ahern and Ms. Nounna would whisper in the stables with the security guard, and when the woman inquired of Ms. Ahern, Ms. Ahern said that her daughter was trying to kill her. (*See id*.) Ms. Ahern had previously (in 2012) voiced concerns (concerns which the Appellants testified were unfounded) that her daughter, Ms. Montoya, was trying to institutionalize her. (1 RA 95.) If these concerns were unfounded, one can only suspect where Ms. Ahern acquired such ideas.

In light of the foregoing, it is no less striking today than it was when the Appellants filed their No-Contest Motion and their Supplement to the Motion, how the Appellants continue to wish to punish Ms. Ahern in such a harsh manner, despite the turmoil and the unfortunate picture painted by their own

words. The content of the Appellants' testimony is completely incongruous with the relief they are seeking. On the one hand, the Appellants paint a picture of a very loving, concerned, distressed, scared daughter, Ms. Montoya, who sees her dear and "valued" mother acting "strangely", completely taken in by a couple of shysters who the daughters call "leeches." (1 RA 91-96.) On the other hand, Appellants decide, apparently, that they are "sick and tired" (1 RA 91) of the "significant amount of abuse" (*see id*) they have suffered as a result of this case and that the remedy for such behavior is to strip their mother's rights entirely from the Trust, as outlined in the Appellants' Motion, Supplement, and Opening Brief. Ms. Ahern's parents certainly did not intend for their daughter to be treated this way – taken advantage of by outsiders and removed from the Trust.

H. Appellants Send Letters To The Temporary Trustee, Mr. Waid, In Attempt To Interfere With His Administration Of The Trust.

After Ms. Waid was appointed as Temporary Trustee, as he testified to below, he began taking necessary actions to comply with the District Court's appointment. (*See* Section V(I)(1), *infra*.) Despite Mr. Waid's obligation to do so, the Appellants demanded that he stop doing his job as Temporary Trustee. Simply put, the Appellants deliberately interfered with the administration of the Trust, while they themselves had asked the District Court to strip Ms. Ahern of her interest in the Trust via the No-Contest Motion for *allegedly* doing the same.

That is, on November 20, 2015, the Appellants (via counsel) sent Mr. Waid a letter demanding that he immediately cease all investigative efforts, reminding him of his duties as trustee, and demanding an immediate distribution of assets, among other things. (1 RA 145-50.) Not satisfied with Mr. Waid's continuation of his duties as the Trustee despite this letter, the Appellants again reached out to Mr. Waid. This second letter was sent on January 29, 2016, and in it, the Appellants demanded that Mr. Waid violate the District Court's order and threatened him with liability for the failure to do so:

> [Appellants] hereby demand that you make no Trust distributions to Mrs. Ahern. Given the existence of a court order requiring the distributions, I fear you may believe that you will be absolved of any future liability that may accompany such distributions. Although, a trustee may generally insulate himself from liability by seeking a court order directing his actions, I must warn you that no such protections are available under an inappropriate and unlawful order.

(1 RA 153.) The threats did not stop there. Appellants proceeded in the letter to assert that he will have breached his fiduciary duties if he follows the Court's order:

> [S]hould a successful appeal of the order requiring distribution occur, the judgment on which your defense depends will be completely dissolved, leaving only the breach of your duty—as well as the accompanying liability.

(*See id.*) Finally, Appellants represented that they were ready to "file suit against [Mr. Waid] (in [his] capacity as trustee)" should he follow the Court's Order. (1 RA 154.)

I. The Court Conducts An Evidentiary Hearing On The No-Contest Motion.

On February 22, 2016, the Court held an evidentiary hearing on the Appellants' request to enforce the No-Contest Clause against Ms. Ahern ("Evidentiary Hearing"). (7 AA 1305-1520.) Both Mr. Waid and Ms. Montoya testified during the Evidentiary Hearing. (*See id.*) Based on this testimony, it is clear that the No-Contest Clause does not apply.

1. Mr. Waid testifies that his investigation was ongoing and that Ms. Ahern had assisted in replenishing the Trust funds.

During the Evidentiary Hearing, Mr. Waid testified that he took over as Temporary Trustee in April of 2015. (7 AA 1360-61.) Mr. Waid further testified that in this role as Temporary Trustee, he conducted a review of the financial status of the Trust, which included reviewing information provided by Ms. Ahern's former counsel and seeking records and account balances from financial institutions. (7 AA 1386-87.) Although he began his review after being appointed, as of the date of the Evidentiary Hearing, his investigation was "incomplete." (7 AA 1387.)

Mr. Waid additionally testified that in his first conversation with Ms. Ahern after his appointment, Ms. Ahern willingly represented to him that she "owed monies" in the range of $800,000. (7 AA 1433.) Mr. Waid also detailed all of the money Ms. Ahern replenished into the Trust:

- April 8, 2015 – Ms. Ahern deposited a $409,220.50 Cashier's Check into the Trust;
- April 13, 2015 – the Trust recovered $500,000 from an account at U.S. Bank;
- April 16, 2015 – Ms. Ahern delivered a $700,000 Cashier's Check to her former counsel, which was then picked up by Mr. Waid;
- June 10, 2015 – the Trust received a check from Ms. Ahern for $146,584.83; and
- June 2015 – the Trust received a check for $72,000.

(7 AA 1434-36.)

Mr. Waid then testified that as of the date of his Interim Report,[3] the estimated shortfall, considering the amount recovered, was $664,132. (7 AA

[3] Despite the fact that the investigation of Mr. Waid was incomplete at the time of the Evidentiary Hearing, and his final Accounting and Report of Trust Activity from 2013 to 2015 was not filed until months after the Surcharge Order

1441.) He also testified that Ms. Ahern, via her current counsel, offered to provide Mr. Waid, as Temporary Trustee, access to $400,000 of the funds being held on behalf of Ms. Ahern, but that he declined the funds until he completed his evaluation, investigation, and deposition of Ms. Ahern. (7 AA 1443-44;1 RA 156.)

2. Mr. Waid also testifies that the Appellants sent letters to him attempting to interfere with his administration of the Trust.

In addition to testifying that Ms. Ahern replenished a portion of the funds to the Trust and that his investigation was not complete, Mr. Waid testified regarding the two letters the Appellants sent him in an attempt to persuade him to stop performing his duties as Temporary Trustee. (7 AA 1450.) With regard to the second letter, Mr. Waid testified that although a Court order permitted him access to the $400,000 Ms. Ahern was proposing to provide (discussed above), he received a letter from the Appellants on January 29, 2016, threatening to commence suit against him if he follow such order (discussed in detail above). (7 AA 1450-53.)

3. One of the Appellants testifies that her mother, Ms. Ahern, was under the influence of another during the time she engaged in the conduct at issue.

---

was entered, Appellants improperly cite to the subsequent report in their Opening Brief. (*See* OB at n. 7.) The Court should not consider this evidence.

During the Evidentiary Hearing, Ms. Ahern's daughter (and one of the Appellants), Ms. Montoya, testified in relation to her and her sister's request to kick their mother out of the Trust. (7 AA 1468.) Specifically, Ms. Montoya expanded on what she told EPS regarding her concern that Ms. Nounna was influencing her mother. (7 AA 1473- 74.) She explained that she first met Ms. Nounna at a meeting with her and her mother's attorney wherein the parties were discussing private financial information and Ms. Montoya objected to Ms. Nounna (and her teenaged daughter) being present. (*See id.*) Despite Ms. Montoya's objection, Ms. Ahern insisted that Ms. Nounna stay for the conversation. (7 AA 1474.)

Ms. Montoya also testified that a few months after this meeting, she received an email from her mother, Ms. Ahern, demanding that she be provided with a $300,000 gift from her grandmother. (*See id.*) This demand was out of character for Ms. Ahern and, as Ms. Montoya testified, she was "taken aback" by the demand because it was "different from what [she] would have expected" from her mother. (*See id.*) Ms. Montoya agreed that Ms. Ahern's demand was "troubling." (*See id.*) Ms. Montoya also testified that she had been told by a caretaker that Ms. Nounna tried to get the caretaker to stay with Ms. Ahern 24/7 to keep Ms. Montoya away from Ms. Ahern. (7 AA 1478.) Ms. Montoya testified that Ms. Nounna also asked the caretaker to "pray over" Ms. Ahern so

that she would not return to Ms. Montoya. (*See id.*) Further, Ms. Montoya testified that Ms. Nounna took her mother's car for eight weeks, ignored Ms. Ahern's request for a return of the car, and only returned it after allegedly spending $5,000 to fix the car. (7 AA 1479.) This was disturbing because the car was new and it did not make sense that he mother would have loaned her car to someone for eight weeks. (*See id.*)

In her testimony, Ms. Montoya also stated that Ms. Nounna told the caregiver that Ms. Montoya wanted to institutionalize her own mother, Ms. Ahern. (7 AA 1480.) This bothered Ms. Montoya, because, according to her testimony, she never expressed a desire to institutionalize her mother and never wanted to institutionalize her mother. (*See id.*) When Ms. Montoya confronted her mother regarding her concern of Ms. Nounna's negative influence, Ms. Ahern stated that she may have to pick between Ms. Montoya, her daughter, and Ms. Nounna. (7 AA 1480-81.) This was disconcerting to Ms. Montoya, as it appeared at that time that Ms. Nounna was nudging her way into Ms. Ahern's life in a negative way. (7 AA 1481.)

Ms. Montoya further testified that her mother, Ms. Ahern, had allowed people in her life in the past that have not had the best intentions. (7 AA 1482-83.) She testified regarding the fact that her concerns for her mother got increasingly more serious, to the point where she called Elderly Protective

Services regarding her mother's wellbeing. (7 AA 1486-88.) The issue that ultimately prompted this call was a conversation Ms. Montoya had with her mother's "computer guy, Bill," wherein he informed Ms. Montoya that he had found Ms. Ahern on the floor of her kitchen in her own "filth," after she had fallen due to vertigo resulting from her being diabetic and not taking her medication. (7 AA 1488-89.) Ms. Montoya also testified that Ms. Nounna had reportedly taken over "handling the accounting" for Ms. Ahern and was trying to get Ms. Ahern to "live off of her Social Security." (7 AA 1489.)

Ms. Montoya recounted another incident that caused her serious concerns for her mother. Specifically, she testified that she was speaking with a friend who was a "little worried about" Ms. Ahern because she and Ms. Nouanne were seen in a horse stable with a security guard speaking in "hushed tones." (7 AA 1499-1500.) When her friend approached Ms. Ahern later regarding the incident, Ms. Ahern expressed a fear that Ms. Montoya was trying to kill her. (7 AA 1500.) This was obviously upsetting to Ms. Montoya, because no such thing was happening. (*See id.*) On another occasion, Ms. Montoya was approached by one of her mother's friends regarding her concern for Ms. Ahern and that Ms. Nounna was making Ms. Ahern become involved in "credit card fraud." (*See id.*)

Finally, Ms. Montoya confirmed in her testimony the information contained in the EPS report regarding (i) Ms. Ahern coming to the bank to withdraw money and stating that "God" or "Sue" (*i.e.*, Ms. Nounna) told her to do it, and then returning to the bank thereafter to deposit the same money back into the account, (ii) Ms. Ahern's address on file with the bank being updated to Ms. Nounna's address, (iii) Ms. Nounna trying to withdraw $80,000 at the bank's drive through window, but being declined because the teller recognized that she was not Ms. Ahern, (iv) Ms. Nounna changing the locks to Ms. Ahern's house so only the two of them could access it, and (v) that Appellant, Ms. Montoya, was concerned that her mother may be the victim of "elderly exploitation." (7 AA 1495.)

As is apparent from the foregoing, Ms. Montoya's own testimony undercuts the very relief she sought at the Evidentiary Hearing and continues to seek in this appeal.

J. After Considering The Evidence Presented To It And Closing Arguments From Counsel, The District Court Orally Issues Its Ruling Refusing To Impose The No-Contest Clause Against Ms. Ahern.

1. Both counsel agree that a surcharge is appropriate in this case.

After the conclusion of the Evidentiary Hearing, the Court held an additional hearing wherein it heard, among other things, closing arguments from

counsel. (8 AA 1521-1616.) In closing arguments, counsel for the Appellants argued (in the alternative), that under NRS Chapter 153.031(3), the appropriate remedy would be for Ms. Ahern's compensation to be reduced because of her breach, and that under Restatement of Trust, Section 100, Ms. Ahern should be charged for her breach with (a) the amount to restore the Trust to what it would have been absent a breach, and (b) the amount of any personal benefit as a result of the breach. (8 AA 1569-70.) Counsel also argued that under Restatement Sections 253 and 257, Ms. Ahern's beneficial interest should be subject to a charge. (8 AA 1571-72.)

Similarly, counsel for Ms. Ahern argued that the "appropriate remedy is and always has been a surcharge of her interest in the trust until the trust is made whole for any malfeasance…" (8 AA 1580.) Counsel further argued that the conduct the Court found Ms. Ahern engaged in would generally result in surcharging her interest, as opposed to removing her as a beneficiary. (8 AA 1582.) Counsel also outlined for the Court, based on Mr. Waid's testimony during the Evidentiary Hearing, that in direct contrast to someone "attacking" the Trust, Ms. Ahern assisted Mr. Waid in retrieving and replenishing funds that were removed from the Trust. (8 AA 1583-84.) Finally, counsel reiterated the testimony from the Appellants' themselves relating to the influence their mother, Ms. Ahern, was under when she engaged in the conduct at issue and

documentary evidence in the case wherein it was reported that Ms. Ahern stated that "God" or "Sue" told her to withdraw the money. (8 AA 1588-90.)

2. The Court rules that the No-Contest Clause is not triggered and that a surcharge of Ms. Ahern's interest is appropriate.

After hearing arguments from counsel *and* hearing live testimony during the Evidentiary Hearing, the Court found that Ms. Ahern's conduct was "clearly" ***not*** done "in violation of the no-contest clause to the extent of bringing any kind of litigation"; rather, she "didn't properly apply her duties as a trustee" and engaged in a gross misuse of funds. (8 AA 1596.) The Court then posed the question of whether Ms. Ahern's conduct "rise[s] to the level where Ms. Ahern should be deprived entirely for all time of any claim to trust funds or is it a violation under the Restatement which should be punished by having her interest surcharged?" (8 AA 1597.) The Court then voiced a concern it had since the beginning of the case as to "what the settlor really meant with this trust and what he really intended." (*See id.*)

In addressing the question posed above, and after contemplation regarding the settlor's intention for the trust to be "administered and distributed without litigation or dispute of any kind," the Court found "what really happened here was just the trustee improperly administering this trust." (8 AA 1598.) As an appropriate punishment for this conduct, the Court held that "this is a case that is

appropriate for a surcharge as opposed to the enforcement of the no-contest clause because that's the part of what she violated." (*See id.*) The Court further explained that Ms. Ahern "violated her duties as a trustee," and that there is "liability here for, at a minimum, treble damages," and that "this is punitive damage time." (*See id.*)

The Court held that Ms. Ahern should "not have taken unilateral action to stop paying the 65 percent to her daughters," and that she "should have sought Court approval," but that "the question is more appropriately handled through a surcharge and appropriate damages…to be determined at a future date, whether that's punitive or trebling or both." (8 AA 1599.) In concluding, the Court denied the request to enforce the No-Contest Clause and ruled that Ms. Ahern was not entitled to any distributions from the Trust beginning thirty (30) days from entry of the order pending a final determination of damages. (8 AA 1610-11.)

K. The District Court Issues Its Written Surcharge Order Denying The No-Contest Motion.

Thereafter, on September 19, 2016, the Court issued its written order denying the Appellants' request to enforce the No-Contest Clause against Ms. Ahern ("Surcharge Order"). (8 AA 1617-20.) Consistent with the oral ruling of the Court at the conclusion of the Evidentiary Hearing, the Court found that

"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 [Appellants]…" (8 AA 1618) (emphasis added.) The Court further held that:

> Ms. Ahern's failure to properly apply her duties ***as a Trustee*** does not warrant the imposition of the harsh remedy of imposition of the no-contest clause, specifically her failure to seek Court approval before ceasing payments to the [Appellants]. Therefore, the Court will not enforce the no-contest clause as against Ms. Ahern ***as beneficiary.***

(8 AA 1618) (emphasis added).

In doing so, however, the Court did not leave Ms. Ahern unpunished. That is, the Court went on to find that Ms. Ahern's "failure to comply with the Court's Order to protect the [Appellants'] 65% share, however, resulted in a misapplication of the Trust income…" (*See id.*) This conduct, the Court held, warrants "a surcharge against Ms. Ahern's 35% share of the Trust…" (*See id.*) The Court stated that the total amount of the surcharge would be determined at a future hearing. (*See id.*) Until that time, the Court ordered that Ms. Ahern's distributions be suspended starting thirty (30) days after entry of the Surcharge Order. (8 AA 1619.)

Ms. Ahern's punishment did not end there, however. In addition to the surcharge of Ms. Ahern's interest in the Trust, the Court held that the issue of punitive and treble damages would be briefed and argued after Mr. Waid

completed his accounting, and that the Court would deal with this issue in a "serious fashion." (8 AA 1618-19.) With regard to the conduct warranting the punitive and/or treble damages, the Court held that Ms. Ahern breached her fiduciary duties under NRS Chapter 165 by removing funds from the Trust account before turning the account over to Mr. Waid and by her inaccurate accounting filed with the Court. (8 AA 1619.) The Court recognized that Ms. Ahern replenished some of the funds to the Temporary Trustee, and that the full amount of damages would be determined at a later evidentiary hearing. (*See id.*)

In conclusion, the Court (i) denied the request to enforce the No-Contest Clause, (ii) suspended Ms. Ahern's distributions until Appellants have been paid in an amount to be determined by the Court, and (iii) ordered Mr. Waid to prepare a report and a trustee's account, [4] which, upon completion, will be the subject of an evidentiary hearing on the issue of the amounts owed by Ms. Ahern, including punitive or treble damages. (8 AA 1620.) Appellants appealed the Surcharge Order on October 19, 2016. (8 AA 1626.)

[4] Notably, after continuing to witness Ms. Ahern's unexplainable behavior due to the influence of others, Mr. Waid formally sought the District Court's intervention to appoint a guardian ad litem.

VI. SUMMARY OF ARGUMENT

The No-Contest Clause must be strictly construed and must not be expanded beyond the clear intentions of the Settlors. Based on this narrow application, the No-Contest Clause at issue here is not triggered. To begin, the evidence demonstrates that Ms. Ahern's conduct was not fueled by some intention to permanently take funds from the Trust in an attempt to disregard her parents' wishes. Because the plain language of the No-Contest Clause dictates that it is only triggered by such intentional conduct, the clause is inapplicable here.

Further, as the District Court held, Ms. Ahern's conduct amounted to nothing more than a breach of her fiduciary duties as the Trustee – a breach for which she has been significantly punished. If the Settlors would have intended such conduct to trigger the No-Contest Clause, they would have stated so in the clause. This, they did not do. Moreover, upon a review of the evidence before the Court, there can be no debate that Ms. Ahern has been subjected to undue influence and manipulation by others who wish to dupe her for their own financial gain. Because of this manipulation, the No-Contest Clause cannot disinherit Ms. Ahern. This is both because the Settlors did not express such a desire and because there is strong public policy against elderly abuse and

punishing a person for conduct that was done at the direction of others who are sitting to gain from such actions.

As such, the No-Contest Clause is not triggered and any finding to the contrary would be unjust. The Surcharge Order, therefore, should be affirmed.

VII. STANDARD OF REVIEW

Appellants challenge the District Court's finding that Ms. Ahern was acting in her capacity as Trustee when she engaged in the conduct at issue. (*See* OB at Section V(B).) "A district court's findings [of fact] will not be disturbed unless they are clearly erroneous and are not based on substantial evidence." *Hannam v. Brown*, 114 Nev. 350, 357, 956 P.2d 794, 799 (1998) (quoting *Gibellini v. Klindt*, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994)).

Appellants also challenge the applicability of the No-Contest Clause. "While a party's conduct is a question of fact, whether said conduct violates a no-contest clause is a legal question reviewed de novo." *Jones v. Jones*, No. 66632, 2016 Nev. Unpub. LEXIS 551, at *10-11 (July 14, 2016)[5] (citing *Redman-Tafoya v. Armijo*, 138 N.M. 836, 126 P.3d 1200, 1210 (N.M. Ct. App. 2005)); *see also In re Estate of Davies*, 127 Cal. App. 4th 1164, 1173, 26 Cal. Rptr. 3d 239, 246 (Ct. App. 2005)).

[5] This case is unpublished.

Notably, even if this Court does not agree with the District Court's reasoning, if the ultimate conclusion is correct, the Court will affirm. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (holding that "this court will affirm the order of the district court if it reached the correct result, albeit for different reasons.") Under these standards, this Court should affirm the District Court's Surcharge Order.

VIII. ARGUMENT

A. The Law Abhors A Forfeiture And No-Contest Clauses Are Strictly Construed.

It is well-settled in Nevada that "[t]he law abhors a forfeiture." *Organ v. Winnemucca State Bank & Trust Co.*, 55 Nev. 72, 77, 26 P.2d 237, 238 (1933). Consistent with this view, "no-contest provisions are looked upon with some disfavor and have been strictly construed, despite their discouragement of unmeritorious litigation, unnecessary expense to the testator's estate and familial disharmony." 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). As such, "[a] breach of a forfeiture clause will be declared only when the acts of a party come strictly within its express terms." *See id* (citing Am. Jur. 2d, Wills § 1569); *see also Estate of Kaila*, 94 Cal. App. 4th 1122, 1128, 114 Cal. Rptr. 2d 865, 870 (2001) (stating

that no-contest clauses are "disfavored by the policy against forfeitures and therefore are strictly construed and may not extend beyond what plainly was the testator's intent."); *Saier v. Saier*, 366 Mich. 515, 520, 115 N.W.2d 279, 281 (1962) ("[A]ll authorities agree that, even in those jurisdictions where conditions against contest are held valid, such conditions are punitive and construable strictly."); *Ivancovich v. Meier*, 122 Ariz. 346, 352, 595 P.2d 24, 30 (1979) (noting that “in terrorem clauses are strictly construed”).

Even the case law cited by Appellants holds that "[a]lthough no contest clauses are enforceable and favored by the public policies of discouraging litigation and preserving the transferor's intent, they are nevertheless ***strictly construed*** and ***may not be extended beyond their plainly intended function***." *Johnson v. Greenelsh*, 47 Cal. 4th 598, 604, 100 Cal. Rptr. 3d 622, 627, 217 P.3d 1194, 1198 (2009) (emphasis added). Consistent with this principal, "[w]hether there has been a 'contest' within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used." *Id* (citation omitted.) Put another way, a no-contest clause will not be enforced ***unless***, after examining all of the circumstances of the case and the exact language utilized in the clause, there is no doubt that the conduct fits squarely within the clause.

In making this determination, Courts, including this Court, "recognize the paramount rule in the construction of wills that the ascertainment and effectuation of the testator's intention is controlling." 3 A.L.R.5th 590, § 2(a) (citing Am. Jur. 2d, Wills § 1140); *see also Hannam*, 114 Nev. at 356, 956 P.2d at 798 ("This court has historically construed trusts in a manner effecting the apparent intent of the settlor.") (citation omitted). The ultimate question, therefore, is the meaning of the words used in the no-contest clause. 3 A.L.R.5th 590, § 2(a). Courts are cautioned, however, to remember that because two settlors "rarely use the same language, and the same words used under different circumstances may express a different intent, courts need not adhere rigidly to precedent in construing no-contest clauses." 3 A.L.R.5th 590, § 2(a) (citing Am. Jur. 2d, Wills § 1131).

Under these guiding principles, it is clear that the No-Contest Clause is not applicable and this Court should affirm the District Court's Surcharge Order.

B. The No–Contest Clause Is Inapplicable And Cannot Be Enforced Against Ms. Ahern.

A simple review of the No-Contest Clause in the Trust demonstrates that the conduct Ms. Ahern has engaged in does *not* fall within the scope of the clause. The plain language of the No-Contest Clause is 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 or 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.

(1 AA 31.) As set forth in the Surcharge Order, the Court properly held that the No-Contest Clause has no application here due to the fact that her actions were taken in her role as a Trustee. (8 AA 1618.) Beyond this sound ruling, the No-Contest Clause is also inapplicable because the conduct engaged in does not – when strictly construed – fit into the language of the clause. Further, the documentary and testimonial evidence in this action demonstrates that Ms. Ahern was influenced by others and, therefore, she cannot be stripped of her interest in the Trust. As such, this Court should affirm the District Court's Surcharge Order in its entirety.

1. The plain language of the No-Contest Clause at issue here clearly dictates that Ms. Ahern's conduct is outside its scope.

Appellants attempt to paint the No-Contest Clause with a "broad" brush (*see* OB at 26-27) but, as dictated by the law, the clause must be strictly

construed and cannot be applied to conduct outside the precise language in the clause. *See Estate of Kaila*, 94 Cal. App. 4th at 1128, 114 Cal. Rptr. 2d at 870 (stating that no-contest clauses are "disfavored by the policy against forfeitures and therefore are strictly construed and may not extend beyond what plainly was the testator's intent.") When viewing the clause under this defined lens, there can be no doubt that it is inapplicable here.

a. <u>As admitted by Appellants, the first portions of the No-Contest Clause are inapplicable here.</u>

It is without debate that certain portions of the No-Contest Clause are clearly inapplicable here. That is, there is no evidence that Ms. Ahern, in bad faith, sought or "establish[ed] to assert any claim to the assets" of the Trust 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." (*See* Section V, *supra*.) In fact, Appellants do not even argue that these provisions trigger the No-Contest Clause. (*See generally*, OB.) Further, any such argument would be futile, as the District Court already determined that the dispute between the parties as to the 65/35 split was brought in good faith. (6 AA 1242.)

As such, the only provision remaining to address is the following: "attack, oppose or seek to set aside the administration and distribution of the said trusts."

As discussed below, this provision is also inapplicable. The Surcharge Order, therefore, must be Affirmed.

b. <u>The remaining portion of the No-Contest Clause is equally inapplicable.</u>

The only provision of the No-Contest Clause at issue in the appeal is the following prohibition: "attack, oppose or seek to set aside the administration and distribution of the said trusts." Based on the plain language of this provision and the evidence – both documentary and testimonial – it is inapplicable.

Before turning to this analysis, it is important to keep in mind that the No-Contest Clause must be narrowly construed and will only apply when the conduct comes "strictly within its express terms." *See* 3 A.L.R.5th 590, § 2(a) ("A breach of a forfeiture clause will be declared only when the acts of a party come strictly within its express terms."); *see also Estate of Kaila*, 94 Cal. App. 4th at 1128, 114 Cal. Rptr. 2d at 870 (stating that no-contest clauses are "disfavored by the policy against forfeitures and therefore are strictly construed and may not extend beyond what plainly was the testator's intent.")

i. The conduct here does not fit squarely within the defined terms in the No-Contest Clause.

As a preliminary matter, the word "attack" is at once extremely broad to the point of vagueness, and also extremely specific, in that it connotes an intentional act designed to injure or destroy. Merriam Webster defines "attack"

as follows: "to set upon or work against forcefully."[6] The phrase "*to set upon or work against*" means the actor has intent to accomplish such destruction. Similarly, to "oppose" something, the actor must have intent. "Oppose" is defined as "to offer resistance to."[7] The term "set" something aside also carries with it the same intention component, as it is defined as to "put to one side."[8]

There is no indication in the record that Ms. Ahern's mishandling of funds involved an intent to take any such actions against the Trust. In fact, according to Mr. Waid, during his first conversation with Ms. Ahern she stated matter-of-factly that she believed she owed the Trust around $800,000. This suggests the use of the funds was more akin to a loan than a theft and, indeed a loan from the Trust appears to be permissible under Article Eighth(D): "nor shall any person borrow the principal or income of the trust estates, directly or indirectly, without adequate interest in any case or without adequate security therefor." (1 AA 29.) As Trustee, Ms. Ahern would have had the power to authorize a loan. *See Johnson*, 47 Cal. 4th at 605, 217 P.3d at 1200 (noting that "an indirect contest is one that attacks the validity of an instrument by seeking relief inconsistent with

---

[6] *See https://www.merriam-webster.com/dictionary/attack,* last visited August 3, 2017.

[7] *See https://www.merriam-webster.com/dictionary/oppose,* last visited August 3, 2017.

[8] *See https://www.merriam-webster.com/dictionary/set,* last visited August 3, 2017.

its terms"). In any case, that Ms. Ahern intends to pay back any amounts that exceeded her 35% is demonstrative that she had no intent to permanently injure or destroy the Trust.

ii. The Settlors did not expressly desire in the No-Contest Clause for Ms. Ahern's conduct to trigger the forfeiture.

Furthermore, had the settlors intended a trustee's breach of duty, or a mishandling of funds, to constitute an attack on, an opposition to, or to set aside the Trust, they would have included it in the no-contest clause:

> ***Had the settlors…wished to include challenges to the trustees' administration of the trust within the scope of the no contest clause, it was essential that they have said so.*** They did not say so, however…The trial court erred in ruling otherwise and in removing appellant from the trust as a consequence.

In re Pennington Trust, No. B174564, 2005 WL 1774937, at *6 (Cal. Ct. App. July 28, 2005) (emphasis added).[9]

> [A] "contest" is not confined to a ***direct*** attack on a will or trust instrument, but may include a separate legal proceeding that would thwart or nullify or unravel the testator's ***expressed wishes***.

In re Estate of Davies, 127 Cal. App. 4th at 1175, 26 Cal. Rptr. 3d at 248 (second emphasis added).

> Applying the doctrine of strict construction to the no contest clause, the appellate court also held that the proposed challenge would not effect a forfeiture of the son's right to recover under the decedent's trust, because the no contest provision in the original trust made no

[9] This case is unpublished.

> mention of amendments to the trust or that any contest or challenge to any amendment would result in a forfeiture. ***The court recognized that, only where an act comes strictly within the express terms of the forfeiture clause may a breach thereof be declared***.

In re Estate of Herold, 162 Cal. App. 4th 983, 997, 76 Cal. Rptr. 3d 546, 557 (2008) (internal citations and alterations omitted) (emphasis added).

> It has long been the rule in this state that no contest clauses in a will are not to be extended beyond what was plainly the testator's intent. There is no reason why this same rule should not be applied to inter vivos trusts. Such clauses must be strictly construed, and no wider scope is to be given to their language than is plainly required [citations]. ***Only where an act comes strictly within the express terms of the forfeiture clause may a breach thereof be declared.***

Scharlin v. Superior Court, 9 Cal. App. 4th 162, 168-69, 11 Cal. Rptr. 2d 448, 452 (1992) (internal citations and alterations omitted) (emphasis added).

Here, the Settlors did not express a desire for a trustee's breach of duty or mishandling of trust funds to fall within the scope of the No-Contest Clause, and, as such, Ms. Ahern's actions were certainly not an attempt to permanently thwart the intent of her father and mother. Moreover, the remedies for such actions are different and separate from forfeiture under the No-Contest Clause (removal as Trustee, surcharge of interest, etc.). This is consistent with the arguments Appellants' counsel made at the Evidentiary Hearing: the remedy is to require the funds to be repaid. (*See* Section V(J)(1), *supra*.) The remedy is

not a forfeiture of the trustee/beneficiary's interest in the Trust. *See* NRS 153.031(3).

iii. Appellants' argument regarding conversion and fraud is a red herring and fatally flawed.

In disregarding the intent element, and the actual findings in this case, Appellants argue that Ms. Ahern's conduct is within the No-Contest Clause because she "committed conversion and fraud." (*See* OB at 31-32.) This argument fatally flawed. First, conversion and fraud are terms of art and have legal significance, including elements that must be satisfied. These claims for relief were never asserted in the Appellants' declaratory relief petition, and the District Court never made a determination regarding these claims for relief. (*See* Section V(D), (J) – (K), *supra.*)

In order to properly present a claim of conversion, the Appellants must show that Ms. Ahern wrongfully exerted an act of dominion ***over their property***, that the act was in denial of the their rights therein, or the act was in the exclusion of their rights in the property. *Ferreira v. P.C.H. Inc.*, 105 Nev. 305, 308, 704 P.2d 1041, 1043 (1989); *Wantz v. Redfield*, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958). "[I]t is not essential that plaintiff shall be the absolute owner of the property converted but she must show that she was ***entitled to immediate possession at the time of the conversion***." *Bastanchury v. Times-Mirror Co.*, 68

Cal. App. 2d 217, 236, 156 P.2d 488, 498 (1945) (emphasis in original). However, "a mere contractual right of payment, without more, does not entitle the obligee to the immediate possession necessary to establish a cause of action for the tort of conversion." *See In re Bailey*, 197 F.3d 997, 1000 (9th Cir. 1999); *see also Imperial Valley Co. v. Globe Grain & Milling Co.*, 187 Cal. 352, 202 P. 129 (Cal. 1921).

In addition, although Nevada has not addressed the issue, numerous states do "not recognize a cause of action for conversion of money unless it can be described or identified as a specific chattel…The rule therefore is that an action for conversion of money will lie only where there is an obligation to return the identical money delivered by the plaintiff to the defendant." *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 490 F. Supp. 2d 1091, 1102 (D. Nev. 2007) (internal quotation marks and citations omitted).

Here, the Appellants did not have a right to immediate possession of the funds for which they now seek recovery. Under their theory of the case, the Appellants were beneficiaries of a separate trust which was entitled to payments from the Trust, which itself was entitled to payments from income derived from the Texas oil properties. (*See generally*, OB.) At most, this is a contractual right, and, therefore, a claim for conversion cannot lie.

To establish fraud by inducement, a plaintiff "must prove by clear and convincing evidence each of the following elements": (1) a false representation made by a party, (2) knowledge or belief by the party that the representation was false, or knowledge that it had an insufficient basis for making the representation, (3) intent to induce another party to consent to the contract's formation, (4) the other party justifiably relied upon the misrepresentation, and (5) that damage to the other party resulted. *See J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 290, 89 P.3d 1009, 1018 (2004). The purported "fraudulent inducement" that Appellants argue occurred is based upon the accounting Ms. Ahern submitted to the Court. (*See* OB at 32.)

As with conversion, the District Court made no finding of fraud by inducement, and couldn't have, because (i) such a claim was never asserted in Appellants' declaratory relief petition, (ii) no evidence was submitted demonstrating that Ms. Ahern had the requisite intent, (iii) there was no allegation that any purported fraud was related to the formation of a contract, (iv) the Appellants never relied upon any alleged fraudulent representation in taking any action, and (v) no damages resulted. As such, Appellants' argument regarding Ms. Ahern's conduct triggering the No-Contest Clause because she committed "conversion and fraud" fails.

2. The No-Contest Clause is inapplicable to Ms. Ahern's conduct as a Trustee.

After hearing all of the live testimony from the witnesses at the Evidentiary Hearing and reviewing all of the evidence, the District Court properly held that "Ms. Ahern, as Trustee, did not comply with the Court order to protect the 65% share of the Trust," but that this "failure to properly apply her duties as a Trustee does not warrant the imposition of the harsh remedy of imposition of the no-contest clause," and, therefore, the Court "will not enforce the no-contest clause as against Ms. Ahern as beneficiary." (8 AA 1618.)

In an attempt to convince this Court to reverse the District Court's sound ruling, the Appellants argue that Ms. Ahern acted in her own interest and that actions taken by a trustee can give rise to violations of a no contest clause. (*See* OB at 21-23.) Both of these arguments fail.

To begin, Appellants have failed to cite a single Nevada case wherein a Trustee's breach of his or her fiduciary duties resulted in the imposition of a no contest clause against a Trustee. (*See generally*, OB.) This is because the appropriate remedy for such a breach is removal from the Trust, a surcharge, etc., and is not the enforcement of a no contest clause.

Notably, Appellants' first argument is made in reliance upon this Court's decision in a related appeal that Ms. Ahern "breached her fiduciary duties of

impartiality and to avoid conflicts of interest…" (*See* OB at 21) (quoting *Matter of Connell*, 388 P.3d 970, 2017 WL 398516, at *3 (Jan. 26, 2017)). What Appellants neglect to recognize, however, is that this was an order affirming a ruling that Ms. Ahern breached her fiduciary duties in her capacity as the ***Trustee***, not that she breached any fiduciary duties owed as a beneficiary. (*See id.*) This is confirmed by the case law and statutes cited by this Court. (*See id.*)[10] As such, Appellants' reliance on this Court's previous order, as well as their discussion regarding common-law duties to co-beneficiaries (*see* OB at 22), are misplaced and fail to demonstrate that the District Court erred in its Surcharge Order.

Similarly, the Appellants' second argument in this regard fails to demonstrate that this Court should reverse the Surcharge Order. For this argument, Appellants hang their hat on the Restatement (Third) of Property (Wills & Don. Trans.) and on one line (arguably dictum) from a non-binding case. (*See* OB at 23.) Once again, these arguments lack merit.

[10] Citing NRS 153.031(3)(b) (addressing attorneys' fees when a trustee breaches his or her fiduciary duties); *Riley v. Rockwell*, 103 Nev. 698, 701, 747 P.2d 903, 905 (1987) (addressing the fiduciary duties of a trustee); Restatement (Third) of Trusts § 79 (2007) (addressing duties of impartiality of a trustee); *see Hearst v. Ganzi*, 52 Cal. Rptr. 3d 473, 481 (Ct. App. 2006) (recognizing a trustee's duty to treat all beneficiaries equally); *see also In re Duke*, 702 A.2d 1008, 1023-24 (N.J. Super. Ct. Ch. Div. 1995) (explaining that a trustee may not advocate for either side in a dispute between beneficiaries).

With regard to the quoted language from the Restatement, upon a review of the entire section, it is clear that it is inapplicable here. That is, Appellants rely on Comment (f) to Section 8.5 of the Restatement relating to actions taken in a representative capacity, but ignore the fact that Comment (a) to the Section dictates that the Section "only addresses the validity of a no-contest clause that pertains to proceedings that challenge the validity of a donative document (or a portion of such a document)." Restatement (Third) of Property (Wills & Don. Trans.) § 8.5, cmt. a (2003). As discussed above, there is no contention that Ms. Ahern initiated a proceeding challenging the validity of a donative document. (*See* Section VIII(B)(1)(a), *supra.*)

With regard to the second argument, not only is it true (as stated above) that Appellants fail to cite a single Nevada case wherein a Trustee's conduct triggered the No-Contest Clause, but the only case they cite in support of their argument is one wherein the Court did not actually enforce a no contest clause against a trustee. *See Johnson,* 47 Cal. 4th at 609, 100 Cal. Rptr. 3d at 631, 217 P.3d at 1202. Moreover, in addressing the applicability of a no contest clause, this Court has drawn a distinction between a party contesting a trust in his role as trustee, as opposed to his role as a beneficiary. *See Hannam,* 114 Nev. at 357, 956 P.2d at 799 (discussing whether party was contesting the will in his "individual capacity as a beneficiary rather than as a trustee.") As such,

Appellants' argument (without any supporting case law) that a trustee cannot act in his capacity as trustee separately from his capacity as a beneficiary, is meritless. Thus, Appellants' arguments fail.

3. The testimony presented from the Appellants clearly demonstrates that Ms. Ahern was under the influence of others when she engaged in the conduct at issue.

As further support of the fact that Ms. Ahern's conduct does not trigger the No-Contest Clause based on a strict construction of its language, the evidence in the record demonstrates that any conduct Ms. Ahern engaged in was because of the undue influence of others, thus making the clause inapplicable and the situation not one to which the Settlors intended for the clause to apply.

"The ultimate fact of undue influence may be and usually is established by circumstantial evidence." *Norlander v. Cronk*, 300 Minn. 471, 475, 221 N.W.2d 108, 111 (1974) (citation omitted). In fact, a combination of evidence is often utilized to determine that undue influence is present:

> [I]t is not sufficient merely to show that the person benefited had an opportunity to exercise undue influence. There must be evidence that undue influence was in fact exerted, but, as noted, this may be shown by circumstantial evidence as well as by direct evidence. While it is true that some of the parties testifying were interested in the outcome of the suit, nevertheless, the question of the credibility of the witnesses was at all times one for the advisory jury and the trial court.
>
> Furthermore, undue influence might be inferred from a disposition of property in favor of the ones who had an opportunity to

> influence, while others who would be the natural recipients of a share in the property were ignored.
>
> Some of the factors which the courts will consider in determining whether the grantor's free will has been overcome are his age, intelligence, experience, physical and mental health, and strength of character.

Id. at 112 (citation omitted). Finally, "[w]hile the burden of proving undue influence is upon the party asserting that it was exercised, the existence of a confidential relationship makes the burden of proof somewhat simpler." *Id.* at 111-12. That is, "[w]here a confidential relationship exists, a showing of an opportunity to exercise undue influence, an inclination to do so, and a resulting disposition of property which ignores the natural recipients is usually sufficient to establish undue influence." *Id.* at 112; *see also Caraveo v. Perez (In re Estate of Bethurem)*, 313 P.3d 237, 241 (Nev. 2013) ("We have held that '[a] presumption of undue influence arises when a fiduciary relationship exists and the fiduciary benefits from the questioned transaction.'" (quoting *In re Jane Tiffany Living Trust 2001*, 124 Nev. 74, 78, 177 P.3d 1060, 1062 (2008))).

Here, by the Appellants' own testimony and evidence, Ms. Ahern and Ms. Nounna had a confidential and fiduciary relationship: (i) Ms. Nounna appears to have controlled nearly all aspects of Ms. Ahern's financial affairs; (ii) Ms. Nounna ran Ms. Ahern's foundation *and* sent Ms. Ahern the individuals who needed help via the foundation; (iii) Ms. Ahern's daughters hardly knew Ms.

Nounna; (iv) Ms. Nounna used multiple aliases; (v) Ms. Nounna (or God) instructed Ms. Ahern to withdraw tens of thousands of dollars from bank accounts; and (vi) Ms. Nounna attended meetings with attorneys with Ms. Ahern wherein private financial discussions were held. (*See* Section V, *supra*.) This confidential relationship, coupled with the circumstantial evidence, gives rise to a presumption that Ms. Ahern was unduly influenced.

In addition, even if the Court does not presume such undue influence, the circumstantial evidence alone demonstrates its existence. Ms. Ahern is nearly eighty years old and her daughters have testified that she wrongly believes her daughters are out to get her, to institutionalize her, or to kill her. (*See id.*) Moreover, Ms. Ahern is susceptible to such influence. In her deposition, Appellant Ms. Montoya testified that "[Ms. Ahern] has been manipulated for years. And [Ms. Nounna], if she's doing it, is not the first person to do it." (*See id.*) Ms. Nounna also infiltrated herself into Ms. Ahern's life and tried to drive (and did drive) a wedge between Ms. Ahern and her daughters, by way of telling Ms. Ahern that her daughters were trying to institutionalize her and trying to kill her, by changing the locks to Ms. Ahern's home, and by having the caregiver watch Ms. Ahern 24/7 so that her daughters would stay away, among other things. (*See id.*) These factors all suggest that undue influence was present, and

that Ms. Ahern should not be found in violation of the No-Contest Clause for acts done not of her own cognition.

In looking at the Settlor's intent, which is at the heart of this Court's consideration, there can be no serious contention that the Settlors would have wanted their daughter to be stripped of her interest in the Trust because of actions taken while she was under the influence of others. *See Estate of Kaila*, 94 Cal. App. 4th at 1128, 114 Cal. Rptr. 2d at 870 (stating that no-contest clauses are "disfavored by the policy against forfeitures and therefore are strictly construed and may not extend beyond what plainly was the testator's intent.") This certainly cannot have been their intention when including the No-Contest Clause, which indicates that certain intentional acts trigger its application. As such, the No-Contest Clause does not apply and the Surcharge Order should be affirmed.[11]

[11] Appellants argue that the enforcement of the No-Contest is mandatory. (*See* OB at 32-33.) Appellants forget that this mandate is only true if the actual provision itself is triggered by specific conduct. (*See* Section VIII(A), *supra*.) As explained above, the No-Contest Clause is not triggered here. Similarly, Appellants address the exceptions to the application of the No-Contest Clause (*see* OB at 34-38), but as the No-Contest Clause is inapplicable (as discussed herein), no such exceptions are warranted for this Court to affirm the Surcharge Order.

C. Enforcing A No-Contest Clause In These Circumstances Is Against Strong Public Policy Disfavoring Forfeitures.

As can be easily deduced from the facts of this case, an order stripping an elderly woman of the rights her parents bestowed upon her because of conduct she engaged in at the direction of and/or under the undue influence of third parties who have infiltrated themselves into her financial life for their own benefit, would fly in the face of the public policy against abuse to elderly people and the public policy against forfeitures. While Ms. Ahern recognizes that there is no expressed exception in the No-Contest Clause for situations where a beneficiary was manipulated into taking certain actions, this Court has not shied away from recognizing that exceptions may exist that are not expressly stated – especially when the recognition of the exception would promote public policy. *See Hannam*, 114 Nev. at 356-57, 956 P.2d at 798 (holding that although there is no intention to create an exception, "failure to recognize such an exception by implication would chill assertion of legitimate claims. We conclude that public policy favors recognition of the implied exception to no-contest clauses for good faith challenges based on probable cause, and now elect to follow the modern trend favoring the exception.") As such, if the Court finds that the No-Contest Clause is triggered (which it is not), the Court should rule that its application is unwarranted based on public policy grounds.

Contrary to Appellants' arguments, refusing to kick Ms. Ahern out of the Trust because of conduct that was the result of the manipulation of others would not leave Ms. Ahern "unscathed." (*See* OB at 40.) That is, as the District Court ordered, Ms. Ahern is facing serious and significant punitive damages as well as treble damages. (*See* Section V(K), *supra*.) When looking at the totality of the circumstances here – an elderly woman being taken advantage of by "leeches" who are directing her conduct being punished by being removed as Trustee and having to pay significant penalties – public policy dictates that there has to be a point where the bleeding stops. When has Ms. Ahern been punished enough? Further, while it may be in line with public policy to ensure that the Settlors' intentions are carried out and that wrongdoers are properly punished, one cannot argue with a good conscience that the scenario before the Court is one that would promote such public policy. Ms. Ahern's parents, when drafting the Trust, could not have intended for their elderly daughter to be kicked out of the Trust and left with nothing because she fell victim to individuals who took advantage of her and orchestrated misdeeds on her behalf. No parent would want that.

IX. CONCLUSION

Based on the foregoing, Ms. Ahern respectfully requests that the Court AFFIRM the Surcharge Order in its entirety.

Dated this 3rd day of August, 2017.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Kirk B. Lenhard*

KIRK B. LENHARD, ESQ., Bar No. 1437
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135
Attorneys for Respondent Ms. Ahern

NRAP 32(a)(9)(C) CERTIFICATE

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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Professional Plus 2010 in 14-point Times New Roman font; or

[ ] This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

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 either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 12,103 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be

supported by a reference to the page and volume number, if any, 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.

DATED this 3rd day of August, 2017.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

BY: */s/ Kirk B. Lenhard*

Kirk B. Lenhard, Esq., NV Bar No. 1437
klenhard@bhfs.com
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed and served the foregoing **APPELLANT'S ANSWERING BRIEF** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on August 3, 2017 upon the following:

JOSEPH J. POWELL, ESQ.
DANIEL P. KIEFER, ESQ.
THE RUSHFORTH FIRM, LTD.
1707 Village Center Cir., Suite 150
Las Vegas, NV 89134
Email: probate@rushforthfirm.com

Attorneys for Appellants

I hereby certify that on August 3, 2017, I served a copy of this document by mailing a true and correct copy, postage prepaid, via U.S. Mail, addressed to the following:

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

/s/ Paula Kay
an employee of Brownstein Hyatt Farber Schreck, LLP