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.

Case No.: 71577

Appeal from the Eighth Judicial District Court, The Honorable Gloria Sturman Presiding, Case No. P-09-066425-T

MARQUIS AURBACH COFFING'S AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT'S ANSWERING BRIEF

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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.

1. Marquis Aurbach Coffing is a professional corporation.

2. Attorneys Terry A. Coffing, Esq., Liane K. Wakayama, Esq., Candice E. Renka, Esq., and Kathleen A. Wilde, Esq. of Marquis Aurbach Coffing have appeared for amicus curiae in this case.

Dated this 15th day of August, 2017.

MARQUIS AURBACH COFFING

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I. STATEMENT OF INTEREST OF AMICUS CURIAE.

MAC represented Respondent Eleanor Ahern ("Ahern") in the district court between November 2014 and April 2015. By the time MAC moved to withdraw as counsel of record, MAC had worked over 900 hours for Ahern. Although Ahern had contractually agreed to "pay for all services," MAC is still owed nearly $200,000 in fees, costs, and interest.

MAC is interested in the instant appeal because a reversal of the district court's decision denying enforcement of the no-contest clause would unwind previous orders which were never appealed to this Court. In particular, if this Court enforces the no-contest clause and effectively holds that Ahern no longer has a beneficial interest under the Trust, the February 9, 2017 Order in which the district court granted MAC's Motion to Adjudicate Attorney's Lien and imposed a lien against Ahern's beneficial interest in the Trust, would necessarily be rendered a nullity.

Because the parties did not address this issue in the Opening Brief or Answering Brief, MAC respectfully submits that the instant amicus brief is permissible under Nevada Rule of Appellate Procedure ("NRAP") 29 because it will provide the Court with non-duplicative arguments and legal authorities to assist the Court in making a decision. See, e.g., Voices for Choices v. Ill. Bell Tel.

Co., 339 F.3d 542, 545 (7th Cir. 2003) ("[T]he criterion for deciding whether to permit the filing of an amicus brief should be the same: whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs."). Further, because "[a]n amicus brief should normally be allowed when a party is not represented competently or is not represented at all," Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997), MAC urges the Court to consider its amicus brief so that the Court is fully apprised of the impact that its decision will have on MAC, a non-party with a lien on Ahern's beneficial interest under the Trust as well as on the other final, un-appealed district court orders premised on the understanding that Ahern is a beneficiary under the Trust.

With these interests in mind, MAC respectfully requests that the Court consider its amicus brief. And, for the reasons stated in more detail below, this Court should reject the Appellants' attempt to enforce a no-contest clause that would nullify MAC's lien and undermine the district court's decisions made throughout the case.

II. SUMMARY OF CASE AND ARGUMENT.

A. THE TRUST.[1]

William N. Connell and Marjorie T. Connell (the "Settlors") established the W.N. Connell and Marjorie T. Connell Living Trust (the "Trust") on May 18, 1972. The Trust's primary asset is real property located in Upton County Texas as well as valuable oil, gas, and mineral rights associated with the property.

During the Settlors' joint lifetime, all Trust assets and income were administered for their benefit. After Mr. Connell passed away in November 1979, the Trust was divided into two sub-trusts, "Trust No. 2," of which Ahern was the beneficiary, and "Trust No. 3," of which Mrs. Connell was the beneficiary.

Between May 1980 and May 2009, Mrs. Connell and Ahern served as co-trustees of the Trust. But, when Mrs. Connell passed away in May 2009, Ahern became the sole Trustee of the Trust. Mrs. Connell's passing did not affect, in any way, Ahern's beneficial rights as to Trust No. 2's assets. According to the terms of Mrs. Connell's pour-over will, however, Ahern's daughters, Jacqueline Montoya ("Montoya") and Kathryn Bouvier ("Bouvier"), inherited Mrs. Connell's beneficial rights and interests in Trust No. 3.

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[1] The statement of facts regarding the Trust is based on this Court's decision in Matter of W.N. Connell and Majorie T. Connell Living Trust, 133 Nev., Adv. Op. 19, 393 P.3d 1090 (2017).

B. LITIGATION REGARDING THE TRUST.

Between May 2009 and May 2013, Ahern and her daughters split the royalties from the Trust assets 65/35 without issue. Matter of W.N. Connell and Majorie T. Connell Living Trust, 133 Nev., Adv. Op. 19, 393 P.3d at 1092. A few months after Ahern ceased making the payments to her daughters, Montoya filed a "Petition for Declaratory Judgment Regarding Limited Interest of Trust Assets Pursuant to NRS 30.040, NRS 153.031(1)(E), and NRS 164.033(1)(A)," in which she asked the district court to confirm her and her sister's entitlement to 65% of the income generated from the gas, oil, and mineral rights. Id.; see also 1 Appellants' Appendix ("AA") 18.

The Petition for Declaratory Judgment led to years of litigation that can only be described as a saga. Indeed, while the initial Petition seemed simple enough, the parties have litigated (and continue to litigate) issues ranging from Ahern's capacity and undue influences in her life to problems with legal counsel and residual questions regarding the Settlors' intent. These issues led to **five** separate appeals to this Court,[2] not including the instant case and the pending proper person

[2] See Related Case Nos. 66231 (appeal from an order granting injunctive relief); 67782 (appeal from an order appointing a trustee), 68046 (appeal from an order granting summary judgment in favor of Montoya and Bouvier); 69737 (appeal regarding trust distributions and payment of attorney's fees); and 72766 (proper person appeal that was dismissed for failure to pay a filling fee).

appeal that Eleanor filed in April 2017.[3] Yet, in the midst of this litigation saga, one issue remained on the back burner – the no-contest clause included in Paragraph 10 of the Trust.

1. The District Court's First Refusal to Enforce the No-Contest Clause.[4]

Ahern first asserted enforcement of the no-contest clause in ***her*** Answer to the Petition filed on February 10, 2014. The issue was not fully litigated until 2015, when the parties filed competing motions for summary judgment in which they argued, amongst other things, that the litigation initiated regarding the Trust violated the no-contest clause.

The district court rejected all of the parties' arguments regarding the no-contest clause because "[t]he thing just got so messed up that I think you had to come to Court and try to figure it out." Similarly, in the April 16, 2015, order regarding summary judgment the district court held:

> 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

[3] See Docket Number 72897.

[4] Unless otherwise stated, the facts and pleadings discussed in this section were part of the record on appeal in Case No. 68046.

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, [Ahern] on one hand, and [Appellants] on the other hand.

3 AA 722.

None of the parties appealed this portion of the district court's order. In fact, while Ahern appealed other aspects of the order, see Docketing Statement in Case No. 68046, Respondents made no mention of the no-contest clause in any of the briefing before this Court. See Appellants' Opening Brief and Respondents' Answering Brief in Case No. 68046. Thus, the no-contest clause was not enforced, pursuant to the district court's final decision in 2015, over two years ago.

2. The District Court's Second Refusal to Enforce the No-Contest Clause.

Then, in June 2015, *i.e.*, after the time for filing a Notice of Appeal or tolling motions had passed,[5] Montoya and Bouvier filed a "Motion for Assessment of Damages Against Eleanor Ahern; Enforcement of No-Contest Clause; and

[5] A notice of appeal from an order regarding summary judgment must be filed within 30 days of the notice of entry of order. See NRAP 4(a)(1). Under Eighth Judicial District Court Rule 2.24, a motion for reconsideration must be filed "within 10 days after service of [the] written notice of the order or judgment. Tolling motions, filed pursuant to NRCP 50(b), 52(b), and 59 must also be filed no later than 10 days after service of the written notice. Thus, because the Notice of Entry of Order was mailed on April 17, 2015, the time for challenging the order had already passed in June 2015.

Surcharge of Eleanor's Trust Income," in which they requested significant damages and again argued that Nevada law requires enforcement of the no-contest clause in the Trust. See 4 AA 854.

Unsurprisingly, the district court rejected the rehashed argument regarding the no-contest clause. See 8 AA 1617-20. In doing so, the district court agreed with the Appellants that it was appropriate to impose a surcharge and award significant damages to punish Ahern for breach of fiduciary duty in her role as Trustee. See 8 AA 1618-19. However, the district court held that enforcement of the no-contest clause and loss of Ahern's beneficial interest under the Trust as a beneficiary, was not an appropriate mechanism to punish Eleanor for her misdeeds as a Trustee. See 8 AA 1618. Thus, the district court held fast to its previous ruling that enforcement of the no-contest clause was not appropriate under the facts and circumstances of this case and rejected the Appellants' argument that enforcement could be used as a punitive measure. Id.

C. MAC'S ATTORNEY'S LIEN.

Ahern retained MAC in November 2014, after it became apparent that litigation regarding the Trust would be complex and time-intensive. Within the first two months of representation, MAC prepared for and represented Ahern in hearings regarding six separate matters. Further, by the time MAC withdrew in

April 2015, MAC had completed briefing on several contentious motions, including a motion to dismiss the petition for declaratory relief, an opposition to Montoya and Bouvier's "Motion to Enforce Settlement Agreement," and the competing motions for summary judgment noted above.

Ahern undoubtedly benefitted from this representation because the district court denied the Motion to Enforce Settlement Agreement and allowed Ahern to retain her 35% share of the Trust assets. Yet, while Ahern had contractually agreed to "pay for all services," MAC did not receive full payment for the significant time and resources it devoted to this matter.

After efforts to resolve the matter privately proved futile, MAC moved the district court to adjudicate an attorney's lien in accordance with NRS 18.015. In doing so, MAC specified that its lien should attach to Ahern's beneficial interest in the Trust because MAC helped Ahern retain her interest when her daughters sought to enforce the no-contest clause.

The district court agreed, reasoning that it was appropriate to attach the attorney's lien to the beneficial interest in a trust so that attorneys like MAC, who take on trust litigation, are not placed at a disadvantage. And, after holding that MAC properly perfected its attorney's lien pursuant to NRS 18.015, the district court entered a written order and judgment allowing MAC to recover $160,955.12

for payment of its fees and costs.[6] None of the parties appealed the order awarding MAC its fees or the subsequent judgment.[7]

D. THE INSTANT APPEAL.

Montoya and Bouvier appealed the September 15, 2016 Order Regarding Motion for Assessment of Damages; Enforcement of No Contest Clause; and Surcharge of Trust Income. As evidenced by the Opening Brief, their argument

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[6] A true and accurate copy of the "Decision and Order re: Marquis Aurbach Coffing's Motion to Adjudicate Attorney's Lien," is attached hereto as **Exhibit 1**. The Judgment is also attached as **Exhibit 2**. MAC acknowledges that the order and the judgment are not part of the record on appeal. This is because Respondents never appealed the order or the judgment and have neglected to alert the Court to the impact a decision in this appeal may have on these final orders. Accordingly, MAC requests that the Court take judicial notice of these orders. See In re Amerco Derivative Litig, 127 Nev., Adv. Op. 17, 252 P.3d 681, 699, n.9 (2011) (holding that this court may take judicial notice of facts that are "[g]enerally known within the territorial jurisdiction of the trial court," as well as those that are "[c]apable of accurate and ready determination . . . [and] not subject to reasonable dispute."); see also Occhiuto v. Occhiuto, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (taking judicial notice of prior divorce proceedings where "[t]he close relationship between this case and the previous divorce proceeding brings it within the exception to the general rule [against judicial notice]").

[7] Ahern filed in proper person a Notice of Appeal purportedly relating the "Decision and Order re: Marquis Aurbach Coffing's Motion to Adjudicate Attorney's Lien." But, after reviewing the Notice of Appeal and Ahern's other filings, this Court realized that Ahern had mistakenly used the wrong caption and was actually challenging a totally different order in which the district court awarded fees and costs to Brownstein Hyatt Farber Schreck, LLP. See Ahern v. Hyatt Farber Schreck, LLP, Case No. 72897 (Order Directing Transmission of Record and Amending Caption, Jun. 19, 2017). Accordingly, none of the parties appealed the order adjudicating MAC's lien or the related judgment.

centers on whether the district court's order as to their *second* request to enforce the no-contest clause was inadequate because harshness is not an enumerated exemption listed in NRS 163.00195. See generally Appellants' Opening Brief ("AOB") at 18-19, 32-34. In her Answering Brief, Ahern touches on the district court's original decision regarding the no-contest clause and the Appellants' failure to appeal that decision. See Respondent's Answering Brief ("RAB") at 10, 34. To support affirmance, Ahern highlights the evidence that she lacked capacity to make decisions for herself, see RAB at 5-9, 19-21, 46-48, 50, and makes the distinction between her role as a Trustee, as opposed to her role as a Beneficiary. See, e.g., RAB at 36-38.

III. LEGAL ARGUMENT.

On appeal, the parties addressed and briefed the issues regarding NRS 163.00195, public policy, and Trust administration. In further support of affirming the district court's refusal to enforce the no-contest clause, this Court should also consider the critical issue of whether (A) the unappealed decision of the district court is the law of the case and/or subject to claim preclusion. Further, because of the facts of this case and public policy concerns raised by the parties, this Court should also consider (B) whether enforcement of a no-contest clause is warranted after years of litigation and entry of many unappealed orders; and (C) whether

MAC, the attorneys who represented Ahern in litigation regarding the construction of Trust documents, should be denied payment just because the instrument in question included a no-contest clause.

A. THE UNAPPEALED DECISIONS OF THE DISTRICT COURT ARE THE LAW OF THE CASE AND/OR SUBJECT TO CLAIM PRECLUSION

"The refusal to resurrect [an] issue late in the proceedings supports efficient appeal relationships." 18B Wright & Miller, FED. PRAC. & PROC. JURIS. § 4478.6 (2d ed., updated Apr. 2017). For this reason, appellate courts routinely reject arguments where the appellant had an opportunity to appeal an earlier district court decision regarding the same issue but did not do so. See, e.g., U.S. v. Escobar-Urrego, 110 F.3d 1556, 1560, (11th Cir. 1997) (observing that the law-of-the-case doctrine has "several arms" and rejecting an appellant's argument where he "had the opportunity to appeal the district court's decision . . . but did not"); Schering Corp. v. Ill. Antibiotics Co., 89 F.3d 357, 358 (7th Cir. 1996) ("Under the doctrine of the law of the case, a ruling by the trial court, in an earlier stage of the case, that could have been but was not challenged on appeal is binding in subsequent stages of the case"); Capps v. Sullivan, 13 F.3d 350, 353 (10th Cir. 1993) ("[A] legal decision made at one stage of litigation, unchallenged . . . when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation,

and the parties are deemed to have waived the right to challenge that decision at a later time."); United States v. Millstone Enters. Inc., 864 F.2d 21, 23 (3d Cir. 1988) (holding that res judicata precludes re-litigation of issue that was or could have been decided in enforcement order that was not appealed); see also Kimmel v. State, 261 A.D.2d 843, 844, 690 N.Y.S.2d 383, 384 (1999) ("Defendants failed to appeal from those orders, which thus constitute the law of the case.").

As evidenced by these authorities, courts often cite to res judicata or the law-of-the-case doctrine to justify their refusal to address unappealed district court orders in later appellate proceedings. See also In re Scrivner, 535 F.3d 1258, 1266 (10th Cir. 2008) ("On at least one occasion, we have applied the law-of-the-case doctrine, rather than issue preclusion, to prevent a party from raising an issue when the party failed to appeal an earlier order deciding the issue."). Although the interchangeable use of these terms of art is technically incorrect,[8] both doctrines

[8] 18B Wright & Miller, supra, at § 4478.6 ("Law-of-the-case terminology is frequently used to address the question whether to deny appellate review of an issue that has not been properly preserved in a lower court or that has not been presented to the court of appeals in an orderly way. This usage has done little harm, but it would be better to express the underlying procedural concerns in different terms."); see also Dictor v. Creative Mgmt. Servs., LLC, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) ("The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case"); Univ. of Nev. v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994) ("Generally, the doctrine of res judicata precludes parties or those in privity with them from relitigating a cause of

support the notion that courts should strive for consistency and avoid re-litigation of old issues. See 18B Wright & Miller, FED. PRAC. & PROC. JURIS. § 4478 (2d ed., updated Apr. 2017) ("Law-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit"); see also 18 Wright & Miller, FED. PRAC. & PROC. JURIS. § 4403 (3d ed., updated Apr. 2017) ("Many closely related policies underlie the rules of res judicata, whether the immediate purpose and effect be to preclude relitigation of matters that have been litigated previously or to preclude any litigation of matters that should have been litigated previously").

Here, this Court should adhere to these sound principles and reject the Appellants' attempt to revive issues that they failed to timely appeal. After all, the district court made a final determination regarding the no-contest clause when, back in April 2015, it held that "good cause to impose the no-contest clause penalties does not exist" because the parties arguments regarding the interpretation of certain Trust provisions "were not asserted in bad faith." Yet, the Appellants did not challenge this determination in an appeal or even mention the issue in the

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action or an issue which has been finally determined by a court of competent jurisdiction").

previous cases before this Court. Notably, Ahern appealed the order, and Appellants did not cross-appeal.

Granted, the Appellants could argue that they raised a slightly different issue, namely, whether the no-contest clause should be used to punish Ahern, in her role as beneficiary, for errors she made in her role as Trustee. If this is the case, however, any argument regarding the plain meaning of the Trust is misplaced because there is nothing in the Trust which suggests that the no-contest clause may be used as a weapon against a beneficiary who did not initiate litigation or assert a claim in bad faith. Moreover, any such argument is outweighed by the waste of court resources (and party resources) that occurs when parties attempt to re-litigate old issues by advancing a nuanced version of the same argument that the court already rejected.

Thus, this Court should affirm the district court's order because the Appellants' arguments regarding the no-contest clause are untimely and should have been raised, if at all, in the appellate proceedings relating to the April 2015 order granting summary judgment. Further, as explained in more detail below, see Subsection B, infra, the Court should reject the Appellants' appeal because it effectively challenges the "Decision and Order re: Marquis Aurbach Coffing's Motion to Adjudicate Attorney's Lien," which was never appealed to this Court.

B. REVERSAL WOULD UNWIND YEARS OF UNAPPEALED DISTRICT COURT DECISIONS.

The purpose of no-contest clauses is to "'protect estates from costly and time-consuming litigation'" and "'minimize the bickering over the competence and capacity of testators, and the various amounts bequeathed.'" Russell v. Wachovia Bank, N.A., 633 S.E.2d 722, 725-26 (S.C. 2006) (quoting In re Estate of Seymour, 600 P.2d 274, 278 (N.M. 1979)). In order to maximize these worthy goals, it is essential that parties who wish to enforce a no-contest clause address the issue as soon as practicable.

Here, the Appellants expressed concerns regarding the no-contest clause nearly two years after ***they*** initiated litigation. As previously noted, Appellants then waited until ***after*** the district court made a ruling regarding the statutorily-enumerated exemptions to the no-contest clause to advance their theory that the no-contest clause may be used to punish Ahern for errors she made in role as Trustee. Given this timeline, the public policy purposes which apply to no-contest clauses have not been served in this case.

Moreover, the late invocation of the no-contest clause implicates – and may unravel – most of the decisions that the district court has made regarding the Trust. After all, if the no-contest clause is enforced, Ahern will no longer have a beneficial interest under the Trust and any decision regarding her interest would

necessarily be nullified. One such decision is the February 9, 2017, "Decision and Order re: Marquis Aurbach Coffing's Motion to Adjudicate Attorney's Lien," in which the district court held that MAC properly perfected its attorney's lien and was entitled to lien Ahern's beneficial interest in the Trust.

None of the parties appealed the order regarding MAC's lien or the majority of other decisions that the district court has made in the last four years, all of which were made with the understanding that Ahern was a beneficiary and trustee of the Trust. So, the problems with enforcing the no-contest clause at this juncture and effectively nullifying the previous orders are numerous. After all, most district court rulings become unchallengeable when the time for an appeal has passed. See, e.g., Schering Corp., 89 F.3d at 358 ("[A] ruling by the trial court, in an earlier stage of the case, that could have been but was not challenged on appeal is binding in subsequent stages of the case."); Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V., 114 F.3d 848, 851 (9th Cir. 1997) ("Having failed to appeal that ruling, which was appealable as a collaterally final order, Offshore may not relitigate . . . the same claims"). And, on a similar note, this Court routinely rejects parties' efforts to litigate issues which are waived or otherwise not properly before the Court. See, e.g., Powell v. Liberty Mut. Fire Ins. Co., 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (explaining that an issue not on appeal is deemed

waived); City of Las Vegas v. Cliff Shadows Prof'l Plaza, 129 Nev., Adv. Op. 2, 293 P.3d 860, 868 (2013) ("we shall not reach this issue as it is not on appeal."); Fisher v. Fisher, 99 Nev. 762, 764 n.1, 670 P.2d 572, 573 n.1 (1983) ("That question is not before this court, and we express no opinion").

Thus, in addition to the reasons set forth in Ahern's Answering Brief, this Court should reject the Appellants' arguments because enforcement of the no-contest clause after years of litigation would have wide-reaching consequences, including reversal of numerous final orders that were never appealed.

C. ATTORNEYS WHO REPRESENT A PARTY IN LITIGATION REGARDING THE CONSTRUCTION OF TRUST DOCUMENTS SHOULD NOT BE DENIED PAYMENT.

The primary goal in litigation regarding a trust is to effectuate the apparent intent of the settlor(s). See, e.g., Klabacka v. Nelson, 133 Nev., Adv. Op. 24, 394 P.3d 940, 947 (2017) ("[C]ourts look first and foremost to the language in the trust and interpret that language to effectuate the intent of the settlers.") (internal quotation marks and citation omitted). Although no-contest clauses may further this important policy by ensuring that a settlor's wishes are not thwarted, Nevada law recognizes that a no-contest clause should not be enforced against parties who wish 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." See NRS 163.00195(3)(c). Similarly, the Legislature and this Court recognize that the purpose of a no-contest clause is not to discourage a beneficiary from protecting his or her rights or enforcing the terms of a trust. See Hannam v. Brown, 114 Nev. 350, 357, 956 P.2d 794, 798 (1998) (acknowledging that failure to recognize a good faith exception to enforcement of no-contest clauses "would chill assertion of legitimate claims."); NRS 163.00195(3); see also In the Matter of: the ATS 1998 Trust, Dated December 17, 1998, Case No. 68748, 2017 WL 3222533, at *4 (Unpublished Order of Affirmance, Nev. July 28, 2017)[9] ("The purpose of a no-contest clause is to enforce the settlor(s)' wishes, not to discourage a beneficiary from seeking his or her rights. The law disfavors forfeiture unless the beneficiary challenges the trust itself or the will of the settlor(s).").

Here, the controversy regarding the no-contest clause implicates these important and necessary exemptions because MAC assisted Ahern in defending what she believed to be her father's intent. Indeed, while it is easy to say in hindsight that Ahern made some significant mistakes in her capacity as Trustee, these concerns were not known to MAC in November 2014 when Ahern retained

[9] NRAP 36(c)(3) provides that a party may cite an unpublished disposition "issued by this [C]ourt on or after January 1, 2016" for its persuasive value.

MAC to defend claims *that her daughters initiated*. Similarly, while Montoya and Bouvier now claim that no-contest clause should apply, MAC represented Ahern at time when the district court agreed "[t]he thing just got so messed up" that the parties "had to come to Court and try to figure it out." Yet, if the Appellants succeed in the instant appeal, MAC's lien for the services that it provided in good faith will be rendered a nullity.

Obviously, the loss of nearly $200,000 in attorney's fees and costs is substantial to MAC. But, realistically, reversal in this case would also have a deterrent effect for other attorneys who may deem it simply too risky to represent parties in litigation regarding a trust with a no-contest clause – even if such parties did not initiate the matter[10] or simply seek guidance as to trust provisions that are genuinely ambiguous. Thus, in the event this Court is inclined to reverse the

[10] Because no-contest clauses such as the one in this case penalize beneficiaries who "assert any claim," it logically follows that such clauses are not meant to punish individuals who defend their interests in litigation initiated by other parties. See, e.g., RESTATEMENT (THIRD) OF PROPERTY §8.5(f) (2003) ("The interest of one beneficiary is not affected when the conduct that triggers the no-contest clause is that of another person, unless the donative document so provides"); Kara Blanco & Rebecca E. Whitacre, The Carrot and Stick Approach: In Terrorem Clauses in Texas Jurisprudence, 43 TEX. TECH. L. REV. 1127, 1137 (2011) ("A beneficiary may also be acting not only on his or her behalf but as a representative of another individual interest in the estate (e.g., a guardian) or as a fiduciary of the estate or trust (e.g., executor or trustee). In that event, such a proceeding or challenge should have no effect on that individual's own gift unless the representative status is a means of presenting such person's own views").

district court's order and enforce the no-contest clause in this case, the Court should at least consider whether its decision will have the unintended consequence of deterring attorneys from representing parties in cases where the no-contest clause arguably does not apply.

IV. CONCLUSION.

For the reasons stated in Ahern's Answering Brief and the foregoing reasons, this Court should affirm the district court's order rejecting Appellants' untimely and improper request to enforce the no-contest clause in the Trust against Ahern as a beneficiary.

Dated this 15th day of August, 2017.

MARQUIS AURBACH COFFING

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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 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionaliy spaced, has a typeface of 14 points or more and contains 4,772 words; or

☐ does not exceed __ pages.

3. Finally, I hereby certify that I have read this 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 15th day of August, 2017.

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Attorneys for Prospective Amicus Curiae, Marquis Aurbach Coffing

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MARQUIS AURBACH COFFING'S AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT'S ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 15th day of August, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Attorneys for Appellants Jacqueline M. Montoya, Kathryn A. Bouvier

Kirk B. Lenhard, Esq.
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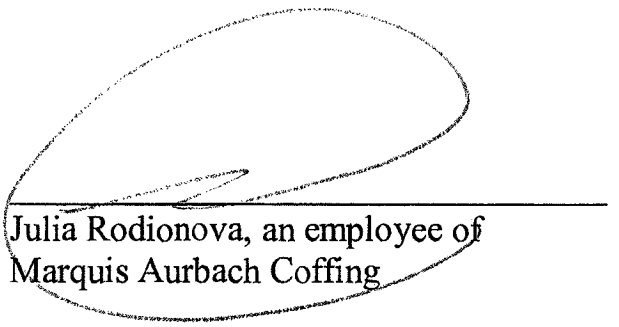
Attorneys for Respondent Eleanor Connell Hartman Ahern



Julia Rodionova, an employee of
Marquis Aurbach Coffing

Exhibit 1

Decision and Order re: Marquis Aurbach Coffing's Motion to Adjudicate Attorney's Lien.

Marquis Aurbach Coffing
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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST DATED May 18, 1972, An Inter Vivos Irrevocable Trust.	Case No.: P-09-066425-T Dept. No.: 26

NOTICE OF ENTRY OF ORDER

Please take notice that a Decision and Order re Marquis Aurbach Coffing's Motion to Adjudicate Attorney's Lien was entered in the above-captioned matter on the 9th day of February, 2017, a copy of which is attached hereto.

Dated this 16th day of February, 2017.

MARQUIS AURBACH COFFING

By _____
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 16th day of February, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

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I further certify that I served a copy of this document by mailing a true and correct copy

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

thereof, postage prepaid, addressed to:

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Pro Se

An employee of Marquis Aurbach Coffing

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ORDR

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

IN THE MATTER OF THE W.N. CONNELL and MARJORIE T. CONNELL LIVING TRUST, dated May 18, 1972	Case No.: P-09-066425-T Department XXVI

DECISION AND ORDER
Re: Marquis Aurbach Coffing's Motion to Adjudicate Attorney's Lien

The above referenced matter came on for hearing on Marquis Aurbach Coffing's (MAC) Motion to Adjudicate Attorney's Lien on September 7, 2016, and November 23, 2016. As the initial filing provided only redacted billings the counsel for the Successor Trustee, and Beneficiaries objected, the matter was continued to allow time for counsel for the Successor Trustee to review and comment on un-redacted billings. The primary objection raised by counsel for the Successor Trustee, as well as the Beneficiaries, was to the attorney's lien attaching to the MTC trust (100% of the total income) as opposed to prior trustee Eleanor Ahern's beneficial interest (35%), on the grounds that the attorneys representation benefitted only Eleanor in her individual capacity and not the MTC trust. The parties returned on January 18, 2017, at which time the Court took the matter under advisement to review *in camera* submissions from the parties (including the beneficiaries who have not reviewed the un-redacted billing statements). The Court, having reviewed the un-redacted billing statements together with the letter in support of the lien from MAC, the letter outlining the Successor Trustee's position on the proper party to pay the fees, and the letter from counsel for the beneficiaries, and the pleadings and papers on file herein the Court hereby enters the following decision:

The litigation herein has gone on for some time, and Eleanor has been represented by several different law firms. The litigation arises out of the WN and Marjorie Connell Trust which held Mr. Connell's separate property consisting primarily of Texas oil and

GLORIA L. STURMAN
DISTRICT JUDGE
DEPT XXVI
LAS VEGAS, NV 89155

gas lease royalties. The trust provided that upon WN's death, Eleanor would receive 35% of the proceeds for her lifetime, with Marjorie Connell receiving 65% for her lifetime. Prior to her death in 2009, Marjorie exercised her power of appointment to leave her share to her granddaughters, Jacqueline Montoya and Kathryn Bouvier, Eleanor was the Successor Trustee. In 2013 Eleanor unilaterally stopped distributions to her daughters, who filed a petition to compel distribution of the 65% to them. The Court found that Marjorie had authority to leave the 65% to her granddaughters, thus Eleanor had wrongfully withheld the funds from her daughters, which Eleanor appealed. Pending resolution of the appeal the Court ordered Eleanor hold the 65% in trust. A settlement was negotiated in the interim, but Eleanor terminated her counsel and hired MAC to successfully oppose enforcement of the settlement. Subsequently MAC withdrew and the law firm of Brownstein Hyatt began representing Eleanor. The Court found that Eleanor had wrongfully failed to hold the 65% in trust, and removed her as trustee. Fred Waid was appointed Successor Trustee for all of the beneficiaries, and attempted to identify how much was missing from the trust, and whether any funds could be recovered. The NV Supreme Court recently affirmed the finding that Eleanor had wrongfully withheld the 65% from her daughters. See, In the matter of the W.N. Connell and Marjorie T. Connell Living Trust, (unpublished Case No. 66231 & 68046 decided 1/26/2017).

MAC has properly perfected its attorney's lien pursuant to NRS 18.015. One of the objections raised by the Successor Trustee was that the lien cannot attach to proceeds because none were "recovered" by Eleanor. The court has authority to enter a judgment for attorney's fees where the client has submitted herself to the court's jurisdiction. See, Argentena Consolidated Mining Co. v Jolley Urga, et al, 125 Nev. 527, 216 P.3d 779 (2009). Here, Eleanor has submitted herself to jurisdiction of Court as a party, the Court also has jurisdiction over MAC, having appeared as counsel in the action. A charging lien does not attach where a party did not file an affirmative claim, rather it attaches "to the tangible fruits of the attorneys services." Id. In Argentena the plaintiff's claim against the defendant was dismissed, the defendant had not filed any claims against the plaintiff so there was nothing for the charging lien to attach to.

Here, Eleanor did file counter petitions, seeking to confirm her claim to the disputed 65%, as well as enforcement of the no contest clause against Jacqueline and Kathryn. The attorney's fees must arise on account of the suit. Id. Withdrawal by

GLORIA J. STURMAN
DISTRICT JUDGE
DEPT XXVI
LAS VEGAS, NV 89155

counsel before settlement does not prevent enforcement of its charging lien. See, McDonald Carrion et al v Bourassa Law Group, LLC. Unpublished, WL 57739793 (2015). The requirement that an attorney lien is enforced against an "affirmative recovery" is a generalized requirement so that the lien may attach to something of value. Id. Here, the fees charged by MAC arise from their defense of Eleanor's claim to the disputed 65%, as well defending her right to continued receipt of her 35% share.

A charging lien may have priority over other liens if notice is perfected before a settlement or judgment. See Golightly and Vannah v TJ Allen, LLC., 372 P.3d 103 (2016). Attorneys may perfect their attorney's lien after a settlement is reached but before funds are received. Id. Here, MAC successfully defeated enforcement of a settlement agreement disputed by Eleanor, and litigation has continued as to the amounts to be charged against Eleanor for breach of fiduciary duty, and enforcement of the no-contest clause against her beneficial interest. Thus the lien may attach to the sums she is affirmatively defending and/or claiming.

The Successor Trustee objects to the lien attaching to Eleanor's beneficial interest as this would violate the Spendthrift provisions of the Trust. As discussed herein, the unique nature of an attorney's charging lien allows a judgment to be entered against the "affirmative recovery" sought by a party to litigation. No distinction is made in the cases interpreting NRS 18.015 which would suggest that a party who is affirmatively defending their right to continue to receive funds from a Trust would have a defense to paying her attorneys by virtue of the fact that the Trust contains a spendthrift clause. To read such a defense into NRS 18.015 would place attorneys who take on Trust litigation at a disadvantage, an outcome which there is no indication the Legislature intended.

The Court has considered the MAC lien claim in light of the factors identified in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 455 P. 2d 31 (1969) factors and finds that the rates charged are reasonable in the community given the (1) qualities of the advocate(s) who have expertise, experience, and specialization in the field of Trusts and Estates litigation; (2) the character of the work which was complex and difficult, important to the outcome of the case, requiring significant time and skill and the need for counsel to familiarize themselves with the history of the case within a relatively shortened timeframe; (3) the work performed required skill time and attention; and (4) the successful outcome objecting to enforcement of a settlement agreement, until such time as the relationship broke down over Eleanor's misrepresentations regarding the

funds ordered to be held in trust. Counsel for the Successor Trustee does not challenge the rate or amount billed, nor do the beneficiaries.

MAC billed for three separate matters, Eleanor's lawsuit against her former attorney David Mann to recover the retainer paid to him; the will contest; and the instant Trust litigation. The retainer agreement was signed by Eleanor in her individual capacity and trustee. Eleanor opposing enforcement of the settlement agreement did not benefit any of the parties, especially not the Trust. Mr. Mann has taken the position that he only represented Eleanor, so seeking recovery of the fee did not benefit the Trust, nor did the Will Contest.

Based on a review of the un-redacted billings, it appears that all of the work undertaken by MAC was exclusively related to Eleanor's interests and not for the benefit of the Trust and could only be assessed against Eleanor's beneficial interest.

MAC also seeks costs in its charging lien. The documentation attached does not approach the specificity required pursuant to Cadle Co. v. Woods & Erickson, LLP, 131 Nev. Adv. Op. 15, 345 P.3d 1049 (2015) for an award of costs by the Court. Filing fees, transcript and recording fees can be confirmed upon a review of the Court's records, so any costs charged for those items will be allowed as part of the judgment. Any other costs, including but not limited to charges "scanning" and "copying" will not be allowed as part of the judgment.

Wherefore, the Court hereby GRANTS the Motion for Attorney's Lien, fees are awarded in their entirety, and costs are awarded in accordance with Cadle. The lien shall be a judgment only against Eleanor's beneficial interest in the Trust.

Dated this 9th day of February, 2017.

GLORIA STURMAN
DISTRICT JUDGE
DEPARTMENT 26

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of the foregoing **DECISION AND ORDER** Re: Marquis Aurbach Coffing's Motion to Adjudicate Attorney's Lien was E-Served, mailed or a copy was placed in the attorney's folder in the Clerk's Office as follows:

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And
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Mesquite, NV 8902 7

Linda Denman
Judicial Executive Assistant
Department 26

Exhibit 2

Notice of Entry of Judgment
and Judgment dated
February 22, 2017

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST DATED May 18, 1972, An Inter Vivos Irrevocable Trust.	Case No.: P-09-066425-T Dept. No.: 26

NOTICE OF ENTRY OF JUDGMENT

Please take notice that a Judgment in favor of Marquis Aurbach Coffing and against Eleanor Ahern for attorney fees and costs was entered in the above-captioned matter on the 28th day of February, 2017, a copy of which is attached hereto.

Dated this 1st day of March, 2017.

MARQUIS AURBACH COFFING

By _____
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 1st day of March, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

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I further certify that I served a copy of this document by mailing a true and correct copy

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

thereof, postage prepaid, addressed to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of THE W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST DATED May 18, 1972, An Inter Vivos Irrevocable Trust.	Case No.: P-09-066425-T Dept. No.: 26

JUDGMENT

Judgment is hereby entered in favor of Marquis Aurbach Coffing and against Eleanor Ahern for attorney fees in the amount of $151,228.69 and costs in the amount of $9,726.43 for a total judgment of $160,955.12, which amount shall accrue interest at the legal rate until such time it is paid in full.

Dated this 22 day of February, 2017.

DISTRICT COURT JUDGE

Submitted by:

MARQUIS AURBACH COFFING

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