

IN THE SUPREME COURT OF THE STATE OF NEVADA

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In the Matter of

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

Electronically Filed
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Case No. 73837 Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

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

APPELLANT'S REPLY APPENDIX

VOLUME 9: AAPP 944 through AAPP 977

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**In the Matter of: The W.N. Connell and
Marjorie T. Connell Living Trust, Dated
May 18, 1972, an Inter Vivos Irrevocable
Trust**

**Transcription from Audio of Oral Argument Before the En
Banc Court**

April 3, 2018



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BEFORE THE EN BANC COURT

CHIEF JUSTICE DOUGLAS PRESIDING

IN THE MATTER OF: THE W.N. CONNELL) SUPREME COURT
AND MARJORIE T. CONNELL LIVING) NO.: 71577
TRUST, DATED MAY 18, 1972,)
AN INTER VIVOS IRREVOCABLE TRUST.)

JACQUELINE M. MONTOYA and
KATHRYN A. BOUVIER,

Appellants,

vs.

ELEANOR CONNELL HARTMAN AHERN,

Respondent.

TRANSCRIPTION FROM AUDIO OF ORAL ARGUMENT

BEFORE THE EN BANC COURT

Oral Argument heard on April 3, 2018

10:30 a.m.

Las Vegas, Nevada

Transcribed by Melinda J. Songstad, RPR, CCR 919

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2

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17 JUSTICE MICHAEL P. GIBBONS

18 JUSTICE KRISTINA PICKERING

19 JUSTICE JAMES W. HARDESTY

20 JUSTICE MICHAEL A. CHERRY

21 JUSTICE RON D. PARRAGUIRRE

22 JUSTICE LIDIA S. STIGLICH

23

24

25

1 TRANSCRIPTION OF ORAL ARGUMENT FROM AUDIO

2 Heard on April 3, 2018 - 10:30 a.m.

3 * * * * *

4 CHIEF JUSTICE DOUGLAS: And that is

5 In Re: Connell Living Trust, 71577.

6 Mr. Kiefer, if you're ready. And if you
7 wish to reserve any time, please so state.8 MR. KIEFER: Good morning, Chief Justice.
9 If it please the Court, Daniel Kiefer on behalf of
10 the appellants. I'd like to reserve three minutes
11 for rebuttal.

12 CHIEF JUSTICE DOUGLAS: Thank you.

13 MR. KIEFER: It's important to note, I
14 think at the outset, that some of the issues in the
15 case have been narrowed by the briefing. And what
16 I mean by that is currently, based on the briefs that
17 have been submitted, there's no dispute regarding
18 Ms. Ahern's conduct. Whether or not she did these
19 things is not in question.20 Furthermore, there's no dispute regarding
21 the application of NRS 163.00195. And what I mean by
22 that is Ms. Ahern selected not even to address the
23 statute, and yet this Court has said that that statute
24 is mandatory. So what we're left with is we're left
25 with a pure legal question of whether or not

1 Ms. Ahern's undisputed conduct rises to the level to
2 breach or violate the no-contest clause.

3 JUSTICE: How old is she?

4 MR. KIEFER: I'm sorry, Your Honor?

5 JUSTICE: How old is she?

6 MR. KIEFER: I believe she's in her
7 eighties.

8 JUSTICE: Well, eighties. Is she 81?
9 Is she 89?

10 MR. KIEFER: I apologize, Your Honor. I
11 don't know the exact date.

12 JUSTICE: Okay. Before you go there, can
13 you address something for me, just so we have it laid
14 out? Violation and no-contest clauses of beneficiary,
15 or is it trustee? Would you address that first?

16 MR. KIEFER: Certainly. The no-contest
17 clause does not specify who the actor is. It says
18 a person. Whether you take an act -- whether you
19 have a dual role as trustee or beneficiary, it's
20 irrelevant, Your Honor, because the issue is the
21 settlor's intent. The settlor intended that anyone
22 related to this trust who has a beneficial interest
23 cannot take the acts specified in the no-contest
24 clause.

25 JUSTICE: I guess what concerned me

1 initially, and I went back through and I went
2 through the trust documents, ordinarily you have
3 a hold harmless clause for the trustee, for very
4 specific reasons, who is going to act as a trustee
5 without a hold harmless. And I went through the
6 trust, and I didn't see it, which surprised me. And
7 was there one? Did I miss something?

8 MR. KIEFER: I apologize, Your Honor. I
9 don't know exactly, but I do not believe there was
10 a hold-harmless clause. But to more directly address
11 your question, the issue of trustee versus beneficiary
12 is it's really a red herring. That was a defense that
13 was kind of created out of --

14 JUSTICE: Well, not if there was a hold
15 harmless. I don't -- I don't get that impression.
16 And, again, maybe we can get some light on it on the
17 other side.

18 MR. KIEFER: Sure.

19 JUSTICE: And would it -- what effect would
20 it have if there was a hold-harmless clause for the
21 trustee, in your opinion?

22 MR. KIEFER: Certainly. It would protect
23 the trustee in her capacity as trustee. But as this
24 Court noted in its last opinion in this very case,
25 Ms. Ahern took action as trustee for her own benefit

1 as beneficiary. In fact, one of the reasons this
2 Court was so upset with her the last time is because
3 she was taking inappropriate actions as trustee to
4 benefit herself as beneficiary.

5 JUSTICE: Yes. But doesn't that undermine
6 your argument if she was acting as a beneficiary? And
7 you can make that distinction. A beneficiary can't
8 make distributions; only the trustees. Wouldn't she
9 have to, by necessity, be acting as her role as
10 trustee?

11 MR. KIEFER: Well, let me put it this way,
12 Your Honor. If Ms. Ahern was only a beneficiary and
13 she wanted to steal \$2 million and she filed something
14 with the Court saying give me \$2 million, it would be
15 immediately rejected and she would have invoked the
16 no-contest clause. The fact that she had easier
17 access to the money due to her role as trustee should
18 not excuse the same act.

19 FEMALE JUSTICE: You know, I struggle,
20 though, to have the language of the no-contest clause
21 read as a hold, applied to her breaches of fiduciary
22 duty as the trustee. I understand that you think
23 you've hopped over that fence, but I have some real
24 difficulty with reading that clause as a hold. The
25 first sentence says, "We want these to be administered

1 and distributed without litigation or dispute of any
2 kind." I know you weight the word "or" pretty
3 heavily, but litigation or dispute in the context of
4 a no-contest clause usually means the initiation of
5 litigation over a trust or a distributive scheme. So
6 that's where my head goes with that first sentence.

7 And then you have the second sentence, which
8 is cluttered with a lot of appositives, but it talks
9 about seeking or "establish to assert." I don't know
10 what that means. But any claim to the assets of
11 these, and then you quote Webster's for what "attack"
12 means and that her contact as trustee was somehow
13 an attack on the Court. But I see this as more
14 litigation related. And these are forfeiture clauses.
15 We're to instruct -- to construe them very literally
16 and very closely. So I need you to persuade me why
17 her misconduct as trustee violated the no action --
18 or the no-contest clause.

19 MR. KIEFER: Certainly. First, I think we
20 need to address the issue of the no-contest clause.
21 It's a bit of a misnomer, and here's why. In the
22 statute, NRS 163.00195 at Sub 2 makes very clear that
23 the beneficiary's interests can be reduced or removed
24 based on conduct other than formal court action, but
25 for years --

1 FEMALE JUSTICE: But you're of the mind
2 on the tenth provision it's called no contest?

3 MR. KIEFER: Correct. But then it defines
4 no-contest clause at Section 6A as one or more
5 provisions in the trust that express a directive
6 to reduce or eliminate the share allocated to
7 a beneficiary or to reduce or eliminate the
8 distributions to be made to a beneficiary if the
9 beneficiary takes actions to frustrate or defeat
10 the settlor's intent as expressed in the trust.

11 FEMALE JUSTICE: You're reading the statute,
12 not the clause in the trust document.

13 MR. KIEFER: Correct.

14 FEMALE JUSTICE: I want you to walk me
15 through the clause in the trust document and tell me
16 how the clause -- through this woman's conduct.

17 MR. KIEFER: Certainly. So what you have to
18 remember is that the District Court took jurisdiction
19 of the trust, took jurisdiction and provided
20 instructions to Ms. Ahern, specific instructions:
21 Segregate the money, don't touch it, and provide me
22 an accounting. Ms. Ahern -- that would have been part
23 of the administration of the trust. When the Court
24 takes jurisdiction of a trust, it can then dictate the
25 administration of the trust. She then looked at those

1 orders, took the money, failed to segregate it, and
2 then submitted a false accounting where the District
3 Court, quote, said she intentionally misled the Court.
4 That was to seek, that was to oppose, set aside, or
5 attack the administration or distribution of the
6 trust. If the Court gives you an order regarding
7 administration of the trust and you disregard it,
8 you are certainly attacking or setting aside the
9 administration of the trust. And that would be how
10 I'd respond to that, Your Honor. And --

11 FEMALE JUSTICE: So you'd think any
12 violation of fiduciary duty by the trustee that has
13 a trust being administered by the Court, if the
14 trustee is also a beneficiary, will automatically
15 denote the no-contest provision?

16 MR. KIEFER: I do not, Your Honor. There
17 are --

18 FEMALE JUSTICE: Then tell me what
19 distinction in this clause you've drawn.

20 MR. KIEFER: Certainly. For example, I
21 can bring -- as beneficiary, I can bring a petition
22 compelling accounting from a trustee. I can bring
23 a petition asking for damages against a trustee for
24 failing to properly invest trust assets. I can bring
25 a petition against a trustee for failing to make

1 trust assets lucrative, i.e., renting out a house.

2 FEMALE JUSTICE: No. But my question was
3 the averse of that. What conduct by a trustee that
4 is in violation ostensibly of a court order would not
5 cause the triggering of a clause like this in your
6 reading?

7 MR. KIEFER: For example, if she failed to
8 account, certainly failed to account and therefore was
9 asked again to account.

10 JUSTICE: So, Counsel, under your position
11 and the examples you've cited, in every instance in
12 which the trustee is hauled into court under each
13 of the requests that you have made on behalf of
14 beneficiaries, the response the trustee makes to
15 those, even a meritless -- even a merit response,
16 a merit, one that has merit, would constitute a
17 violation of the no-contest -- the clause, Clause 10.

18 MR. KIEFER: Well, I would respectfully
19 disagree with that.

20 JUSTICE: Well, what would be the
21 distinction?

22 MR. KIEFER: The distinction would be what
23 the clause says. The controlling factor here is what
24 the settlors intended as directed by the primary --

25 JUSTICE: But you rely on the words

1 "attack," "oppose," and so forth. So when the
2 trustee walks into court and opposes the petition for
3 an accounting or a petition directing the trustee to
4 invest funds, and they oppose it, they've just
5 violated the no-contest clause in your view.

6 MR. KIEFER: Well, and I think it's
7 actually -- let me restate that, Your Honor.

8 JUSTICE: Have they?

9 MR. KIEFER: Based on what we've said, I
10 think yes, and I think that this Court's ruling in
11 ATS 1998 Trust would say the same thing, because this
12 Court examined, in July of last year, the exact same
13 provisions of the no-contest clause and found them to
14 be extremely broad. And in that case, a beneficiary
15 who merely alleged that the administration of the
16 trust had been improper, this Court said was a prima
17 facie violation of the no-contest clause. Now, that
18 beneficiary was saved by the safe harbor provisions.
19 And, in fact, in this case, there's never been any
20 allegation that any of the safe harbor provisions
21 apply.

22 JUSTICE: But isn't the point, from what
23 you've just made -- we're dealing with the trustee
24 here, not the beneficiary. I mean, yes, they have
25 dual capacities, but the role in which the trustee

1 is responding, both in the innocent response of saying
2 I oppose the petition directing me to invest funds in
3 a particular way because I've got investment managers
4 that tell me to do it this way and I'm going to follow
5 their advice or the facts in this case, where the
6 Court undertakes administration, tells the trustee to
7 do something, and the trustee wrongfully ignores the
8 Court's direction. In any event, the trustee is
9 acting in this capacity, not the beneficiary.

10 MR. KIEFER: Well, even if that's the case,
11 Your Honor, I'm not sure why we'd want to protect the
12 trustee who's also a beneficiary who is so willing
13 to violate court orders regarding administration --

14 JUSTICE: Well, there's lots of remedies
15 available, many remedies available to the Court, lots
16 of law enforcement remedies available.

17 MR. KIEFER: Certainly.

18 JUSTICE: But the no-contest clause is quite
19 a different matter, and so is the statute that governs
20 no-contest clauses.

21 MR. KIEFER: And I agree. And the key
22 there, Your Honor, is that the remedy of choice here
23 was designated by the settlors, and their intent
24 dominates. That's the key. The settlors were the
25 ones who put in this incredibly broad provision,

1 because they wanted to dictate how this trust was
2 run. And, in fact, it does not seem that there were
3 problems with the way that the trust was run for
4 many years. But now that she's run afoul, now that
5 Ms. Ahern elected to run afoul of the settlor's
6 intent, she can no longer reap the benefits from the
7 trust.

8 Essentially what we're asking, Your Honor,
9 is that the tap be shut off and it be shut off not
10 according to what we wanted but according to what the
11 settlors wanted. The settlors could have elected
12 any language they wanted in their no-contest clause.
13 They elected what this Court deemed extremely broad
14 language.

15 FEMALE JUSTICE: But how factually -- I'm
16 sorry -- factually is this applied to this -- the
17 non-contest provision? If this be that, kind of what
18 my colleagues are saying, she is not saying that she
19 was right to have that money. She agrees she owes
20 the trust money. She's not attacking the validity of
21 the trust. She's not making a claim contrary to the
22 trust. How factually are you fitting into this
23 clause?

24 MR. KIEFER: I'll give you the quickest
25 response to that, Your Honor. After she was removed

1 as trustee, she went to the bank and withdrew
2 \$500,000. I don't know how someone could make that
3 claim and go get that money and put it her own pocket
4 and not be making a claim to trust assets.

5 JUSTICE: With regard to that, would you
6 address something simply for me?

7 MR. KIEFER: Certainly.

8 JUSTICE: In your opinion, was she subject
9 to any undue influence of the others? And if she
10 wasn't, tell me why not.

11 MR. KIEFER: She was absolutely not subject
12 to undue influence, and this is why. The entering
13 brief has done a good job of trying to muddle this
14 situation regarding undue influence. Ms. Ahern
15 attended the trial both days. She could have got
16 on the stand and testified regarding her -- the
17 alleged influence. She elected not to. She didn't
18 call any witnesses regarding that, except for her
19 daughter. And here's the problem that belies the
20 whole argument. She -- prior to that, she had
21 submitted an affidavit to the Court saying Ms. Noona
22 has never influenced me; she has never had any effect
23 on my decisions regarding the trust. That means that
24 her own testimony stands unrefuted on the record.

25 CHIEF JUSTICE DOUGLAS: Two minutes.

1 JUSTICE: So how do you explain --

2 CHIEF JUSTICE DOUGLAS: He's at two minutes.

3 JUSTICE: I'm not going to use up your time.

4 MR. KIEFER: I'll reserve the rest for
5 rebuttal.

6 JUSTICE: Thank you.

7 MR. KIEFER: If you don't mind, Your Honor.

8 CHIEF JUSTICE DOUGLAS: Thank you.

9 Mr. Lenhard.

10 MR. LENHARD: May it please the Court,
11 Counsel. I appear today on behalf of Eleanor Connell
12 Ahern, the former trustee of the Connell Trust.

13 I'm in a somewhat unusual position with the
14 Court as far as today, because I'm asking you to
15 affirm an order. To say it was harsh on my client
16 would be a mild understatement. I'm asking you to
17 affirm or -- explaining her conduct as trustee, affirm
18 an order where it was determined that she had
19 improperly administered the trust. She had violated
20 her duties as trustee. She had failed to segregate
21 65 percent of the trust per a court order. She had
22 misapplied trust income. I'm asking that order be
23 affirmed because we did not realistically challenge
24 those findings at the trial.

25 I'm also agreeing that her interests have

1 been surcharged, as the Court ordered, to repay the
2 funds that had been improperly paid. And, in fact,
3 her interest has been surcharged, and it continues
4 to be surcharged today. As well, she had to pay
5 compensatory damages, punitive damages, and attorneys'
6 fees.

7 The other beneficiaries to this trust have
8 been made whole plus. The only thing we challenged at
9 that trial, and Judge Sturman agreed, was that she
10 should not be removed as a beneficiary of that trust.
11 She should not forfeit her interest as a beneficiary
12 of that trust. I would not be standing here today if
13 the daughters would have accepted that decision of the
14 Court. I would not be challenging that order. I'm
15 standing here today because the daughters want more.
16 They basically want to throw their mother out on the
17 street, and I have to oppose that. She is a
18 beneficiary of that trust, and she has not violated
19 that no-contest clause.

20 JUSTICE: Can I have you address something?
21 I was about to ask a question of opposing counsel.
22 He indicated that the language on the no-contest
23 provision was very broad in that the settlors
24 specifically created that language, but in reading
25 that, you know, the argument on the other side of

1 that is, well, if they specifically wanted to craft
2 that language, why didn't they include the trustee's
3 actions as well as other persons and the
4 beneficiaries?

5 MR. LENHARD: Let me address that, if I can.
6 First of all, I don't see that language as that rock.
7 It is a classic, solid litigation, no-contest clause.
8 Don't file suit. If you file suit, you're going to
9 get one dollar. That's what that clause says. What's
10 the beginning? The grantor specifically desired that
11 these trusts created here and be administered and
12 distributed without litigation or dispute of any kind.
13 Could it be any clearer?

14 Now, if the settlors decide to apply the
15 no-contest clause to the actions of the trustee, it
16 would have been very easy to state that exact language
17 in the no-contest clause. Its absence is telling.
18 That tells the Court -- it told the District Court,
19 and I'm hoping it tells this Court, that the settlors
20 did not intend to include the actions of the trustee
21 under the no-contest clause.

22 JUSTICE: If you did -- if you didn't
23 interpret it that way, would you ever have a case
24 where any trustee who happened to be a beneficiary
25 would agree to act as a trustee? And here, when you

1 have family relationships and you specifically want
2 a particular trustee, it just seems to diverge. It
3 just doesn't make sense.

4 MR. LENHARD: I'll tell you this. If the
5 trustee with the potential custody is my client, I
6 wouldn't let them do it.

7 JUSTICE: Unless there's a hold harmless
8 clause.

9 MR. LENHARD: Because the risk is too great.

10 JUSTICE: Mr. Lenhard, would you
11 distinguish, if you can, the assertion that was made
12 that this differs because there was a specific
13 overlay -- that is, order of the Court -- of what the
14 client was not to do, the trustee.

15 MR. LENHARD: I don't see that as different,
16 because, again, she violated the Court's order. And
17 clearly that's not in dispute, Your Honor. She
18 violated the Court's order as the trustee. And the
19 actions of the trustee --

20 JUSTICE: But there's no -- in this case,
21 as Justice Parraguirre pointed out, there's no hold
22 harmless.

23 MR. LENHARD: I understand that. Clearly,
24 there's not a hold harmless. But, again, at the
25 settlor's desire to hold the actions of Ms. Ahern for

1 liability as the trustee, they would have said actions
2 of the trustee would be included in the no-contest
3 clause. They are absolutely omitted. They're not
4 there. That should -- hopefully would tell the Court
5 it was not intended to include the actions of --

6 JUSTICE: Shouldn't we strictly construe
7 a forfeiture clause?

8 MR. LENHARD: Absolutely. We cite that in
9 our brief. And I don't believe there is a Nevada case
10 on point in a trust circumstance. But Nevada law is
11 clear. Forfeitures, forfeiture clauses, are to be
12 strictly construed. If you strictly construe this
13 language, Ms. Ahern remains in the trust as a
14 beneficiary because her actions were all taken as
15 a trustee. And keep in mind that was a factual
16 determination by Judge Sturman. And I think the Court
17 is well aware of the standard of review of a factual
18 determination.

19 JUSTICE: Abuse of discretion.

20 MR. LENHARD: Exactly. And can you say
21 that, following that two-day trial, Judge Sturman
22 abused her discretion in determining that Ms. Ahern
23 was acting as a trustee and abused her discretion --
24 or, actually, the interpretation of the no-contest
25 clause was a de novo repute. Now, can you state that

1 she reviewed and interpreted this clause improperly
2 when clearly the clause does not call for actions of
3 a trustee?

4 JUSTICE: Let me ask you one more question.
5 I hate to take up your time. I think I misheard you
6 and --

7 MR. LENHARD: That is --

8 JUSTICE: I might have misheard you earlier
9 or misunderstood. Did you say her distributions as
10 a beneficiary have ceased?

11 MR. LENHARD: They're on hold. She can
12 surcharge. Let me --

13 JUSTICE: Right. The surcharge and the
14 distributions ceasing pursuant --

15 MR. LENHARD: The --

16 JUSTICE: The District Court -- the District
17 Court said there was no violation of the no-contest
18 clause. So why were they ceased?

19 MR. LENHARD: Because she -- Judge Sturman
20 decided -- now, keep in mind I went through this trial
21 and then before the second trial I was removed as
22 counsel. So I'm here on this appeal. So I'm going
23 to tell you what I'm not in.

24 JUSTICE: Okay.

25 MR. LENHARD: Okay? Judge Sturman

1 determined that her actions as trustee -- and there
2 had been money that had been misappropriated had to
3 be repaid by her other interests as a beneficiary in
4 the trust, and that surcharge is still in effect.

5 JUSTICE: I see. So it's not as a result
6 of a violation of the no-contest clause in your --

7 MR. LENHARD: No. No, sir.

8 JUSTICE: Okay.

9 MR. LENHARD: Absolutely not.

10 JUSTICE: I understand.

11 MR. LENHARD: And that surcharge exists
12 today, and my understanding is it's supposed to be
13 paid off.

14 JUSTICE: Okay. Got it.

15 MR. LENHARD: But she has not received
16 a dime from that trust --

17 JUSTICE: So let's be clear. There was --
18 Judge Sturman found no violation of the no-contest
19 clause?

20 MR. LENHARD: I hope I'm as clear as I can
21 be, and if I'm not being clear, let me make this as
22 clear as I know how to make it. She found no
23 violation of the no-contest clause.

24 JUSTICE: And our standard review is abuse
25 of discretion?

1 MR. LENHARD: On a factual determination as
2 to the -- her actions as a trustee. As to the legal
3 interpretation of the no-contest clause, I believe
4 that's a de novo review, in all candor. So it's
5 a little different standard, obviously.

6 JUSTICE: Next review.

7 MR. LENHARD: Now, there's something else
8 and -- I'm so tall, I have a hard time getting down
9 to the --

10 CHIEF JUSTICE DOUGLAS: Seven and a half
11 minutes.

12 MR. LENHARD: There's a big -- there is a
13 big issue that's being avoided in this case.

14 JUSTICE: Under risk points?

15 MR. LENHARD: Yes, sir.

16 JUSTICE: Sounds like I read this stuff;
17 right?

18 MR. LENHARD: If -- I have to disagree with
19 my colleague on the issue of undue influence. We
20 spent two days at trial walking through two documents
21 that were submitted by counsel for the appellants.
22 One was what we call the "Let's get the record
23 straight" document. The second was the EPS document,
24 the Elderly Protection Services document. And I just
25 want to state: That was returned by the daughters

1 who submitted it to Elderly Protection Services. We
2 went on the assumption that when those documents were
3 submitted, they were truthful. The documents
4 submitted by counsel to the Court, the "Let the record
5 be straight," clearly has the representation by
6 counsel it was true and accurate. But even with that
7 understanding, we asked Ms. Montoya at trial about
8 that document. And she inspects it. She reviewed it
9 for accuracy. She saw nothing inaccurate. And she
10 was comfortable with representations contained in that
11 document.

12 And what did we establish as a result of
13 those two documents? It's a rather sad picture, but
14 it's important for you to understand that picture
15 because it puts into context Judge Sturman's ruling.
16 But before we even go there, keep in mind that one
17 year before this trial, Fred Wade, the trustee, went
18 to the Court in April of 2015. And he saw it guarding
19 their life, but he didn't properly notice the hearing,
20 and Judge Sturman was correct in denying it at that
21 time.

22 But what did Mr. Wade say? The independent
23 court-appointed trustee. He said there were two
24 powers of attorney out there granted by Ms. Ahern. He
25 was concerned. And, more importantly, what he said

1 was, "Who knows how much these people have billed her
2 for." Fred Wade knew as early as 2015 that there were
3 people influencing this woman and had their hands in
4 her pocket.

5 What did we establish at trial through the
6 EPS document and the "Let the record be straight"
7 document? First we established that she is eccentric.
8 Eleanor is an eccentric person who has a lot of people
9 in her life that do not have her best interests at
10 heart.

11 JUSTICE: But does that let her off the hook
12 in terms of what she was charged to do?

13 MR. LENHARD: No. But she paid a horrible
14 price as a result of it. She paid millions of dollars
15 back in compensatory and punitive damages and
16 determinants' fees. She has paid the price.

17 JUSTICE: You know, this case --

18 MR. LENHARD: She has paid the price.

19 JUSTICE: This comes under, partially, the
20 first part of this no-contest provision where it talks
21 about without litigation, but that's not a part of
22 this, or "a dispute of any kind." This is kind of
23 a dispute of any kind that we're into. You have --

24 MR. LENHARD: You -- I'm sorry. I didn't
25 mean to cut you off, sir.

1 I don't think you can read the second part
2 of that clause without reading the first part of that
3 clause which --

4 JUSTICE: That's why they put them over
5 there, Counsel. And I know you want to distinguish,
6 but I'm -- I have a problem with --

7 MR. LENHARD: Let's -- let's be --

8 JUSTICE: It means that.

9 MR. LENHARD: Let's do "or" and say they're
10 disjunctive rather than conjunctive.

11 JUSTICE: Judge Sturman had no problem with
12 the order.

13 MR. LENHARD: No, she didn't.

14 JUSTICE: But Judge Sturman is not reviewing
15 this justice hearing.

16 MR. LENHARD: I understand that.

17 JUSTICE: I'm one vote out of seven.

18 MR. LENHARD: I understand.

19 "Establish to assert any claim to the assets
20 of these trusts established herein. Attack or oppose
21 or seek to set aside." That still implies litigation.
22 That implies an effort to go into court and set aside
23 the trust. That is what Judge Sturman found in
24 reviewing the totality of these documents.

25 JUSTICE: And you left off the last part,

1 "and distribution of said trust."

2 MR. LENHARD: But you have to read that --

3 JUSTICE: And if there's no money, you can't
4 distribute, and that was the issue that got borne out
5 to us by the taking of funds. And I don't know
6 whether the record got into that, whether there was
7 a loan document or anything else to categorize it, or
8 whether it was just a flat taking of the money.

9 MR. LENHARD: To say it was confused as to
10 how the money went back and forth would be a mild
11 understatement. I'm going to read that in the side
12 section and get back to the interpretation because,
13 again, I say you have to read the document as a whole.
14 But let's only read it from "or" on. It's still
15 "Attack, oppose, or seek to set aside the
16 administration or distribution of set assets." That
17 implies some type of effort to go into court and
18 somehow reverse or set aside the language of the trust
19 document. That was not done here. But I think you're
20 talking about a policy here. And let me make it real
21 clear. Out of her interest in this estate, the
22 daughters have been made totally whole. They have
23 not lost a nickel in this case.

24 JUSTICE: And they tried to get a
25 guardianship for this woman in 2015?

1 MR. LENHARD: The trustee tried to have
2 a guardian ad litem appointed. It was denied.

3 JUSTICE: And how old is she? Is she 81,
4 89, 86?

5 MR. LENHARD: She's in her early eighties.
6 She's sitting in the courtroom today.

7 All I can say, again, is that through the
8 actions of Mr. Wade, through the actions of the Court,
9 she has been made whole. And I want to go back again
10 to the influence issue, because this is a sorry story
11 that was presented to the Court. And it's something
12 that I think bothered Judge Sturman. And so we're
13 clear, Judge Sturman has stated concerns about undue
14 influence from my first day in this case. But as
15 early as 2012, the testimony was clear that Ms. Ahern
16 disappeared from the daughters' lives, that Luana
17 became her financial advisor, her spiritual advisor,
18 and her accountant. She took over her banking and
19 financial relationships.

20 But even more disturbing than this was the
21 testimony presented through the "Let the record be
22 straight document" of one elderly home caregiver, a
23 lady names Monelle. She told us about efforts to keep
24 the mother from the daughters. She was told to pray
25 to keep the mother from the daughters. She was told

1 by Luana the daughters wanted to institutionalize
2 Ms. Ahern. When the daughters confronted Ms. Ahern
3 with these facts, she said, I don't want to have to
4 choose between Luana and the two of you. It's kind of
5 a sad story, isn't it? Well, it gets worse. One of
6 the neighbors related the incident to the daughters
7 where Ms. Ahern thought they were trying to kill her.

8 Then we go on to the banking issues set out
9 by the Elderly Protection Services document. We had
10 an incident where Ms. Ahern shows that the bank is
11 trying to withdraw a significant sum of money. She
12 was told God told her to do it. In the alternative,
13 Suzanne and Luana told her to do it. Luana tries to
14 withdraw funds from the drive-up window. The bank,
15 of course, wouldn't allow it.

16 CHIEF JUSTICE DOUGLAS: Finish your
17 statement, please.

18 MR. LENHARD: All right. All I'm stating is
19 this is a woman who was influenced by others and did
20 not have her best interests at heart. This fact is
21 taken into account by Judge Sturman. When you apply
22 these facts to the no-contest clause, I am confident
23 you will determine the settlor did not anticipate the
24 situation for the trustee that his elderly daughter
25 could be influenced by others and, as a matter of law,

1 would be thrown out of the trust. And as a matter of
2 policy, I can't believe that's the policy of the State
3 of Nevada to possess nothing more than retribution,
4 undue advantage. Thank you.

5 CHIEF JUSTICE DOUGLAS: Thank you.

6 Counsel, you have a little less than two
7 minutes for rebuttal.

8 MR. KIEFER: Thank you, Your Honor.

9 JUSTICE: Why should we ignore the issue of
10 undue influence in this case of an 81-year-old or
11 82-year-old person? Right? It's -- you've done a
12 big thing in this court. You should ought to make
13 sure that people are protected. They're protected
14 persons now.

15 Sir, we have a guardianship commission that
16 Justice Hardesty was able to create. And maybe this
17 would not have existed had his commission and the
18 statutes been in effect with what we have now with
19 protection of people who are in their eighties.

20 MR. KIEFER: And I totally understand. If
21 I had heard what I just heard from opposing counsel,
22 I would feel the same way. But there's a big problem
23 with what was just stated: It was all argument.
24 There was no testimony on the --

25 JUSTICE: Excuse me. Just -- can we get the

1 clock started, please?

2 MR. KIEFER: He specifically stated
3 Ms. Noona did this, Ms. Ahern did this. Neither of
4 those parties took the stand and testified as to
5 anything. What he's relaying is information that he
6 has been told or that's merely argued. We had a trial
7 for this very purpose. Whatever it was they wanted
8 the Court to know, they need to tell the Court.

9 Now, here's the other issue, Your Honor.
10 How can we say on one hand that she should be
11 surcharged and punitively punished but she's not
12 responsible for her actions because of undue
13 influence?

14 JUSTICE: So you want to take her trust fund
15 away?

16 MR. KIEFER: The Court is all -- and, again,
17 this isn't about making the beneficiaries whole.

18 JUSTICE: Wait. You didn't answer my
19 question. So you want to take her trust money away?

20 MR. KIEFER: The settlors want to --

21 JUSTICE: The beneficiary.

22 MR. KIEFER: The settlors want to take her
23 money away because they specifically --

24 JUSTICE: You're their advocate.

25 MR. KIEFER: -- had forbidden her actions.

1 JUSTICE: You're their advocate.

2 MR. KIEFER: I agree, Your Honor. But
3 the problem is, if ever there was a case where a
4 no-contest clause should be enforced, it's this one.
5 This woman stole millions of dollars. And the one
6 thing that can't save her, despite her dual role
7 as trustee and beneficiary, is that right after she
8 was removed as trustee, acting with no authority as
9 trustee, she went to a bank and took \$500,000. If
10 that doesn't violate the no-contest clause, I'm not
11 sure what does.

12 JUSTICE: Counsel -- Counsel, we've been
13 informed that most of this money has now been paid
14 back and such. The real question for us is we have
15 a standard abuse of discretion. Why was the District
16 Court wrong?

17 MR. KIEFER: Sure. First -- first, the
18 no-contest clause was not deemed not triggered. The
19 only thing that Judge Sturman said was it was too
20 harsh. That's not an acceptable exemption under
21 NRS 163.00195.

22 JUSTICE: No. She said it wasn't violated.

23 MR. KIEFER: She said it was too harsh, in
24 fact, was what it --

25 JUSTICE: The ruling is it wasn't violated.

1 MR. KIEFER: I would respectfully disagree,
2 Your Honor. She said it was too harsh. Thank you.

3 JUSTICE: I'm glad I get to write.

4 CHIEF JUSTICE DOUGLAS: With that, this
5 matter is --

6 (End of audio transcription.)

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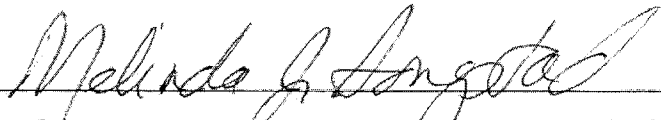
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I, Melinda J. Songstad, certify that the foregoing is a true and correct transcription, to the best of my ability, of the audio file as provided to me.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in this matter, and further that I am not financially or otherwise interested in the outcome of this matter.

Certified to by me this 5th day of June, 2018.


Melinda J. Songstad, RPR, CCR 919