

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 In the Matter of the:

3 FUND FOR THE
4 ENCOURAGEMENT OF SELF
5 RELIANCE

6 An Irrevocable Trust.

7 DOAN L. PHUNG,

8 Appellant,
9 vs.

10 THU-LE DOAN,

11 Respondent.

Supreme Court No. 71064 Electronically Filed
District Court Case No. 18-0018 Jun 01 2018 12:21 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

12 An Appeal from The Eighth Judicial District Court

13 The Honorable Gloria Sturman, Presiding

14 **APPELLANT'S OPENING BRIEF**

15 Michael R. Mushkin, Esq.
16 Nevada Bar No. 2421
17 L. Joe Coppedge, Esq.
18 Nevada Bar No. 4954
19 **MUSHKIN CICA COPPEDGE**
20 4495 South Pecos Road
21 Las Vegas, Nevada 89121
22 (702) 454-3333 Telephone
 (702) 386-4979 Facsimile
 michael@mccnvlaw.com
 jcoppedge@mccnvlaw.com

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1 **I. Jurisdictional Statement**

2 The Supreme Court or Court of Appeals has jurisdiction over this matter
3 pursuant to NRAP 3A. This appeal is from a final Order Denying Respondent's
4 Objection to Commissioner's Report and Recommendation Confirming Prior
5 Report and Recommendation, Granting Petition to Assume Jurisdiction of Trust,
6 Making Additional Findings of Fact and Conclusions of Law, Confirming Co-
7 Trustees and to Modify Trust (the "Order").¹ The Order was filed on December
8 27, 2017. Notice of Entry of the Order was entered on December 28, 2017.²
9 The Notice of Appeal was filed on January 19, 2018.³

10 **II. Routing Statement**

11 This matter is presumptively retained by the Supreme Court under NRAP
12 17(a)(13) and NRAP 17(a)(14) as the appeal concerns a question of first
13 impression of Nevada law and the principal issue is a matter of statewide public
14 importance. The question of whether a trustee of a wholly charitable trust that
15 benefits the public may decant trust assets over the objection of other trustee(s)
16 is not only a matter of first impression in Nevada, but this specific question has
17 not been addressed by other jurisdictions. Judge Sturman acknowledged the
18 importance of the principal issue by stating, "... this is -- this is law, new law in
19 the State of Nevada. But it's a really important issue. And because the kind of
20 things. . . it's becoming a big deal. So we need to know what the law in Nevada

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22 ¹ AA Vol. V 001313 – 001320

² AA Vol. VI 001321 – 001324

³ AA Vol. VI 001333 – 001334

1 is.”⁴ Thus, this case involves a significant issue of first impression that merits
2 being retained by the Supreme Court.

3 Further, the principal issue, whether a trustee has a legal right to decant a
4 wholly charitable trust, involves a significant question of statewide public
5 importance as the public policy consequences could be far reaching. If the
6 district court’s decision is allowed to stand, there could be a dramatic increase
7 in the number of lawsuits to decant charitable trusts as disenchanted trustees of
8 other charitable trusts could use these decisions to decant funds, which would
9 expand the decanting statute far beyond its intended purpose.

10 **III. Statement of Issues Presented for Review**

11 1. Whether the district court erred in finding and ordering that Thu-
12 Le Doan has a legal right to decant the Fund for the Encouragement of Self-
13 Reliance (“FESR” or the “Trust”), a wholly charitable trust.

14 2. Whether the district court erred in applying NRS 163.556 to allow
15 the division of a FESR, a wholly charitable trust.

16 3. Whether the district court erred by adopting the Probate
17 Commissioner’s reasoning that the only material facts for the court to find in
18 applying NRS 163.556 to FESR is whether a trustee (i) has the power of invasion
19 of principal of the trust assets and (ii) there is no reduction of any income interest
20 of any income beneficiary of the trust.

21 4. Whether the district court erred by declining to enforce the parties’
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⁴ AA Vol. VII 001434

1 contract rights as set forth in a Marital Settlement Agreement, which does not
2 allow Thu-Le to invade the Trust assets of FESR and which limits the parties'
3 ability to make large distributions from Trust assets.

4 5. Whether the district court erred by failing to acknowledge the
5 disputed issues of material fact which require the setting of a discovery schedule
6 and evidentiary hearing pursuant to EDCR 4.17.

7 6. Whether the district court erred by adopting the Probate
8 Commissioner's reasoning that he was relying on Thu-Le's ability to serve as a
9 trustee, but he did not inquire about her conclusive incapacity to serve, her
10 misuse of FESR funds, her questionable conduct with respect to another
11 charitable trust or her removal as a trustee of the Trust.

12 **IV. Statement of the Case**

13 These cases follow the parties' 2012 divorce. Petitioner below, Thu Le
14 Doan ("Thu-Le"), after four (4) years of trying unsuccessfully to have the
15 Family Court divide the charitable trusts, filed separate Petitions to Assume In
16 Rem Jurisdiction of Trust, Confirm Trustee and to Modify "Trust (the
17 "Petition") on September 22, 2016, requesting that the assets of two (2) wholly
18 charitable trusts, FESR and the Vietnamese-American Scholarship Fund
19 ("VASF")⁵ be divided equally into separate irrevocable charitable trusts or, in
20 the alternative, that the assets be divided equally and Thu-Le's portion be
21 decanted into her own charitable trust.⁶ Among other things, the FESR Petition

22 ⁵ VASF is the subject of a related appeal in case number 74963.

⁶ AA Vol. I 000743 – 000789

1 made demonstrably false allegations against Respondent, Doan L. Phung
2 (“Phung”) including that he made political donations in violation of the trust
3 charters and that she can no longer work with Phung because the relationship
4 has become hostile.⁷

5 Phung filed an objection on October 12, 2016.⁸ The matter was initially
6 scheduled to be heard on November 4, 2016;⁹ however, the hearing was moved
7 to October 14, 2016 on an order shortening time requested by Thu-Le in an effort
8 to quash the Trust’s previously planned board meeting scheduled for October
9 15, 2016.¹⁰

10 At the initial hearing, without taking any evidence, the Probate
11 Commissioner recommended decanting for the simple reason Thu-Le claimed
12 she could not work with Phung and that the parties were at “loggerheads”,
13 merely because she said so, and it was best for everybody to divide the Trusts.¹¹
14 Notably, the Probate Commissioner later admitted he was not fully prepared for
15 the initial hearing.¹²

16 Following the entry of the Report and Recommendation Granting Petition
17 to Assume Jurisdiction of Trust, Confirming Co-Trustee and to Modify Trust,¹³
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19 ⁷ AA Vol. I 000745 – 000746

20 ⁸ AA Vol. I 000815 – 000836

⁹ AA Vol. I 000793 – 00794

21 ¹⁰ AA Vol. I 000798 – 000808

¹¹ AA Vol. II 000847 – 000852

22 ¹² AA Vol. I 000694

¹³ AA Vol. II 000847 – 000852

1 Phung filed an objection,¹⁴ asserting among other things, that the Probate
2 Commissioner misapplied the decanting statute to a wholly charitable trust, and
3 in the alternative, Phung requested discovery and an evidentiary hearing
4 pursuant to EDCR 4.17 to ferret out disputed facts. The objection was heard by
5 the district court on February 1, 2017. At the hearing, the district court
6 determined, (1) it is unclear from the record and Report and Recommendation
7 whether the Probate Commissioner considered if there are any questions of fact
8 that will impact or militate a different relief under the decanting statute, and (2)
9 it is unclear from the record and Report and Recommendation the analysis that
10 the Probate Commissioner went through to reach his conclusion to decant.¹⁵

11 The district court remanded this matter back to the Probate Commissioner
12 for clarification of certain questions, including (1) whether there are any
13 questions of fact that are material to an analysis under the decanting statute, (2)
14 whether the Probate Commissioner ascertained those material facts, and if so,
15 what are the material facts and how did he consider them in his analysis, (3)
16 whether the Probate Commissioner determined there are material facts not in
17 dispute, and if so, what are the material facts that are not in dispute, and (4)
18 whether there are material facts that support a different relief other than
19 decanting.¹⁶

20 Following a hearing on April 28, 2017, the Probate Commissioner issued

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¹⁴ AA Vol. II 000863 – 000961

22 ¹⁵ AA Vol. IV 001101 – 001102

¹⁶ AA Vol. IV 001101 – 001102

1 a new Report and Recommendation Confirming Prior Report and
2 Recommendation Granting Petition to Assume Jurisdiction of Trust, Making
3 Additional Findings of Fact and Conclusions of Law, Confirming Co-Trustees
4 and to Modify Trust, entered on August 4, 2017, which among other things,
5 found:

6 (ii) that . . . a trustee has the absolute right to decant a trust with the
7 only requirements being that a trustee has the power of invasion of
8 principal and that there is no reduction of any fixed income interest of any
9 income beneficiary of the trust;

10 (iii) that the only material facts for the Court to find in applying
11 NRS 163.556 is whether a trustee has power of invasion of principal and
12 that there is no reduction of any fixed income interest of any income
13 beneficiary of the trust;

14 (iv) that although the facts on whether the trustees are at
15 loggerheads are illuminating, such facts are not determinative to the
16 ultimate solution, which is an absolute right given to a trustee who holds
17 the power of invasion of principal and there is no reduction of any fixed
18 income interest of any income beneficiary of the trust;

19 (v) that the Court does not have to depend upon specific evidences
20 or instances of evidence of why things may or may not be workable;

21 (vi) that the Court is relying upon the ability and rights of the
22 trustees to the exclusion of the parties contract rights¹⁷;

23 . . .

24 Phung filed an objection to the new Report and Recommendations.¹⁸

25 Following oral argument on October 12, 2017, the district court entered the

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¹⁷ AA Vol. IV 001185 – 001192

¹⁸ AA Vol. V 001196 – 001278

1 Order on December 27, 2017.¹⁹ Among other provisions, the Order indicated
2 that although the Probate Commissioner incorrectly used the term “absolute
3 right”, he correctly analyzed NRS 163.556 in finding that Thu-Le has a right to
4 decant FESR. Based upon that and other findings, the district court ordered that
5 Thu-Le has a legal right to decant FESR.²⁰ This appeal followed.

6 **V. Statement of Facts**

7 Respondent Phung and Petitioner Thu-Le were married in 1970 and lived
8 together over forty (40) years before divorcing in 2012. The sole breadwinner
9 of the family was Phung, who established his own nuclear engineering company,
10 PAI Corporation (“PAI”), a Tennessee corporation. In over thirty (30) years of
11 working for PAI, Phung earned millions with which he established three charity
12 organizations to benefit the needy – VASF, FESR and the Institute for Vietnam
13 Future (“IVNF”). Only VASF and FESR are at issue in the Petitions filed by
14 Thu-Le. Although Thu-Le performed no role in setting up the trusts, Phung
15 made her a trustee of VASF and FESR.²¹

16 **A. FESR is a wholly charitable trust benefitting the public.**

17 FESR was created by Phung in 1997 to empower qualified but
18 disadvantaged people and organization activities in Vietnam and the United
19 States to encourage the pursuit of self-reliance. The purposes of FESR include,
20 (1) assisting organizations that loan macro amounts of money at favorable

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22 ¹⁹ AA Vol. V 001313 – 001320

²⁰ AA Vol. V 001313 – 001320

²¹ AA Vol. I 000816 – 00822

1 interest rates for the purpose of enabling individuals to pursue a trade or
2 business; (2) paying macro amounts of money to individuals who are
3 qualified as above but are nevertheless unable to meet the loan criteria; to
4 individuals from a disadvantaged background who are qualified to attend
5 Vietnamese or American institutions of training but because of their
6 financial need have difficulty in so doing; . . .²²

7 FESR is a unitrust, utilized by Phung and Thu-Le to obtain Federal and
8 state charitable tax deductions. The following sections of the Charter are
9 pertinent to the present discussion.

10 Section 2: RESTRICTION ON USE OF TRUST FUND

11 ...no part of the Trust fund shall be used to carry on propaganda or
12 otherwise attempt to influence legislation, or to participate in any political
13 campaign...other provisions of this instrument notwithstanding, **the**
14 **Trustees shall not engage in any act of self-dealing...** (emphasis
added.)

15 Section 6: APPOINTMENT OF SUCCESSOR TRUSTEE

16 The number of Trustees shall not exceed five (5) individuals, two of
17 whom are Trustors or selected exclusively by one or both Trustors.
18 Trustors expressly reserve the right during their lifetime to appoint
19 additional Trustees and the Trustees may elect additional Trustees by not
20 less than two-thirds (2/3) majority vote. The term for which Trustees are
21 authorized to act shall be for five years. **A Trustee shall be removed by**
22 **not less than two-thirds (2/3) majority vote of all Trustees** when they
deem that such Trustee is incompatible or not in sympathy with the
purpose of the Trust, or for any other just cause. In the event that a
vacancy shall occur because of death, resignation, incapacity to act, or
removal of a Trustee, then the remaining Trustees shall, within sixty (60)

²² AA Vol. I 000752

1 days from the date of such vacancy, fill the vacancy. **The failure of a**
2 **Trustee to attend any of the meetings of Trustees for three (3)**
3 **consecutive meetings shall be deemed conclusive as his or its**
4 **incapacity to act.** (emphasis added.)

5 Section 9: GIFTS IRREVOCABLE

6 Gifts made to the Trust **shall be irrevocable.** (emphasis added.)

7 Section 10: TRUST IRREVOCABLE

8 This CHARTER is irrevocable and may not be amended or modified,
9 provided, however, that if for any reason whatsoever this Trust fails to
10 qualify as tax-exempt charitable Trust, such changes as are necessary for
11 the Trust to so qualify may be made by Trustors so long as they are living
12 and competent, otherwise and thereafter, by a court of competent
13 jurisdiction.²³

14 **B. The MSA is a court approved contract between the parties.**

15 In 2010, after 40 years of marriage, Thu-Le filed for divorce. Phung did
16 not contest the divorce and agreed to the MSA prepared by Thu-Le's attorney.
17 The MSA was signed on February 22, 2012 and made an integral part of the
18 divorce.²⁴ The Decree of Divorce was entered on April 12, 2012, which
19 "approved, adopted, ratified, and confirmed [the MSA] as an Order of this
20 Court."²⁵ Among other provisions, the MSA provides that Thu-Le was awarded
21 51% of the community assets. The parties further agreed that Phung would
22 continue to manage the Trust accounts on behalf of the parties, just as he had
23 always done, subject to monetary restrictions on making donations. Further, the

24 ²³ AA Vol. I 000752 – 000755

25 ²⁴ AA Vol. I 000767 – AA 000788

²⁵ AA Vol. I 000762 – AA 00765

1 MSA could not be modified unless agreed to in writing and signed by both
2 parties.²⁶

3 In relevant part, the MSA provides:

4 HUSBAND **shall manage** the Fidelity VASF Brokerage Account No.
5 XXXX4792, Fidelity FESR Brokerage Account No. ZXXXX4784, Bank
6 of America Account No. XXX XXX 2956, Bank of America Account
7 XXXX XXXX 4259 **on behalf of the both Trustees**, HUSBAND and
8 WIFE. However, **any and all decisions relating to contributions,**
9 **expenditures, grants, etc., in excess of \$5,000.00 shall be agreed to in**
10 **writing by both trustees. Moreover, these assets cannot be moved or**
11 **transferred without the express written permission of both Trustees.**
12 (emphasis added.)

13 MSA at Section 14.1.²⁷

14 The parties further agreed that:

15 This Agreement shall be taken as the full and final Marital Settlement
16 between the parties, and it is agreed that a copy of this Agreement shall
17 be offered to the Eighth Judicial District Court, Family Division, . . . and
18 the Court shall be requested to ratify, confirm and approve the same, and
19 this Agreement shall by reference be merged into and become a part of
20 said Decree to the extent as if therein set forth in full. The parties
21 specifically agree that the provisions of this agreement may be enforced
22 by the contempt powers of the Family Court, however except where
specifically provided; the Family Court shall have no jurisdiction to
modify the agreement of the parties without the express written agreement
of the parties.

MSA, Section 26.1.²⁸

C. Thu-Le filed a Petition to decant FESR.

Thu-Le filed a Petition to decant FESR, making numerous manufactured

²⁶ AA Vol. I 000767 – 000788

²⁷ AA Vol. I 000776

²⁸ AA Vol. I 000782 – 000783

1 facts, false allegations and unsubstantiated claims, including but not limited to
2 the following:

- 3 • Phung engaged in political activities using charity funds;
- 4 • Thu-Le feared for her safety when the police in Communist Vietnam
- 5 purportedly interviewed her about Phung;
- 6 • Thu-Le was feared for her safety with working with Phung;
- 7 • Thu-Le did a lot of work for the charities between 2011 and 2016; and
- 8 • The administration of the Trust is at loggerheads.²⁹

9 Phung refuted all of the above allegations and requested discovery and an
10 evidentiary hearing.³⁰ However, the Probate Commissioner and the district
11 court in acting upon his Reports and Recommendations, failed to follow the
12 applicable rule and did not allow discovery into the disputed facts, nor schedule
13 an evidentiary hearing, in violation of the clear mandates of EDCR 4.17.³¹

14 **D. Thu-Le misused FESR money, was derelict in her supervision**
15 **of the Vietnamese charity, TTKKTL and misappropriated money from**
16 **TTKKTL when she resigned.**

17 NRS 163.556 requires that the trustee wishing to decant a trust shall meet
18 “ascertained qualities”. Without the benefit of any discovery, Phung provided
19 evidence to the district court that refuted each false allegation and proffered
20

21 ²⁹ AA Vol. I 000743 – 000789

22 ³⁰ AA Vol. I 000815 – 000836

³¹ AA Vol. II 000847 – 000852; AA Vol. IV 001179 – 001184; AA Vol. V
001313 – 001320

1 evidence regarding the qualifications of Thu-Le.

- 2 • Thu-Le has not attended to the affairs of the FESR since at least
3 2011.³²
- 4 • Thu-Le's claims to have worked on many projects in Vietnam between
5 2012 and 2016. However, any charitable work she did in Vietnam for
6 months to work for the Vietnamese charity TTKKTL in her
7 hometown, abusing FESR money in the process.³³
- 8 • In 2014 Thu-Le caused the VASF building in Oak Ridge, Tennessee
9 to be vacant, leading to it losing insurance.³⁴
- 10 • Thu-Le caused Fidelity Investments to freeze the FESR accounts
11 multiple times, forcing Phung to pay penalty fees for bounced checks
12 and to borrow money to run the current affairs of the Trust.³⁵
- 13 • Under her supervision as chairperson over operations manager Phan
14 Van Hai ("Mr. Hai") of the TTKKTL charity in Vietnam, Thu-Le
15 failed to detect Mr. Hai's systematic theft of TTKKTL funds in the
16 approximate amount of \$57,000.³⁶
- 17 • During her supervision over Mr. Hai and during her visits of the
18 operations of TTKKTL between 2012 and 2016, Thu-Le did not detect
19 that Mr. Hai created phantom civil groups in 2015 to defraud

20 ³² AA Vol. I 000816 – 00819

21 ³³ AA Vol. I 000816 – 000818

22 ³⁴ AA Vol. II 000940

³⁵ AA Vol. II 000931

³⁶ AA Vol. II 000959 – 000961

1 contributions from VASF and FESR.³⁷

- 2 • Upon her and Mr. Hai's resignations from the TTKKTL, she caused
3 Mr. Hai to steal approximately \$20,000 for her with the excuse she
4 took back the money her family contributed to TTKKTL in 2008
5 without her permission.³⁸

6 Notwithstanding the plethora of disputed facts, neither the Probate
7 Commissioner, nor the district court in acting upon his Reports and
8 Recommendations, considered any of the disputed facts, ignored the contract
9 between the parties, and in so doing, ordered that Thu-Le has a legal right to
10 decant the Trust, irrespective of any "illuminating" facts.³⁹

11 **E. Thu-Le was removed as a trustee of FESR due to her conclusive**
12 **incapacity to serve.**

13 FESR properly noticed a board meeting for October 15, 2016.⁴⁰ The
14 announced agenda, included among other things, the election of Holy Ngo as a
15 trustee and distributions from the Trust in December 2016.⁴¹ Instead of
16 participating in Trust matters, Thu-Le requested that the hearing on her Petition
17 be expedited from November 4, 2016 to October 14, 2016, in an attempt to quash
18 the properly noticed meeting.⁴² At the October 14, 2016 hearing, the Probate

19 ³⁷ AA Vol. II 000959 – 000961

20 ³⁸ AA Vol. II 000959 – 00961

21 ³⁹ AA Vol. II 000847 – 000852; AA Vol. IV 001179 – 001184; AA Vol. V
001313 – 001320

22 ⁴⁰ AA Vol. II 000928

⁴¹ AA Vol. II 000928

⁴² AA Vol. I 000798 – AA 000808

1 Commissioner did not enter an injunction prohibiting the previously scheduled
2 meeting from taking place.⁴³

3 As a result, the board met as scheduled on October 15, 2016. Among
4 other business discussions, Holly Ngo was elected as a trustee of both FESR,
5 and Thu-Le was removed as a trustee for her conclusive incapacity to serve
6 resulting from her failure to attend three (3) consecutive board meetings.⁴⁴ The
7 district court did not dispute the fact that Holly Ngo was elected as a trustee and
8 Thu-Le was removed as a trustee, but proffered the opinion that Thu-Le had
9 filed her petitions before that action.⁴⁵

10 **VI. Summary of Argument**

11 The Order adopting the Probate Commissioner's Report and
12 Recommendation is based upon an erroneous interpretation and application of
13 NRS 163.556, which does not allow for the decanting of a charitable trust such
14 as FESR. The Order ignored the fact that FESR is not community property, but
15 instead is a charitable unitrust that has benefitted from charitable donations and
16 is designed to benefit the public. Further, the district court failed to analyze
17 disputed facts that are material to an application of NRS 163.556, failed to
18 recognize that Trust has other trustees whose rights should not be abridged,
19 failed to analyze facts that could lead to a different relief other than decanting,
20 and in remarkable fashion, ignored the parties' contract that limits Thu-Le's

21 ⁴³ AA Vol. I 000842 – 000844

22 ⁴⁴ AA Vol. II 000939 – AA 000943

⁴⁵ AA Vol. II 000939 – 000943

1 ability to invade Trust assets and rejected the clear intent of the Trust Charter,
2 as amended by the MSA. The MSA, a court approved contract between the
3 parties, mandates that Phung shall manage the Trust assets, thereby limiting
4 Thu-Le's access to the Trust funds and prohibits both parties from making
5 distributions exceeding \$5,000 without the concurrence of the other.

6 Thu-Le utilized multiple manufactured reasons and tactics to mislead the
7 district court into decanting FESR while concealing the fact that she is not
8 qualified nor prepared to run a charitable trust on her own. If the Probate
9 Commissioner and district court had followed EDCR 4.17 and entered a
10 discovery schedule and evidentiary hearing, the court would have learned that
11 Thu-Le has proven herself to be incompetent over the past 20 years at FESR,
12 has been absent from all FESR activities since 2012, has misused over \$12,000
13 from FESR for extensive overseas travels, has taken money from the overseas
14 TTKKTL charity, and ignored the systematic theft of approximately \$85,000
15 from TTKKTL by its operations manager during the period 2011-2016 under
16 her watch.⁴⁶

17 If the Order is allowed to stand, it will resolve an issue of first impression
18 in Nevada that will create the potential for an increased number of lawsuits by
19 disenchanted trustees of charitable trusts, irrespective of the rights of the other
20 trustees, irrespective of any contract that would foreclose such decanting, and
21 irrespective of the qualifications of the trustee seeking to decant. Based upon
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⁴⁶ AA Vol. II 000867 – 000872; AA Vol. II 000959 – 000961

1 the arguments that follow, Phung requests that the Order be reversed, and upon
2 remand, that the Petition be dismissed.

3 **VII. Argument**

4 **A. Standard of Review.**

5 This Court reviews interpretations of statutes and court rules de novo.
6 *Marquis Aurbach v. Dist. Ct.*, 122 Nev. 1147, ___, 146 P.3d 1130, 1136, (2008);
7 *Renown Health, Inc. v. Vanderford*, 126 Nev. 24, ___, 235 P.3d 615, 616 (2010)
8 (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005)). While a
9 district court's findings of facts are given deferential review, *Renown Health*,
10 126 Nev. at ___, 235 P.3d at 616, the district court's conclusions of law are
11 reviewed de novo. *White v. Continental Ins. Co.*, 119 Nev. 114, 114, 65 P.3d
12 1090, 1091 (2005). Thus, the district court's erroneous conclusion that Thu-Le
13 has a legal right to decant FESR under NRS 163.556 should be reviewed de
14 novo by this Court.

15 **B. The district court erred by finding and ordering that Thu-Le**
16 **had a legal right to decant FESR, a wholly charitable trust.**

17 **1. The decanting statutes do not apply to FESR, a wholly** 18 **charitable trust.**

19 The district court failed to properly analyze the applicable statutory
20 authority in decanting the charitable trust assets. NRS 163.556 provides the
21 purported authority for decanting FESR, and in relevant part, states:

22 1. Except as otherwise provided in this section, **unless the terms of a**

1 **testamentary instrument or irrevocable trust provide otherwise, a**
2 **trustee with discretion or authority to distribute trust income or principal**
3 **to or for a beneficiary of the trust may exercise such discretion or**
4 **authority by appointing the property subject to such discretion or**
5 **authority in favor of a second trust as provided in this section.**

6
7 2. The second trust to which a trustee appoints property of the first
8 trust may only have as beneficiaries one or more of the beneficiaries of
9 the original trust:

10 (a) To or for whom a distribution of income or principal may be
11 made from the original trust;

12 (b) To or for whom a distribution of income or principal may be
13 made in the future from the original trust at a time or upon the happening
14 of an event specified under the first trust; or

15 (c) Both paragraphs (a) and (b).

16 For purposes of this subsection, a permissible appointee of a power of
17 appointment exercised by a beneficiary of the second trust is not
18 considered a beneficiary of the second trust.

19 3. **A trustee may not appoint property of the original trust to a**
20 **second trust if:**

21 (a) Appointing the property will reduce any income interest of
22 any income beneficiary of the original trust if the original trust is:

(1) A trust for which a marital deduction has been taken
for federal or state income, gift or estate tax purposes;

(2) A trust for which a charitable deduction has been
taken for federal or state income, gift or estate tax purposes; or

(3) A grantor-retained annuity trust or unitrust under 27
C.F.R. § 25.2702-3(b) and (c).

As used in this paragraph, "unitrust" has the meaning ascribed to it in

1 NRS 164.700.

2 ...

3 11. The provisions of this section do not abridge the right of any trustee
4 who has the power to appoint property which arises under any other law.

5 ...

6 18. As used in this section, "ascertainable standard" means a standard
7 relating to an individual's health, education, support or maintenance
8 within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal
9 Revenue Code, 26 U.S.C. § 2041(b)(1)(A) or 2514(c)(1), and any
10 regulations of the United States Treasury promulgated thereunder.

11 In analyzing NRS 163.556, the district court adopted the Probate
12 Commissioner's two prong finding that the only material fact is whether the
13 "trustee has the power of invasion of principal and that there is no reduction of
14 any income interest of any income beneficiary of the trust."⁴⁷

15 A simple review of the statutory language demonstrates why the analysis
16 the district court undertook is in error, and why it is not appropriate to decant a
17 charitable trust. As set forth above, the beneficiaries of the Trust are the public.
18 There is no identifiable "income interest of any income beneficiary" under
19 FESR. It is impossible to analyze whether there is no reduction of any income
20 interest of any income beneficiary if there are no identified income beneficiaries.
21 Moreover, the Trust is a unitrust in which charitable deductions have been taken
22 for Federal and/or state income tax purposes. Under NRS 163.556(3), Thu-Le
may not appoint property of the Trust to a second trust. Further, the decision to
distribute funds in a wholly charitable trust belongs solely to the board of

⁴⁷ AA Vol. IV 001180

1 directors, and not to any individual trustee. The decanting statute was not
2 intended to and does not apply to the charitable Trust at issue. Utilizing the
3 decanting statutes to divide a charitable trust is an error that must be reversed.

4 **2. Thu-Le is not a trustee with the power of invasion of the**
5 **principal of trust assets.**

6 As set forth in the Charter and MSA and as described above, Thu-Le does
7 not have unlimited discretion or broad authority to distribute trust income or
8 principal. NRS 163.556 clearly states that a trustee, in attempting to decant, can
9 only exercise **“such”** discretion or authority that is authorized by the Trust
10 documents. The parties agreed that Phung would manage both trust accounts.
11 This much is clear and not subject to dispute.⁴⁸ Moreover, both trustees are
12 limited to making contributions, expenditures and grants in amounts less than
13 \$5,000.⁴⁹ Any contribution, expenditure or grant exceeding \$5,000 must be
14 agreed to in writing by both Thu-Le and Phung.⁵⁰ Such a limitation was agreed
15 to at the time of the divorce and made a part of the Divorce Decree so neither
16 party could misuse or waste trust assets. Since Thu-Le cannot (i) manage the
17 Trust assets, (ii) is limited to making contributions or grants less than \$5,000
18 unless both trustees agree to a greater amount, and (iii) the trust assets cannot be
19 moved or transferred without the express written permission of both trustees,
20 she is not a trustee with discretion or authority to distribute trust income or

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⁴⁸ AA Vol. I 000776

22 ⁴⁹ AA Vol. I 000776

⁵⁰ AA Vol. I 000776

1 principal. She cannot exercise discretion or authority she does not have and,
2 thus, she does not have the necessary discretion or authority to decant by
3 appointing the Trust property to a second trust.

4 **3. The Trust documents do not reflect the settlors' intent to**
5 **allow decanting of the charitable trust assets.**

6 There does not appear to be any case law in Nevada regarding the
7 application of NRS 163.556 to a charitable trust. As a result, we look to other
8 states for guidance. That case law demonstrates the paramount importance of
9 adhering to the intent of the settlors. In interpreting a trust, the intent of the
10 settlors is paramount. *Morse v. Kraft*, 466, Mass. 92, 98 (Mass. 2013)⁵¹. In
11 determining intent, it is particularly significant to review the language used by
12 the trustees at the time those powers were created. *Id.* In fact, “[i]t is fundamental
13 that a trust instrument must be construed to give effect to the intention of the
14 donor as ascertained from the language of the whole instrument considered in
15 light of circumstances known to the donor at the time of its execution.” *Ferri v.*
16 *Powell-Ferri*, 476 Mass. 651, 654 (Mass. 2016). The district court erred by
17 adopting the Probate Commissioner’s reasoning that he relied “upon the ability
18 and rights of the trustee to the exclusion of the parties’ contract rights.”⁵² It is
19 those contract rights that this Court must look to ascertain the parties’ intent, and
20 those contract rights which are paramount.

21 _____
22 ⁵¹ Phung acknowledges that Massachusetts and Connecticut have not enacted
decanting statutes. However, the case law is relevant as to the parties’ intent.

⁵² AA Vol. IV 001180

1 In ascertaining a trustor's intent to permit decanting, courts must look to
2 whether a trustee has broad discretion to distribute the assets of an irrevocable
3 trust. *Id.* at 656. For instance, in *Morse*, in a case allowing decanting, the court
4 made note of the trustee's "almost unlimited" discretion to distribute the assets
5 of an irrevocable trust. *Morse*, 466 Mass. at 98. Further, in states that have
6 enacted decanting statutes, such as Nevada or Tennessee, courts look to "a
7 trustee's broad authority to distribute principal from the trust for the benefit of
8 one or more of the beneficiaries when determining whether the trustee has the
9 authority to decant." *Ferri*, 476 Mass. at 656. The authority to decant is
10 contingent upon a very broad discretion on the part of a trustee. *Ferri v. Powell-*
11 *Ferri*, 2013 Conn. Super. LEXIS 1938 (Sup. Ct. Conn. 2013) (The Connecticut
12 Superior Court, in applying Massachusetts law, decided against decanting
13 because the "'trustees' authority to segregate assets . . . was not sufficiently
14 broad enough to authorize decanting.")

15 FESR is a wholly charitable unitrust designed by the settlors to benefit no
16 specific beneficiary. FESR benefits deserving people and/or organizations
17 selected by the board. The Trust was also used by Phung and Thu-le to obtain
18 Federal and state tax deductions. The intent of the settlors is clear. The trusts
19 are to be managed by a board of up to five (5) trustees. The intent as reflected
20 in the Charter also prohibits self-dealing by the trustees. Dividing the trust
21 assets so that each has control over 50% of the trust assets is an act of self-
22 dealing that violates the intent of the settlors, and is contrary to the Trust Charter,

1 which prohibits modification unless there is a tax reason to do so.

2 Further, Thu-Le does not have broad authority to distribute Trust assets.
3 In fact, neither party has broad, unlimited power. They expressly agreed to a
4 contract, the MSA, which sets forth the intent of the parties and provides that
5 Thu-Le does not have the authority to manage FESR. The authority to manage
6 the Trust rests solely with Phung. Further, any contribution, expenditure or
7 grant exceeding \$5,000 must be agreed to in writing by both Thu-Le and Phung.
8 These limitations were put in place for a reason, and the intent of the settlors
9 must be respected. NRS 163.556 contain restrictions on the ability to decant, by
10 asserting unless the terms of the Trusts expressly provide otherwise. Pursuant
11 to the express terms of the Trust, as amended by the MSA, Thu-Le does not have
12 the broad authority necessary to decant approximately \$7,000,000 into a
13 separate trust that she alone has an unfettered right to manage and from which
14 she alone can distribute trust assets.⁵³ The district court erred as a matter of law
15 by ignoring the settlors' clear intentions and contract rights by finding that Thu-
16 Le has a legal right to decant FESR.

17 **4. The district court erred by failing to establish a discovery**
18 **schedule and set an evidentiary hearing pursuant to EDCR 4.17(a).**

19 As set forth above, the decanting statutes were not intended to apply to
20 wholly charitable trusts such as FESR. Moreover, the parties' intent, as reflected
21 in the Charter and MSA, demonstrates that decanting is not appropriate in the
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⁵³ AA Vol. V 001267

1 present case. These errors alone are sufficient to reverse the Order as neither
2 party possesses the broad authority necessary to decant. However, should this
3 Court delve further into the proceedings below, additional procedural errors
4 mandate reversal of the Order and remand directing the district court to establish
5 a discovery schedule and set an evidentiary hearing.

6 EDCR 4.17(a) provides:

7 [i]n contested matters before the Probate Commissioner involving
8 disputed issues of material fact, the Probate Commissioner shall
9 set an evidentiary hearing date and a discovery schedule after
10 receiving input from the attorneys for the parties and any
11 unrepresented parties. Such settings shall be made at the time of
the hearing on the initial petition commencing the litigation or at
the request of any party thereto. . .”

12 (emphasis added).

13 NRS 0.025 defines “shall” as follows: “Except as otherwise expressly
14 provided in a particular statute or required by context: ... ‘shall’ imposes a duty
15 to act.” Thus, use of the word “shall” in EDCR 4.17 imposed a duty on the
16 Probate Commissioner to act when certain conditions are met. In this instance,
17 the act to be done was entering a discovery schedule and setting an evidentiary
18 hearing in contested matters involving disputed issues of material fact.

19 Should this Court not find as a matter of law that the decanting statutes
20 do not apply to charitable trusts such as FESR, there are numerous disputed
21 issues of material fact which require the setting of an evidentiary hearing and a
22 discovery schedule under EDCR 4.17 before the court can decant the Trusts.

1 Although the Probate Commissioner modified his initial findings, later adopted
2 by the district court, to state that “the facts on whether the trustees are at
3 loggerheads are illuminating, such facts are not determinative to the ultimate
4 resolution,” it is unclear in the context of this case what “illuminating” means,
5 and the extent to which the district court and Probate Commissioner still
6 considered those “facts”.⁵⁴ Without any further explanation by the Probate
7 Commissioner or district court, the court erred by failing to address Thu-Le’s
8 false claims. Those disputed issues of material fact include, but are not limited
9 to, the following:

- 10 • Thu-Le falsely alleged and Phung refuted that some of his donations
11 are made to unauthorized political groups.
- 12 • Thu-Le falsely alleged and Phung refuted that the MSA only gave him
13 “investment” management powers over the Trust assets.
- 14 • Thu-Le falsely alleged and Phung refuted that he is refusing to allow
15 Thu-Le to make distributions from the Trust.
- 16 • Thu-Le falsely alleged and Phung refuted that the Trust’s assets are
17 community property.
- 18 • Thu-Le alleged and Phung refuted that the relationship between Thu-
19 Le and Phung has become very hostile and Thu-Le is unable to work
20 with Phung to achieve the charitable goals of the Trust.
- 21 • Due to the documented neglect of her duties and her incapacity to

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⁵⁴ AA Vol. V 001188

1 serve as a Trustee, Thu-Le cannot be trusted to manage the assets of
2 FESR.

- 3 • Notwithstanding any statement by Thu-Le, the Trust has operated just
4 as it has since its formation by Phung.
- 5 • Thu-Le does not have standing to petition this Court regarding FESR
6 as she is no longer a Trustee of the charity.⁵⁵

7 Without regard to the disputed facts, the Probate Commissioner believed
8 that the unsubstantiated allegation that “the parties cannot work together” was
9 sufficient reason to decant, and treated the Trust as if it is a private trust rather
10 than a charitable trust benefitting the public. In so doing, he ignored the intent
11 of the settlors as set forth in the Charter and MSA

12 **5. Thu-Le’s incapacity to serve as a trustee has been**
13 **conclusively determined and she was removed as a Trustee.**

14 The district court’s approval of the Probate Commissioner’s finding that
15 he relied on the ability and rights of the trustee to the exclusion of the parties’
16 contract rights was not only a clear error rejecting the parties’ intent, but it
17 ignored unrefuted evidence that Thu-Le is not qualified to serve as a trustee over
18 a separate trust consisting of approximately \$7,000,000 in assets.

19 NRS 163.556 requires that a trustee seeking to decant possess
20 “ascertained qualities.” Had the district court ordered discovery and scheduled
21 an evidentiary hearing as required by EDCR 4.17, the fact that Thu-Le does not
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⁵⁵ AA Vol. V 001199

1 have the necessary qualifications to serve as a trustee of FESR would have been
2 apparent.

3 Thu-Le does not have the ascertained qualities of an experienced,
4 impartial and honest trustee. There is no dispute that Thu-Le has never actively
5 participated as a trustee on behalf of the Trust. Moreover, her fitness to serve
6 as a trustee of the Trust should have been examined by the district court before
7 relying upon any perceived ability.

8 The Charter states in part, “[t]he failure of a Trustee to attend any of the
9 meetings of Trustees for three (3) consecutive meetings shall be deemed
10 conclusive as his or its incapacity to act.”⁵⁶ At the October 15, 2015 meeting
11 that Thu-Le attempted to quash, the Board discussed the fact that Thu-Le had
12 not performed any of her duties as a trustee, and single-handedly caused harm
13 to the work of the Trust, such as causing the VASF building in Tennessee to
14 lose insurance and freezing FESR bank accounts leading to checks being
15 bounced with monetary penalties.⁵⁷ Moreover, Thu-Le failed to attend any
16 meetings since 2012, and specifically failed to attend three (3) consecutive
17 meetings on October 15, 2015; August 27, 2016 and October 15, 2016.⁵⁸ Based
18 on the above undisputed facts, the Board voted to remove Thu-Le as a Trustee,
19 effective October 15, 2016.⁵⁹ Thus, in addition to not having discretion or
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21 ⁵⁶ AA Vol. I 000753 – 000754

22 ⁵⁷ AA Vol. V 001261 – 001274

⁵⁸ AA Vol. V 001261 – 001274

⁵⁹ AA Vol. V 001271

1 authority to distribute any trust income or principal, Thu-Le's incapacity to
2 serve as a trustee has been conclusively determined.

3 Further, from 2012 until July 2016, Thu-Le was the chairperson of
4 TTKKTL, a charitable trust in Vietnam that is not the subject of these
5 proceedings. During the pendency of this case, Phung discovered after Thu-Le
6 resigned from TTKKTL that certain transition documents revealed the loss of
7 funds. Mr. Hai, the former director who worked directly under Thu-Le's
8 supervision, maintained a secret TTKKTL account, and that upon resigning his
9 office on August 31, 2016, shortly after Thu-Le resigned, Hai withdrew
10 approximately \$57,000 and deposited it into his own account.⁶⁰ The City of Hue
11 Inspector interrogated Hai and found of the missing \$57,000, approximately
12 \$20,400 was money that Thu-Le purportedly asked Hai to keep for her and the
13 remaining, approximately \$36,700, was money that VASF asked him to transfer
14 to smaller charities, but he had not done so.⁶¹ The City of Hue Inspector further
15 found that during the time Hai worked under the direction of Thu-Le, the two
16 committed some questionable acts.⁶² Specifically, it appears that Hai
17 manufactured a few applications requesting funds from VASF.⁶³

18 The details of Thu-Le's misconduct concerning TTKKTL are unrefuted.
19 Thu-Le's documented neglect of her Trustee duties, her conclusive incapacity
20

21 ⁶⁰ AA Vol. V 001277

22 ⁶¹ AA Vol. V 001277

⁶² AA Vol. V 001277

⁶³ AA Vol. V 001278

1 to serve as a Trustee and questionable handling of other trust funds are issues
2 that should have been addressed through competent evidence. For the district
3 court to accept the Probate Commissioner's finding that he relied upon the
4 ability of Thu-Le to serve as a trustee, and not even inquire about her unrefuted
5 incapacity and her misconduct with respect to another charitable trust, is an error
6 that mandates the orders be reversed and that the cases be remanded. At the
7 very least, there must be discovery on these issues and an evidentiary hearing.

8 **VIII. Conclusion**

9 The district court committed multiple errors in approving and adopting the
10 Probate Commissioner's Report and Recommendation, due to his **a priori**
11 opinion that since the parties are divorced it is best to divide everything to make
12 life easy. There are numerous reasons the district court's orders should be
13 reversed, including:

14 1. The district court erred in finding and ordering that Thu-Le has a
15 legal right to decant the charitable trust FESR.

16 2. The district court erred in applying the decanting statutes to allow
17 the division of FESR, a wholly charitable trust under NRS 163.556.

18 3. The district court erred by adopting the Probate Commissioner's
19 reasoning that the only material facts for the court to find in applying NRS
20 163.556 to FESR are whether a trustee (i) has the power of invasion of principal
21 of the trust assets and (ii) there is no reduction of any income interest of any
22 income beneficiary of the trust.

1 4. The district court erred by declining to enforce the parties contract
2 rights as set forth in a Marital Settlement Agreement, which does not allow Thu-
3 Le to invade the trust assets of FESR and which limits the parties' ability to
4 make large distributions from trust assets.


5 5. The district court erred by failing to acknowledge the disputed
6 issues of material fact which require the setting of a discovery schedule and
7 evidentiary hearing pursuant to EDCR 4.17.

8 6. The district court erred by adopting the Probate Commissioner's
9 reasoning that he was relying on Thu-Le's ability to serve as a trustee, and did
10 not inquire about her conclusive incapacity to serve, her misuse of FESR funds,
11 her questionable conduct with respect to TTKKTL or her removal as a trustee
12 of the Trusts.

13 Based on the foregoing, Appellant, Doan L. Phung respectfully requests
14 that the Orders be reversed and that the Petitions be dismissed, or in the
15 alternative, that this matter be remanded to the district court for discovery and
16 an evidentiary hearing.

17 DATED this 1 day of June, 2018.

18 MUSHKIN • CICA • COPPEDGE

19 
20 MICHAEL R. MUSHKIN, ESQ.
21 Nevada Bar No. 2421
22 L. JOE COPPEDGE, ESQ.
 Nevada State Bar No. 4954
 4475 South Pecos Road
 Las Vegas, Nevada 89121

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1 supported by a reference to the page and volume number, if any, of the transcript
2 or appendix where the matter relied on is to be found. I understand that I may be
3 subject to sanctions in the event that the accompanying brief is not in conformity
4 with the requirements of the Nevada Rules of Appellate Procedure.

5 DATED this 1 day of June, 2018.

6 MUSHKIN • CICA • COPPEDGE

7 

8 MICHAEL R. MUSHKIN, ESQ.

9 Nevada Bar No. 2421

10 L. JOE COPPEDGE, ESQ.

11 Nevada State Bar No. 4954

12 4475 South Pecos Road

13 Las Vegas, Nevada 89121

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Pursuant to NRAP 25(d), I certify that on this 18 day of June, 2018, I


[] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

[X] via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

☐ via hand-delivery to the addressee listed below;

[] via facsimile;

[] by transmitting via email to the email address set forth below


An Employee of
Mushkin Cica Coppedge