

IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of the:

FUND FOR THE
ENCOURAGEMENT
OF SELF RELIANCE

An Irrevocable Trust.

DOAN L. PHUNG,

Appellant,

vs.

THU-LE DOAN,
Respondent.

Electronically Filed
Jul 31 2018 04:20 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT NO. 74964

District Court Case No.
P-16-089638-T

An Appeal from the Eighth Judicial District Court
The Honorable Gloria Sturman, District Judge

RESPONDENT'S ANSWERING BRIEF

GOLDSMITH & GUYMON, P.C.

DARA J. GOLDSMITH, ESQ.

Nevada Bar No. 4270

dgoldsmith@goldguylaw.com

PETER CO, ESQ.

Nevada Bar No. 11938

pco@goldguylaw.com

2055 Village Center Circle

Las Vegas, NV 89134

Phone: (702) 873-9500

Fax: (702) 873-9600

NRAP 26.1 DISCLOSURE STATEMENT

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.

Goldsmith & Guymon, P.C. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dara J. Goldsmith and Peter Co are the attorneys who have appeared for Respondent in this case.

Respondent, Thu-Le Doan is an individual.

DATED this 31st day of July, 2018.

GOLDSMITH & GUYMON, P.C.

A handwritten signature in dark ink, appearing to read 'Dara J. Goldsmith', is written over a horizontal line.

Dara J. Goldsmith, Esq.

Nevada Bar No. 4270

Peter Co, Esq.

Nevada Bar No. 11938

2055 Village Center Circle

Las Vegas, NV 89134

TABLE OF CONTENTS

NRAP 26.1 Disclosure Statement	ii
Table of Authorities	iv
I. Statement of the Case	1
II. Statement of Facts	7
III. Summary of the Argument	9
IV. Argument	11
Certificate of Compliance	22
Certificate of Service	24

TABLE OF AUTHORITIES

<u>Cases Cited</u>	<u>Page</u>
Ferri v. Powell-Ferri, 476 Mass. 651, 654 (Mass. 2017)	16, 17
Morse v. Kraft, 466 Mass. 92, 98 (Mass. 2013)	16
Nevada Statutes:	
NRS 163.556	1, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21
NRS 164.700	12
Court Rules:	
EDCR 4.17	18

I.

STATEMENT OF THE CASE

This appeal is the result of the District Court granting Respondent Thu-Le Doan's ("Thu-Le") Petition to Decant the Fund for the Encouragement of Self Reliance ("FESR"), an irrevocable charitable trust, pursuant to Nevada's decanting statute NRS 163.556.¹ Thu-Le requested the same relief for the Vietnamese-American Scholarship Fund ("VASF"), an irrevocable charitable trust, which the District Court also granted.²

Thu-Le initiated the proceeding on September 22, 2016, by filing the Petition to Assume In Rem Jurisdiction of Trust, Confirm Trustee and to Modify Trust (the "Petition").³ In the Petition, Thu-Le requested the District Court terminate FESR and FESR's assets be divided equally and be decanted into separate irrevocable charitable trusts, one for Thu-Le and one for Doan L. Phung ("Phung") or in the alternative that FESR's assets be divided equally and Thu-Le's portion be decanted into Thu-Le's separate irrevocable charitable trust and Phung's portion remain in FESR with Phung serving as the sole Trustee of FESR.

The hearing on the Petition was originally calendared to be heard in the ordinary course on November 4, 2016.⁴ However, on September 28, 2016, Phung

¹AA Vol. V 001313 - 001320

²VASF is the subject of a related appeal in case number 74963

³AA Vol. I 000743 - 000789

⁴AA Vol. I 000793 - 000794

emailed Thu-Le a Notice of Meeting of the Board of Directors of the Trust for October 15, 2016, at 3 p.m. at the Rainbow Library located at 3150 N. Buffalo Dr. Las Vegas, NV 89128.⁵ Due to Phung's scheduling of the Meeting for FESR prior to the November 4, 2016 hearing, Thu-Le requested that the hearing on the Petition be shortened to October 14, 2016, which the District Court granted.⁶ In addition to granting the shortened hearing date, the District Court also ordered that no further meetings may be called by Phung in regards to FESR and that Phung take no further action in regards to FESR until this matter is resolved by the Court.⁷

On October 7, 2016, an Acknowledgment was filed wherein the Attorney General for the State of Nevada acknowledged service of the Order Shortening Time for the Petition to October 14, 2016.⁸ The Attorney General has never appeared in this action and by its non-appearance/lack of objection has assented to the relief requested by Thu-Le.

Phung filed an Objection to the Petition on October 12, 2016,⁹ and Thu-Le filed her Reply on October 13, 2016.¹⁰ At the initial hearing, the Probate Commissioner recommended decanting FESR because Thu-Le and Phung, as Co-Trustees, were at

⁵AA Vol. I 000803

⁶AA Vol. I 000798 - 000808

⁷AA Vol. I 000808

⁸AA Vol. I 000814

⁹AA Vol. I 000815 - 000836

¹⁰AA Vol. I 000837 - 000841

“loggerheads” and could not function together to accomplish the goals of FESR.¹¹

The Probate Commissioner’s Report and Recommendation Granting Petition to Assume Jurisdiction of Trust, Confirming Co-Trustees and to Modify Trust was entered on December 19, 2016, wherein the Probate Commissioner recommended that the Court take in rem jurisdiction over the Trust as it was domiciled in Nevada,

that Thu-Le and Doan were confirmed as Co-Trustees of FESR, that due to the administrative issues, the functional purposes of FESR cannot be accomplished and is unworkable, thus in order to be able to accomplish and not to have to worry about what each side is doing and that each side may or may not be over-controlling, there is sufficient reason and it is appropriate to decant FESR’s assets, that FESR’s assets be divided equally and Thu-Le’s portion is to be decanted into Thu-Le’s separate irrevocable charitable trust with Thu-Le serving as sole trustee of her new separate irrevocable charitable trust and Phung’s portion can either remain in FESR with Phung serving as the sole Trustee of FESR OR Phung’s portion may be decanted into a new separate irrevocable charitable trust with Phung serving as the sole Trustee of his new separate irrevocable charitable trust, that there is no need for an evidentiary hearing as the Court finds it is just unworkable between the parties and that is sufficient reason for not having an evidentiary hearing, that the parties continue to process any scholarship applications pending before FESR and both parties must agree in granting the pending scholarships, that all pending scholarship applications be provided to Thu-Le’s counsel Dara J. Goldsmith, Esq. for an honest and impartial review by Thu-Le as to acceptability, that if one party violates the Charter of FESR and causes a tax effect upon the other party, the violating party shall indemnify the other party and make good of it, and that the VASF case no. P-16-089637-T and the FESR case no. P-16-089638-T should not be consolidated.¹²

Phung filed his Objection to the Report and Recommendation on December 30, 2016,¹³ Thu-Le filed her Reply to the Objection on January 24, 2017,¹⁴ and Phung

¹¹AA Vol. II 000847 - 000852

¹²AA Vol. II 000853 - 000860

¹³AA Vol. II 000863 - 000961

¹⁴AA Vol. III 001078 - 001083

filed his Reply in support of his Objection on January 26, 2017.¹⁵ The Objection was heard by the District Court on February 1, 2017, and the District Court determined, (1) it is unclear from the record and Report and Recommendation whether the Probate Commissioner considered if there are any questions of fact that will impact or militate a different relief under the decanting statute, and (2) it is unclear from the record and Report and Recommendation the analysis that the Probate Commissioner went through to reach his conclusion to decant.¹⁶

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

Following a hearing on April 28, 2017, the Probate Commissioner issued a new Report and Recommendation Confirming Prior Report and Recommendation Granting Petition to Assume Jurisdiction of Trust, Making Additional Findings of Fact and Conclusions of Law, Confirming Co-Trustees and to Modify Trust, entered

¹⁵AA Vol. IV 001093 - 001098

¹⁶AA Vol. IV 001101 - 001102

¹⁷AA Vol. IV 001101 - 001102

on August 4, 2017, which among other things found:

(ii) that ... under NRS 163.556 a trustee has an absolute right to decant a trust with the only requirements being that a trustee has the power of invasion of principal and that there is no reduction of any income interest of any income beneficiary of the trust;

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

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

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

(vi) that the Court is relying upon the ability and rights of the trustee to the exclusion of the parties contract rights;

(vii) that Petitioner may decant half of the trust assets as she can make that determination under NRS 163.556, specifically a "trustee with discretion or authority to distribute trust income or principal to or for a beneficiary of the trust may exercise such discretion or authority by appointing the property subject to such discretion or authority in favor of a second trust as provided in this section.";¹⁸

Phung filed his Objection to the new Report and Recommendation on August 21, 2017,¹⁹ Thu-Le filed her Reply to the Objection on September 12, 2017,²⁰ and Phung filed his Reply in support of his Objection on October 5, 2017.²¹

¹⁸AA Vol. IV 001185 - 001192

¹⁹AA Vol. V 001196 - 001278

²⁰AA Vol. V 001281 - 001288

²¹AA Vol. V 001292 - 001310

Following oral argument on October 12, 2017, the District Court entered the Order on December 27, 2017, wherein the Court found and ordered among other things:

3. That a trustee has a legal right to decant a trust under NRS 163.556 if the following two prong test is met: (1) "[A] trustee with discretion or authority to distribute trust income or principal to or for a beneficiary of the trust may exercise such discretion or authority in favor of a second trust as provided in this section." NRS 163.556(1) and (2) "A trustee may not appoint property of the original trust to a second trust if: (a) Appointing the property will reduce any income interest of any income beneficiary of the original trust if the original trust is:...(2) A trust for which a charitable deduction has been taken for federal or state income, gift or estate tax purposes..." NRS 163.556(3).

4. That NRS 163.556 does not state that a trustee has an "absolute right" to decant a trust and that although the Probate Commissioner had incorrectly used the term "absolute right", the Probate Commissioner correctly analyzed NRS 163.556 in finding that Petitioner, Thu-Le Doan, had a right to decant FESR.

5. That the Probate Commissioner fully analyzed NRS 163.556 and correctly found that Petitioner as Co-Trustee of FESR met the two prong test: (1) that Petitioner had the power of invasion of principal of the trust assets and (2) that there is no reduction of any income interest of any income beneficiary of the trust; and as such has the right to decant FESR.

6. That Petitioner as Co-Trustee of FESR had the legal right to decant FESR when she initially filed her Petition to Assume In Rem Jurisdiction of Trust, Confirm Trustee and to Modify Trust on September 22, 2016, and that whether or not Petitioner was subsequently removed as Co-Trustee of FESR, does not affect Petitioner's ability to proceed with her petition to decant FESR.

7. That the Probate Commissioner refused to enjoin FESR from continuing to act, and as the trust continued to act, Petitioner was removed as a Co-Trustee for her failure to participate.

8. That the Court did not address whether removing Petitioner as a Co-Trustee was wrong as the Court does not believe that it has to look at that since Petitioner had the right to decant FESR when she initiated the action.

9. That although the Parties' Marital Settlement Agreement limited a trustee's discretion to make distributions in excess of \$5,000.00, unless

agreed to in writing by both trustees, such a limitation did not affect the purpose of FESR which was to provide "micro loans" at favorable interest rates for the purpose of enabling individuals to pursue a trade or business.

10. That Petitioner, Thu-Le Doan, as Co-Trustee of FESR has a legal right to decant FESR.²²

II.

STATEMENT OF FACTS

Thu-Le and Phung were married in 1970 and were divorced in 2012. FESR was established on December 26, 1997, by Thu-Le and Phung as an irrevocable charitable trust and was funded with the community property funds of Thu-Le and Phung.²³

According to the terms of the Charter for FESR, the purpose of FESR is to encourage the pursuit of self reliance, including but not limited to: "(1) assisting organizations that loans micro amounts of money at favorable interest rates for the purpose of enabling individuals to pursue trade or business; (2) paying micro amounts of money to individuals who are qualified as above but are nevertheless unable to meet the loan criteria; to individuals from a disadvantaged background who are qualified to attend Vietnamese or American institutions of training but because of their financial need have difficulty in so doing; or (3) contributions to any charitable organizations, trust, community chest, fund or foundation which at the time of the contribution by Trustees is one of those organizations specified in the Internal

²²AA Vol. V 001313 - 001320

²³AA Vol. I 000743 - 000744

Revenue Code, contributions to which are deductible for income tax purposes.”²⁴

The Charter was amended on January 26, 1999, by Thu-Le and Phung so that FESR would comply with Section 501(c)(3) of the Internal Revenue Code.²⁵

The Decree of Divorce ending Thu-Le and Phung’s marriage was entered on April 12, 2012, with the Clark County District Court, Nevada, Case No. D-11-455322-D. The Decree of Divorce incorporated a Marital Settlement Agreement (“MSA”).²⁶

FESR was not divided in the divorce proceedings. The MSA gave Phung investment management powers over FESR’s assets. Pursuant to the MSA any and all decisions relating to FESR’s contributions, expenditures, grants, etc., in excess of \$5,000.00 shall be agreed to in writing by both Thu-Le and Phung, thus Thu-Le and Phung can make donations from the Trust without the other’s consent as long as the total donations are less than \$5,000.00 per donee.²⁷

The majority of the charitable donations made by Thu-Le on behalf of FESR are made in Vietnam. Thu-Le is extensively involved in charitable programs in Vietnam relating to public sanitation, teaching swimming and drowning prevention programs. Thus, Thu-Le travels to Vietnam extensively and frequently to manage

²⁴AA Vol. I 000752

²⁵AA Vol. I 000759 - 000760

²⁶AA Vol. I 000762 - 000789

²⁷AA Vol. I 000776

and run her various charitable ventures there.²⁸

The Charter states specifically that “[n]o part of the Trust fund shall be used to carry on propaganda or otherwise attempt to influence legislation, or to participate in any political campaign.”²⁹ None of Thu-Le’s charitable donations are used for political propaganda or for any political campaigns and therefore her charitable donations do not violate the Charter.

Due to their contentious and litigious divorce, the relationship between Thu-Le and Phung has become hostile, thus Thu-Le is unable to work with Phung as Co-Trustees to achieve the charitable goals of the Trust.³⁰ Phung alleges numerous false allegations against Thu-Le, however such disputed facts are immaterial in applying NRS 163.556, thus the District Court granted Thu-Le’s Petition to Decant FESR without an evidentiary hearing.

III.

SUMMARY OF THE ARGUMENT

The District Court correctly applied NRS 163.556 to allow Thu-Le to decant FESR. The only material facts for the Court to find in applying NRS 163.556 is whether a trustee has the power of invasion of principal and that there is no reduction of any income interest of any income beneficiary of the trust.

Since the decanted assets will be distributed to a charitable trust wherein the

²⁸AA Vol. I 000745

²⁹AA Vol. I 000759

³⁰AA Vol. I 000746

beneficiaries will remain the same as FESR, there is no reduction of any income interest of any income beneficiary of FESR and the Attorney General of the State of Nevada who represents the interests of the charitable beneficiaries of FESR did not object to Thu-Le's request to decant FESR.

NRS 163.556(1) gives a trustee a legal right to decant a trust as long as the trustee has discretion or authority to distribute trust income or principal to or for a beneficiary of the trust. The statute does not state that unlimited discretion or broad authority is required for a trustee to decant, only that a trustee has discretion or authority to distribute trust income or principal. Pursuant to FESR's Charter, Thu-Le has the discretion and authority to distribute the trust income and principal to the beneficiaries of FESR. Although not required by NRS 163.556, the Charter gives Thu-Le very broad discretion with the only restrictions related to the Internal Revenue Code and political activities.

The only material facts the District Court needed to consider in applying NRS 163.556 were (1) whether Thu-Le had discretion or authority to distribute trust income or principal to or for a beneficiary of the trust, and (2) whether there was any reduction of income interest of any income beneficiary of the original trust. In determining the material facts the District Court only had to review the Charter and the Charter Amendment which is not in dispute between the parties. Since there were no disputed issues of material fact, the District Court was correct in not setting an evidentiary hearing and a discovery schedule.

Since Thu-Le and Phung cannot work together as Co-Trustees due to the parties divorce and the resulting MSA, the intent of the Trustors have been greatly

compromised, as neither party will be able to agree on any distributions over \$5,000.00 which seriously limits the charitable purpose and causes that FESR contribute too. Thus, NRS 163.556 provides the perfect remedy to the impasse of the Co-Trustees.

The District correctly found that Thu-Le as Co-Trustee of FESR had the legal right to decant FESR when she initially filed her Petition to Assume In Rem Jurisdiction of Trust, Confirm Trustee and to Modify Trust on September 22, 2016, and that whether or not Petitioner was subsequently removed as Co-Trustee of FESR, does not affect Petitioner's ability to proceed with her petition to decant FESR.

IV.

ARGUMENT

A. The District Court was correct in finding and ordering that Thu-Le had a legal right to decant FESR.

1. The decanting statute applies to FESR.

The District Court correctly applied NRS 163.556 to allow Thu-Le to decant FESR. The only material facts for the Court to find in applying NRS 163.556 is whether a trustee has the power of invasion of principal and that there is no reduction of any income interest of any income beneficiary of the trust. Here, the Trustees have the power, so decanting is appropriate.

Phung argues that NRS 163.556 does not apply to FESR because FESR is a charitable trust and under NRS 163.556(3) Thu-Le cannot decant FESR because there is no identifiable “income interest of any income beneficiary” under FESR and that it is impossible to analyze whether there is no reduction of any income interest of any

income beneficiary if there are no identified income beneficiaries, that FESR is a Unitrust in which charitable deductions have been taken, and therefore the decanting statute was not intended to and does not apply to FESR.

NRS 163.556(3)(a) provides as follows:

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

(a) Appointing the property will reduce any income interest of 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 26 C.F.R. § 25.2702-3(b) and (c).

As used in this paragraph, “unitrust” has the meaning ascribed to it in NRS 164.700.

Phung incorrectly identifies FESR as a unitrust. NRS 164.700(3) defines a unitrust as “a trust in which a certain percentage of annually assessed fair market value of trust property is paid to a trust beneficiary.” FESR is an irrevocable charitable trust where a charitable deduction was taken for federal and state tax purposes with no certain percentage of annually assessed fair market value of trust property being paid to a trust beneficiary, thus NRS 163.556(3)(a)(2) applies to FESR.

Phung’s argument that Thu-Le cannot decant FESR because there is no identifiable “income interest of any income beneficiary” under FESR and that it is impossible to analyze whether there is no reduction of any income interest of any

income beneficiary if there are no identified income beneficiaries is flawed because the Charter identifies the Trust principal and income beneficiaries as the organizations that provide micro loans at favorable interest rates for the purpose of enabling individuals to pursue trade or business, the individuals that receive the micro loans, individuals from a disadvantaged background to attend Vietnamese or American institutions of training or any charitable organization, trust, community chest, fund or foundation.

The District Court ordered that half of FESR's assets be decanted into a separate irrevocable charitable trust with Thu-Le serving as sole trustee of the separate irrevocable charitable trust, thus since the decanted assets will be distributed to a charitable trust wherein the beneficiaries will remain the same as FESR, there is no reduction of any income interest of any income beneficiary of FESR. The Attorney General of the State of Nevada represents the interests of the charitable beneficiaries of FESR and the Attorney General's office have been properly served throughout the proceedings and the Attorney General did not object to Thu-Le's request to decant FESR. At this time and at the time Thu-Le Petitioned the District Court to decant FESR, decanting is/was appropriate.

2. Thu-Le is a trustee with the power of invasion of the principal of the trust assets.

Phung argues that Thu-Le cannot decant FESR because she does not have unlimited discretion or broad authority to distribute trust income or principal.

NRS 163.556(1) provides as follows:

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

NRS 163.556(1) gives a trustee a legal right to decant a trust as long as the trustee has discretion or authority to distribute trust income or principal to or for a beneficiary of the trust. The statute does not state that unlimited discretion or broad authority is required for a trustee to decant, only that a trustee has discretion or authority to distribute trust income or principal. Pursuant to the Charter, Thu-Le has the discretion and authority to distribute the trust income and principal to the beneficiaries of FESR.

In fact pursuant to the Charter, Thu-Le's discretion is very broad as the only restrictions are that the charitable distributions are within the meaning of Section 501(c)(3) of the Internal Revenue Code or Section 170(c) and IRS guidelines GCM 35319 and 37444 for gifts or grants to foreign organizations or individuals, and that the funds shall not be used to carry on propaganda or otherwise attempt to influence legislation, or to participate in any political campaign.³¹

Phung argues that pursuant to the MSA, Thu-Le cannot manage FESR's assets, is limited to making contributions or grants less than \$5,000.00 unless both trustees agree to a greater amount and FESR's assets cannot be moved or transferred without the express written permission of both trustees and thus Thu-Le is not a trustee with discretion or authority to distribute trust income or principal. First, NRS 163.556

³¹AA Vol. I 000759

does not require that a trustee have management rights of the assets, only that a trustee have discretion to distribute trust income and principal to decant a trust. Second, the Charter does not restrict Thu-Le from managing FESR's assets, the restriction is a result from Thu-Le and Phung's contentious divorce and since the family court had no jurisdiction to decant FESR, the MSA included the \$5,000.00 limitation on contributions and grants so that neither party could dissipate FESR's assets until FESR could be decanted in probate court.

Phung argues that due to the \$5,000.00 limitation, Thu-Le does not have unlimited discretion or broad authority to distribute trust income and principal and therefore cannot decant FESR. As stated above, the MSA is a result of the divorce and the Charter had no monetary limitations and the trustees were free to distribute to the beneficiaries without a \$5,000.00 limitation. Even if the Charter contained a \$5,000.00 limitation, NRS 163.556 does not require a trustee to have unlimited discretion or broad authority, and since Thu-Le can make distributions to beneficiaries of up to \$5,000.00 each, Thu-Le has the discretion and authority to distribute trust income and principal and therefore can decant FESR's assets even with the \$5,000.00 limitation. Additionally, Thu-Le and Phung have the discretion to agree to any distributions greater than the \$5,000.00 limitation.

The District Court also found that although the MSA limited a trustee's discretion to make distributions in excess of \$5,000.00, unless agreed to in writing by both trustees, such a limitation did not affect the purpose of FESR which was to provide "micro loans" at favorable interest rates for the purpose of enabling individuals to pursue a trade or business.

3. The Charter reflects the settlors' intent to allow decanting of FESR's assets.

There is no case law in Nevada regarding NRS 163.556 or trust decanting, thus Phung cites to case law from the state of Massachusetts to support his argument that Thu-Le cannot decant FESR. It is important to note that Massachusetts has not enacted a decanting statute and in Morse v. Kraft, 466 Mass. 92, 95 (Mass. 2013), the Court noted that “[p]otentially, common law provides authority for decanting, but a [S]tate statute or the terms of the trust instrument may expressly authorize a trustee to decant trust property to another trust.” Since Nevada expressly authorizes a trustee to decant trust property to another trust pursuant to NRS 163.556, the Massachusetts case law cited by Phung does not apply to this Nevada case.

Since Massachusetts does not have a decanting statute, Massachusetts must look at the terms of the trust instrument to determine if a trustee can decant a trust. Id. In determining whether a trustee has authority to decant a Trust, the intent of the settlor is “paramount”. Ferri v. Powell-Ferri, 476 Mass. 651, 656 (2017). The authority to decant need not be expressly granted to the trustee in the declaration of trust, a court may conclude that such authority exists based on other trust language. Id. The determination is reached by assessing the terms of a particular trust instrument and other relevant evidence of the settlor’s intent. Id. Thus, Massachusetts will allow a trustee to decant a trust if a trustee has almost unlimited discretion to distribute assets of an irrevocable trust. Id.

The Ferri Court noted that “States that have enacted explicit decanting provisions similarly look to a trustee’s broad authority to distribute principal from the

trust for the benefit of one or more of the beneficiaries when determining whether the trustee has the authority to decant. See, e.g., Fla. Stat. § 736.04117.” Id. The Ferri Court refers to the Florida decanting statute which allows decanting if a trustee has absolute power under the terms of the trust to invade its principal to make current distributions to or for the benefit of one or more beneficiaries. Fla. Stat. § 736.04117. NRS 163.556 does not require a trustee to have absolute power to invade the principal of a trust to decant, Nevada only requires the trustee to have discretion or authority to distribute trust income or principal to or for a beneficiary of the trust to decant a trust.

Although not required by NRS 163.556, as noted above, the Charter gives Thu-Le very broad discretion with the only restrictions related to the Internal Revenue Code and political activities. And as stated previously, it is only the MSA that limits Thu-Le’s discretion for distributions greater than \$5,000.00, which both Thu-Le and Phung can exercise their discretion to agree to distributions greater than \$5,000.00.

If this Court is inclined to consider the intent of the Settlers of FESR, then the Court will find that Thu-Le and Phung intended to allow decanting. Section Eleven of the Charter states that “[i]n the event that the purpose for which this Trust has been created cannot, at any time, be carried out, Trustees are to administer the Trust for another charitable purpose which is similar to the original purpose of the Trustors.”³² Clearly, the intent of the Trustors have been compromised due to the parties divorce and the resulting MSA. Thu-Le and Phung cannot work together as Co-Trustees, thus neither party will be able to agree on any distributions over \$5,000.00 which seriously

³²AA Vol. I 000755

limits the charitable purpose and causes that FESR contribute too. NRS 163.556 provides the perfect remedy to the impasse by the Co-Trustees, therefore the District Court granted Thu-Le's petition to decant FESR.

4. The District Court correctly denied a discovery schedule and did not set an evidentiary hearing pursuant to EDCR 4.17(a).

Pursuant to EDCR 4.17(a) "[i]n contested matters before the Probate Commissioner involving **disputed issues of material fact**, the Probate Commissioner **shall** set an evidentiary hearing date and a discovery schedule..." (emphasis added).

The only material facts the District Court needed to consider in applying NRS 163.556 were (1) whether Thu-Le had discretion or authority to distribute trust income or principal to or for a beneficiary of the trust and (2) whether there was any reduction of income interest of any income beneficiary of the original trust. In determining the material facts the District Court only had to review the Charter and the Charter Amendment which is not in dispute between the parties.

Since there were no disputed issues of material fact, the District Court was correct in not setting an evidentiary hearing and a discovery schedule.

Although Thu-Le provided ample justification for wanting to decant FESR and Phung provided numerous false representations against Thu-Le, the Probate Commissioner found that "although the facts on whether the trustees are at loggerheads are illuminating, such facts are not determinative to the ultimate resolution, which is an absolute right given to a trustee who holds the power of invasion of principal and that there is no reduction of any income interest of any

income beneficiary of the trust.”³³

The District Court found that as a matter of law, the Probate Commissioner did not err in applying NRS 163.556, that the Probate Commissioner came to the right conclusion, but used the incorrect term "absolute right" versus "right".³⁴

The District Court found that the Probate Commissioner fully analyzed NRS 163.556 and correctly found that Thu-Le as Co-Trustee of FESR met the two prong test: (1) that Petitioner had the power of invasion of principal of the trust assets, and (2) that there is no reduction of any income interest of any income beneficiary of the trust; and as such Thu-Le had the right to decant FESR.³⁵

Phung attempts to portray that there are disputed material facts for the Court to consider by making numerous false allegations against Thu-Le regarding the relationship between Thu-Le and Phung, that Thu-Le neglected her duties as Co-Trustee, that she cannot be trusted to manage FESR's assets, and numerous other false allegations. Thu-Le refuted Phung's false allegations throughout the course of these pleadings and noted to the District Court that such disputed facts are not material facts for the Court to consider in applying NRS 163.556, which the District Court agreed and therefore did not grant an evidentiary hearing and a discovery schedule.

³³AA Vol. IV 001188

³⁴AA Vol. V 001315

³⁵AA Vol. V 001314

5. Thu-Le had the legal right to decant FESR when she initially filed her Petition.

Phung argues that Thu-Le's incapacity to serve as a trustee has been conclusively determined and she was removed as a Trustee. The District found that Thu-Le as Co-Trustee of FESR had the legal right to decant FESR when she initially filed her Petition to Assume In Rem Jurisdiction of Trust, Confirm Trustee and to Modify Trust on September 22, 2016, and that whether or not Petitioner was subsequently removed as Co-Trustee of FESR, does not affect Petitioner's ability to proceed with her petition to decant FESR.

The District Court noted that it did not address whether removing Thu-Le as a Co-Trustee was wrong as the Court did not believe that it had to look at that since Thu-Le had the right to decant FESR when she initiated the action.

Phung argues that Thu-Le was removed as Trustee on October 15, 2016, what Phung fails to mention is that at the October 14, 2016, hearing the Probate Commissioner inquired upon Thu-Le and Phung whether they could work together on the scholarship program or whether a substantial bond be required, both Thu-Le and Phung represented to the Court that they agreed to work together on the scholarship program for FESR. Yet the very next day, Respondent held a meeting to remove Thu-Le as Co-Trustee. As mentioned above, Thu-Le had the right to decant FESR when she initiated the action.

Thu-Le again denies the false and irrelevant allegations made by Phung against her regarding Trung Tam Khuyen Khich Tu Lap ("TTKKTL"), and as stated in previous pleadings "since TTKKTL is not before this Court, Thu-Le will not waste

this Court's time in correcting Phung's false allegations that aren't relevant to the instant matter." Thu-Le has never neglected her duties as a trustee, nor has she ever mishandled trust funds. Phung again attempts to portray that there are disputed material facts for the Court to consider by making numerous false allegations against Thu-Le regarding TTKKTL and as stated above such disputed facts are not material facts for the Court to consider in applying NRS 163.556.

Based on the foregoing and the clear and concise language of NRS 163.556, this Court should affirm the decision of the District Court.

Dated this 31st day of July, 2018.

GOLDSMITH & GUYMON, P.C.



DARA J. GOLDSMITH, ESQ.

Nevada Bar No. 4270

PETER CO, ESQ.

Nevada Bar No. 11938

2055 Village Center Circle

Las Vegas, NV 89134

Attorneys for Respondent Thu-Le Doan

CERTIFICATE OF COMPLIANCE

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 WordPerfect X4 in 14-point and Times New Roman type style.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32 (a)(7)(C), it is Proportionately spaced, has a typeface of 14 points or more and contains 5,669 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying belief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

///

///

///

DATED this 31st day of July, 2018.

GOLDSMITH & GUYMON, P.C.

A handwritten signature in black ink, appearing to read 'Dara J. Goldsmith', written over a horizontal line.

DARA J. GOLDSMITH, ESQ.

Nevada Bar No. 4270

PETER CO., ESQ.

Nevada Bar No. 11938

2055 Village Center Circle

Las Vegas, Nevada 89134

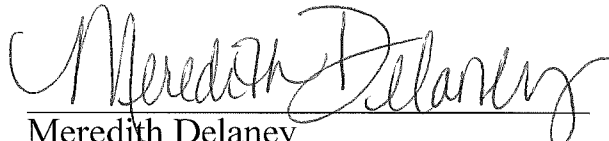
(702)873-9500

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the law firm of GOLDSMITH & GUYMON, P.C., and that on July 31, 2018, I caused a true and correct copy of the foregoing Respondent's Answering Brief to be served electronically to the following parties:

Michael R. Mushkin, Esq.
L. Joe Coppedge, Esq.
MUSHKIN CICA COPPEDGE
4775 South Pecos Road
Las Vegas, NV 89121
Attorneys for Appellant


Meredith Delaney

W:\DJG\AT\1833-2 Doan\1833-2.answer.brief.FESR.final.wpd