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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.

Supreme Court No. 74964

District Court Case No. 1089638

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Elizabeth A. Brown  
Clerk of Supreme Court

An Appeal from The Eighth Judicial District Court

The Honorable Gloria Sturman, Presiding

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APPELLANT'S REPLY BRIEF

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## I. Introduction

The Uniform Law Commission assembled 11 practicing lawyers and legal experts to study more than 26 state decanting statutes and develop the Uniform Trust Decanting Act (“UTDA”). While the UTDA has yet to be adopted in Nevada, it has been adopted by many states at an increasing pace. The Uniform Law Commission describes the risk of decanting.

Decanting is the term used to describe the distribution of assets from one trust into a second trust, like wine is decanted from the bottle to another vessel. Decanting can be a useful strategy for **changing the outdated terms** of an otherwise irrevocable trust, but can also be **abused to defeat the settlor’s intent**.<sup>1</sup> (emphasis added).

This case presents the perfect example of where decanting has been misused to defeat the settlors’ intent. Respondent Thu-Le Doan (“Thu-Le”), a settlor and former trustee, who prior to her removal for cause, was at most a passive trustee of the wholly charitable trust The Fund for the Encouragement of Self-Reliance (“FESR” or the “Trust”) for more than 20 years.<sup>2</sup> Following the parties’ divorce, she continued to neglect her fiduciary duties, taking no active role in the operation of the Trust.<sup>3</sup> Then, more than four years after signing the Marital Settlement Agreement (“MSA”),<sup>4</sup> which was expressly “approved,

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<sup>1</sup> Uniform Trust Decanting Act - Description

<sup>2</sup> AA Vol. II 000940

<sup>3</sup> AA Vol. II 000940

<sup>4</sup> AA Vol. I 000785

1 adopted, ratified, and confirmed” as an order of the District Court<sup>5</sup>, Thu-Le  
2 apparently changed her mind and wanted the wholly charitable trust FESR to be  
3 treated as community property to be divided in half under the guise of  
4 “decanting” so she could gain control over 50% of the Trust assets.<sup>6</sup> Her petition  
5 to decant FESR was filed irrespective of the rights of the other trustees, the  
6 prohibitions against decanting set forth in the FESR Charter, the failure to meet  
7 the decanting statute requirements, her lack of authority to invade Trust assets as  
8 set forth in the Trust Charter and the court approved MSA, and her documented  
9 record of mismanagement and theft of the Vietnamese charitable trust, Trung  
10 Tam Khuyen Khich Tu Lap (“TTKKTL”)<sup>7</sup>.

11 Appellant, Doan L. Phung (“Phung”) respectfully requests this Court  
12 address and correct the errors below, including that the District Court erred as a  
13 matter of law by using the decanting statute to decant a wholly charitable trust<sup>8</sup>,  
14 that the District Court ignored the intent of the FESR settlors against decanting  
15 as set forth in the FESR Charter, and by holding that the decanting statute  
16 supersedes the MSA, the District Court erred by treating the wholly charitable  
17 trust FESR as community property. The District Court further erred by refusing  
18 to follow the clear mandates of EDCR 4.17, which require discovery and an  
19 evidentiary hearing to address disputed facts, apparently believing Thu-Le’s

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20 <sup>5</sup> AA Vol. I 000763

21 <sup>6</sup> AA Vol. I 000743–000750

22 <sup>7</sup> AA Vol. II 000959–000961

<sup>8</sup> The Uniform Trust Decanting Act does not permit decanting a trust held solely  
for charitable purposes, See Section 3(b).

1 manufactured claims despite the fact the Trust operated just as it always had  
2 throughout her absence.<sup>9</sup> The District Court further erred by finding, without  
3 proof, that Thu-Le possessed the requisite authority to invade the Trust assets and  
4 without taking evidence, that she would administer half of the Trust assets  
5 without any reduction in benefits to future unknown beneficiaries.

6 Phung further requests this Court reverse the District Court's erroneous  
7 finding that the only condition Thu-Le must meet in order to decant is a "two-  
8 prong" requirement that she has the authority to invade the Trust assets and that  
9 decanting will not reduce benefits of intended beneficiaries, irrespective of the  
10 rights of other trustees and irrespective of Thu-Le's documented lack of  
11 ascertainable qualifications.

12 The District Court's errors are made clear in the language of the FESR  
13 Charter, which prohibits any single trustee from invading the Trust assets  
14 unimpeded. Further, the clear intent of FESR settlors prohibits trustees from self-  
15 dealing, prohibits trustors from taking back donated gifts and prohibits the  
16 Charter from being changed or reformed unless there is a tax reason.<sup>10</sup> Moreover,  
17 the MSA appoints Phung to be the manager of FESR assets and prohibits the  
18 parties from invading and/or transferring the Trust assets without the other's  
19 approval. The decanting statute contains several requirements, not merely two  
20 as argued by Thu-Le and found by the District Court, for a trustee to be allowed  
21

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22 <sup>9</sup> AA Vol. I 000816-000824

<sup>10</sup> AA Vol. I 000752-000760

1 to decant a trust.<sup>11</sup> Thu-Le does not meet any.

2 Finally, it is important to note that if the decision of the District Court is  
3 upheld, it will not only represent a miscarriage of justice, it will also create the  
4 unintended legal precedent of allowing the decanting of charitable trusts in  
5 Nevada.

## 6 II. Summary of Argument

7 Thu-Le's answering brief and the District Court's order in favor of rely  
8 upon her purportedly satisfying the so-called two-prong conditions, (1) that she  
9 has the power of invasion of the principal of trust assets and (2) that there is no  
10 reduction of any income interest of any income beneficiary of the Trust.<sup>12</sup> Not  
11 only were these two conditions not met based on the limited and disputed  
12 evidence presented by the parties, the District Court's decision omitted additional  
13 requirements that must be satisfied before decanting can be considered. They  
14 include decanting cannot abridge the rights of other trustees and Thu-Le must  
15 possess the necessary qualifications to carry out the settlors' intent, especially  
16 since the Probate Commissioner relied upon her purported abilities as a trustee to  
17 the exclusion of the parties' contract rights.

18 Further, the statute specifically states at the beginning, "Unless the terms  
19 of a testamentary instrument or irrevocable trust provide otherwise..."<sup>13</sup> The  
20 Charter provides that "otherwise." Below we examine the issues for adjudication

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21 <sup>11</sup> NRS 163.556

22 <sup>12</sup> Answering Brief, p.12

<sup>13</sup> NRS 163.556

1 the District Court should have addressed through an evidentiary hearing as  
2 required by EDCR 4.17.

3 1. The intent of FESR settlors, as set forth in the Trust Charter and  
4 MSA, does not allow Thu-Le to divide the Trust's assets for her to gain control  
5 of 50%, nor does it allow any trustee to decant without the consent of the Board  
6 of up to five members.

7 2. Thu-Le does not meet any of the requirements for decanting under  
8 NRS 163.556.

9 3. Thu-Le's lack of abilities leads to the inescapable conclusion that  
10 she is not qualified to serve as a trustee. The District Court erred by relying upon  
11 Thu-Le's supposed qualifications as a trustee, without taking evidence, to the  
12 exclusion of the parties' contract rights under the court approved MSA.

13 **III. The FESR Charter does not permit decanting by a single trustee.**

14 Thu-Le does not dispute the intent of settlors is a "paramount" factor in  
15 determining whether a trustee can decant Trust assets to be better suited to new  
16 conditions without reducing the benefits of intended beneficiaries. In fact, Thu-  
17 Le admits the determination of intent "is reached by assessing the terms of a  
18 particular trust instrument and other related evidence of the settlor's intent."<sup>14</sup>

19 FESR is a wholly charitable trust. The words and phrases of the Charter  
20 are important and express the intent of the settlors.

21 For the purpose empowering qualified but disadvantaged people and  
22

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<sup>14</sup> Answering Brief, p. 17, citing *Ferri v. Powell-Ferri*, 476 Mass. 651, 656 (2017)



1 organization activities in Vietnam and the United States of America  
2 to look for ways to help themselves, we, DOAN L PHUNG and THU-  
3 LE DOAN of 5505 Painted Sunrise Drive, Las Vegas, Clark County,  
4 Nevada, herein referred to as "Trustors", irrevocably create a Trust  
fund of the property listed in Exhibit "A" attached hereto and made a  
part hereof, which we have today delivered to **THU-LE DOAN,**  
**DOAN L. PHUNG, trustees.**

5 We hereby give, transfer, and deliver the property described in  
6 Exhibit "A" to the **Trustees** in Trust for the purposes stated.

7 The fund shall be known as the FUND FOR THE  
8 ENCOURAGEMENT OF SELF RELIANCE (FESR)

9 **Trustors** and **Trustees** agree as follows:

10 SECTION ONE: MANAGEMENT OF TRUST FUND AND  
11 INCOME

12 **Trustees** shall hold the Trust fund and may in their discretion invest  
13 it or parts of it in securities, real estate or other investments....and  
14 apply the Trust fund and income thereof exclusively to the charitable  
15 uses and purposes described above solely by the means of: (1) paying  
16 funds to individuals from a disadvantaged background who are  
17 qualified to attend Vietnamese or American institutions of learning or  
training but because of their financial need are unable to do so; or (2)  
contribution to any organizations ...which at the time of contribution  
by **Trustees** is one of those organizations specified in the Internal  
Revenue Code, contributions to which are deductible for income tax  
purposes.

18 SECTION TWO: RESTRICTION ON USE OF TRUST FUND  
19

20 No part of the Trust fund shall be used to carry on propaganda or  
21 otherwise attempt to influence legislation, or to participate in any  
political campaign.

22 Other provisions of this instrument notwithstanding, the **Trustees**  
shall not engage in any act of self-dealing as defined in Section 494L,

1 subdivision (d) of the Internal Revenue Code of 1986, or  
2 corresponding provision of any subsequent federal tax laws...”

3 . . .

### 4 SECTION SIX: APPOINTMENT OF SUCCESSOR TRUSTEE

5 The number of **Trustees** shall not exceed five (5) individuals, two of  
6 whom are Trustors or selected exclusively by one or both Trustors.  
7 Trustors expressly reserve the right during their lifetime to appoint  
8 additional **Trustees** and the **Trustees** may elect additional **Trustees**  
9 by not less than two thirds (2/3) majority vote, The term for which  
10 **Trustees** are authorized to act shall be for five years. A **Trustee** may  
11 be removed by not less than two-thirds (2/3) majority vote of all  
12 *Trustees* when they deem that such Trustee is incompatible, or not in  
13 sympathy with the purposes of the Trust, or for any other just cause.  
14 In the event that a vacancy shall occur because of death, resignation,  
15 incapacity to act, or removal of a Trustee, then the remaining  
16 **Trustees** shall, within sixty (60) days from the date of such vacancy,  
17 fill the vacancy. The failure of a **Trustee** to attend any of the meetings  
18 of **Trustees** for three (3) consecutive meetings shall be deemed  
19 conclusive as his or its incapacity to act.

20 . . .

### 21 SECTION NINE: GIFTS IRREVOCABLE

22 Gifts made to the Trust shall be irrevocable...

### SECTION TEN: TRUST IRREVOCABLE

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

### SECTION ELEVEN: INTERPRETATION OF TRUSTOR'S INTENT

In the event that the purpose for which this Trust has been created

1 cannot, at any time, be carried out, **Trustees** are to administer the  
2 Trust for another charitable purpose which is similar to the original  
purpose as is reasonably possible.<sup>15</sup>

. . . .

3 (emphasis added)

4 The FESR Charter uses the word “Trustees” 18 times while referring to a  
5 “Trustee” only twice, and only then when the Charter speaks to the incapacity of  
6 such “trustee.” The intent of the settlors was “to give, transfer, and deliver the  
7 property... to the Trustees in Trust for the purposes stated.”<sup>16</sup> It only speaks to  
8 “a Trustee” when such trustee is delinquent in her duties, and not performing as  
9 required by the Charter, such as when a trustee fails to attend the three  
10 consecutive Board meetings. Nowhere in the Charter is “a trustee” allowed to  
11 invade the assets without the permission of the Board.

12 The Probate Commissioner, in his rush to judgment, was hasty to conclude,  
13 without being fully prepared,<sup>17</sup> that Thu-Le and Phung were confirmed as the  
14 only “co-trustees” the Trust.<sup>18</sup> This is inconsistent with the settlors’ intent as the  
15 Charter provides for as many as five trustees. Thu-Le effectively blocked the  
16 addition of trustees until the Board meeting of October 15, 2016.<sup>19</sup> The Probate  
17 Commissioner’s conclusion that Phung and Thu-Le are the only “co-trustees”  
18 was erroneous and has not only abridged the rights of other trustees, he  
19 potentially created unintended and far reaching consequences of his poorly

20 <sup>15</sup> AA Vol. I 0000752–000760

21 <sup>16</sup> AA Vol. I 0000752

22 <sup>17</sup> AA Vol. VII 001444

<sup>18</sup> AA Vol. II 000858

<sup>19</sup> AA Vol. III 001027

1 reasoned recommendation. In making his recommendation, it is clear the Probate  
2 Commissioner treated the Trust assets as community property to be divided  
3 among the parties. This is not, nor was it ever the intent of the settlors.

4 As noted above, the FESR Board met as scheduled on October 15, 2016,  
5 and Thu-Le, despite acknowledging in court that she would work with Phung,<sup>20</sup>  
6 failed to appear.<sup>21</sup> In Thu-Le's absence, Holly Ngo was elected as a trustee of  
7 FESR, and Thu-Le was removed as a trustee for her conclusive incapacity to  
8 serve resulting from her failure to attend three consecutive board meetings.<sup>22</sup> The  
9 District Court did not dispute the fact that Holly Ngo was elected as a trustee and  
10 Thu-Le was removed as a trustee, but proffered the opinion since Thu-Le filed  
11 her petition before the Board action, she was allowed to continue with the  
12 underlying suit.<sup>23</sup>

13 The Probate Commissioner's treatment of the Trust Assets as community  
14 property, adopted by the District Court, further demonstrates the absurdity and  
15 unintended result of the District Court's decision. For example, the decanting  
16 statute speaks to the authority of a trustee. What if a trustee<sup>24</sup>, other than Thu-Le  
17 or Phung, who by the Charter possesses the same authority, attempted a coup not  
18 unlike what Thu-Le has done here? Would a court be so hasty to allow Holly  
19 Ngo to decant the Trust assets now? Clearly, the answer is no for Holly Ngo, and

20 <sup>20</sup> AA Vol. VI 001394-001399

21 <sup>21</sup> AA Vol. III 001026-001027

22 <sup>22</sup> AA Vol. III 001027

23 <sup>23</sup> AA Vol. VI 001327

<sup>24</sup> The Charter authorizes up to five (5) trustees.

1 is equally no for Thu-Le.

2 Section Two of the Charter prohibits self-dealing, which is defined in  
3 Section 4941(d) of the Internal Revenue Service Code.

4 (1) In general, for purposes of this section, the term “self-dealing”  
5 means any direct or indirect

6 (A) sale or exchange, or leasing, of property between a  
7 private foundation and a disqualified person;

8 (E) transfer to, or use by or for the benefit of, a disqualified  
9 person of the income or assets of a private foundation;

10 The “private foundation” is FESR while the “disqualified person” is any  
11 person or trustee who is not permitted by the Board of Trustees to conduct  
12 business for the Trust. Thu-Le’s incapacity to serve as a trustee, and her  
13 subsequent disqualification and removal as a trustee is undisputed.<sup>25</sup> Neither  
14 Thu-Le or Phung have the express permission from the Board to divide the assets  
15 of FESR in the name of decanting when no terms of the Charter require change.<sup>26</sup>  
16 Thus, decanting half of Trust assets to a trust controlled solely by Thu-Le is an  
17 act of self-dealing prohibited by the Trust Charter.

18 Section Nine prohibits returning money to donors unless the money cannot  
19 be spent to achieve the desired purpose of the donors. Thu-Le does not  
20 purportedly propose to change the terms of the trust or its beneficiaries.<sup>27</sup> Thus,

21 \_\_\_\_\_  
22 <sup>25</sup> AA001026–001027; AA0001327

<sup>26</sup> Charter, Section Ten

<sup>27</sup> Answering Brief, p. 13

1 she does not qualify for a return of her donated gift to this charity. Demanding  
2 50% of the assets to do with them as she pleases in her own charity surely appears  
3 as demanding the return of the gifts. Previously, Thu-Le requested that money  
4 donated to the Vietnamese charity, TTKKTL, be held for her.<sup>28</sup> Having already  
5 requested the return of donated funds to TTKKTL, there is significant risk she  
6 could do it again if she has sole control over her own charity. The District Court  
7 erred by failing to order discovery and conduct an evidentiary hearing pursuant  
8 to EDCR 4.17.

9 Section Ten reflects the intent of the settlors to not allow amendment or  
10 modification to the Trust unless the Trust fails to qualify as tax exempt charitable  
11 remainder Trust<sup>29</sup>. The Court must respect the intent of the settlors to not modify  
12 the trust, particularly for the Thu-Le's egregious reasons of wanting to gain  
13 control of half of the Trust assets irrespective of the rights of other trustees.

14 The intent of the settlors is clear. Thu-Le cannot decant the Trust unless  
15 there is assent from the Board, and the Board cannot decant the Trust unless it  
16 fails to qualify as a tax deductible charitable remainder trust<sup>30</sup>. Further, any  
17 authority to allow Thu-Le to divide the assets is contrary to the prohibition of  
18 self-dealing and against the gift irrevocability. The District Court erred by  
19 adopting the Probate Commissioner's recommendation notwithstanding the

20 <sup>28</sup> AA Vol. II 00954-000961

21 <sup>29</sup> Phung acknowledges he erred by referring to the Trust as a unitrust in his  
22 Opening Brief. It is a tax deductible charitable remainder trust. However, this  
error does not does not change the arguments herein.

<sup>30</sup> Charter, Section Ten

1 acknowledged flawed reasoning and by refusing to order an evidentiary hearing  
2 in accordance with EDCR 4.17.

3 **IV. Thu-Le Failed to Satisfy the Statutory Decanting Requirements.**

4 Thu-Le repeats, no less than five times, the District Court's finding that:

5 [t]he only material facts for the Court to find in applying NRS  
6 163.556 were (1) whether Thu-Le had discretion or authority to  
7 distribute trust income or principal to or for a beneficiary of the  
8 trust, and (2) whether there was any reduction of income  
9 interest of any income beneficiary of the original trust<sup>31</sup>

10 The fact that Thu-Le repeats the finding multiple times does not make it correct.

11 Thu-Le conveniently omits relevant language from the statute such as abridging  
12 the rights of other trustees.

13 NRS 163.556 provides in relevant part:

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

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

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

(b) To or for whom a distribution of income or  
principal may be made in the future from the original trust at a

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<sup>31</sup> Answering Brief, p. 10; AA Vol. VI 001323

1 time or upon the happening of an event specified under the first  
2 trust; or

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

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

6 (a) Appointing the property will reduce any income  
7 interest of any income beneficiary of the original trust if the  
8 original trust is:

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

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

15 (3) A grantor-retained annuity trust or unitrust  
16 under 26 C.F.R. § 25.2702-3(b) and (c).

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

20 (Emphasis added)

21 As set forth above, to decant under NRS 163.556, Thu-Le must not only  
22 have broad authority to invade Trust assets and demonstrate that her management  
of 50% of Trust assets will not reduce any benefits of intended beneficiaries, she  
must prove that decanting will not abridge the rights of other trustees.<sup>32</sup> She must  
also demonstrate she has the necessary qualifications to carry out the settlors'

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<sup>32</sup> NRS 163.556(11)



1 intent.

2 The Trust Charter forecloses the right to decant.

3 This Charter is irrevocable and may not be amended or  
4 modified; provided however, that if for any reason whatsoever  
5 this Trust fails to qualify as tax exempt charitable remainder  
6 Trust, such changes as are necessary for the Trust to so qualify  
7 may be made by Trustors so long as they are living and  
8 competent, otherwise and thereafter, by a court of competent  
9 jurisdiction.<sup>33</sup>

10 The Trust Charter sets forth the only grounds upon which the Trust can be  
11 amended or modified. Since FESR does not fail to qualify as a tax exempt  
12 charitable remainder trust, the intent of the settlors is to prohibit amendment or  
13 modification, including the amendment and/or modification to divide the Trust's  
14 assets in half, giving Thu-Le 50% to manage as her own charitable trust.

15 Further, Thu-Le does not have the authority to invade Trust assets  
16 unimpeded. In addition to the fact the Charter gives power to appoint to "trustees"  
17 and not "a trustee", any decision as big as decanting must be approved by the  
18 Board, an approval Thu-Le does not have. In addition, Thu-Le prepared and  
19 signed the MSA. The MSA provides further evidence Thu-Le cannot invade the  
20 principal of FESR. The MSA provides:

21 Section 14.1: HUSBAND **shall manage** the Fidelity FESR  
22 Brokerage Account No. XXXX4792, Fidelity FESR Brokerage  
Account No. ZXXXX4784, Bank of America Account No.  
XXX 2956, Bank of America Account XXXX 4259 **on behalf**  
**of the both Trustees**, HUSBAND and WIFE. However, any  
and all decisions relating to contributions, expenditures, grants,

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<sup>33</sup> AA Vol. I 000754-000755

1 etc., in excess of \$5,000.00 shall be agreed to in writing by  
2 both trustees. Moreover, these assets cannot be moved or  
3 transferred without the express written permission of both  
Trustees.

4 Section 26.1: This Agreement shall be taken as the full and final  
5 Marital Settlement between the parties, and it is agreed that a  
6 copy of this Agreement shall be offered to the Eighth Judicial  
7 District Court, Family Division, . . . and the Court shall be  
8 requested to ratify, confirm and approve the same, and this  
9 Agreement shall by reference be **merged into and become a**  
10 **part of said Decree to the extent as if therein set forth in**  
11 **full.** The parties specifically agree that the provisions of this  
agreement may be enforced by the contempt powers of the  
Family Court, however except where specifically provided; the  
Family Court shall have **no jurisdiction to modify the**  
12 **agreement of the parties without the express written**  
13 **agreement of the parties.**<sup>34</sup>

14 (emphasis added)

15 Thu-Le is judicially estopped from asserting a position contrary to the  
16 court approved and adopted MSA. Judicial estoppel is a principle designed to  
17 “guard the judiciary’s integrity.” *In Re Fried Irrevocable Trust*, 133 Nev. Adv.  
18 Op. 8, 390 P.3d 646, 652 (2017) citing, *Marcuse v. Del Webb Communities, Inc.*,  
19 123 Nev. 278, 287, 163 P.3d 462, 469 (2007). It is a doctrine that applies “when  
20 a party’s inconsistent position [arises] from intentional wrongdoing or an attempt  
21 to obtain an unfair advantage.” *Id.* “Whether judicial estoppel applies is a  
22 question of law that we review de novo. *Id.* quoting “*Deja Vu Showgirls v. State,*  
*Dep’t of Taxation*, 130 Nev. Adv. Rep. 72, 334 P.3d 387, 391 (2014).”

“[O]ne of [judicial estoppel’s] purposes is to prevent parties from

<sup>34</sup> AA Vol. I 000776–000783

1 deliberately shifting their position to suit the requirements of another case  
2 concerning the same subject matter.” *Id.* citing Vaile v. Eighth Judicial Dist.  
3 Court, 118 Nev. 262, 273, 44 P.3d 506, 514 (2002). “[A] party who has stated  
4 an oath in a prior proceeding, as in a pleading, that a given fact is true may not  
5 be allowed to deny the same fact in a subsequent action.” *Id.*

6 When considering whether judicial estoppel applies, Nevada courts look  
7 at five elements: (1) the same party has taken two positions; (2) the positions  
8 were taken in judicial or quasi-judicial administrative proceedings; (3) the party  
9 was successful in asserting the first position; (4) the two positions are totally  
10 inconsistent; and (5) the first position was not taken as a result of ignorance,  
11 fraud, or mistake. All five elements are necessary to sustain a finding of judicial  
12 estoppel. *Id.*

13 All elements of judicial estoppel are satisfied. Thu-Le has adopted  
14 different positions regarding her ability to invade the Trust assets. In the divorce  
15 proceedings, she agreed Phung would manage the Trust, that any contribution,  
16 expenditure or grant exceeding \$5,000 must be agreed to in writing by both  
17 parties, and the Trust assets cannot be moved or transferred without the express  
18 written permission of both parties.<sup>35</sup> Now, she claims the broad authority  
19 necessary to transfer half of the Trust assets to her own trust. Second, Thu-Le  
20 asserted her prior position in a judicial proceeding in the parties’ divorce. Third,  
21 Thu-Le successfully asserted her prior position as the District Court approved the

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22 <sup>35</sup> AA Vol. I 000776

1 MSA and adopted it as a court order. Fourth, Thu-Le's positions are  
2 irreconcilable. In the MSA, she not only agreed that Phung would manage the  
3 Trust and there would be restrictions on making contributions more than  
4 \$5,000.00, she expressly agreed that the Trust assets could not be moved or  
5 transferred without the agreement of both Thu-Le and Phung. Now, she claims  
6 the ability to invade the Trust assets unimpeded, allowing her decant half of the  
7 into a wholly separate trust controlled by her. In fact, she goes beyond that. Thu-  
8 Le continues her practice of making unsubstantiated statements to mislead this  
9 Court. In her answering brief, she states without reference to any admissible  
10 record that

11           the MSA included the \$5,000.00 limitation on contributions  
12           and grants so that neither party could dissipate FESR's assets  
13           **until FESR could be decanted in probate court.**<sup>36</sup>

14           It cannot be emphasized strongly enough there is no reference to any  
15 evidence in the record to support this statement. Moreover, this statement is  
16 contrary to all admissible evidence in the record. Thu-Le's propensity to mislead  
17 should not go unnoticed.<sup>37</sup> Finally, she has not asserted that she was acting under  
18 ignorance, fraud, or mistake when her attorney prepared, and she signed the  
19 MSA. Based on the foregoing, Thu-Le is estopped from asserting that she has  
20 the requisite authority to decant the Trust assets of FESR.

21 \_\_\_\_\_  
<sup>36</sup> Answering Brief, p. 15

22 <sup>37</sup> It is noteworthy that her counsel declined to sign a court filing on Thu-Le's  
behalf. AA Vol. III 001033-001038.

1 Notwithstanding her position adopted in the divorce proceedings, Thu-Le  
2 claims in her answering brief:

3 the intent of the Trustors have (sic) been greatly compromised,  
4 as neither party will be able to agree on any distribution over  
5 \$5,000.00 which seriously limits the charitable purpose and  
causes that FESR contribute too (sic).<sup>38</sup>

6 First, there is no evidence to support this statement, and even if Thu-Le  
7 presented any evidence, it would create an issue of fact requiring resolution by  
8 an evidentiary hearing under EDCR 4.17. The MSA was prepared by Thu-Le's  
9 attorney and signed by both parties. There is no issue what the MSA provides.  
10 Phung will manage the Trust and distributions of more than \$5,000.00 must be  
11 agreed to in writing by both parties. Further, by stating, "these assets cannot be  
12 moved or transferred without the express written permission of both Trustees,"  
13 the MSA demonstrates a clear intent against decanting by a single trustee.<sup>39</sup>

14 Thu-Le has incorrectly summarized the statute and omits key language by  
15 arguing that "[t]he statute does not state that unlimited discretion or broad  
16 authority is required for a trustee to decant, only that a trustee has authority to  
17 distribute trust principal..."<sup>40</sup> NRS 165.556 states:

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

22 <sup>38</sup> Answering Brief, p. 10-11

<sup>39</sup> AA Vol. I 000776

<sup>40</sup> Answering Brief, p. 14

1 the property **subject to such discretion or authority** in favor  
2 of a second trust as provided in this section.

3 (Emphasis added)

4 By omitting the word “such” in her quote, Thu-Le has assumed authority she  
5 does not have. Thu-Le can only exercise such authority that she has. In order to  
6 ascertain whether a trustee has the ability to decant, the Probate Commissioner  
7 and District Court should have asked and answered the following: Does Thu-Le  
8 have the authority to manage the Trust? No, that authority rest solely with Phung.  
9 Does Thu-Le have the authority to make contributions more than \$5,000.00? No,  
10 that requires the agreement of both Thu-Le and Phung. Does Thu-Le have the  
11 ability to move or transfer the trust assets? No, that requires the agreement of  
12 both Thu-Le and Phung.

13 **V. Thu-Le lacks the necessary qualifications to serve as a Trustee.**

14 If the Probate Commissioner and District Court had examined Thu-Le’s  
15 abilities, they would have found she is not qualified as a trustee. Notwithstanding  
16 the fact that Thu-Le filed the petition before she was expelled from the Board,  
17 her failure to qualify as a trustee and neglect of fiduciary duties **precede** the  
18 petition. In over 20 years on the Board, Thu-Le was not interested in any  
19 beneficiaries other than people from her home city of Hue, Vietnam.<sup>41</sup> Phung  
20 established the Vietnamese charity TTKKTL to accommodate her interests while  
21 they were married, and she has been solely interested in that work while  
22

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<sup>41</sup> AA Vol. III 001017; AA Vol. III 001026–001027

1 neglecting FESR.<sup>42</sup> If she gained the authority to distribute half the assets and  
2 income from FESR, it is likely she would only benefit recipients in Hue to the  
3 detriment of others elsewhere in Vietnam and in the United States. At the very  
4 least, the District Court should have allowed discovery and conducted an  
5 evidentiary hearing to address this issue.

6 Indeed, the work she claims to have done in Vietnam over the past six  
7 years was in fact a misuse of VASF and FESR assets to do work for TTKKTL.<sup>43</sup>  
8 Therefore, history has demonstrated that if Thu-Le were to manage FESR assets,  
9 she would prefer folks in her hometown and **thus reduce the benefits** for the  
10 people elsewhere in Vietnam and the United States, contrary to the intent of the  
11 Charter.

12 In response, Thu-Le claims

13 [s]ince the decanted assets will be distributed to a charitable  
14 trust wherein the beneficiaries will remain the same as FESR,  
15 there is no reduction of any income interest of any income  
beneficiary of FESR...<sup>44</sup>

16 This statement not only fails to include an appropriate reference to the  
17 record on appeal, it is false. The name of the Trust is the Fund for Encouragement  
18 of Self Reliance.<sup>45</sup> Thu-Le acknowledges the stated purpose of FESR is to “is to  
19 encourage the pursuit of self reliance, including but not limited to: ‘(1) assisting  
20 organizations that loans micro amounts of money at favorable interest rates for

21 <sup>42</sup> AA Vol. III 001026

<sup>43</sup> AA Vol. III 001017; AA Vol. III 001026–001027

22 <sup>44</sup> Answering Brief, p. 9-10

<sup>45</sup> AA Vol. I 000752

1 the purpose of enabling individuals to pursue trade or business; (2) paying micro  
2 amounts of money to individuals who are qualified as above but are nevertheless  
3 unable to meet the loan criteria; to individuals from a disadvantaged background  
4 who are qualified to attend Vietnamese or American institutions of training but  
5 because of their financial need have difficulty in so doing...”<sup>46</sup>

6 The District Court also acknowledged the purpose of FESR and noted  
7 multiple times that the Trust makes micro gifts.<sup>47</sup> Now, contrary to the express  
8 purpose of FESR, Thu-Le wants to make a splash. She wants to divide FESR, so  
9 she can spend up to \$100,000 on a water treatment facility in her hometown.<sup>48</sup>  
10 That is not now, nor has it ever been consistent with the stated purpose or  
11 historical giving of FESR.

12 The District Court, by adopting the Probate Commissioner’s flawed  
13 recommendation, relied upon Thu-Le’s unproven abilities as one of the express  
14 reasons for allowing decanting.<sup>49</sup> Thu-Le’s supposed qualifications, or in this  
15 instance, lack of qualifications, are unrefuted. While Thu-Le may claim that the  
16 facts of her misconduct regarding TTKKTL are not relevant, those facts go  
17 directly to her qualifications as a trustee.

18 Again, without reference to any admissible evidence in the record, Thu-Le  
19 states, “since TTKKTL is not before this Court, [she] will not waste this Court’s  
20

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21 <sup>46</sup> Answering Brief, p. 7-8

22 <sup>47</sup> AA Vol. VII 001474

<sup>48</sup> AA Vol. VI 001356-001357

<sup>49</sup> AA Vol. IV 001180



1 time in correcting Phung's false allegations that aren't relevant to the instant  
2 matter."<sup>50</sup> So there is no mistake, the unrefuted findings are set forth in the  
3 investigative report prepared by Nguyen Nhien, Inspector General for TTKKTL  
4 (the "TTKKTL Report"). On November 21, 2016, Mr. Nguyen reported his  
5 findings. Among them, Mr. Phan Van Hai was appointed Director of the  
6 Executive Office in 2006, and from 2012, until Thu-Le resigned on July 26, 2016,  
7 he worked under Thu-Le's supervision. Subsequently, Mr. Hai resigned on  
8 August 31, 2016. Following Mr. Hai's resignation, the "new director and deputy  
9 director went over the transition documents and discovered some irregularities:  
10 Over the years, Mr. Phan Van Hai had maintained a secret TTKKTL account that  
11 is controlled only by him . . ." Specific findings of the investigation revealed:

12 3. The new leadership team started transitioning in on  
13 September 1, 2016 with little cooperation from Mr. Hai. In  
14 particular, Mr. Hai did not mention anything about the secret  
15 account. In the following few weeks, the new leadership team  
16 discovered Mr. Hai had withdrawn the sum of 1,260,456 VND  
17 (approximately 57,000 USD) from that secret account but  
18 never informed the new director nor [Phung] of the act. **He**  
19 **would not return the money upon demand, stating he kept**  
20 **it for [Thu- Le] per her request.**

18 4. **[I] have met twice with Mr. Phan Van Hai and asked**  
19 **him to return the money to TTKKTL. He refused. He said**  
20 **he was instructed by [Thu-Le] to keep that money for her...**

21 5. The government of Hue asked the City Inspector (TTTP)  
22 to investigate the matter. TTTP interrogated Mr. Phan Van Hai  
and discovered the 1.2 billion VND (approximately 57,000

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<sup>50</sup> Answering Brief, p. 20-21

1 USD) consisted of 448 million VND (**approximately 20,400**  
2 **USD) he claimed [Thu-Le] asked him to keep for her,** and  
3 the remainder 812 million (approximately 36,700 USD) was  
4 the money VASFCESR asked him 9 months earlier to transfer  
5 to other smaller charities per request of VASFCESR but he had  
6 not done. The TTTP demanded Mr. Phan Van Hai to return the  
7 money. He did the 812 million on October 25, 2016, and the  
8 448 million on November 15, 2016.

6. **The TTTP also uncovered that, during the time Mr.**  
7 **Phan Van Hai worked under the direction of [Thu-Le], the**  
8 **two had committed some questionable actions.** Case in  
9 point, Mr. Hai manufactured a few applications to ask for funds  
10 from VASFCESR that is under the management of [Phung] and  
11 [Thu-Le] was suing Dr. Phung for control of VASF and CESR.  
12 Unsuspecting fraud, Dr. Phung approved half a dozen of those  
13 organizations and sent the money to Mr. Phan Van Hai for him  
14 to deliver to them because they did not have a trustworthy  
15 international bank account. It now appears that those  
16 organizations either did not exist, or belonged to Mr. Phan Van  
17 Hai or his relatives. It may be possible that Mr. Phan Van Hai  
18 withheld delivering the money to further [Thu-Le's] lawsuit in  
19 the USA.<sup>51</sup>

14 (Emphasis added.)

15 Thu-Le's qualification as a trustee to have sole control over 50% of the  
16 FESR assets are questionable at best. She manufactured facts in the petition to  
17 mislead the District Court.<sup>52</sup> She has been absent for over 6 years from Trust  
18

19 <sup>51</sup> AA Vol. II 000959-00961

20 <sup>52</sup> AA Vol. I 000816-000823; Thu-Le makes numerous statements of fact in her  
21 answering brief that are not supported by appropriate references in the record to  
22 admissible evidence. For example, Thu-Le states that: "Phung alleges numerous  
false allegations against Thu-Le..." Answering Brief, p. 9. This statement is  
repeated several times throughout the Answering Brief. However, at no time  
does Thu-Le identify any specific allegation which she claims is false, nor does  
she include a reference in the record to support her statements.

1 affairs.<sup>53</sup> She did not attend board meetings three times consecutively, leading to  
2 her removal from the Board for cause.<sup>54</sup> She misused FESR funds to conduct  
3 business for TTKKTL in her hometown.<sup>55</sup> She failed to supervise Mr. Hai such  
4 that he was able to embezzle more than \$57,000 between 2011 and 2016.<sup>56</sup> She  
5 was party to Mr. Hai's theft of TTKKTL funds when both resigned from  
6 TTKKTL in 2016.<sup>57</sup> She intentionally obstructed the operations of VASF when  
7 she vacated PAI Corporation from the VASF building in Oak Ridge, Tennessee,  
8 causing it to lose insurance.<sup>58</sup> She caused the accounts of FESR to be frozen  
9 causing several checks to bounce.<sup>59</sup>

10 Thu-Le may believe these facts are not relevant, but they clearly raise  
11 legitimate issues concerning her qualifications to serve as a trustee. The Probate  
12 Commissioner should have conducted an evidentiary hearing as required by  
13 EDCR 4.17 before jumping to the conclusion that Thu-Le was qualified as a  
14 trustee or did not violate any term of the Charter, and the District Court erred by  
15 failing to require such an evidentiary hearing

## 16 **VI. Conclusion**

17 The Trust Charter reflects the settlors' intent to have the Trust governed  
18 by a Board of Trustees of up to 5 trustees. It clearly prohibits self-dealing,

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19 <sup>53</sup> AA Vol. III 001026

20 <sup>54</sup> AA Vol. III 001027

<sup>55</sup> AA Vol. III 001027

21 <sup>56</sup> AA Vol. II 000959–000961

<sup>57</sup> AA Vol. II 000959–00961

22 <sup>58</sup> AA Vol. III 001027

<sup>59</sup> AA Vol. III 001027

1 returning gifts that have been donated to the Trust, and changing or reforming the  
2 Charter unless there is a tax reason. It also defines how a delinquent trustee can  
3 be removed from the Board. There is no dispute Thu-Le met that definition and  
4 was removed as a trustee for cause due to her conclusive incapacity to serve.

5 The District Court erred as a matter of law by applying the decanting  
6 statute to the wholly charitable trust FESR. The Charter reflects a clear intent  
7 that it is not subject to decanting by a single trustee. Clearly, Thu-Le does not  
8 possess the broad authority necessary to invade Trust assets. There is no  
9 assurance there will not be a reduction in the benefits to intended beneficiaries  
10 and, there is no question that decanting abridges the rights of other trustees, a  
11 clear violation of the decanting statute. Moreover, the MSA reflects that parties'  
12 intent against decanting as Phung is appointed as the manager of the Trust assets,  
13 both parties are limited in making contributions, expenditures and grants more  
14 than \$5,000.00 and the Trust assets cannot be moved or transferred without the  
15 express written permission of both parties.

16 The District Court further erred by relying upon Thu-Le's so-called  
17 abilities as a trustee, without an evidentiary hearing, to the exclusion of the  
18 parties' contract rights in the court approved and adopted MSA. This error was  
19 compounded by the fact that the District Court ignored the TTKKTL Report from  
20 the Inspector General, which was substantively unrefuted and raised significant  
21 issues regarding Thu-Le's qualifications to serve as a trustee.

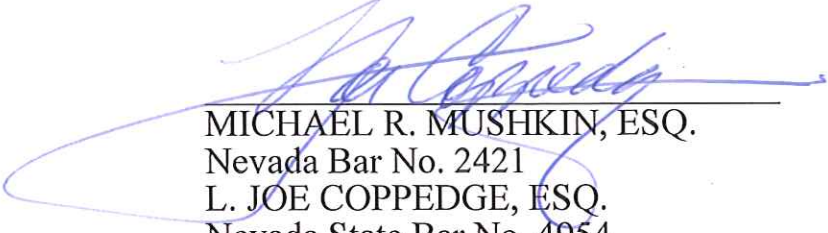
22 The Probate Commissioner, and the District Court in adopting his

1 recommendation, mistakenly viewed and treated the Trust assets as community  
2 property to be divided between the parties, and in the process ignored the  
3 requirements of the decanting statute and mandates of EDCR 4.17, which require  
4 discovery and an evidentiary hearing.

5 Based on the foregoing, Phung respectfully requests that this Court reverse  
6 the District Court Order decanting the wholly charitable trust FESR.

7 DATED this 13 day of September, 2018.

8 MUSHKIN • CICA • COPPEDGE

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10   
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1                                   **CERTIFICATE OF COMPLIANCE**

2           1.    I hereby certify that this brief complies with the formatting  
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5)  
4 and the type style requirements of NRAP 32(a)(6) because:

5           2.    ☒ This brief has been prepared in a proportionally spaced  
6 typeface using Microsoft Word 2010 in Times New Roman 14-point font; or

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

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

13                   ☒ Proportionately spaced, has a typeface of 14 points or more,  
14 and contains 6,985 words; or

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16 contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text; or

17                   ☐ Does not exceed \_\_\_\_\_ pages.

18          5.    Finally, I hereby certify that I have read this appellate brief, and to  
19 the best of my knowledge, information, and belief, it is not frivolous or interposed  
20 for any improper purpose. I further certify that this brief complies with all  
21 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),  
22 which requires every assertion in the brief regarding matters in the record to be

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 13 day of September, 2018.

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Pursuant to NRAP 25(d), I certify that on this 13<sup>th</sup> day of September,

- ☐ 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;
- ☒ 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