

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

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MOTION TO REISSUE ORDER AS A PUBLISHED OPINION

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1 **MOTION TO REISSUE ORDER AS A PUBLISHED OPINION**

2 Appellant Doan L. Phung, by and through his undersigned attorney, moves
3 the Court to reissue its March 21, 2019 Order as a published opinion. NRAP
4 36(f). Publishing the order in this case will provide clear guidance to trustees
5 administering trusts and estate planning practitioners in both Nevada and foreign
6 jurisdictions that “decanting” a trust under NRS 163.556 cannot be utilized to
7 thwart the settlor’s intent; and that an unauthorized decanting is void ab initio.

8 Judicial review of Nevada’s decanting statute is of significant importance
9 because Nevada is nationally recognized as being at the forefront of trust
10 decanting legislation and also because there is a dearth of reported cases
11 nationwide interpreting decanting statutes.¹

12 **I. Publication Is Warranted**

13 This Court “will decide a case by published opinion if it:”

14 (A) Presents an issue of first impression;

15 (B) Alters, modifies, or significantly clarifies a rule of
16 law previously announced by the court; or

17 (C) Involves an issue of public importance that has
18 application beyond the parties.

19 NRAP 36(c). Here, two of the three criteria are easily met, though either of them
20

21 ¹ See *In re: Connell Living Trust*, 133 Nev. Adv. Op. 19, at n.1 (2017) (where
22 this Court granted a motion to publish its unpublished order in a trust matter
where it was asserted by the movant that “Nevada’s case law on trusts should be
robust” because Nevada is a jurisdiction where an ever-growing number of trusts
are established).

1 alone is sufficient for publication.

2 **A. This Court's March 21, 2019 Order Further Clarifies that a**
3 **Trustee's Authority to Decant an Irrevocable Trust is Governed**
4 **by the Terms of the Trust and the Settlor's Intent.**

5 This Court has previously ruled that it construes trusts "in a manner
6 effecting the apparent intent of the settlor." *In re Connell Living Tr.*, 134 Nev.
7 Adv. Op. 73, 426 P.3d 599, 602 (2018). This Court has also previously ruled that
8 to determine the settlor's intent, it "employ[s] contract principles, including
9 determining the intentions of the settlor 'by considering the trust as a whole[.]'"
10 *Id.* (internal citations omitted). But until now, the Court had not squarely
11 addressed whether a settlor's intent is relevant to determine whether a trustee has
12 discretion and authority to decant a trust under NRS 163.556.

13 What this Court appeared to resolve by way of its March 21, 2019 Order
14 is that a trustee's authority to decant is ultimately governed and limited by the
15 terms of the trust instrument, which are construed, as a matter of law, "in a
16 manner effecting the apparent intent of the settlor."

17 In the case at bar, this Court concluded that the trustee did not have the
18 "discretion or authority to distribute" because it construed the phrase "Trustees
19 ... may, in their discretion," to mean that one single trustee could not unilaterally
20 distribute trust property, notwithstanding NRS 163.556(1), which provides that
21 "a [single] trustee ... may exercise such discretion."

22 One could conceive of similar situations where a trustee of an irrevocable
trust had powers to distribute but with limitations imposed by the express terms

1 of the trust instrument. If a decanting were performed under NRS 163.556 for the
2 purpose of freeing the trustee and the beneficiaries from those limitations (e.g.,
3 spendthrift provisions, no contest provisions, ascertainable distribution
4 standards), such action would completely thwart the settlor's purpose for
5 expressly including such limitations in the trust instrument.²

6 Preserving a settlor's intent when performing a trust decanting under
7 Nevada law is also an issue of public importance that has application beyond the
8 parties of this case. In recent years, Nevada has been at the forefront of decanting
9 legislation. Because of this, the Court should publish its March 21, 2019 Order
10 because any trustee who avails himself or herself of Nevada's decanting laws
11 must not abuse such laws. Indeed, decanting is intended to fix outdated, inflexible
12 or otherwise deficient trusts. It is not intended to thwart a settlor's intent.

13 **B. The Validity of an Unauthorized Decanting is an Issue of Public**
14 **Importance that Applies Beyond the Parties to this Case**

15 In the case at bar, this Court held that the district court "erred in ordering
16 a course of action that the trust instrument did not permit and that the settlors did
17 not intend." (March 21, 2019 Order at 3-4.) The course of action ordered by the
18 district court was an order instructing the trustee to decant half of the assets of
19 the Fund for the Encouragement of Self Reliance ("FESR") into a new trust to be
20

21 ² See, e.g., *Matter of Tracy*, 464 Pa. 300, 306, 346 A.2d 750, 752 (Penn. 1975)
22 ("[W]e are not prepared to apply legal rules of construction to thwart settlor's
intent.").

1 controlled by the Respondent.³ By way of its March 21, 2019 Order, this Court
2 remanded the matter back to the district court to unwind the decanting. (March
3 21, 2019 Order at 4.) Implied by operation of the relief afforded was that this
4 Court determined that the decanting was void ab initio as Respondent did not
5 have the authority to unilaterally decant the FESR:

6 Because the trust instrument does not provide that a
7 trustee may unilaterally distribute trust property,
8 unanimous action by the trustees would be required to
 exercise the decanting right under the statute.

9 (March 21, 2019 Order, at 3.)

10 A decanting is void ab initio when the same is done without authority.⁴
11 Publishing the Court's March 21, 2019 Order will provide guidance to trustees
12 and estate planning practitioners in that any attempt to decant an irrevocable trust
13 pursuant to NRS 163.556 where a trustee has no authority to do so constitutes a
14 void transaction.

15 **C. The Text of the March 21, 2019 Order Need Not be Revised**

16 The Court's March 21, 2019 Order can be published without revision. The

17 ³ Appellant's Appendix, Vol. V at AA 001313-AA 001329, pp. 6-7.

18 ⁴ See, e.g., *Hodges v. Johnson*, 170 N.H. 470, 473, 177 A.3d 86, 88 (N.H. 2017)
19 (decanting held void ab initio because it eliminated future interests of
20 beneficiaries); Revised Code of Washington 11.107.080(7)(1) ("A provision in the
21 second trust instrument which is not permitted under this chapter is void to the
22 extent necessary to comply with this chapter."); *Stafford v. Crane*, 382 F.3d 1175
(10th Cir. 2004) (holding that an irrevocable trust was void ab initio because the
settlor lacked authority to form trust); *Day v. Seblatnigg*, 186 Conn.App. 482, 199
A.3d 1103 (Conn.App.2018) (Irrevocable trust declared void ab initio because
settlor lacked legal capacity to form a trust).

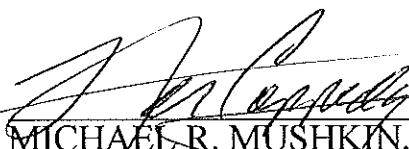
1 Court laid out the relevant facts and procedural history and included a thoughtful
2 and well-sourced analysis in its discussion. There are no “additional issues not
3 included in the original decision” that need to be discussed. NRAP 36(f)(4). This
4 factor, too, points in favor of publication.

5 **II. CONCLUSION**

6 This Court’s March 21, 2019 Order should be published. It meets the
7 criteria for publication, and publication will send a clear message to all trustees
8 and estate planning practitioners that decanting an irrevocable trust under NRS
9 163.556 cannot be utilized to defeat a settlor’s intent for imposing limitations on
10 a trustee’s powers and discretion and any attempt to do so will result in a void
11 decanting.

12 DATED this 4 day of April, 2019.

13 MUSHKIN • CICA • COPPEDGE

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Pursuant to NRAP 25(d), I certify that on this 4th of

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[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;

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