

In the Supreme Court of the State of Nevada

IN THE MATTER OF THE CHRISTIAN)
FAMILY TRUST u.a.d. 10/11/16)

~~~~~ )  
SUSAN CHRISTIAN-PAYNE, )  
ROSEMARY KEACH AND )  
RAYMOND CHRISTIAN, JR. )

Appellants, )

-vs- )

ANTHONY L. BARNEY, LTD. and )  
JACQUELINE UTKIN, )

Respondents. )

~~~~~ )  
ANTHONY L. BARNEY, LTD.,)
Cross-Appellant,)

-vs-)

SUSAN CHRISTIAN-PAYNE,)
ROSEMARY KEACH AND)
RAYMOND CHRISTIAN, JR.)

Cross-Respondents,)

and)
JACQUELINE UTKIN,)

Respondent.)
~~~~~ )

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**APPELLANT/CROSS-RESPONDENTS' OPENING BRIEF**

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## NRAP 26.1 DISCLOSURE

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:

Appellants/Cross Respondents, Susan Christian-Payne, Rosemary Keach and Raymond Christian, Jr. are individuals, residents of Clark County, Nevada and have been represented by Cary Colt Payne, Esq., of the Cary Colt Payne, Chtd. lawfirm in District Court matter below.

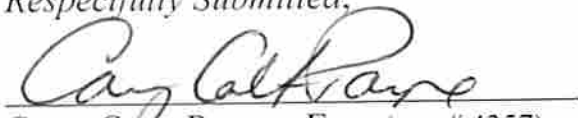
Beneficiaries, Tommy L. Christian and Christopher A. Christian.

Respondent/Cross Appellant, Anthony L. Barney, Ltd., through its principal, Anthony L. Barney, Esq., previously represented itself and Nancy Christian, deceased in the District Court matter below. Appearing in the matter for the firm was Anthony L. Barney, Esq., Tiffany Barney, Esq. and Zachary Holyoak, Esq.

Respondent, Jacqueline Utkin, prior trustee, was represented by Jerimy Kirschner, Esq., of the JERIMY KIRSCHNER & ASSOCIATES, LTD. Lawfirm in the District Court matter below.

Monte Reason, beneficiary and prior trustee, was represented by Joseph Powell, Esq. of the RUSHFORTH, LEE AND KIEFER Lawfirm in the District Court matter below.

*Respectfully Submitted,*



CARY COLT PAYNE, ESQ. (NVB# 4357)

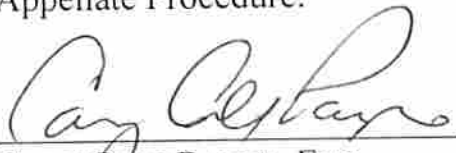
Attorney for Appellant

## ATTORNEY CERTIFICATE NRAP RULE 28.2

1. 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 Microsoft Word 14-point Times New Roman and is double-spaced.

2. 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 6,752 words and does not exceed 30 pages.

3. 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 subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

A handwritten signature in cursive script, appearing to read "Cary Colt Payne".

CARY COLT PAYNE, ESQ.  
Attorney for Appellant

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## **APPELLANT'S OPENING BRIEF**

### ***I. Jurisdictional Statement***

The Supreme Court has jurisdiction over this matter as it is an appeal from an order of the District Court pursuant to NRAP 3(A)(b)(3), NRS 155.190 (e),(h), (j), (n).

### ***II. Routing Statement***

Appellants respectfully submit that this appeal is appropriate for resolution/decision in the Court of Appeals, pursuant to NRAP 17(B)(15): Cases involving trust and estate matters in which the corpus has a value of less than \$5,430,000;

### ***III. Statement of the Issues for Review***

(1) Whether the District Court erred in allowing a non party law firm file their own independent petition for fees/costs and paid from a dead client's discretionary spendthrift trust.

(2) Whether the District Court erred in allowing the alleged successor trustees pre-authorization of payment of attorneys fees/costs from a discretionary/spendthrift trust.

### ***IV. Statement of Interested Parties***

Appellants: Susan Christian Payne, Rosemary Keach, Raymond Christian, Jr., Children of the Settlers Raymond Christian, Sr. and Nancy Christian; original co-trustees and parties to The Christian Family Trust (u.a.d. 10/11/16)

Respondents: Anthony L. Barney, Ltd. (creditor)  
(hereinafter "Respondent", "Respondent Barney firm")

Other parties: Monte Reason, half brother to Appellants,  
beneficiary (#1 below), alleged successor trustee;  
resigned and nominated Jacqueline Utkin  
Jacqueline Utkin, successor trustee, removed for conflicts

Trust: The Christian Family Trust (u.a.d. 10/11/16)  
Settlors/Trustors: Raymond Christian, Sr. and Nancy Christian  
Raymond Christian, Sr. (died 1/31/17)  
Nancy Christian (died 12/14/17)

Original Trustees: Susan G. Christian-Payne,  
Rosemary Keach and Raymond Christian, Jr.

Income Beneficiary: Nancy Christian (pursuant to CFT ¶4.3(a):  
“During the lifetime of the Survivor, the Trustee, in the Trustee's sole discretion, may pay to the Survivor all of the net income of the Trust estate, as the Trustee may determine necessary, in the Trustee's sole discretion, for the health, education, support and maintenance of the Survivor.”

Beneficiaries of Trust Res:

(1) as to the proceeds of the sale of the Dancing Vines property (\$194,704.59), see Trust &6.1 (a)-(g):

Rosemary Keach (20%=\$38,940.92), outright, free of trust;  
Raymond T. Christian, Jr. (20%=\$38,940.92) outright, free of trust;  
Tommy L. Christian (20%=\$38,940.92) outright, free of trust;  
Susan G. Christian-Payne (20%=\$38,940.92) outright, free of trust;  
Christopher A. Christian (10% = \$19,470.45) outright, free of trust;

Monte B. Reason (10% = \$19,470.45), and this Trust share shall be held, in Trust and distributed to him in the sole discretion of SUSAN G. CHRISTIAN-PAYNE for his health, education, maintenance and support.

(2) The rest, residue and remainder of the Trust Estate, including all cash (\$234,134.34) and the real properties located at 2848 Bluff Point Drive, Las Vegas, Nevada and 37920 Grandview Ave., Yermo, California, see Trust &6.2:

Rosemary Keach (one third-33%) outright, free of trust;  
Raymond T. Christian, Jr. (one third-33%) outright, free of trust;  
Susan G. Christian-Payne (one third-33%) outright, free of trust;

## *V. Statement of the Case and Procedural History*

On October 11, 2016, Raymond Christian, Sr., and Nancy Christian (collectively as “Trustors”, or individually as “Ray Sr.” and “Nancy”), created The Christian Family Trust (“CFT”). (APP-ROA-V1-032-062) The Trustors were not the trustees of the CFT. Their children, Appellants, Susan Christian-Payne, Rosemary Keach and Raymond Christian, Jr., were the original co-trustees. (“Appellants”)

Nancy and Ray, Sr. were married in the 1960’s, became divorced, had other marriages and children, and remarried in 2009.

In 2016, Ray, Sr., became ill and thereafter bedridden; it was agreed that Nancy and Ray, Sr. relocate to a residence nearer to their children. The decision was made to sell the Dancing Vines property and purchase the Bluffpoint property (both in Las Vegas, Nevada). (APP-ROA-V1-002-003)

This was not a traditional family non-testamentary (estate plan) trust between husband and wife. The Trust was created, in part, to protect Nancy from her son and her creditors. Nancy was known to unwisely spend money and if left unchecked, would run out of money. (APP-ROA-V1-002)

The CFT contained a restraint on alienation clause (§14.2) making the CFT a spendthrift trust. (APP-ROA-V1-056) The CFT also provided for the sole discretion of the co-trustees making the CFT a discretionary trust. (APP-ROA-V1-038)

Ray Sr. funded the CFT solely with his property. Other than the Dancing Vines real property, which was in the process of being sold, all “cash” funding of the CFT came from the separate property assets of Ray, Sr.

The Appellants, as co-trustees, commenced to administer the CFT, with input from their father. Raymond Christian, Sr. was diagnosed with terminal conditions and died (three months later) on January 31, 2017.

Upon the death of Ray Sr., Nancy immediately demanded the Appellants (as co-trustees of the CFT) provide her with \$5,000 per month. Nancy had her own home, monies and sufficient income of more than \$2,100 at that time. (APP-ROA-V1-003) Nancy hired Respondent Barney for representation against the trust/children.

The Appellants (then trustees) exercised their fiduciary duty to inquire in order for them to determine what was necessary and to what level their sole discretion was to be utilized under the trust. The trust had little or no “net income”, as there was only a small rental income, offset by a mortgage, etc., from real property in California. (APP-ROA-V1-004) Any payments would have been from trust principal. When their fiduciary due diligence inquiry was made by the then trustees as to the reasons why Nancy insisted on such sums, or to provide backup documentation for her request, no response was ever received from Nancy. (APP-ROA-V1-004)

Rather than deal with the actual issue of any trust income or Nancy’s needs, she Christian hired the lawfirm of Anthony Barney, Ltd. On June 12, 2017, (after the death of her husband) she signed documents which attempted to remove the existing co-trustees and nominating her son, Monte Reason as sole successor trustee. (APP-ROA-V1-067-068)

Monte Reason was not the biological son of Ray, Sr. Monte had a long history of criminal activities, arrests, etc. (APP-ROA-V1-013-026) Ray Sr. had long been

concerned with Monte's ability to influence his mother. Neither Nancy, during her lifetime, or Monte Reason as the alleged successor trustee, ever brought forward any further request or any petition to the court for a budget, request, or the monthly stipend. No Petition to confirm Monte as Trustee was ever sought.

On July 31, 2017, Appellants filed their Petition for Jurisdiction of the Trust, confirm original trustees and for Instructions (APP-ROA-V1-001) pursuant to NRS 153, 163, 164. The petition sought, inter alia, instructions in dealing with certain administrative portions of the terms of the trust and Appellants purported removal. Nancy moved to Dismiss (NRCP 12(b)(1)) (APP-ROA-V1-073), which was opposed by the Appellants. (APP-ROA-V1-106). Monte Reason filed his Response to the Petition to Assume Jurisdiction. (APP-ROA-V2-157) Nancy Christian and Monte Reason thereafter filed a Joint Objection to the Petition to Assume Jurisdiction, etc. (APP-ROA-V4a & 4b-223-373)

The matter was transferred to the Honorable Judge Vincent Ochoa, Dept. S, sitting as the Probate Court Judge, who issued his Decision and Order (APP-ROA-V2-185) The District Court found that Appellants were interested persons as defined in NRS 132.185 and have standing to pursue the petition and found/ordered, inter alia that:

Susan Christian-Payne, Rosemary Keach, and Raymond Christian (hereinafter "Petitioners") were the original individuals named co-trustees and accepted the Trusteeship of the Trust at the time of its initial execution in October 2016. The names of the four (4) now living children from the Grantors' marriage are Rosemary Christian-Keach, Raymond T. Christian, Jr., Tommy L. Christian, and Susan Christian-Payne.

About a month after Raymond died and after the property closed, Nancy Christian sought to be paid an additional \$5,000 per month from the trust.

The Trust provides at Article 4.3(a) that: "the Trustee, in Trustees' sole discretion may pay to the Survivor all of the net Income of the Trust estate, as the Trustee may determine necessary. In the Trustee's sole discretion for the health, education and maintenance of the survivor ... "

Nancy was informed as to the trust terms and net income payments by correspondence dated June 3, 2017. Within 10 days thereafter, Nancy, executed documents to remove Petitioners as co-trustees and appoint Monte Reason.

Petitioners allege that the trust was not intended to be revocable as to the trustees and that Article 9.3 contained at least one scrivener's or other similar type of error.

Monte Reason, the successor trustee, is Nancy's child from a previous marriage. Monte Reason has past child support arrears and criminal issues including drug issues. His share was to be ten percent of the trust and was to be held in a trust to be distributed in the sole discretion of the trustee Susan G. Christian-Payne. *See* Trust Sec. 6.1 (f) and (g). Petitioners were to each receive twenty percent of the proceeds from the sale of the home outright and free of trust. *See* Trust Sec. 6.1 In addition, Petitioners were to receive each one third of any remaining property. *See* Sec.6.2

Here, Petitioners were co-trustees of the trust and had fiduciary responsibility to protect the interests of Nancy and the assets of the Christian family trust. They had sole discretionary power of the assets of the trust and allege that they were removed as trustees for exercising this discretion. Petitioners further allege that appointment of Monte Reason as trustee will result in abuse or misuse of trust assets.

In the minutes from the March 15, 2018 hearing, the district court ordered that no attorneys fees be awarded until the final decision on whether Monte Reason could be a trustee. (APP-ROA-V10- 895) Appellants objected to the right of Nancy Christian's ability to remove the original signatories to the trust agreement, and the issue of replacing them with Monte Reason. This issue has not been decided by the district court.

Discovery commenced and litigation continued including Accounting (APP-ROA-V2- 166), Inventory (APP-ROA-V2-174), etc.

Prior to much being decided, Nancy Christian died December 14, 2017. The provision in the CFT providing her lifetime income lapsed. (CFT-Art. 2, ¶2.4- APP-ROA-V1-038)

Monte resigned as trustee of the CFT, and nominated Jacqueline Utkin. (APP-ROA-V7b-560)

After Nancy's death, the Respondent (Barney firm), in that sole (individual and/or corporate) capacity, filed its own Petition for Attorney's Fees and Costs. (APP-ROA-V8-577) The basis for relief was "pursuant to the terms of the trust" (at page 1). The Petition relied extensively on the pre-approval of the "successor trustees", and their "lack" of opposition. The petition was not verified (NRS 132.160). It sought in excess of \$62,105.64 in attorney fees, and costs in the amount of \$3,031.97 to be paid from the Trust principal.

The Appellants opposed the petition for multiple reasons. (APP-ROA-V9-742) The matter proceeded to hearing on April 4, 2018. (APP-ROA-V13a–V13d) The District Court awarded the amount of \$50,000 in attorney's fees, plus costs of \$3,031.97 to be paid from the Trust. Notice of Entry (APP-ROA-V15-1225) of the order was filed, and this appeal followed.

## *VI. Summary of the Arguments*

The CFT, was a discretionary/spendthrift trust. Such trusts do not permit for the payment of Nancy Christian's, a contestant) of her creditors before or after her death. It also does not provide the District Court the jurisdiction or authority for either the consideration of, or application for, or the payment of her creditors. The Barney firm



(admitted) it was a creditor of Nancy Christian; therefore it was a creditor of her personal estate. Respondent Barney firm does not have standing to bring any kind of Petition for Fees for payment of fees from the CFT. Nevada law dictates a creditor to file a claim in an estate as proscribed under NRS Chapter 147. NRS 163.417 also states the creditor shall not and a court cannot order payments to creditors.

The payment of the attorney fees/costs damaged the Trust and the beneficiaries.

That the record indicates the District Court lacked any sort of consideration of either the Brunzell or Beattie factors.

## ***VII. Legal Argument and Authorities***

### ***A. Standard of Review***

In Logan v. Abe, 131 Nev. Adv. Op. 31350 P.3d 1139, (Nev., 2015) the Nevada Supreme Court held: A district court abuses its discretion when it commits "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." State v. Eighth Judicial Dist. Court, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (quoting Steward v. McDonald, 958 S.W.2d 297, 300 (Ark. 1997)). An award of attorney fees is fact intensive, therefore, this Court will affirm an award of attorney fees if it is based upon substantial evidence. See Logan, 131 Nev., Adv. Op. 31, 350 P.3d at 1143. When the attorney fees matter implicates questions of law, however, the proper review is de novo. In re Estate & Living Tr. of Miller, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009).



In a probate matter, the Supreme Court will “defer to a district court’s findings of fact and will only disturb them if they are not supported by substantial evidence. Waldman v. Maini, 124 Nev. 1121, 1129, 195 P.2d 850, 856 (2008). “Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion”. In re Estate of Bethurem, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013) (quoting Winchell v. Schiff, 124 Nev. 938, 044, 193 P.3d 946, 950 (2008)) Legal questions, including matters of statutory interpretation are reviewed de novo. Waldman, 124 Nev. at 1129, 195 P.3d at 856.

### ***B. Specific Arguments***

***(1) Respondent Barney did not have standing to file any kind of independent petition for attorney fees/costs.***

The District Court erred in permitting a creditor of a decedent to petition to seek payment of their attorneys fees from the trust. It also erred by not following the probate process proscribed by Nevada law. (NRS Chapter 147)

Respondent Barney has no privity to the CFT, is not a beneficiary of the CFT, there was no beneficial result to the CFT, and while Respondent Barney arguably is a creditor of Nancy, her beneficial interest died with her. Barney is not a creditor of the CFT as it did not perform services for the CFT. Barney is not a real party in interest.

The only individuals/entity who could oppose the instant appeal would be the current trustee of the CFT as real party in interest or the CFT beneficiaries.

Nevada law and case precedent has consistently provided that a creditor must go through the creditor's process outlined in NRS Chapter 147. *In Re Dickersons Estate*, 51 Nev. 69, 268 P. 769 (1928); *In the Matter of Jane Tiffany Living Trust*, 177 P.3d 1060 (Nev., 2008)

Respondent relied on the back of Utkin (second trustee) as the legal basis for "...claim accepted by the trustee", pursuant to NRS 132.390(c)(8). Utkin was removed as trustee due to her conflicts and negative attitude towards Appellants. (APP-ROA-V17-1402 & 1409) Respondent sought and received written approval prior to filing the Petition. (APP-ROA-V8-610 & 612) Despite the District Court's order, NRS 132.390(c)(8) was never cited as a basis in the Petition for Attorney's Fees and Costs. (APP-ROA-V8-577)

Respondent did not purport to have a legal theory for an award of fees/costs. Respondent argued in his Petition for Attorney's Fees. (APP-ROA-V8-586), at page 10, line 19: "ALB, Ltd.'s creditor claim is valid against the trust", without substantiating how or why. Respondent further alleged that "ALB, Ltd. has a creditor claim against the trust for what it seeks to be paid".

***(2) The Christian Family Trust qualified as a Nevada spendthrift/discretionary trust.***

The CFT was a discretionary Nevada trust as proscribed by NRS 163.4185(1)(c), and contained spendthrift provisions (NRS 166.040). (CFT ¶14.1, 14.2 -APP-ROA-V1-056) Pursuant to the Christian Family Trust, Nancy's interest was

only for the duration of her lifetime (life estate) for Nancy's health, education, support and maintenance (HEMP), etc. (APP-ROA-V1-038)

Nancy Christian had a mere beneficial right to "income" under the CFT, subject to the absolute discretion of the then Co-Trustees (Appellants). The CFT (APP-ROA-V1-032-062) gave the Appellants' complete, ultimate sole discretion. The Trust provides at Article 4, ¶4.3(a) that: "*the Trustee, in Trustees' **sole discretion** may pay to the Survivor all of the net income of the Trust estate, as the Trustee may determine necessary, in the Trustee's sole discretion for the health, education and maintenance of the survivor...*". [Emphasis added]

A discretionary interest exists under Nevada law, if the trustee has discretion to determine whether a distribution should be made and when. In Nevada, the beneficiary of a discretionary trust does not have an enforceable right to a distribution; thus, the beneficiary does not have a property interest that can be reached by a creditor. (NRS 163.4185(1)(c)) Further, a beneficiary who only has a discretionary interest in a trust, does not have an enforceable right to distribution from the trust, and a trustee given "sole" discretion does not have to act reasonably. (NRS 163.419(2))

While Nancy was living, she was only an income beneficiary. Nancy had no rights under the trust to transfer any assets. Respondent Barney firm was, at best, her personal attorney and a self-styled creditor of Nancy. Once Nancy died, her beneficial interest lapsed.

Respondent Barney was neither a party to the action, trustee, or beneficiary, and therefore is not a real party in interest of the Christian Family Trust (NRCP 17). As

Nancy's personal attorney, Respondent Barney firm had no other rights, and does not have standing to bring an independent Petition for their fees as a creditor against the CFT, a discretionary/spendthrift trust. In law, standing or *locus standi* is the term for the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case.

The Nevada Supreme Court, in Klebacka v. Nelson, 133 Nev., Adv. Op. 24 (2017), clearly affirmed, by unanimous decision, the existence of such trusts being absolute protection against creditors. There are no exceptions for creditors even as to those such as alimony or child support, which are inapplicable in this matter. Nevada has NO statutory exception creditors. The decision also noted that no specific language necessary to create a spendthrift trust, and that one must first look to the words of the trust agreement to determine if the settlor had the intent to create a spendthrift trust. All of these were affirmed resoundingly in In re Frei Irrevocable Trust, 133 Adv. Op. 8 (2017)

The CFT contains such language at Paragraphs 14.2 (APP-ROA-V1-056), specifically prohibits the Barney firm, as a creditor of Nancy Christian, from being paid from trust assets, which states:

**14.2 Spendthrift Provision.** No interest in the principal or income of any trust created under this Trust Instrument shall be anticipated, assigned, encumbered or subjected to creditors' claims or legal process before actual receipt by a beneficiary. This provision shall not apply to a Trustor's interest in the Trust estate. The income and principal of this Trust shall be paid over to the beneficiary at the time and in the manner provided by the terms of this Trust, and not upon any written or oral order, nor upon any assignment or transfer by the beneficiary, nor by operation of law. [Emphasis added]

It is submitted that given the terms of the CFT, it is both a discretionary trust and a spendthrift trust pursuant to Nevada Law.

As a discretionary (NRS 163.5559(1)) and spendthrift trust, the CFT (CFT ¶14.1, 14.2 & NRS 166.040, NRS 111.779(12)(A)(6)) (APP-ROA-V1-032-062) was not responsible to pay for Nancy's lawyers, which are her personal debts. Respondent stated in the Petition for Attorneys Fees and Costs (at page 2): "In February 2017, Nancy Christian came to the law offices of Anthony L. Barney, Ltd., regarding some issues she was having with her children."

When Nancy died, her interests in the CFT were divested. Nevada law forbids the payment to Nancy's creditors. NRS 163.417 states the creditor shall not and a court cannot order payment to creditors. This is also confirmed in NRS 111.779(12)(a)(6) in that a creditor has no claim against a spendthrift trust.

***(3) The Christian Family Trust did not allow for the payment of creditors of the deceased second settlor.***

Paragraph 4.1 of the CFT (APP-ROA-V1-037) specifically states that the debts of the first of the two settlers were to be paid by the trust.

#### ARTICLE 4 : DISTRIBUTION OF INCOME AND PRINCIPAL UPON THE DEATH OF A TRUSTOR

**4.1 Decedent and Survivor Defined.** Reference to the "Decedent" shall refer to either of the Trustors whose death shall first occur and reference to the "Survivor" shall refer to the surviving Trustor. [Emphasis added]

**4.2 Payment of Debts.** After the death of the Decedent, the Trustee may, in the Trustee's sole discretion, pay from the income and/or principal of the Decedent's separate property and Decedent's one-half of the community property, which is a part of this Trust estate, the administrative expenses, the expenses of the last illness and funeral of the Decedent and any debt owed by the Decedent.

Respondent incorrectly relied solely upon paragraph 4.2's provisions for its purported authority to be paid. (Petition for Attorney's Fees and Costs, page 10, lines 2-14 – APP-ROA-V8-586)

The CFT clearly states the Decedent is the first of the trustors to die, to wit: Ray Sr. (dod 1/31/17). The Trust made absolutely no provision(s) for any payment of any creditors of the "survivor" trustor, in this case, Nancy Christian.

At the hearing, Respondent Barney argued during the hearing that Brunzell did not apply, neither did prevailing party, but only under the terms of the trust. (APP-ROA-V13b-1070-1071) -Transcript 4/4/18 at pages 34-35):

MR . BARNEY : Well , I'm-- I'm suggesting that getting us paid pursuant to the terms of the trust which I don't think is in dispute at this point . You sign the order. Jackie Utkin is the trustee that's been confirmed. Irrespective of that issue, these aren't prevailing party fees. You know, I mean, we -- we sent -- we essentially indulged the Court on the -- on the issue of the -- on the Brunzell factors. It's -- Brunzell factors really don't come into play on a trust payment, because the terms of the trust control in terms of us getting paid. [Emphasis added]

The general rule is that attorneys fees and/or costs are not recoverable by a successful party except as provided for by agreement, statute, court rule or case law. (NRS 18.010; EDCR 7.60(b))

The definition of a "prevailing party" is a "winner of a lawsuit". A party must recover "a money judgment" to be entitled to attorney fees under NRS 18.010(2)(a). Smith v. Crown Fin. Servs. of Am., 111 Nev. 277, 285, 890 P.2d 769, 774 (1995) In this matter Respondent Barney firm was not any sort of winner of a lawsuit, and therefore not a prevailing party. As the action had not proceeded to judgment or where

there is no prevailing party, no statutory authority existed for an award of attorney's fees and/or costs. See Sun Realty v. District Court, 91 Nev. 774, 542 P.2d 1072 (1975) cited, Works v. Kuhn, 103 Nev. 65 at 68, 732 P.2d 1373 (1987); Eberle v. State ex rel. Redfield Trust, 108 Nev. 587 at 590, 836 P.2d 67 (1992); Semenza v. Caughlin Crafted Homes, 111 Nev. 1089 at 1096, 901 P.2d 684 (1995)

The District Court failed to make any findings as to why the award was appropriate. Also see Morgali v. Kaupp, 70 Nev. 257, 265 P.2d 1069 (1954).

The District Court did not have jurisdiction to award Respondent attorneys fees and costs. Also see Dixon v. Second Judicial District Ct., 44 Nev. 98, 190 Pac. 352 (1920) cited, Consumers League v. Southwest Gas Corp., 94 Nev. 153, 156, 576 P.2d 737 (1978)

Appellants sought court intervention for the purpose of instructions as it related to the CFT clear provisions to distribute and address the attempt to remove them. (APP-ROA-V1-001) Nancy filed to Dismiss the Petition to Assume Jurisdiction, which was denied; Nancy thereafter filed an Objection to the Petition to Assume Jurisdiction, which was also denied. At no point was Nancy (or Respondent Barney firm) ever a prevailing party to qualify for an award of attorney's fees/costs.

The order in question made no reference whatsoever or any findings as to whether or not the court considered the factors enumerated in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 455 P.2d 31 (1969) or the those in Beattie v. Thomas, 668 P.2d 268, 99 Nev. 579 (Nev., 1983), citing to Armstrong v. Riggi, 549 P.2d 753, 92 Nev. 280 (Nev., 1976).



This Court has long held that, any award of attorney's fees in a trust matter must show that the fees requested are reasonable or benefitted the Trust. In Respondent Petition for Attorney's Fees (APP-ROA-V8-586), at page 10, line 22: "ALB, Ltd's fees and costs that were expended on Nancy's behalf are administrative expenses of the trust". Normally, Trust expenses are the administrative expenses of a trust (i.e, costs which the trustees incur in running the trust).

Respondent's invoices to Nancy were in her sole name. There was no evidence that Nancy approved these fees. (APP-ROA-V13-1096-1097-Transcript 4/4/18 at page 61, lines 20-26 and page 64, line 10) No fee agreement or scope of representation was ever provided signed by Nancy (the petition was signed only by the attorney).

In the Petition for Fees, Respondent stated: "The Law Offices of Anthony L. Barney Ltd. was retained to obtain Nancy's help in getting her a home and a life in which she had grown accustomed to living." (APP-ROA-V8-583) Nancy did not have any administrative authority to incur administrative expenses.

Attorneys fees sought must be reasonable and justified and must be reasonable and have benefitted the trust or its beneficiaries. Nancy Christian relied on the trust when she unilaterally decided to remove the co-trustees. The actual issue for Nancy at the time was a monthly stipend during her lifetime, and that singular issue was never brought before the court during her lifetime or decided.

In the six (+/-) months Respondent Barney firm represented Nancy, prior to her death, they filed a Motion to Dismiss the Petition to Assume Jurisdiction, a preemption of the original assigned judge, a Motion to Dismiss (APP-ROA-V1-073), a formal Joint



Objection to the Petition to Assume Jurisdiction (APP-ROA-V4a & 4b), and a Petition for an Accounting. (APP-ROA-V3-194) A review of the billing statements (Appellants Opposition- APP-ROA-V9-742) indicate various other activities, such as filing a bar complaint against the drafting attorney, after obtaining his file, despite the fact that the drafting attorney of the estate plan documents was an attorney-client exception pursuant to NRS 49.115(4) and (5). (APP-ROA-V9-811)

There was never a showing or any findings by the District Court that any of their actions benefitted the trust; instead the specific terms of the trust were actually ignored. Respondent failed in the Petition for Attorney's Fees to present any cogent argument (or evidence) that the services rendered had any value or reasonableness to the CFT.

"The burden is on the attorney to prove, by preponderance of the evidence, both that the services rendered and the reasonable value thereof"; in the Estate of Herrmann, 100 Nev.1, 677 P.2d 594 (1984), citing to Kimball v. Pub. Ut. Dis. #1 of Douglas Cty, 64 Wash.2d 252, 391 P.2d 205 (1964). In the Herrmann matter, the court held that the District Court may consider the value of the services to the general estate. The court therefore believes that it is incumbent upon both the attorneys for the heirs and the attorney for the executor to establish by a preponderance of the evidence to the court to prove the reasonableness of the value of the services rendered to the estate.

Although the order references NRS 132.390(c)(8), and NRCP 12(f), as conclusions of law, the subject order is devoid of any findings of reasonableness, necessity or the *Brunzell* or *Beattie* factors.

*(4) The alleged trustees breached their fiduciary duty by pre-authorization of payment prior to filing.*

The terms of the CFT are clear – there are no provisions which would permit the payment of Nancy Christian’s creditors.

The issue of whether or not Monte Reason even was a successor trustee hinges on the outcome of whether or not Nancy had the right to remove and change the original trustees. Even if, arguendo, Nancy had such powers, the Court had taken jurisdiction of the trust, and Monte Reason did not petition the court to confirm himself as trustee. As such, it is questionable as to his ability to “nominate” a successor, let alone Jacqueline Utkin who was later removed for cause.

The Barney firm contends that the two, both now removed former trustees (Monte Reason and Jacqueline Utkin) “pre-approved” the requested fees. (APP-(ROA-V13c-1098 -Transcript 4/4/18 at page 62, lines 9-13 and APP-ROA-V8-610 and 612) See Appellants Opposition to the Petition for Fees. (APP-ROA-V9-742)

Former trustee Utkin filed a Notice of Non-Opposition and Limited Joinder to the Petition for Fees and Costs for Anthony L. Barney, Ltd. (APP-ROA-V6-660) This was a violation of the trustees fiduciary duty to protect the trust, trust res and its beneficiaries and is malfeasance, misfeasance and nonfeasance. As part of the non-opposition, it incorrectly states: “5. The CFT was not an asset protection trust, thus the creditor claims against the settlors can reach CFT property”. (APP-ROA-V6-661; page 2, lines 7-8) and “6. The fees of Creditor are a debt owed by Nancy and the assets of the trust are subject to this Creditor’s claim”. (APP-ROA-V6-661; page 2, lines 9-10)

It was argued that Utkin was not only incorrect as a matter of law, but also in breach of her duties in not following the express terms of the trust. A trustee has a duty to implement the trust terms and protect trust property. It also has additional duties by carrying out the wishes of the beneficiaries. Respondent argued that the Trust, paragraph 4.2 was the authority, but ignored paragraph 4.1, which was an incorrect reading. Both Respondent and Utkin's counsel (Kirschner) intentionally ignored paragraph 4.1, as a material omission to the District Court.

The Supreme Court held in *In Re Frei Trust, supra*:

"[A] 'fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.' *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (quoting Restatement (Second) of Torts § 874 cmt. a (1979)). A claim for breach of fiduciary duty "*seeks damages for injuries* that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship." *Id.* (emphasis added).

In the context of a spendthrift trust, a trustee's ability to make payments from the trust is extremely limited. NRS 166.120(2). A trustee may not make payments to an assignee of the beneficiary, even if that assignment is voluntary, without first commencing an action in court. *Id.* Furthermore, "[t]he trustee of a spendthrift trust is required to disregard and defeat every assignment or other act, voluntary or involuntary, that is attempted contrary to the provisions of this chapter." NRS 166.120(4). In an action under the spendthrift act, however, a beneficiary must "show by clear and convincing evidence that the [trustee] acted. . . knowingly and in bad faith" and "directly caused the damages suffered by the [beneficiary]." NRS 166.170(5).

Appellant's argument(s) were not supported by the CFT agreement itself or Nevada law.

Finally, by trustee's "pre-approval", these two fiduciaries violated their duty as to not adhering to the trust terms in and of itself.

### *VIII. Conclusion and Relief Sought*

In matters of Trust Agreements, the District Court is to apply the language and the intent and agreement of the Settlers. In this matter, the CFT strictly did not permit Nancy Christian's creditors to bring such a petition or to be paid from the trust property. The District Court exceeded its jurisdiction in allowing a non-party creditor (Barney firm) as a Nancy Christian creditor, be paid out of the trust res.

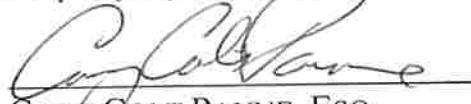
The Barney firm's Petition for Fees was mired in hearsay, inaccuracies, misstatements of fact, and despite claiming they were furthering the interest of the trust, have, by their own billing indicated that the opposite is apparently true.

The Barney firm was, at best, a creditor of Nancy Christian, not The Christian Family Trust. The Trust does not provide for Nancy's personal debts to be paid. Her personal estate should pay her debts. Respondent Barney firm admits they are creditors of Nancy. They state this matter is not a prevailing party matter. They only rely upon the actual terms of the trust as the sole legal authority to be paid.

Ultimately the District Court exceeded its authority in that neither the trust, nor statute provide a basis for the payment of the Barney's firm attorneys fees and costs i, and it is requested that the order of the District Court summarily be reversed.

Dated: January 8, 2019

*Respectfully Submitted,*

  
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## CERTIFICATE OF SERVICE

I certify that pursuant to NRAP 31, on the 9<sup>th</sup> day of January, 2019 I have served to the following an electronic filing copy of this Brief by electronic filing to the Court's E-Flex System and via US Mail:

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A handwritten signature in black ink, appearing to read "Cary Colt Payne", written over a horizontal line.

An employee of  
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