

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

2 IN THE MATTER OF: THE
3 BEATRICE B. DAVIS FAMILY
4 HERITAGE TRUST, DATED JULY
5 28, 2000, AS AMENDED ON
6 FEBRUARY 24, 2014.

7 CHRISTOPHER D. DAVIS,

8 Appellant,

9 vs.

10 CAROLINE DAVIS; AND
11 DUNHAM TRUST COMPANY,

12 Respondents.

Supreme Court No. 79080

District Court Case No. P083867
Electronically Filed
Jan 13 2020 11:38 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

13 **RESPONDENT DUNHAM TRUST COMPANY'S ANSWERING BRIEF**

14
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16 **& CARLSON, APC.**

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. I have read this Answering Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

2. This Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e) (1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure; and

3. This Answering Brief complies with the formatting requirements of Rule 32(a)(4)-(6), and the page- or type-volume limitations stated in Rule 32(a)(7).

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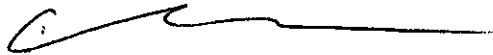
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NRAP 26.1 DISCLOSURE

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.

DUNHAM TRUST COMPANY does not have any parent corporation and there are no publicly held companies owning 10% or more of its stock. Further, LEE, HERNANDEZ, LANDRUM & CARLSON, APC has appeared for said party in the underlying District Court case and will appear for the same before the Nevada Supreme Court in the instant Appeal proceeding. No other counsel has appeared for said party.

**LEE, HERNANDEZ, LANDRUM
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I.

TABLE OF AUTHORITIES

Statutes:

NRS 155.190 (1) 6, 19

NRS 155.190 (1)(h) 6

NRAP 4 (a)(1) 6, 19

NRAP 17 (b)(14) 7

3 Code of Colorado Regulations, 719-1, Rule 5.00.4017

Title 18, Article 18 of the Colorado Revised Statutes Uniform Controlled
Substances Act of 2013 17

Title 21 of the U.S. Code, the Uniform Controlled Substances Act 17

Cases:

Healy v. Volkswagenwerk Aktiengesellschaft, 103 Nev. 329, 331, 741 P.2d 432,
433 (1987) 6, 10

Walker v. Scully, 99 Nev. 45, 657 P.2d 94 (1983) 10

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II.

JURISDICTIONAL STATEMENT

This matter involves an appeal of the April 26, 2019 Order entered by the Eighth Judicial District Court, which is an appealable order under NRS 155.190 (1)(h) that instructs a trustee. Pursuant to NRS 155.190 (1) and NRAP 4 (a)(1), the time for filing an appeal of the subject Order is thirty (30) days after the date of notice of entry of order is served. The notice of entry of order for the subject Order on appeal in this matter was filed and served on Appellant on April 26, 2019, via U.S. Mail and email.¹

Based on the date of service, Appellant's Notice of Appeal was untimely filed on May 28, 2019, which is thirty-two (32) days after the notice of entry of order. As such, pursuant to this Court's holding in Healy v. Volkswagenwerk Aktiengesellschaft, 103 Nev. 329, 331, 741 P.2d 432, 433 (1987), Appellant's untimely filing of the Notice of Appeal divests this Court of jurisdiction to entertain the instant Appeal, and the same should be summarily dismissed.

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¹ Respondent's Appendix, Vol. I, Bates APP000127-134.

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III.

ROUTING STATEMENT

If this Court is not inclined to dismiss the Appeal based on untimely filing of the Notice of Appeal, pursuant to NRAP 17 (b)(14), the appropriate jurisdiction for this matter would be the Court of Appeals, as the April 26, 2019 Order being appealed arises from a case involving trust and estate matters in which the corpus has a value of less than \$5,430,000.

MEMORANDUM OF POINTS AND AUTHORITES

IV.

ISSUE PRESENTED

Whether the Eighth Judicial District Court's April 26, 2019 Order directing DTC, as the Trustee, to surrender the primary asset of the Beatrice B. Davis Family Heritage Trust (the "Trust"), which is life insurance policy number ACLI 11058007 (ALIP 000081031) (the "Policy"), and to liquidate all assets owned by the policy (the "Order"), was in the best interests of the Trust and its beneficiaries.

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V.

STATEMENT OF THE CASE

The underlying action was commenced in the Eighth Judicial District Court, Probate Division ("DC"). The litigation was initiated on February 10, 2015, wherein Trust beneficiary, Caroline Davis ("Caroline") requested the court assume jurisdiction over the Trust, confirm DTC as Directed Trustee, over Stephen K. Lehnardt as Distribution Trust Advisor, and over Appellant as Investment Trust Advisor, as well as the disclosure of documents and information from Appellant. On July 1, 2015, the District Court granted in part and denied in part, Caroline's Petition, by assuming jurisdiction over the Trust, and Appellant, confirming DTC as the Directed Trustee, denying jurisdiction over Mr. Lehnardt, and granting her request for disclosure of documents in Appellant's possession, as related to his role as Investment Trust Advisor and Manager of FHT Holdings. Following this Order on Caroline's Petition, Appellant appealed the same in Nevada Supreme Court Case number 68948. Said appeal was ultimately denied by this Court on May 25, 2017.

Following denial of Appellant's initial Appeal, he and Caroline engaged in settlement negotiations, which did not involve DTC. Ultimately, Appellant and Caroline reached a resolution, and reported the same to the District Court. This prompted Appellant's former attorneys, Anthony Barney, Harriet Roland, and

1 Goodsell & Olsen, to file Motions seeking awards of attorneys' fees based on
2 unpaid legal fees owed by Appellant to said counsel, who were retained to represent
3 Appellant in the underlying litigation with his sister Caroline. As a result of such
4 motion practice, the Barney Firm was awarded \$32,680.17, the Olsen Firm was
5 awarded \$31,930.83, and the Roland Firm was awarded \$39,501.63, in attorneys'
6 fees against the Trust and Appellant, jointly and severally (collectively referred to
7 as the "Attorney Judgments").
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10 The Attorney Judgments, and their entry against the Trust, aided in
11 compromising the Trust's viability, which led DTC to file a Petition for Instructions
12 seeking instruction from the District Court regarding distribution of Trust assets to
13 the beneficiaries. Specifically, based on information available to DTC regarding the
14 viability of the Trust, and at the request of beneficiary Caroline Davis, DTC
15 requested instruction to surrender and liquidate the Trust assets, and distribute the
16 proceeds of the same among the beneficiaries.
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19 After review of numerous briefs and supporting exhibits submitted by the
20 parties, and after substantial oral argument which Appellant participated in directly,
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1 the District Court instructed DTC to surrender the assets of the Trust², which is the
2 Policy, and to liquidate all assets held by the Policy, for the purpose of satisfying
3 the Attorney Judgments, with the balance to be distributed as later determined by
4 the Court.³ As such, the instant Appeal arises from DTC's Petition for Instructions,
5 and the District Court Order granting the same.
6

7 Notice of Entry of the Order on Petition for Instructions was filed and served
8 on all parties, including Appellant, on April 26 2019. Appellant filed his Notice of
9 Appeal thirty-two (32) days later on May 28, 2019, which is untimely based on the
10 thirty (30) day timeline under NRAP 4 (a)(1) and NRS 155.190 (1), which applies
11 to orders instructing trustees. *See* NRS 155.190 (1)(h). As such, no further
12 consideration of Appellant's Appeal is necessary by this Court, as an "... untimely
13 Notice failed to invoke this court's jurisdiction to entertain this appeal." Healy, 103
14 Nev. 329 at 331 (1987) (*citing* Walker v. Scully, 99 Nev. 45, 657 P.2d 94 (1983)).
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25 ² The Trust owns FHT Holdings, LLC, which is the owner of the Policy. DTC
26 currently serves as Manager of FHT Holdings, LLC, in addition to serving as
27 Directed Trustee of the Trust.

28 ³ Respondent's Appendix, Vol. I, Bates APP000127-134, ¶¶ 2-5.

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VI.

ARGUMENT

A. The Subject Trust and the Policy.

Beatrice B. Davis (“Grantor”), a Missouri resident, created the Trust, naming her children, Appellant and Caroline Davis, as the primary beneficiaries of the Trust. The respective spouses and descendants of the primary beneficiaries are also included as discretionary beneficiaries of the Trust. DTC was appointed as the Directed Trustee, and Appellant was appointed as the Investment Trust Advisor. The primary asset of the Trust was a life insurance policy, number ACLI 11058007 (ALIP 00081031) (the “Policy”). The Policy and the assets held by the Policy were administered by Advantage Insurance (“Advantage”), and insured the life of Appellant Davis’ ex-wife, Cheryl Davis, with a \$35,000,000 death benefit, and a \$4,000,000 revolving line of credit (“LOC”).

The Policy accountings and Trust records show that various loans were taken against the Policy by the Grantor and Appellant Davis, with an outstanding liability against the Policy totaling \$2,889,944.99.⁴ As a result of the substantial unpaid loans taken against the Policy, the value of the Policy was severely reduced. This

⁴ Respondent’s Appendix, Vol. II, Bates APP000277-299.

1 presented an immediate issue for the Trust overall as the reduced value of the Policy
2 assets directly limited the cash available to fund the annual Policy premiums and
3 administration charges.⁵
4

5 Moreover, the Policy assets were not sufficient to continue funding the Policy
6 premiums and charges, and maintain the death benefit. The Policy assumes that the
7 insured has a life span of 86 years.⁶ Based on the assets of the Policy, liquidation of
8 the assets would likely only keep the Policy viable until 2035, which is eleven (11)
9 years prior to the projected year of death of the insured, and at which point the
10 Policy would lapse.⁷ This means that unless the insured dies prematurely, the Policy
11 would terminate, leaving the Trust beneficiaries with nothing.⁸ Additionally of
12 concern to DTC is that the insured life under the policy is Appellant's ex-wife. As
13 such, the same creates a moral hazard situation for the Policy, given that the
14 beneficiaries, and contingent beneficiaries such as Appellant's current spouse,
15 would benefit from the insured's premature death. This means that in the event that
16 Cheryl Davis dies of any cause other than natural causes, the payment of the death
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24 ⁵ Respondent's Appendix, Vol. II, Bates APP000304.

25 ⁶ Respondent's Appendix, Vol. I, Bates APP000113-116.

26 ⁷ Id.

27 ⁸ Respondent's Appendix, Vol. I, Bates APP000304-305.

1 benefit would be subject to investigation and severe scrutiny by the insurer,
2 potentially resulting in non-payment of the death benefit.⁹

3 After analysis of the Trust's financial condition, DTC determined that
4 surrender of the Policy, liquidation of its assets and distribution of the proceeds
5 from the same amongst the beneficiaries is in the best interests of the Trust and the
6 beneficiaries. As such, DTC petitioned the District Court for instruction directing it
7 to surrender the Policy, liquidate the assets, and distribute the proceeds from the
8 same to the beneficiaries per the Court's direction. The court ultimately agreed, and
9 resultantly granted DTC's petition, directing: 1) DTC to surrender the policy; 2)
10 directing the Trust beneficiaries (i.e. Appellant) to turn over all tangible assets in
11 their possession, which are owned by the Policy, to Advantage Insurance; and 3)
12 directing DTC to liquidate all assets owned by the Policy, for the purpose of
13 satisfying the Attorney Judgments, with the balanced to be distributed to the
14 beneficiaries as directed by the court.¹⁰

15 DTC complied with the District Court's Order, and directed Advantage to
16 surrender the Policy, and liquidate all policy assets.¹¹ Surrender was effectuated as
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24 ⁹ Id.

25 ¹⁰ Respondent's Appendix, Vol. I, Bates APP000127-134, ¶¶ 2-5.

26 ¹¹ Respondent's Appendix, Vol. I, Bates APP000118-126.

1 of June 27, 2019, and most of the Trust assets, other than the Remaining Policy
2 Assets, have been liquidated by the insurance carrier, and used to satisfy the
3 Attorney Judgments, and administrative costs of Advantage as related to the
4 winding up of the Policy.¹²

6 **B. Liquidation of the Assets is in the Best Interest of the Trust and**
7 **Beneficiaries.**

8 In addition to being untimely, Appellant's Appeal is moot as DTC complied
9 with the District Court's Order, and directed the insurance carrier for the Policy to
10 surrender the same, and liquidate all policy assets. Surrender was effectuated as of
11 June 27, 2019, and most of the Trust assets have been liquidated by the insurance
12 carrier. As of September 20, 2019, the remaining cash available from the Policy
13 was approximately \$30,000, after payment of administration charges and liabilities
14 of the Trust.¹³ The remaining assets that were held by the Policy, which are subject
15 to liquidation are:
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25 ¹² Respondent's Appendix, Vol. I, Bates APP000024-29.

26 ¹³ Id.

- i. A 95% interest in PharmService LLC, which owns a Colorado pharmacy. PharmService LLC has significant debt owed to Bank of Kansas City, and is operating under a forbearance agreement with the same;
- ii. 565 common shares of Blue Ridge Bancshares, Inc., parent company of Blue Ridge Bank & Trust Co. of Independence, MO, with a speculated value of up to \$500,000;
- iii. A bankrupt company called Eleos Inc., the shares in which likely hold no value, if they were not already cancelled following its bankruptcy;
- iv. Tangible assets including artwork, jewelry, furniture and a rare book that were assigned to the Policy by Grantor. These assets were in the custody and control of the Davis Family Office, LLC, in Kansas City, MO, which is operated and/or managed by Appellant. This real property, with an estimated value of just under \$680,500, is presumed to still be in the custody and control of the Davis Family Office, LLC, which has refused to surrender these assets to Advantage, as the Policy administrator.

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1 To date, Appellant has failed to account for the status of these
2 assets;

3 v. The Policy held approximately six (6) promissory notes totaling
4 approximately \$5 million of face value.¹⁴ The obligors of these
5 notes are all Davis family entities¹⁵ the Appellant. The Policy
6 insurer determined that these promissory notes are not
7 collectable;
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10 vi. There is an outstanding policy loan to the owner in the amount
11 of \$2,998,602, plus interest.¹⁶ As this amount is payable by the
12 owner to the Policy, it is offset against the cash surrender
13 amount and no cash will change hands to settle this loan.
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15 (Collectively referred to as "Remaining Policy Assets").¹⁷
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20 ¹⁴ Id.

21 ¹⁵ Davis family entities include the Beatrice B. Davis Revocable Trust, April 4,
22 1990, of which Appellant is the Trustee, and the Davis Family Office, LLC, of
23 which Appellant is the sole Member. *See* Respondent's Appendix, Vol. II, Bates
APP000282-299.

24 ¹⁶ The Trust, by way of former Trustee, Alaska USA Trust Company, made loans
25 to Grantor and Appellant by way of withdrawing amounts against the Policy line of
credit.

26 ¹⁷ Respondent's Appendix, Vol. I, Bates APP000001-5.

1 By surrendering the Policy, the assets held by the Policy will be relinquished
2 to the Trust, unless the Policy undertakes to liquidate the same and turn over the
3 proceeds to the Trust.¹⁸ If DTC is not permitted to authorize Advantage to sell the
4 Policy's largest asset, PharmService LLC, which owns a pharmacy located in
5 Colorado, the Trust would be required to take over ownership of the pharmacy, and
6 management of the same. Based upon information and belief, it is DTC's
7 understanding that if ownership interest in the pharmacy is transferred from the
8 Policy to the Trust, DTC, as Trustee, would be required to register with the State of
9 Colorado, pursuant to the Board of Pharmacy Rules, which states in pertinent part:

13 Transfer of Ownership. Application to transfer registration of an in-
14 state or non-resident prescription drug outlet shall be submitted to the
15 Board as provided in CRS 12-42.5-116, immediately upon the transfer
16 of ownership. A transfer of ownership shall be deemed to have
17 occurred:

18 ...

19 c. In the event the in-state or non-resident prescription drug outlet is
20 owned by a limited liability company (LLC), upon sale or transfer of
21 20 percent or more of the membership interests.¹⁹

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25 ¹⁸ Respondent's Appendix, Vol. I, Bates APP000024-29.

26 ¹⁹ 3 Code of Colorado Regulations, 719-1, Rule 5.00.40.

1 Further, DTC believes that the Trusts' ownership of the pharmacy would
2 subject DTC, to Title 18, Article 18 of the Colorado Revised Statutes, the Uniform
3 Controlled Substances Act of 2013, in addition to Title 21 of the U.S. Code, the
4 Uniform Controlled Substances Act. DTC is a corporate trustee and is not qualified
5 to own or operate a pharmacy, nor does it have any interest in assuming the risk
6 associated with operating such a business. Attempting to manage such a highly
7 regulated asset under the Trust would expose both the Trust and DTC to substantial
8 liability under both Colorado and Federal law. A perfect example of the same is the
9 current opioid crisis in the United States and the substantial litigation involving drug
10 manufacturers, prescribing physicians and pharmacies that provide opioid
11 medications.²⁰ As such, it is not in the Trust's or the beneficiaries' interest that the
12 Trust maintain PharmService LLC and continue to operate the same.

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14 Appellant fails to provide any evidence to support his contention that
15 PharmService LLC is a viable financial asset that will benefit the beneficiaries,
16 particularly in light of the outstanding debt owed to Bank of Kansas City, and its
17 lackluster financial performance.²¹ Moreover, he has failed to provide any evidence
18 that this asset has not been properly managed. As such, Appellant has failed to
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25 ²⁰ Respondent's Appendix, Vol. I, Bates APP000009-21.

26 ²¹ Respondent's Appendix, Vol. II, Bates APP000468-489.

1 substantiate his Appeal and the same should be denied.

2 **C. No Determination on Distribution Has Been Made By the District**
3 **Court, and Appellant's Request for the Same on Appeal is Improper.**

4 Appellant asks this Court to direct a distribution to him from the Trust for his
5 health, maintenance and welfare. Such a request is improper under the instant
6 Appeal given that the District Court's April 26, 2019 Order did not include any
7 finding or order directing a distribution from the Trust to any beneficiary. As such,
8 Appellant's request for a distribution is not appropriate, as there is no order
9 addressing the same to appeal to this Court. Based on the same, this Court can and
10 should summarily deny Appellant's request for distribution, as the same is not an
11 appealable issue, given that no distribution has been denied to him under a District
12 Court order.
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16 **VII.**

17 **CONCLUSION**

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19 Procedurally, Appellant's Appeal is untimely as it was filed after the thirty
20 (30) day deadline mandated under NRS 155.190 (1) and NRAP 4 (a)(1), and no
21 further consideration of the same is required by this Court. In the event that this
22 Court finds that it does maintain jurisdiction to consider the Appeal, the same
23 should be denied as moot, as DTC has already surrendered the Policy per the
24 District Court's Order of April 26, 2019, and liquidated a majority of the Policy
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1 assets in compliance with said Order.

2 With respect to the Remaining Policy Assets, the Appellant seeks to preclude
3 DTC solely from liquidating the PharmService LLC asset. The same should be
4 denied as forcing the Trust and DTC to maintain this asset and continue operating
5 the Colorado pharmacy owned by PharmService LLC will subject the Trust and
6 DTC to substantial risk and liability. DTC is not qualified to operate and manage a
7 pharmacy, as the same is a highly regulated and specialized business. The potential
8 harm posed to the Trust and DTC outweighs any potential future benefit. Further,
9 the Financial Statement of PharmService LLC does not support Appellant's
10 position that the same is a viable financial asset for all beneficiaries,
11 nor has Appellant provided any evidence to support such contention. Based on the
12 same, the Appeal should be denied.
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14 Further, with respect to Appellant's request that this Court direct a
15 distribution from the Trust to accommodate his health, maintenance and welfare,
16 said request is improper on Appeal, as no order has issued from the District Court
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1 as to any distributions to be made from the Trust. Resultantly, such request should
2 not be considered under the instant Appeal, and should be summarily dismissed.

3 Notwithstanding the foregoing, if the beneficiaries reach agreement upon
4 retention of PharmService LLC, assuming the obligations and liabilities of
5 management and operation of the same, and ultimately agree upon distribution of
6 the remaining Trust assets, DTC submits that the appropriate course of action for
7 the beneficiaries, including Appellant, would be to petition the District Court
8 accordingly.
9

10
11 DATED this 13th day of January, 2020.
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14 **LEE, HERNANDEZ, LANDRUM**
15 **& CARLSON, APC**

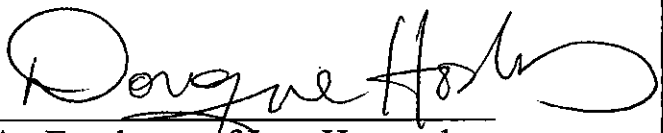
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CERTIFICATE OF SERVICE

On the 13th day of January, 2020, the undersigned, an employee of Lee, Hernandez, Landrum & Carlson, APC, hereby served a true copy of **RESPONDENT DUNHAM TRUST COMPANY'S ANSWERING BRIEF**, to the parties listed below via the electronic service through the Nevada Supreme Court's website (or, if necessary, by U.S. Mail, first class, postage pre-paid):

Chris Davis 514 West 26th Street, #3E Kansas City, MO 64108	Chris Davis 2934 1/2 North Beverly Glen Circle, Apt. 506 Los Angeles, CA 90077
Caroline D. Davis 2501 Nob Hill Place North Seattle, WA 98109 Phone: (206) 284-0837 Cddavis1@comcast.net	Honorable Gloria Sturman District Court Judge, Dept XXVI Eighth Judicial District Court 200 Lewis Ave. Las Vegas, NV 89155


An Employee of Lee, Hernandez,
Landrum & Carlson, APC