

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

IN THE MATTER OF THE TRUST  
AGREEMENT, 23 PARTNERS TRUST  
I, AN IRREVOCABLE TRUST.

MICHAEL T. NEDDER AND  
DOUGLAS DELUCA,

Appellants/Cross-Respondents/Petitioner,

vs.

JULIA ANN DELUCA, PRIMARY  
BENEFICIARY OF 23 PARTNERS  
TRUST I; AND JOANNE S. BRIGGS,  
AS PARENT AND GUARDIAN OF  
ALEXANDER IAN DELUCCA,  
PRIMARY BENEFICIARY OF 23  
PARTNERS TRUST 1.

Respondents/Cross-Appellants.

Supreme Court Case No.: 82991

District Court Case No. PJ04-275  
Electronically Filed  
Feb 13 2023 05:07 PM  
Elizabeth A. Brown  
Clerk of Supreme Court

---

**PETITION  
FOR *EN BANC* RECONSIDERATION**

---

**Hutchison & Steffen, PLLC**

Russel J. Geist, Esq. (NV Bar No. 9030)  
Alex Velto (NV Bar No. 14961)  
5371 Kietzke Lane, Reno, NV 89511; Phone: (775) 853-8746  
rgeist@hutchlegal.com; avelto@hutchlegal.com  
*Attorneys for Petitioners*

## **NRCP 26.1 DISCLOSURE**

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:

Petitioners are MICHAEL T. NEDDER and DOUGLAS DELUCA.

Petitioner is represented by Russel J. Geist and Alex Velto of Hutchison & Steffen, PLLC and have been at all times relevant to the District Court Case through the current appeal the attorneys of record for Petitioners. No other attorneys from Hutchison & Steffen, PLLC are expected to appear before this Court with respect to the appeal now pending.

DATED: February 13, 2023.     **HUTCHISON & STEFFEN, PLLC**

By: *Alex Velto*

---

Russel J. Geist, Esq. (NV Bar No. 9030)

Alex Velto, Esq. (NV Bar No. 14961)

Hutchison & Steffen, LLC.

5371 Kietzke Lane

Reno, NV 89511

Tel.: 775-853-8746

Fax: 775-201-9611

*Attorneys for Appellants/Cross-Respondents/  
Petitioners*

## **TABLE OF CONTENTS**

<b>NRCP 26.1 DISCLOSURE</b> .....	ii
<b>TABLE OF CONTENTS</b> .....	iii
<b>TABLE OF AUTHORITIES</b> .....	iv
<b>I. INTRODUCTION</b> .....	- 1 -
<b>II. PETITION FOR <i>EN BANC</i> RECONSIDERATION STANDARD</b> .....	- 2 -
<b>III. ARGUMENT</b> .....	- 2 -
<i>a. Construing the Trustee’s intent as counter to Nevada’s statutory scheme will jeopardize Nevada’s Legislative Intent promoting spendthrift trusts</i> .....	2
<i>b. Respondent/Cross-Appellant’s should only be able to review for cause to avoid a conflict with NRS 163.419</i> .....	4
<b>IV. CONCLUSION</b> .....	- 7 -
<b>CERTIFICATE OF COMPLIANCE</b> .....	- 8 -
<b>CERTIFICATE OF SERVICE</b> .....	- 11 -

## **TABLE OF AUTHORITIES**

### **Cases**

<i>In the Matter of The Trust Agreement, 23 Partners Trust I, An Irrevocable Trust,</i> Case No. 82991, December 22, 2022 .....	1
<i>Fornell v. Fornell Equipment, Inc.</i> , 390 Mich. 540, 548, 213 N.W.2d 172 (1973)..	3
<i>Burrows v. Palmer</i> , 125 N.E.2d 484 (Ill. 1955).....	4, 5

### **Statutes**

NRS 163.419 .....	1, 2, 3, 4, 5
NRS 163.4185.....	2
NRS 165.1207.....	2

### **Other Authorities**

NRAP 26.1(a) .....	ii
NRAP 32(a)(4) .....	7
NRAP 32(a)(6) .....	7
NRAP 32(a)(7)(C) .....	7
NRAP 40(a)(2) .....	7
NRAP 40(b)(3) .....	7
NRAP Rule 25(d) .....	9

## I. INTRODUCTION

Appellant/Cross-Respondents/Petitioners Michael T. Nedder and Douglas Deluca petition this Court for *en banc* reconsideration of its Opinion affirming in-part and reversing in-part filed on December 22, 2022, in the above-captioned matter because the proceeding involves a substantial precedential, constitutional, or public policy issue. The Nevada Legislature chose to set Nevada apart from other jurisdictions by creating a state favorable to spendthrift trusts. Since that time, the Nevada Legislature, twice, has reaffirmed the State's commitment as a model for estate planning. Respectfully, this Court's broad reading of the Trust document itself risks ignoring Nevada's statutory scheme that promotes spendthrift trusts and creating a conflict with NRS 163.419. *See In the Matter of The Trust Agreement, 23 Partners Trust I, An Irrevocable Trust*, Case No. 82991, December 22, 2022. A more limited reading that preserves the discretionary status of the beneficiaries, as well as the policy behind spendthrift trusts all together. It also preserves the grantor's intent and protects all potential beneficiaries from the pitfalls of unfettered access to a trust.

Further, the Opinion creates issues for Trustee administration of the Trust, potentially opening the door for runaway challenges to Trust administration and allowing spendthrift trusts to become targets of debt collectors and predictable assets that can be targeted by parties who are non-discretionary beneficiaries of a Trust.

As such, Appellant/Cross-Respondents/Petitioners respectfully submit this Motion for Reconsideration to ensure the purpose of spendthrift trusts in Nevada are not chipped away.

## **II. PETITION FOR EN BANC RECONSIDERATION STANDARD**

A petition for *en banc* reconsideration is appropriate when: (1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue. NRAP 40A(a). The basis for the Trust's petition for *en banc* reconsideration is that the proceedings involve a substantial precedential, constitutional, or public policy issue.

Here, *en banc* reconsideration is necessary and appropriate pursuant to NRAP 40(a) because, respectfully, the proceedings involve the substantial precedential, constitutional or public policy issues of ensuring the purpose of spendthrift trusts in Nevada are not chipped away and the precedent, which could erode Nevada legislative structure and Trustor intent regarding spendthrift trusts and trustee discretion.

## **III. ARGUMENT**

*a. The Court's ruling runs counter to Nevada's statutory scheme's policy of promoting trusts.*

The Court's conclusion that the Trust places Respondents/Cross-Appellants

as presently vested beneficiaries, and not discretionary beneficiaries, is counter to Nevada's statutory scheme and could placing the discretionary beneficiaries at risk. NRS 165.1207 addresses a trustee's duty to account and excludes discretionary interest beneficiaries from those entitled to receive an accounting, providing that a trustee is not required to provide an account to a beneficiary of an irrevocable trust while that beneficiary's only interest in the trust estate is a discretionary interest, as described in NRS 163.4185. NRS 165.1207(1)(b)(5). Under NRS 163.4185(1)(c), a distribution interest is "[a] discretionary interest if the trustee has discretion to determine whether a distribution should be made, when a distribution should be made and the amount of the distribution."

Here, this Court's Opinion dated December 22, 2022, recognizes that the Trustee has absolute discretion to determine what, if any, benefit Respondents/Cross-Appellants receive. This is confirmed in Section 3.2.1 of the Trust, which gives the Trustee "sole, absolute, and unreviewable discretion . . . to distribute to . . . any one or more of the distributees." The discretion is protected by a family trustee, Nevada trustee, review by the Court, and the language of the Trust.

Given that Nevada's statutory scheme does not entitle Respondents/Cross-Appellants to an accounting, this Court's reading of the Trust contravenes the statutory scheme and could create harmful unintended consequences. The Trust does not require disclosure to discretionary beneficiaries, only to beneficiaries that

are presently vested, principal, or remainder beneficiaries. Rather than adhering to NRS 165 and 163's discretionary beneficiary definitions, the Court read broadly the terms of the Trust to construe the beneficiaries as vested beneficiaries.

A narrow reading of the Trust's language, that preserves the beneficiaries' role as solely discretionary beneficiaries, is important to align with the goals of spendthrift trusts by "secur[ing] it against his improvidence or incapacity. . . or which, in other words, bars such interest from seizure in satisfaction of his debts." *Fornell v. Fornell Equipment, Inc.*, 390 Mich. 540, 548, 213 N.W.2d 172 (1973). A narrow reading of the Trust also presents a reasonable balance between the interests of the spendthrift Trustor and his desired reluctance of potential interference with the Trust's administration by discretionary beneficiaries.

Further, there is no indication that the Trustee has abused its discretion, therefore, this Court should protect any explicit requirement set forth in the Trust document to produce an accounting. The Court's requirement that an accounting be required without a showing of abuse of discretion changes Nevada's stance on Court involvement in trust administration where the trust gives the trustee discretion. Nevada, like many other states, seeks to preserve this discretion as it aligns with and preserves the Trustor's intent. *See, e.g., Jennings v. Murdock (In re Estate of Murdock)*, 553 P.2d 846, 862 (Kan. 1976)("The accepted rule is that where the instrument creating a trust gives the trustee discretion as to its execution, a court may



not control its exercise merely upon a difference of opinion as to matters of policy, and is authorized to interfere only where he acts in bad faith or his conduct is so arbitrary and unreasonable as to amount to practically the same thing.”); *In re Estate of Brooks*, 596 P.2d 1220, 1221 (Colo. App. 1979) (“When a trustee has been granted absolute discretion, Colorado courts “will interfere only when a trustee's discretion has been arbitrarily or capriciously exercised. ”); *In re Wills’ Trust Estate*, 448 P.2d 435, 439 (Ariz. Ct. App. 1968) (“Where a trustee is invested with discretion in the administration of his trust, the exercise of this discretion is not subject to control by the courts unless it is shown that an abuse of discretion has taken place.”).

The Court’s expansive reading of the Trust opens the door to potential pitfalls the Trustor desired to avoid. First, it could allow claims to be made against discretionary allocations that are routine. The purpose of the spendthrift trust is, in part, to prevent creditors from lodging claims. If discretionary beneficiaries are entitled accountings, and gain knowledge of their potential distributions and there is a record of how they are made, creditors could attempt to stand in the discretionary beneficiaries’ shoes and claim a right to the distributions, cutting against the purpose of their status as discretionary beneficiaries and of creating a spendthrift trust. Second, a more limited reading of the Trust’s language protects the fiduciary’s role in making decisions that may not always be equitable or equal. The Trustor here wanted the Trustee to act in a manner that does not inhibit his discretion or allow for

beneficiary interference and second guessing.

*b. Respondent/Cross-Appellants' should only be able to review for cause to avoid a conflict with NRS 163.419.*

The Court's conclusion that Respondents/Cross-Appellants can review the Trust without cause creates a clear conflict with NRS 163.419. A discretionary interest is reviewable only for cause, if the Trustee acts "dishonestly, with bad faith, or with willful misconduct." NRS 163.419. But here, there is no cause to require an accounting or disclosure of the Trust's terms. When there is only a discretionary interest, public policy should preclude disclosure.

For example, in *Burrows v. Palmer*, 125 N.E.2d 484 (Ill. 1955), the Illinois Supreme Court relied in part on Section 214 of the Restatement (Second) in finding that the contingent beneficiaries were entitled to sue for restoration of trust corpus. The court made clear that "[i]n general, a trust beneficiary is entitled to such equitable relief as will protect his interest in the trust property when such interest is endangered by the wrongful acts of the trustee." *Id.* at 486 (emphasis added). The court there expressly recognized that contingent beneficiaries "have an interest in the trust property." *Id.* at 487.

Here, the terms of the Trust are consistent with the Restatement principles distinguishing a discretionary beneficiary—who has no definite interest in trust corpus—from a remainderman, contingent or otherwise—who has a specific interest in the corpus. When there is only a discretionary interest, requiring disclosure

creates a conflict with NRS 163.419 and risks ignoring its cause standard that seeks to protect the rationale for discretion.

#### **IV. CONCLUSION**

Appellants/Cross-Respondents/Petitioners merely seek to protect the motivations of the Trustor and the interests of the discretionary beneficiaries. However, the Court's conclusion that the Trust places Respondents/Cross-Appellants as presently vested beneficiaries, and not discretionary beneficiaries, is counter to Nevada's statutory scheme and could place the discretionary beneficiaries at risk. Further, a broad reading of the Trust document risks creating confusion in the district courts' application of NRS 163.419. As such, they request *en banc* reconsideration of the issues on appeal.

//

//

//

//

//

//

//

//

//

Additionally, in the event that this Court directs Respondent to answer this petition for *en banc* reconsideration, Appellants/Cross-Respondents/Petitioners respectfully request that this Court permit leave for Appellants/Cross-Respondents/Petitioners to file a reply in support of this petition.

DATED: February 13, 2023.     **HUTCHISON & STEFFEN, PLLC**

By */s/ Alex Velto*

---

Russel J. Geist, Esq. (NV Bar No. 9030)

Alex Velto, Esq. (NV Bar No. 14961)

Hutchison & Steffen, LLC.

5371 Kietzke Lane

Reno, NV 89511

Tel.: 775-853-8746

Fax: 775-201-9611

*Attorneys for Appellants/Cross-Respondents/  
Petitioners*

## CERTIFICATE OF COMPLIANCE

I, Alex Velto, Esq., declare as follows:

1. I am an attorney with Hutchison & Steffen, PLLC, counsel of record for Appellants/Cross-Respondents/Petitioners.

2. I certify that I have read the foregoing **PETITION FOR *EN BANC* RECONSIDERATION**.

3. I 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).

4. I further certify that this brief complies with the page- or type- volume limitations of NRAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is either proportionally spaced, has a type face of 14 points or more and contains no more than 4,667 words or does not exceed 10 (ten) pages. This brief contains **1,903 words**.

5. Finally, I hereby certify that I have read this brief, and it is not frivolous of interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40(a)(2) which requires any claim that the court overlooked a material fact be supported by a reference to the page of the transcript appendix or record where the matter may be found; any claim that the court has overlooked a material question of law or has

overlooked or misapprehended or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner raised the issue. 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.

I declare under the penalty of perjury the statements herein are true and correct.

Executed on February 13, 2023 in Washoe County, Nevada.

**HUTCHISON & STEFFEN, PLLC**

By: */s/ Alex Velto*

---

Russel J. Geist, Esq. (NV Bar No. 9030)  
Alex R. Velto, Esq. (NV Bar No. 14961)  
Hutchison & Steffen, LLC.

5371 Kietzke Lane

Reno, NV 89511

Tel.: 775-853-8746

Fax: 775-201-9611

*Attorneys for Appellants/Cross-Respondents/  
Petitioners*

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, pursuant to NRAP 25(d), I served the foregoing **PETITION FOR *EN BANC* RECONSIDERATION** on the following parties, via the manner of service indicated below, on February 13, 2023 via electronic service through the Nevada Supreme Court's Eflex system:

Alexander G. LeVeque, Esq.  
Roberto M. Campos, Esq.  
SOLOMON DWIGGINS & FREER, LTD.  
9060 W. Cheyenne Avenue  
Las Vegas, NV 89129

*Attorneys for Joanne S. Briggs as parent  
and Guardian of Julia Ann DeLuca and  
Alexander Ian DeLuca, Beneficiaries of 23  
Partners Trust I*

Dated: February 13, 2023

By: */s/ Rachael L. Chavez*

---

An Employee of Hutchison & Steffen, PLLC