

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, )  
ROSEMARY KEACH AND )  
RAYMOND CHRISTIAN, JR. )

Appellants, )

-vs- )

FREDRICK WAID, Trustee )  
ANTHONY L. BARNEY, LTD., )  
Respondents. )  
~~~~~ )

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APPELLANTS REPLY 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, Susan Christian, 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.

Two named beneficiaries named Tommy L. Christian and Christopher A. Christian did not appear in the District Court.

Respondent, Fredrick Waid, current trustee, was represented by Russel Geist, Esq., of the HUTCHINSON & STEFFEN 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.

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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 3771 words and does not exceed 15 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.



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APPELLANT'S REPLY BRIEF, ETC.

I. Introduction to Reply to Answering Brief.

This matter began as an adjudication of the rights of the Appellants, not Nancy Christian as a Trustor.

The facts are not in dispute. The law is clear. The Christian Family Trust ("CFT") contained a restraint on alienation clause (§14.2), making the CFT a spendthrift trust. (NRS Chapter 166)

After the trust agreement was formed and prior to the segregation or funding of any subtrusts (Article 4.1) or any determination of whether Nancy had the right to remove the original trustees, she died. Nancy Christian was represented by Anthony L. Barney, Ltd (hereinafter "Barney").

After Nancy died, Barney (not the trustee) petitioned to the District Court, asserting Barney had the legal right to payment fees and costs from the CFT in the total amount of approximately \$68,000 for his representation of Nancy. The District Court awarded Barney approximately \$53,000 in fees and costs (+/-), which is the subject of this appeal.

Since that time this court ordered the new Trustee(s) (Fredrick P. Waid) be substituted in as the real party interest, which has been confirmed. Utkin, the prior Trustee has confessed to error. Monte Reason, Nancy's son has become the Special Administrator of the Estate of Nancy Christian. The trustee Waid has not taken a position despite what Barney argues.

Barney's Brief indicates: "where appropriate, (Barney) be construed a friend of the court brief in nature". Barney has not requested, nor has been given such status by the Court.

Barney has since filed, in Nancy Christian's estate matter (Case P-17-093928-E), to appoint and control that estate administration. For the first time, Barney states: "After meeting with Tiffany Barney, Esq., and having its terms explained to her by an attorney who was independent of the Former Trustees in February 2017, Nancy expressed that the CFT did not represent her or her husband's wishes and that neither she nor her husband understood the terms of the CFT when it was signed". Yet, Barney advances his arguments in this appeal based upon his dead client's "reliance" on the terms of the CFT.

Barney has also filed (9/26/19) another new petition in the underlying Trust case, for even more fees, styled: "Petition for Payment of Unpaid Amount Previously Approved by Prior Trustee and to Adjudicate Creditor's Claim which the Current Trustee has not Approved or Rejected".

II. Legal Arguments/Authorities

1. The CFT and its terms control

Nowhere does the CFT allow for the payment of a creditor of Nancy Christian. It does, however, provide (Article 4.2) for the payment of debts of the first Trustor to die. Nancy Christian was not the first Trustor to die. The Christian Family Trust at Article 4 (page 6) states:

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.

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.

In this matter, the Decedent is the first of the trustor's to die, to wit: Raymond Christian, Sr. (dod 1/31/17). The Trust makes no provision for the payment of any creditors of the survivor trustor, Nancy Christian. Therefore, the District Court erred in ordering the Christian Family Trust to pay Nancy's creditors. The terms of the CFT are controlling.

Similarly, in the matter of the Fund for Encouragement of Self Reliance, an Irrevocable Trust, 135 Nev. Adv. Op. 10 (2019) ("FFEOSR") this court held that the District Court erred in allowing a trustee to violate trust terms: "Because the terms of the trust instrument requires the unanimous consent of all trustees to make a distribution of half of the trust's assets, the District Court erred by ordering the wholly charitable trust decanted under NRS 163.556" and "because the right under NRS 163.556(1) are subject to the terms of the trust instrument, we must address the terms of the trust instrument permitting a trustee to make a unilateral distribution". Id at page 4.

As in *FFEOSR*, in this case, the District Court erred in ordering a course of action that the trust instrument did not permit and the settlors did not intend.

Current Trustee Waid has filed in his Notice (filed 12/11/19) that a Trustee has the authority to pay bills of a trust. It has never been established that Barney was a creditor of the CFT – only a creditor of Nancy Christian, individually. There is no fee agreement between Barney and the CFT, to perform legal services on behalf of the CFT. Barney never represented any of the multiple trustees in that matter.

2. Barney has no Standing as an Attorney for dead-discretionary beneficiary.

Barney argues Appellants have no standing, which is incorrect. See matter of the *Estate of Hermann*, 100 Nev.1, 26, 677 P.2d 594, 610 (1984)

Barney has made (numerous) assertions, some not in the record, as a “friend for the court” (Barney’s definition) for its filing a petition advocating legal positions for a now dead (former) client and former trustees. Those matters are not part of the District Court’s Record in this appeal. In doing so, Barney violates NRAP 10(a) and 27(a)(1). (See e.g., Ans. Brief, pg.3 ; footnotes 8,9)

The CFT is a spendthrift trust. *In re Frei Irrevocable Trust*, 133 Nev. Ad. Op. 8 (2017) Nancy Christian only had a limited beneficial right (subject to HEMP) to trust income during her lifetime-not afterwards. The terms of the CFT limited payment of creditors to the first of the Settlers to pass (Raymond Christian, Sr.) and did not provide for the survivors (Nancy’s) creditors to be paid. A spendthrift trust does not allow the payment of a creditor before or after death. It also does not provide the

Court jurisdictional “authority” for either the consideration of, application for, or let alone the payment of a “friend”.

Barney concedes it at best was an unsecured creditor of dead client. Had Barney perfects a claim it would be a secured creditor. Barney could then move pursuant to e.g. NRS Chapter 147 or 111.779. Barney does not have standing to maintain this appeal or any kind of jurisdictional authority to maintain a Petition for Fees and costs. NRAP 3A(a) See *Albany v. Arcata Assoc., Inc.*, 106 Nev. 688, 799 P.2d 566 (1990).

3. Barney never moved to adjudicate his Legal fees claim-statutory or other, therefore bypassing NRS 111.779 and/or 164.025.

Barney’s Brief ignores the entire codified process as (unsecured/secured) creditor in the State of Nevada.

NRS 164.025(3) is clear – it provides a creditor of a trust must file a claim. This is similar where a claimant in an Estate file a claim as proscribed under NRS Chapter 147 (Presentation and Payment of Claims). “A person having a claim, due or to become due, against the decedent **must** file the claim with the clerk within 90 days...” NRS 147.040, 164.025(3). [Emphasis added]

Barney’s “claim” (legal fees) was not adjudicated in accordance with NRS 18.015. Barney has no excuse to why it did not follow NRS 164.025(3), or why he has not moved to adjudicate a lien. The definition and the subsequent statutory process combined with NRS 147, 150, 164.025 codifies the process.

Barney’s “claims” are entirely based on Barney’s statements of a “contractual amount due and owing by Nancy Christian”. The only matter in the Court’s record is

Barney's own assertions. Barney claimed he had a written fee agreement, but no such agreement was presented to the District Court or part of the District Court Record in this appeal. There was no way for the District Court to know what the scope of any services were to be performed. How would Nancy's estate test a claim for such work?

As incredulous as it sounds, Barney is still billing Nancy Christian for its work in this appeal. See Motion filed 5/10/19 in this Appeal; related reply and attachments.

4. Barney failed to/or refused to follow Nevada Law as proscribed in NRCP 17 and 24.

Barney failed to follow NRCP Rules 17 and 24. Barney offered no reasonable reason in its brief why it is not required to follow the proscribed processes under said rules.

Barney was not named as a party to the District Court. It was never served any "process" as a party. Barney unilaterally filed its Petition requesting payment of attorneys fees for his representation for his dead client.

Barney failed to timely move to intervene. Rule 24 permits a non-party to intervene in "an action". NRCP 24 ("upon timely application anyone shall be permitted to intervene in an action"). See also, Danberg Holdings Nev. LLC v. Douglas County, 115 Nev. 129, 978 P.2d 311 (1999).

Barney's brief fails to adequately address why it had not followed the necessary processes. (Nevada law and case precedent has consistently provided that a creditor must go through the creditor's process outlined in NRS 111.779, Chapter 147 et seq., 164.025. See also In Re Dickersons Estate, 51 Nev. 69, 268 P. 769 (1928); In the

Matter of Jane Tiffany Living Trust, 74 Nev.124,177 P.3d 1060 (2008).

Barney “claimed” he represented Nancy “under a signed fee agreement to **“further her intent under the CFT”** [Emphasis added]. Barney never presented any agreement(s) and there are no agreement(s) in the Record. It is (clear) error to present a legal (or factual) basis to the Court for the purpose of “releasing” monies to be paid pursuant to a purported agreement that is not part of the record. See, e.g., Bradley v. Romeo, 102 Nev. 103, 716 P.2d 227 (1986).

5. Barney relies upon the assertion that the (two) Trustees approved Barney’s fees and to “release” the Trusts money.

Barney relies on the backs 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, *inter alia*, due to her conflicts and negative bias towards Appellants. (APP-ROA-V17- 1402 & 1409) Despite the District Court’s Order, NRS 132.390(c)(8) was never cited in the Petition for basis as an Attorney’s Fees and Costs. (APP-ROA-V8-577) NRS 132.390 relates to Title 12, not Title 13.

Barney did not purport to have a legal claim for an award of fees/costs. Instead, Barney argued in the Petition for Fees, (APP-ROA-V8-586), at page 10, line 19: “Barney, Ltd.’s creditor claim is valid against the trust”, without legal substantiation. Barney further alleged that “Barney, Ltd. has a creditor claim against the trust for what it seeks to be paid”. Barney never represented the CFT – only Nancy Christian; therefore, he is not a direct creditor of the CFT.

Both Monte and Utkin, during their tenures as trustee, did nothing to enhance the CFT; rather they litigated against the beneficiaries for the sake of litigation. This

entire matter originally commenced over the issue of trustee's rights. Prior to the litigation commencing, Nancy Christian wanted her right as income beneficiary to trust funds. Neither Monte or Utkin ever sought relief on that issue. In fact, Barney, during Nancy's lifetime, failed to Petition for that relief argued in his Brief.

Barney's Petition (2/8/18 - APP-ROA 577) asserted he had the "approval" of both Monte Reason and Jacqueline Utkin, former trustees of the CFT. A scrutiny of the timeline of events from the date of Nancy Christian's death as to the "approval", pursuant to Barney's Petition, are as follows:

| <i>DATE</i> | <i>DESCRIPTION</i> | <i>RECORD CITE</i> |
|-------------|---|--------------------|
| 12/18/17 | Nancy Christian death (12/18/17) | |
| 12/19/17 | Barney Firm letter to RLK Firm re fees
(referenced in response letter) | |
| 1/4/18 | Monte Reason Resigns as Trustee | APP-ROA 509 @560 |
| 1/4/18 | RLK (Monte) letter to Barney re approval fees | APP-ROA 577 @610 |
| 1/12/18 | Utkin executed Certificate of Incumbency
(not notarized) | APP-ROA 509 @563 |
| 1/24/18 | Utkin filed Petition for Appointment as Trustee | APP-ROA 509 |
| 1/26/18 | Barney letter to Utkin/Kirschner re fees | APP-ROA 577 @ 617 |
| 2/1/18 | Utkin/Kirschner email to Barney approve fees | APP-ROA 577 @ 612 |
| 2/8/18 | Barney filed Petition for Fees | APP-ROA 577 |
| 3/15/18 | Hearing on Utkin's Petition for Appointment | |
| 4/4/18 | Order appointing Utkin filed | |
| 6/1/18 | Order suspending Utkin filed (later removed) | APP-ROA 1391 |

Barney's reliance on Monte Reason's "approval" was incorrect. Monte had resigned as Trustee at the time approval was given, any discretion and/or approval therefore is of no force and effect.

As to further reliance on Utkin, it is submitted that Utkin did not have her Certificate of Incumbency even notarized, the document was defective, and without authority to act. Further, Utkin would not have any official power to act as trustee or consent to anything being paid as of February 1, 2018, as asserted in her counsel's email to approve fees. Any authority Utkin had, at a minimum, would only have been as of the date of the hearing on the Petition to Appoint her as trustee. In any event, her "approval" was void.

The CFT was under the jurisdiction of the District Court. Monte never petitioned the court for an order appointing him as trustee, and Utkin had yet to receive authority from the court. Interesting is the emails attached as an exhibit (Ex. F) to Appellants' Opposition to the Petition for Fees (APP-ROA-839) wherein counsel for Utkin wanted a stipulation confirming Utkin as trustee so she could act. This would indicate that her counsel was under the impression that Utkin could not act until formally appointed by the court.

Finally, this Court's May 7, 2019 Order considered Utkin's intentional decision to not participate as a "confession of error", the definition of which: "is a party's admission, express or implied, made on appeal, that the court below committed an *error* in his favor, or prejudicial to the rights of an adverse party." The confession of error, as the rule of the case, binds all involved in that the District Court subsequently relied in error by even considering Utkin's "decision", as Trustee, to approve the

payment of the Barney Firm's fees. Since Trustee (Utkin) was the real party in interest, and has confessed error; therefore, what remains is that the Christian Family Trust by its terms could not pay any of Nancy Christian's creditors, including Barney. Barney's reliance on Utkin's "approval" is improper, as Utkin has now conceded was error. Given the course of events, and results thereof, Barney's reliance on the former trustees for the payment of his fees is improper and violates the CFT terms.

6. Barney asserts in this Brief (for the first time) he only needed the Courts authority to "release" money.

Barney's Answering Brief raises several (new) arguments, including an injunction, on appeal for the first time, that are not jurisdictional in nature. This Court has long held that the appellate court will not hear arguments raised for the first time on appeal. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

In Barney's Petition for Fees (2/8/18 - APP-ROA 577) it is abundantly clear that the petition it styled and its contents seeks payment of Barney's attorneys fees and costs for their representation of Nancy Christian.

Barney, in his Brief (3 times), makes the representation that the District Court ordered an "injunction" be placed upon the CFT assets (page 1) that: "District Court lifted its injunction temporarily for the specific purpose of making a payment". Barney's reference to the Record is his own order, the subject of this appeal. At no point did the District Court order an injunction pursuant to NRCP 60 etc.

Barney did not file a “Motion to unfreeze or release of money”, which under practical circumstances may be a request to release funds to a party for a specific reason.

No matter what misrepresentation and/or semantics Barney now argues, the Petition for Fees and resulting Order was, and always will be, for the payment of the attorney’s fees. Barney attempts, for the first time, bootstrap some new definition of the funds involved as being for something else other than direct payment of his fees and costs.

Barney attempts to advance the arguments is undermined by his own actions in filing two new Petitions (see above).

Barney similarly claims it only needed court authority to “unfreeze” the account, in an attempt to “backdoor” the argument. A review of the Petition for Fees (2/8/18 - APP-ROA 577) in this matter exposes the argument.

7. Appealed Order lacks requisite findings, conclusions, etc. to support the Decision

The Petition for Fees had one and only one legal citation, to wit: NRS 164.065(3). (Pg. 11) That was not what the petition nor the order in question stated on its face. The order as a result of Barney’s petition also lacked any findings of facts to support his brief or legal positions, and reversed on this point. See Davis v. Ewalefo 131 Nev. Adv. Op. 45, 352 P.3d 1139 (2015). The order also lacks the necessary conclusions of law to support Barney’s arguments. See also Manuela H. v. Eight Jud. Dist. Ct., 132 Nev. Adv. Op.1, 365 Pd 3d 497 (2016). In fact the order is not supportive of any of Barney’s arguments raises in his brief. See further, Jitnan v.

Oliver, 127 Nev. 424, 254 P.3d 623, 630 (2011) (“Without an explanation of the reasons or basis for a district court’s decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere “speculation.”) It is in the District Court’s best interest, moreover, to articulate its reasons, as the failure to do so might itself compel reversal and remand. Webb v. Shull, 128 Nev. 85, 270 P.3d (2012) (reversing and remanding “because the district court failed to articulate its reasoning”, and therefore the court was “unable to review whether the district court abused its discretion”).

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

Finally, Barney also asserts (for the first time) that “Neither the Appellants nor Waid have made any claims against the discretion by Reason or Utkin. How would Barney even purport to know about such claims? Does one believe they knows what are “all claims the Appellants” have/have not asserted? Likewise, Barney goes even further regarding claims for “breach of fiduciary duty, fraud, willful misconduct, or gross negligence against the Trustee”. (A. Brief at pg. 15) Barney at best offers only speculation.

8. *Barney did not have any sort of privity with Nancy’s debts.*

Nancy signed the CFT as “Trustor”. See CFT pre-amble and signature page. Barney argues that “Nancy owed Barney for outstanding legal fees and costs” (Ans. Brief pg. 12 ln. 8-9) Barney, as Nancy’s lawyer, did not have any sort of privity with

Nancy as a Trustor. Barney admits he was retained after the formation of the CFT. When Nancy died she no longer had no other beneficial interests in the CFT. Brock v. Premier Trust, Inc., 133 Nev. Adv. Op. 8, 390 P. 3d 646 (2017).

Barney's arguments (for the first time in his Answering Brief) that since Nancy had a beneficial interest in the funding and because of its terms (e.g. Sec. 14.2) there was some sort of continual interest in the Trust assets when she died. The CFT by its terms precludes this argument by its terms.

The record is clear. Nancy, as the Trustor contributed nothing to the funding of the CFT. Secondly, by the trusts own terms the debts of her husband (Raymond) only were to be satisfied (CFT sec. 4.1 and 4.2) - not Nancy's debts. Nancy's rights were confined solely to Section 4.3-4 of the CFT. Its arguments about the use of a residence vanished upon her death.

By way of clarification, the Dancing Vines real property was purchased with Ray, Sr.'s separate property, placed in joint tenancy when purchased. The real property was thereafter conveyed to the CFT. The property was contracted for sale during the joint lifetimes of Ray, Sr. and Nancy, but the closing of the transaction took place just after Ray, Sr. died. The Dancing Vines proceeds were specifically and separately provided for in the CFT, separate and apart from the remainder of the rest residue and remainder of the CFT res.

It is again respectfully submitted that this entire argument having never taken place in the District Court, nor is in the Record should not be given any weight. The Record for an appeal, pursuant to NRAP 10(a) states: **"(a) The Trial Court Record.**

The trial court record consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk.”

These extraneous arguments were not before or ever decided in the District Court. They also are not part of the District Court Record improper to be included, and should be stricken pursuant to NRAP 27(a)(1).

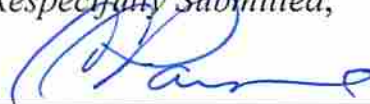
Finally, to the extent Barney now questions the beneficiaries’ standing, see Pahlman v. First Nat’l Bank of Nev., 86 Nev. 151, 465 P.2d 616 (1970).

III. CONCLUSION

Ultimately the District Court committed error, exceeded its jurisdictional authority in that neither the trust, or statute, provide any basis for the “payment” of the Barney’s firm attorneys fees and costs. It is requested that the order of the District Court summarily be reversed.

Dated: December 17, 2019

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that pursuant to NRAP 31, on the 17th day of December, 2019 I have served to the following an electronic filing copy of this Reply Brief as follows:

X via electronic filing by electronic filing through the Court's E-Flex System:

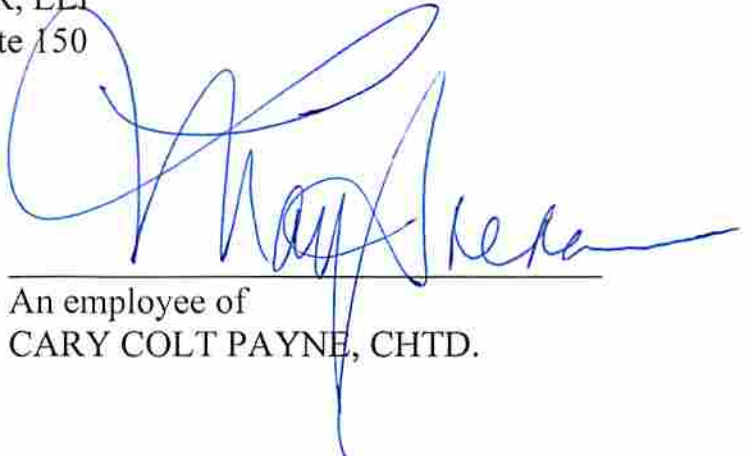
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