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Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACQUELINE UTKIN, Successor Trustee
to the Christian Family Trust, Dated
October 11, 2016

Petitioner

And

SUSAN CHRISTIAN-PAYNE,
ROSEMARY KEACH, RAYMOND
CHRISTIAN, JR, MONTE REASON,
TOMMY L. CHRISTIAN,
CHRISTOPHER A. CHRISTIAN

Real Parties in Interest

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK
AND THE HONORABLE VINCENT
OCHOA,

Respondents

Supreme Court No.

District Ct. Case No: P-17-092512-T

**PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE,
WRIT OF PROHIBITION**

COMES NOW, Jacqueline Utkin ("Petitioner"), Successor Trustee to The Christian Family Trust, Dated October 11, 2016 ("CFT"), by and through her attorneys of record, Jerimy Kirschner & Associates, PLLC., and respectfully petitions this Honorable Court pursuant to NRS 34.150, NRS 34.320, and Nev. R. App. P. 21(a), *et. seq.* to issue a Writ of Mandamus or, in the Alternative, Writ of Prohibition in the underlying action.

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III. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in Nev. R. App. P. 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:

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IV. JURISDICTIONAL STATEMENT

This petition for Writ of Mandamus or alternatively for Writ of Prohibition (“Writ”) arises from an Order entered June 1, 2018 (1 App. 001-009). This Court has jurisdiction pursuant to NRS 34.150, NRS 34.320 and NRAP 21(a).

**V. ROUTING STATEMENT PURSUANT TO NEV. R. APP. P.
28(a)(5)**

This case is not subject to a presumptive retention by the Supreme Court under Nev. R. App. P. 17(a). This case is not presumptively assigned to the Court of Appeals. *See* Nev. R. App. P. 17(b).

Specifically, this is a Writ of Mandamus, or alternatively, Writ of Prohibition in a trust and estate matter, and thus falls outside of Nev. R. App. P. 17(b)(5) and Nev. R. App. P. 17(b)(9).

VI. INTRODUCTION

The lower court lacked authority to file a petition to itself to remove a trustee and appoint an independent trustee when no party had sought such relief. In addition, the lower court engages in independent fact finding and predetermines the outcome of any challenges to the court's petition without taking evidence or having given the Parties a meaningful opportunity to be heard. The lower court further suppresses meritorious opposition by announcing, in advance of the hearing on its motion, that there could be no reasonable objections to the lower court's petition. The lower court's order contains the implicit threat that any objections would be frivolous, vexatious and would subject the lower court's opponent to sanctions. In doing so the lower court violates the Petitioner's rights to due process and as such Petitioner files this Writ for an order by this Court prohibiting the lower from enforcing its June 1, 2018 order pertaining to appointment of an "independent trustee" ("Independent Trustee Order")¹ and an Order requiring the lower court to cease attempts to appoint an independent trustee itself, and order to Vacate the Independent Trustee Order, and to afford the Petitioner due process

¹ See, 1 App. 0001-0009.

VII. RELIEF SOUGHT BY PETITIONERS

A.1. An Order prohibiting District Court Judge Vincent Ochoa from enforcing the June 1, 2018 Order pertaining to the appointment of an Independent Trustee Order² for The Christian Family Trust, Dated October 11, 2016 (“Trust”).

A.2. An Order for the lower court to vacate the Independent Trustee Order.

A.3. An Order requiring the to cease attempts to remove Petitioner as trustee and appoint an independent trustee.

² See, 1 App. 0001-0009.

VIII. ISSUES PRESENTED

B.1. Can the lower court move for appointment of an “independent trustee” when neither the trustee nor beneficiaries have requested such relief?

B.2. Can the lower court engage in independent fact finding in order to nominate a stranger to the action to be the “independent trustee” and then, without an evidentiary basis, prequalify that individual as “having no conflict of interest” and determine that the stranger is “in a better position to guide the Trust”?

B.3. Has the lower court violated the procedural due process rights of Petitioner by announcing that there could be “no good purpose or rationale to object” to the appointment of the “independent trustee” prior to briefing, hearing, or taking any evidence?

B.4. Does the Independent Trustee Order, which asserts grounds for removal of Petitioner and declare conflicts to exist, constitute *de facto* findings of facts arrived at without having a hearing, having briefing from the parties, or having taken evidence?

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**IX. FACTS NECESSARY TO UNDERSTAND THE ISSUES
PRESENTED BY THE PETITION**

A. FORMATION AND TRUSTEE SUCCESSION

1. On October 11, 2016, Nancy I. Christian and her husband Raymond T. Christian, Sr. executed a revocable Trust entitled the "Christian Family Trust Dated October 11, 2016 (the "Trust").³

2. The Trust beneficiaries were the settlors during their lifetime,⁴ with their six children being beneficiaries afterwards.⁵

3. The Trust is a testamentary instrument and its settlors were not its initial trustees.⁶

4. Initially, three of the settlors six children served as trustees, Susan Christian-Payne, Rosemary Keach, and Raymond Christian Jr. ("Former Trustees").⁷

5. On January 31, 2017, trustor Raymond Christian died, leaving the surviving settlor as Nancy Christian.⁸

³ See, 1 App. 0010-0040

⁴ See, 1 App. 0013, Section 2.1

⁵ See, 1 App. 0015-0020

⁶ See, 1 App. 0012

⁷ *Id.*

⁸ See, 1 App. 0080

6. On June 12, 2017, Nancy Christian executed a Modification which removed the Former Trustees and replaced them with another child Monte Reason (the “Modification”),⁹ and which was supported by a certificate of an independent attorney.¹⁰

7. On June 30, 2017, the Former Trustees transferred four hundred twenty-eight thousand, eight hundred twenty-eight dollars and ninety-three cents (\$428,828.93) in Trust funds out of a Trust account and deposited the funds into their attorney’s IOLTA account.¹¹

8. On July 31, 2017, the Former Trustees filed the underlying contest challenging Nancy Christian’s authority to remove them as trustees and asking that the assets of the Trust be frozen pending resolution (the “Action”).¹²

9. On August 17, 2017, Nancy Christian filed a verified pleading in which she accused the Former Trustees of evicting her from her home,¹³ denying

⁹ See, 1 App. 042-043

¹⁰ See, 1 App. 044

¹¹ See, 1 App. 049

¹² See, 1 App. 052, 061. 1 App. 067-081 have been redacted since they appear to be associated with a matter under seal. Petitioner shall submit them separately under cover.

¹³ See, 1 App. 126, ¶8 & 10

her access to her dying husband,¹⁴ failing to involve her in his funeral,¹⁵ and improperly denying her distributions from the Trust.¹⁶

10. On October 31, 2017, the lower court issued an order confirming jurisdiction over the Trust and “freezing” the assets of the Trust, but did not require the Former Trustees to post a bond as a condition of the injunction (“Freeze Order”).¹⁷

11. On December 14, 2017, settlor Nancy Christian died.

12. On January 16, 2018, Monte Brian Reason resigned as the then existing trustee and appointed Petitioner as the new Successor Trustee.¹⁸

B. CONFIRMATION OF PETITIONER AS TRUSTEE

13. On January 26, 2018, Petitioner filed a petition pursuant to NRS 153.031 (b), (d), and (k) seeking to confirm the construction of the Trust which lead to her appointment, to determine the validity of the Trust terms, and to confirm her as the successor trustee (“Petitioner to Confirm Trustee”).¹⁹

¹⁴ See, 1 App. 127, ¶12

¹⁵ See, 1 App. 127, ¶16-18

¹⁶ See, 1 App. 127, ¶21

¹⁷ See, 1 App. 154.

¹⁸ See, 1 App. 155-156; *See also*, 1 App. 157-159

¹⁹ See, 1 App. 160-220

14. On February 23, 2018, the Former Trustees filed an opposition and a counter-petition to have themselves reinstated as trustees.²⁰

15. On April 4, 2018, the Court entered its order confirming Petitioner as the successor trustee to the Trust (“Order Confirming Trustee”), stating in pertinent part:

THE COURT HEREBY FINDS THAT: the language of The Christian Family Trust Dated October 11, 2016 (“Trust”) is clear and unambiguous.

THE COURT FURTHER FINDS THAT: Trustor Nancy Christian’s modification to name Monte Reason trustee was permitted pursuant to the clear and unambiguous terms of the Trust. THE COURT FURTHER FINDS THAT: Monte Reason’s nomination of Jacqueline Utkin to serve as successor trustee was permitted pursuant to the clear and unambiguous terms of the Trust.

THE COURT FURTHER FINDS THAT: Jacqueline Utkin has accepted the appointment to serve as successor trustee to the Trust.

THE COURT FURTHER FINDS THAT: Jacqueline Utkin is the successor trustee to the Trust.²¹

16. No party to the action appealed the Order Confirming Trustee within thirty (30) days or otherwise filed a motion which would extend the time to appeal.²²

²⁰ See, 2 App. 221-292

²¹ See, 2 App. 293-295

²² See, Docket for Action, 2 App. 299-301

C. MAY 16, 2018 HEARING

17. On May 16, 2018, the lower court held a hearing (“Hearing”) on multiple pending motions.

18. At no point prior to the Hearing had the Petitioner or beneficiaries requested an independent trustee to be appointed.

19. At the Hearing, the District Court, acting *sua sponte*, suggested the appointment of an “independent trustee,” and also invited counsel for the Former Trustees to argue in favor of it at least three times.^{23 24}

20. In response, counsel for the Former Trustees opposed stating to the lower court “You’re gonna...potentially restart the whole process over again.”²⁵

21. At the end of the Hearing, the lower court stated that it was “considering an independent trustee.”²⁶

22. Petitioner requested a full evidentiary hearing, and for the lower court to identify the grounds for Petitioner’s removal.²⁷

²³ See, 2 App. 302, Hearing Video Time 02:46:14-02:46:17 (“Do we appoint an independent trustee to handle this”); Hearing, Video Time 02:46:36-02:46:39 (“Do we appoint an independent trustee to avoid this litigation..”); Hearing, Video Time 02:46:57-02:47:14 (“If we can do it with this trustee, fine. If we cannot do it with this trustee, this is your chance to say why not...”).

²⁴ A transcript of the proceeding could not be prepared in time for this Writ, therefore Petitioner is providing the video from the hearing and will supplement her appendix with the transcript at a later date.

²⁵ See, 2 App. 302, Hearing Video Time 02:47:13-02:47:16

²⁶ See, 2 App. 302, Hearing Video Time 02:58:30-02:58:32

²⁷ See, 2 App. 302, Hearing Video Time 02:58:55-02:58:57

23. The Court instructed Petitioner to “file your authority to request a full hearing.”

24. Petitioner stated her anticipated objection to any order removing her based on a “lack of due process, lack of hearing, lack of opportunity...”²⁸ with the Court interjecting to state, “file your reason why you think [a] lack of due process.”²⁹

25. On May 25, 2018, Petitioner filed a brief outlining why the lower court was required to provide her meaningful notice and a meaningful opportunity to be heard prior to her removal.³⁰

D. JUNE 1, 2018 INDEPENDENT TRUSTEE ORDER

26. On June 1, 2018, the lower court filed its Independent Trustee Order³¹ which is the primary subject of this Writ.

27. No party to the action had requested – whether by written petition, oral motion, or otherwise – the appointment of an independent trustee.

28. No notice was provided to any party in advance of the Hearing that the lower court was considering an independent trustee and no grounds for such an appointment were provided.

²⁸ See, 2 App. 302, Hearing Video Time 02:59:02-02:59:05

²⁹ See, 2 App. 302, Hearing Video Time 02:59:05-02:59:08

³⁰ See generally, 2 Appx. 300, “Brief” filed May 25, 2018.

³¹ See, 1 App. 001-009

29. The Independent Trustee Order starts with the preface “[t]he following facts are not the Court’s ‘finding of facts’ but nevertheless are the facts as presented by the parties in their pleading and court arguments.”³²

30. The lower court then states, “[t]he parties have moved on to litigate many issues except the foremost central issue presented to the court related to Nancy’s authority to remove the original Trustees and replacement of the Trustees...the main issue of determining the proper Trustee has not been resolved.”³³ *C.f., supra* ¶14.

31. The lower court finds the Petitioner “has expressed a serious dislike for the major beneficiaries of the Trust and a positive bias towards Monte Reason, a limited beneficiary,”³⁴ and that “[t]here are irreconcilable conflicts between Ms. Utkin and the main beneficiaries of the Trust.”³⁵

32. The lower court arrived at its finding from an affidavit filed in support of the settlor Nancy Christian’s November 13, 2017 objection to the court assuming jurisdiction of the trust and the settlor’s countermotion to find the Former Trustees in breach of fiduciary duties, for conversion, and to invalidate impermissible transfers to the Former Trustees.³⁶

³² See, Independent Trustee Order, 1 App. 001 Ln. 12-14. (Emphasis added)

³³ See, 1 App. 003, Ln. 4-10

³⁴ See, 1 App. 004, Ln. 16-18.

³⁵ See, 1 App. 005, Ln. 5-6

³⁶ See, 1 App. 004– 005

33. This perceived conflict was raised in the Former Trustees' February 23, 2018 objection to Petitioner's request to be appointed as trustee³⁷ which preceded the April 4, 2018 Order confirming her as trustee ("Order Confirming Trustee").³⁸

34. The Independent Trustee Order further states the lower court was interested,³⁹ that it was "suggest[ing] [] the appointment of Fred Waid Esq. as Trustee"⁴⁰ and that it would set a "court motion" to discuss the appointment.⁴¹

35. The lower court found that Fredrick Waid, Esq. ("Mr. Waid") had no conflict of interest and was "in a better position to guide the Trust through distribution and potential litigation."⁴²

36. There is no trace of Mr. Waid's name appearing anywhere in the record for the Action prior to the June 1, 2018 Independent Trustee Order.

37. There has been no hearing or evidence taken on Mr. Waid's qualifications nor whether he had a potential conflict with any party to this action.

38. The lower court goes on to state that a "hearing will be held to discuss this appointment of a Trustee."⁴³

³⁷ See, 1 App. 004, Ln. 11-13.

³⁸ See, 1 App. 293-295

³⁹ See, 1 App. 006, Ln. 1-2.

⁴⁰ See, 1 App. 006, Ln. 7-8.

⁴¹ See, 1 App. 008, Ln. 8-9.

⁴² See, 1 App. 007, Ln. 13-16.

⁴³ See, 1 App. 007, Ln. 13-16; *See Also*, 1 App. 008, Ln. 18-21.

39. The purpose of the hearing was “to determine if any of the parties object to the appointment of Fredrick Waid, Esq. as Trustee”⁴⁴ and that the parties had “a right to request a prompt evidentiary hearing at said court hearing.”⁴⁵

40. Albeit, the lower court announced in its order that “[t]here is no good purpose or rationale to object to appointing a neutral Trustee in light of the litigation history in this case.”⁴⁶

41. The Independent Trustee Order ends with the threat that “[l]itigants should be aware that the Trust will not bear the initial cost of any further litigation and the Trust might possibly not bear the ultimate fees of such litigation.”⁴⁷

X. REASONS WHY THE WRIT SHOULD ISSUE

A. STANDARD FOR ISSUANCE OF A WRIT

A Writ of Mandamus will issue to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, and where there is no plain, speedy, and adequate remedy in the ordinary course of law. *See, Oxbow Constr. v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 86, 335 P.3d 1234, 1238 (2014); *See Also, Hickey v. District Court*, 105 Nev. 729, 782 P.2d 1336 (1989); NRS 34.160. “A writ of mandamus is available to, among

⁴⁴ *See*, 1 App. 007, Ln. 12-13

⁴⁵ *See*, 1 App. 008, Ln. 9-11.

⁴⁶ *See*, 1 App. 006, Ln. 9-12 (emphasis added)

⁴⁷ *See*, 1 App. 008, Ln. 10-13.

other things, control an arbitrary or capricious exercise of discretion.” *See, Oxbow Constr.*, at 1238 (internal quotation omitted). The writ is the appropriate remedy to compel performance of a judicial act. *See, Solis-Ramirez v. Eighth Judicial Dist. Court ex rel. County of Clark*, 112 Nev. 344, 913 P.2d 1293 (1996). “When seeking such extraordinary relief, the petitioners bear the burden of demonstrating that an exercise of this court's discretion to that end is warranted.” *Id.* The Court can use its “discretion to consider such writ petitions when “an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.” *See, Oxbow Constr.*, at 1238.

Similarly, the purpose of a Writ of Prohibition is not to correct errors, but to prevent courts from transcending their jurisdiction, and they are issued to arrest the proceedings of a district court exercising its judicial functions when those proceedings are in excess of the jurisdiction of that court; it also is to issue where there is no plain, speedy, and adequate remedy at law. *See, Guerin v. Guerin*, 114 Nev. 127, 953 P.2d 716 (1998); *Gladys Baker Olsen Family Trust v. District Court*, 110 Nev. 548, 874 P.2d 778 (1994); NRS 34.320; NRS 34.330. The writ is the correct mechanism for prohibiting the use of enforcement orders effectuating an underlying order that was issued without jurisdiction. *See, Golden v. Averill*, 31 Nev. 250, 101 P. 1021 (1909).

As to both varieties of writs, they are intended to resolve legal, not factual disputes. *See, Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). The Court may in its discretion treat a petition for writ of ,andamus as one for prohibition, vice versa, or treat a notice of appeal interchangeably as a Petition for a Writ. *See, Messner v. District Court*, 104 Nev. 759, 766 P.2d 1320 (1988); *See, In re Temporary Custody of Five Minors*, 105 Nev. 441, 777 P.2d 901 (1989).

Herein, the lower court has petitioned itself for a relief exclusive to the parties while simultaneously predetermining the results without a hearing, evidence or an opportunity for the parties to be heard. The lower court went further by announcing that any opposition to the court's motion would lack good purpose or rationale. The result puts Petitioner in direct conflict with the court while the court intimidates the Petitioner into silence under an implicit threat that opposition would be frivolous or vexations and thus subject to sanctions. Petitioner faces the irreparable harm of having a matter heard before an tribunal lacking impartiality and which has laid the groundwork for sanctions against her before a single pleading has been filed or evidence taken.

An appeal is not a plain, speedy, and adequate remedy when the lower court is conducting independent investigations of fact while announcing so clearly in advance of a hearing that it intends to violate the procedural due

process rights of a party. Furthermore, judicial economy suggests that a writ should issue to arrest the lower court and forestall a substantial violation of civil rights which may spawn an action under 42 U.S.C. § 1983 or later appeals to this Court.

The only disputes are as to matters of law, going both to a duty to act, and a duty to refrain from acting, both of which have been violated by the lower court, and requiring an order by way of an extraordinary writ from this Court. The lower court has exceeded its jurisdiction and a writ is needed to refrain it from acting to violate Petitioner's procedural due process rights.

B. THE LOWER COURT'S DOES NOT HAVE A LEGAL BASIS FOR MOVING ITSELF TO APPOINT AN INDEPENDENT TRUSTEE

1. The authority cited by the lower court did not authorize it to initiate a petition to remove a trustee.

No party to the Action was seeking appointment of an independent trustee, and the confirmation of Petitioner as trustee had become final as a matter of law. The lower court has declared itself interested, and then petitioned itself to seek removal of the Petitioner,⁴⁸ however, there is no authority for it to do so. The authority the lower court cites is reserved for parties themselves, and there is no petition for an independent trustee anywhere in the record.

⁴⁸ *supra* ¶33

The lower court references the Former Trustees’ February 23, 2018 opposition to Petitioners’ confirmation as trustee and counter-motion (“Opposition/Counter-motion to Confirmation”)⁴⁹ and then cites NRS 153.031(1)(f) as authority for the court to review “the acts of the trustee, including the exercise of discretionary powers.” However, a review of the entire Opposition/Counter-motion to Confirmation reveals that no such relief was requested by the Former Trustees.⁵⁰ This is not a form over substance argument; there is no reference to NRS 153.031(1)(f) anywhere in the Opposition/Counter-motion to Confirmation and there is no reference to acts that the Former Trustees were asking the lower court to review. The Opposition/Counter-motion to Confirmation was filed in response to Petitioner requesting the lower court to confirm the construction of the Trust, determine the validity of its terms, and to confirm her as trustee pursuant to NRS 153.031(b),(d) and (k).⁵¹ That petition was granted and Former Trustee’s Opposition/Counter-motion to Confirmation was denied.⁵²

The Order Confirming Trustee was entered on April 4, 2018, and no party appealed.⁵³ The Order Confirming Trustee became final and conclusive on all

⁴⁹ See, 1 App. 004, Ln. 11-15.

⁵⁰ See, 2 App. 221-229.

⁵¹ See, 1 App. 164

⁵² See, 1 App. 293-294

⁵³ See, Docket for Action, 2 App. 296-301

parties as a matter of law after thirty days. *See*, NRS 155.190(1)(h) (Any order “Instructing or appointing a trustee” may be appealed within 30 days of the notice of entry of order.); *See Also*, Matter of Estate of Miller, 111 Nev. 1, 6, 888 P.2d 433, 436 (1995) (“[U]nless appeal is taken within 30 days, an order of the kinds mentioned in NRS 155.190 is not thereafter subject to attack”) (citing, Luria v. Zucker, 87 Nev. 471, 488 P.2d 1159 (1971)) (emphasis added); NRS 153.080 (“An order entered under the provisions of this chapter, when it becomes final, is conclusive upon all interested persons, whether or not they are competent or in being”); *See Also*, NRS 164.015(6) (For matters under this section and NRS 153.031, “[t]he order is final and conclusive as to all matters determined and is binding in rem upon the trust estate and upon the interests of all beneficiaries, vested or contingent, except that appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution may be taken from the order within 30 days after notice of its entry by filing notice of appeal with the clerk of the district court”). The lower court could not resurrect the opposition to attack the Order Confirming Trustee after it had become final, rather the parties themselves would have had to do it stating new and independent grounds for removal.

Next, the lower court transitions from arbiter to advocate, providing “the Court’s suggestion is the appointment of Fredrick Waid, Esq.” while citing NRS 153.031(1)(k) and NRS 164.010 (5)(d).⁵⁴ However, NRS 153.031 is for trustees and beneficiaries, not the court, and none of those parties filed a petition after the Order Confirming Trustee became final. NRS 164.010 (2)(d)⁵⁵ is closer to the mark when read in conjunction with NRS 164.010 (1), but even that is predicated upon an application of the trustee, settlors or beneficiaries. NRS 164.010 (2)(d) permits the court to consider “granting orders” on other matters relating to the trust, which necessarily implies one of the parties requested an order. Examples of relief are illustrated in the statute’s citations to NRS 30.040, NRS 153.031 or NRS 164.015, however, all of these are predicated upon motions by the parties themselves, not the court acting *sua sponte*.

Going on, none of the cases cited by the lower court in the Independent Trustee Order provides it independent authority to remove the Petitioner. Moreover, not one of the cases suggested the lower court could declare a conflict of interest to have existed without having a hearing or having taken evidence.

⁵⁴ See, 1 Appx. 6, Ln. 6-7.

⁵⁵ The cite to NRS 164.010 (5)(d) appears to be a *scrivener’s* error as that statute does not exist, and it is presumed the Court intended NRS 164.010 (2)(d).

Taken together, the lower court has not cited any legal authority allowing the court to make itself an advocate in the Action, and it follows that the lower court's Independent Trustee Order constitutes the court acting outside of its jurisdiction.

2. The lower court also misstates the procedural posture of the case which is significant because of how review is initiated.

The lower court stated, “[t]he parties have moved on to litigate many issues except the foremost central issue presented to the court related to Nancy’s authority to remove the original Trustees and replacement of the Trustees...the main issue of determining the proper Trustee has not been resolved.”⁵⁶ However, this is indirectly contradicted by the Order Confirming Trustee which found that the Trust’s clear and unambiguous terms allowed for the removal of the Former Trustees and the subsequent appointment of Petitioner.⁵⁷ After all the parties failed to appeal within thirty (30) days, the order was no longer subject to attack. The Independent Trustee Order is effectively a new “petition” filed by the court, after the Order Confirming Trustee had become final, but which presents no new questions of fact or law.

⁵⁶ 1 App. 003, Ln. 4-10

⁵⁷ See, 2 App. 293-295

The result is lower court is acting outside of its jurisdiction. As such, a Writ of Mandamus should be issued to the lower court ordering it to vacate its Independent Trustee Order.

C. THE DISTRICT COURT HAS NOT AFFORDED THE PARTIES DUE PROCESS

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” Mathews v. Eldridge, 96 S. Ct. 893, 901 (1976). “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Id.* at 902 (quoting, Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)); *See Also*, Zinermon v. Burch, 110 S. Ct. 975, 984 (1990) (Usually, the “Constitution requires some kind of a hearing before the State deprives a person of liberty or property.”). At minimum, due process requires “*some* kind of notice and ... *some* kind of hearing.” Goss v. Lopez, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975) (emphasis in original).

In addition, an “impartial decision maker is essential” to due process. Goldberg v. Kelly, 397 U.S. 254, 271, 90 S. Ct. 1011, 1022, 25 L. Ed. 2d 287

(1970). While there is no “required” list of procedures for due process, Judge Henry Friendly’s influential list provides, by relative priority:

1. An unbiased tribunal.
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision.

See, Judge Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-1295 (1975); cited with approval by State v. Beaudion, 131 Nev. Adv. Op. 48, 352 P.3d 39, 44 (2015); *See Also*, Mathews v. Eldridge, 424 U.S. 319, 343, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

1. There can be no meaningful opportunity to be heard when results are preconceived, especially when the results must have been reached by the lower court engaging in independent fact finding.

The lower court’s Independent Trustee Order strongly implies that the upcoming hearing would not be before an impartial tribunal. The lower court has predetermined that it will select Mr. Waid to be the independent trustee while simultaneously adjudicating him as having no conflicts and being in the

best position to lead the Trust.⁵⁸ The lower court’s selection and determinations did not come from the parties, the pleadings, or the evidence before the court, so this this would be a factual finding independent of the record. However, a court is prohibited from engaging in an independent investigation of the fact. *See*, Nev. R. Jud. Can 2.9(5)(C) (“A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed”). The lower court’s selection and prequalification of an outsider without notice to the parties is eerily similar to the type of conduct which led to significant restructuring in the guardianship courts here in Nevada.⁵⁹ A party cannot challenge an investigation it does not know about, and a fact finding by the court, conducted outside of the courtroom, cannot satisfy due process. This is true especially when the lower court only announces its findings after its investigation had been completed.

Notwithstanding the forgoing, the lower court invites the parties to oppose the court’s own petition to appoint Mr. Waid and for the parties to request an evidentiary hearing –which the lower court would then decide. However, the lower court has determined in advance that, “[t]here is no good purpose or rationale to object to appointing a neutral Trustee in light of the litigation

⁵⁸ *See*, 1 App. 007, Ln. 13-16.

⁵⁹ *See Generally*, <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>

history in this case.”⁶⁰ This is insurmountable bias and the specific use of “no good purpose or rationale to object” predisposes any objection as sanctionable. NRS 155.165 (“The court may find that a person is a vexatious litigant if the person files a petition, objection, motion or other pleading which is without merit...”)⁶¹ The lower court caps it with a threat that Petitioner would not be reimbursed her legal fees should she fight for her position, which she is permitted to do under the terms of the Trust.⁶¹

To summarize, the results reached outside the courtroom are fixed, resistance is futile, and resistance will be punished. This is not a meaningful opportunity to be heard. . Moreover, the Independent Trustee Order reveals a lower court that fully intends on violating the procedural due process rights of Petitioner, and as such Petitioner seeks a Writ of Prohibition arresting the lower court from taking such actions.

2. The Court Cannot Make Findings of Fact without having taken evidence, or given the parties notice and an opportunity to be heard.

The Independent Trustee Order causes substantial confusion on a procedural level because it makes findings of fact, while simultaneously saying it is not making findings of fact. The lower court starts its order by saying, “[t]he

⁶⁰ See, 1 App. 006, Ln. 9-12 (emphasis added)

⁶¹ See, 1 App. 008, Ln. 10-13.

following facts are not the Court’s ‘finding of facts’ but nevertheless are the facts as presented by the parties in their pleading and court arguments,”⁶² and then goes on to make a number of *de facto* findings of fact about a conflict of interest.⁶³ Notably, the lower court does not reference any actions that Petitioner took while acting as trustee which would demonstrate a conflict of interest. Instead, the lower court declares Petitioner as having a disqualifying conflict of interest,⁶⁴ based on a preconfirmation detail which was known to the Court. Effectively, the lower court is reconsidering the grounds of a final order without any party moving it to do so, and without new law or facts. The result is an unmistakable transition from arbitrator to advocate.

Next, the lower court makes findings that attack the scope of the litigation and the fees incurred⁶⁵ without giving the parties a chance to defend themselves. This is significant because there have been astonishingly good grounds for fighting this matter on behalf of the Trust. For example, fees were incurred:

- i. by the *settlor* to defend her removal of the Former Trustees;⁶⁶

⁶² See, 1 Appx. 1, Ln. 12-14.

⁶³ The Court prefaced its order with a statement that these were not findings of facts, perhaps to avoid procedural due process issues, however the “analysis” then relies upon the section as if it were factual findings.

⁶⁴ *supra*, ¶31-32.

⁶⁵ 1 App. 003 Ln. 4-22

⁶⁶ 2 App. 296, “Motion to Dismiss”; 2 App. 296, “Response to Petition to Assume Jurisdiction of Trust; confirm Trustees; instructions, Etc. And Joinder in Motion to Dismiss Pursuant to NRCP 12(b)(1) and NRCP 12(b)(5)”

- ii. by the *settlor* to evict the Former Trustees out of her home that they had evicted her from;⁶⁷
- iii. by the *settlor* and Trustee Monte Reason to force the Former Trustees to provide a proper accounting, which was renewed by the Petitioner when she became trustee;⁶⁸
- iv. by the *settlor* and Trustee Monte Reason for conversion of Trust assets by the Former Trustee;⁶⁹
- v. by Petitioner to hold the Former Trustees in contempt for failing to comply with the District Court's express order for them to turn over receipts and statements supporting their accounting;⁷⁰
- vi. by *settlor* and Petitioner seeking to dissolve the bondless injunction over trust assets;⁷¹ and
- vii. by Petitioner to confirm construction of the trust and that Petitioner was the successor trustee.⁷²

⁶⁷ See generally, Las Vegas Justice Court Case No. 17C023096, Nancy Christian, Monte Reason, Christian Family Trust, Plaintiff(s) vs. Raymond Christian, Jr., Defendant(s)

⁶⁸ See, 2 Appx. 297, "Motion for Compliance with and Enforcement of Court Order, and for Sanctions Relating Thereto, for Order to Show Cause Why Former Trustees Should Not be Held in Contempt, for Order Compelling Former Trustees to Account, and for Access to and Investment Control of Trust Funds Belonging to The Christian Family Trust;" See Also, 2, App. 298, "Joint Petition for Review of Former Trustees Refusal to Provide Proper Accounting;"

⁶⁹ 2 App. 297, "Joint Objection to Petition to Assume Jurisdiction of Trust; Confirm Trustees; Instructions, Etc. and Joint Counterpetition to Assume Jurisdiction in rem of the Trust, to Confirm Trustee, to find Breach of Fiduciary Duty, Conversion, and Fraud Against Former Trustees, to Invalidate all Transfers to the Former Trustees as the Product of Undue Influence, to Order the Immediate Delivery of all Trust Assets, and to Impose a Constructive Trust"

⁷⁰ See, 2 App. 299, "Motion for (1) Fees Pursuant to NRS 165.148 (2) Compliance with and Enforcement of Court Order and Sanctions; (3) for Order to Show Cause Why Former Trustees Should Not be Held in Contempt, and (4) for an Extension of Discovery"

⁷¹ See, 2 App. 297, "Motion for Turnover of Assets and to Dissolve the Injunction over Christian Family Trust Assets"

⁷² See, 2 App. 298, "Petition To Confirm Successor Trustee"

Every single one of the petitions filed were necessitated by the Former Trustee's conduct, not because the Trust wanted to waste its assets on attorney fees. The administration of the Trust has heavily involved the lower court because of the Former Trustee's petitions and also because of the lower court's Freeze Order. Petitioner was not given an opportunity to present these arguments, because they were not provided proper notice, which is a deprivation of procedural due process.

In conclusion, the lower court is making *de facto* findings of fact while saying it is not, and then relying upon those *de facto* findings of fact to reconsider a prior order and remove the Petitioner. All this is accomplished without a pleading from the parties, or adequate notice and opportunity to be heard. This is a violation of Petitioner's procedural due process rights and a Writ of Prohibition should issue to arrest the lower court's actions.

XI. CONCLUSION

It is respectfully submitted that the lower court's rationalizations for initiating a removal of Petitioner in favor of a stranger to the action are inadequate and that a Writ of Mandamus should enter directing the lower court to vacate its Independent Trustee Order.

In addition, the lower court has demonstrated that it has violated the procedural due process rights of Petitioner and will to do so at an upcoming hearing. Therefore, a Writ of Prohibition should enter directing the lower court arrest all efforts to carry out its removal of Petitioner through its Independent Trustee Order.

DATED this 11th day of June, 2018.

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/s/ Jerimy L. Kirschner, Esq._____

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Attorney for Jacqueline Utkin, Successor Trustee to the Christian Family Trust

Dated October 11, 2016

XII. VERIFICATION

1. I, Jerimy L. Kirschner, Esq., declare:
2. I am the attorney, for the Petitioner herein;
3. I verify, pursuant to Nev. R. App. P. 21 (a)(5), that I have read the foregoing PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION, that the same is true in my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.
4. I declare under penalty of perjury of the laws of Nevada, that the foregoing is true and correct.

Dated June 11th, 2018

/s/ Jerimy L. Kirschner, Esq.
Jerimy L. Kirschner, Esq.

XIII. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2016 in size 14 font in Times New Roman. I further that I have read this brief complies with the page or type-volume limitations of Nev. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 5,681 words.

Finally, I hereby certify that 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 Nev. R. App. P. 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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.

Dated this 11th day of June, 2018.

JERIMY KIRSCHNER & ASSOCIATES, PLLC

/s/ Jeremy L. Kirschner, Esq.
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XIV. CERTIFICATE OF SERVICE

That this 11th day of June, and pursuant to Nev. R. App. P. 25 and Nev. R. App. P. 21(a)(1) I certify that I am an employee of JERIMY KIRSCHNER & ASSOCIATES, PLLC; that, in accordance therewith, I caused a copy of the PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION to be served, in a sealed envelope, on the date and to the addressee(s) shown below:

The Honorable Judge Vincent Ochoa
Eighth Judicial District Court of
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