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HIGH COURT OF AMERICAN SAMOA

ROBIN KNEUBUHL [ROUSH], BENJAMIN F. KNEUBUHL, FRANCES K. OPELLE, PLAINTIFFS, vs. DOUGLAS CRANE 'MIKE' KNEUBUHL, DOUGLAS KNEUBUHL, JR., CARRIE SUE LAVIGNE ECKERT, KELLY NADINE FULTS, AND MARK KNEUBUHL, DEFENDANTS	**L & T 18-18** PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION/CLARIFICATION

Movant plaintiff[1] respectfully requests clarification of only one[2] of the court's conclusions in its July 9, 2018, Declaratory Judgment, namely, when describing the qualifications to be a beneficiary in the 1960 Lena P. Kneubuhl Land Trust, executed under A.S.C.A. § 37.0204 et seq., the court wrote that the Second Generation Beneficiary

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[1] Movant neither joins nor endorses nor objects to any other claim for similar clarification made by any other party.
[2] In an earlier decision Judge Richmond found that "The court has authority to clarify earlier opinions and orders." *Opelle v. Kneubuhl, et. al*, CA 50-04, Order Correcting Plaintiff's Opinion of the Court's September 13, 2006 Opinion and Order, p. 4, citing *Mailo v. Aumavae*, 31 A.S.R. 2d6, LT 1996), which found a single word ("duty") to be "misleading."

grandchildren (SGBs), found and determined to be "issue" under the statute, and, in consequence thereof, are therefore required to be the "biological children" of the first generation beneficiaries (FGBs). In imposing this new paradigm, the court bases its determination that SBGs must be "biological children" of their parents upon the BLACK'S LAW definition of the word "issue." The immediate consequence of this determination would seem automatically to exclude adopted children (hereinafter "adoptees") anywhere from taking or using their "inheritance" as an SGB in any trust (and not just the Kneubuhl trust) made in American Samoa under the §37.0205.

The definition of "issue" is essential to defining beneficiary qualifications to enjoy trust interests under the statute, since it is one of only two requirements, the other being a child of a "lawful marriage."

The statute A.S.C.A. § 37.0205 reads:

> This regulation shall not apply to any native proprietor of land other than communal family land, who desires to make provision for his son or daughter, in view of legal marriage with a nonnative, or for his son or daughter already married to a nonnative, or for any of the issue of any such marriage, by deed or will in favor of a trustee to hold in trust for the use of such son or daughter or such issue.

To review, the words "biological" and "issue" appear in the following places in the court's' Declaratory Judgment of July 9, 2018, where the court wrote:

Page 17: "Each FBG holds his/her interest as near as possible to legal title, with the interest in land automatically passing to his her issue upon that FGB's death . . . . the interest [does not] merely go to each of FGB's heirs; rather it must necessarily pass to the issue, i.e. the biological children of the FGB. FN6"

Page 18: FN6 reads: "An heir may be defined as a 'person who inherits real or personal property whether by will or intestate succession.' " BLACK'S LAW

DICTIONARY, 740, 8th ed., 2004). In contrast, issue is defined as "lineal descendants; offspring." Id.

Page 19: "Rather, all of the issue of a particular FGB take equal, undivided equitable interests in their deceased parent's interest."

Page 20: "Upon death of the last-surviving issue of a particular FGB, the specific equitable interest once held by that particular FGB *likely* reverts to the Settlor's estate. FN9: We need not explore this point since outside the scope." (emphasis added)

Page 23: "IV. Conclusion. (A.) "[An FGB's life estate] is transferred to the FGB's biological children immediately upon that FGB's death . . . . (C.) [T]he FGB's biological children take equal, undivided interests in that FGB's separate interests."

It is clear that the statute uses only the term "issue" and that the court has provided welcome and clarifying operative terms to Lena's trust, but it is not clear that the new restriction that to be included in the class of SGBs biological children (to be a "biological child") is necessary to the disposition of the claims raised, and may indeed be hurtful in general since imposing invidious distinctions among Lena's grandchildren. It is not helpful to the orderly administration of the trust, and possibly entirely contra to fa'a Samoa, where it operates to exclude adopted children.

Perhaps the new requirement is offered and intended as *dicta*[3], i.e. comment and explanation or mere illustration of the rules of inheritance. If the latter is correct, the

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[3] *Dicta* ". . . do not embody the resolution or determination of the specific case before the court [and] is not binding in subsequent cases as legal precedent." BLACK'S LAW DICTIONARY, Sixth Ed.., West, 1990, p. 454. Under "*Dictum*" "a remark by the way"; *Dicta* "do not embody the resolution or determination of the court , are made without argument, full consideration of the point, are not the professed deliberate determinations of the judge himself." Id.

relief requested can be accomplished by merely striking that term "biological" from the text. It is not necessary to bring the definition of the words "issue" and "children" up to date, but it would be helpful since the result would be more in accord with their contemporary usage, American Samoan jurisprudence, and prevailing trust law.[4]

If, on the other hand, the July 9, 2018 Judgment was intended to be an enforceable order (or other)[5], with the draconian consequence of disinheriting any of Lena's grandchildren SGBs who are adopted,[6] it is with an abundance of caution over unintended consequences that the issue is raised and amendment/clarification of the judgment is now requested.

This amendment/clarification is based upon the following four (4) grounds, stated pursuant to and in conformance with the "particularity requirement" of T.C.R.C.P. 7(b)(1), which rule is not reiterated here.

1) Imposing the requirement the SGBs be :biological children" finding that the use of the term "biological" is impermissible since "relief" would constitute relief not requested in any pleading by any party; nor was the controversy raised- whether SGB adoptees may be beneficiaries- tried with the consent of all the parties;

2) The Omitted Case Canon: As a matter of construction and interpretation, if a term is not present in a statute, document or instrument, the court ought not insert it;

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[4] But that is the job of the Fono.

[5] The numerous alternative forms of disposition available to the court will not be addressed here, given the length and breadth of the law of judgments and other alternatives for relief available in the post-trial practice rules; we do not, however, waive those alternatives which will expire on July 19, 2018.

[6] Lena had five adopted grandchildren.

3) The word "issue" has evolved over time; its former use indicting descent along bloodlines is now outdated; restoration of its former meaning (which was never applied or implemented) carries significant unintended consequences are harmful to similarly situated families and beneficiaries everywhere;

4) Exclusion of adoptees from the class of beneficiaries is contrary to American Samoan jurisprudence, and American Samoan customary law;

We will address each in turn below in the order given above.

1) Due Process: When Relief is Not Requested

In their pleadings, Plaintiffs requested that the court make findings regarding how trust interests pass (p. 17), requested that the court outline the process from the identification of "issue" who step into FGB's share to enjoy uses of the life estates (p. 18), concluding that these are undivided within stirps (p. 19), and especially to reaffirm the rules against impermissible ownership and alienation, and therefore sales and transfers (pp. 20-22). All of these requests for relief, and more, were requested in plaintiffs' prayers for relief, all thoroughly reiterated in the court's Order of April 13, 2018, and granted in the Declaratory Judgment.

The plaintiffs conspicuously did not request that the court make new findings regarding new or additional birth qualifications of the beneficiaries, nor did they raise any claim(s) concerning birth qualifications, conceding that all the individual Kneubuhl beneficiaries did not meet the only birth characteristic then appearing to be relevant and pertinent to the statute and its underlying rationale: all Kneubuhl SGBs are of insufficient Samoan blood to qualify for land ownership. Accordingly, where the analysis considered birth qualifications, it went beyond the prayers for relief by granting

relief not requested, and was, like the discussion of likely disposition of the reversionary interest, (see page ____) "out of scope."

The finding and presumptive order was beyond the scope of a declaratory judgment determination, especially since made without notice to any of the parties, both plaintiffs and defendants, thereby depriving them of an opportunity to defend against it. Absent such a claim, if intended as an order, or basis for one, when a finding does not conform to the pleadings, it may not be granted for due process reasons. This long established rule was encompassed and incorporated by the High Court in its determination of June 15, 2018 rejecting an entire claim, for the reverse reason that it had no accompanying claim for relief. (See Transcript, Motion Hearing, High Court, June 15, 2018, pp.11- 17.) The long standing rule is that there is no jurisdiction to enter orders where there is no claim or claim for relief. (See *Burtnett v. King*, CAL 2d., S.F. No. 17550 *en banc,* 1949, citing *Spreckels S. Co. v. Industrial . Com.*, 186 Cal. 256 (1921); see also *Flowers v. Flowers*, Fourteenth Ct. App., NO. 14-11-00894-CV, Texas (2013) at 6-7, holding "The petition must give fair and adequate notice of the claims being asserted, and if we cannot reasonably infer that the petition contains a given claim, then we must conclude the petition does not contain the claim. See *SmithKline Beecham Corp.*, 903 S.W.2d at 354–55. . . .[unless] issues not raised by the pleadings are tried by express or implied consent of the parties, these issues shall be treated as if they had been raised by the pleadings."

It is important to note that the issue of biological qualifications other than the Kneubuhls' (insufficient) Samoan lineage was never litigated in this or any other prior proceeding, nor do any facts of birth status appear anywhere on the present record. (citations omitted) While there appears no case exactly on point, related due process

concerns appear throughout American Samoan jurisprudence, for example, where it is held on behalf of adoptees that ". . . no one can be denied property without having had a day in court," (*Puailoa v. Estate of Lagafuaina*, 12 A.S.R. 2d 84, (1984) where the issue of concern was whether a litigant could be bound when he was not a party to the suit. See also *Wray v. Wray*, 5 A.S.R. 2d 34, holding that when a matter is not fully litigated ". . . doubts should be resolved in favor of relief [from a judgment]; see also *Samoa Products, Inc. v. Aasa*, 17 A.S.R. 2d 66 (_____) concerning matters not fully litigated. Had the Kneubuhl family had notice that adoption would be an issue, it undoubtedly would have been litigated promptly and thoroughly, based on the four consideration set forth here.

2) Statutory Construction: The Omitted Case Canon.

The "Omitted Case Canon" reminds that when interpreting or applying statutes "Nothing is to be added to what the text states or reasonably implies. That is, a matter not covered is to be treated as a matter not covered," Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* , West (2012), p. 193. This particular authority, however entertaining, is also instructive, since the authors predict and warn against the dense thicket which is being entered whenever a word is added to a text:

In clarifying "issue" in its Declaratory Judgment of July 9, 2018, the court offered the word "biological" and used "i.e." which is an abbreviation for the Latin *id est*, which means "that is, namely, or in other words" (citations omitted), undoubtedly because the

Fono itself had earlier chosen "issue" for the statute.[7] Likely the Fono, as did the Court, used "issue" appropriately to distinguish from "heirs," but also to exclude from the class of beneficiaries those who might wish to make claims of right under that more broad and expansive term "heirs," commonly used in the laws of inheritance in general, especially through wills and intestacy, local probate rules and in everyday common parlance.[8] Sophisticated beneficiaries understand that interests of infinite duration confer a fee simple interest (legal ownership), and hence might advocate for "heirs" rather than mere "issue."

To determine whether the terms have changed over time (from 1960), and in consequence, may now be more inclusive and tolerant towards adoptees, it is helpful to repeat the inquiry using a different edition of BLACK'S LAW. illustrates the changes in usage which have occurred as of recent times.

For the present, BLACK'S now defines "issue" as "All persons descended from a common ancestor, including "offspring; progeny; lineal descendants . . . . " and all of these terms are defined in a circular fashion by reference internally to one another. *BLACK'S*, Sixth Ed., West, 1990 at 831. "Offspring" is defined simply as "children; issue" Id. 1085; "progeny" is included, but not separately defined. The definition offered therein for "descendant" is the least enlightening, defining them as: "Those persons who are in the blood stream of the ancestor . . . one who is in the line of descent." This current definition concludes with the very helpful clarification and observation that

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[7] See page _____. This is not intended to be, nor can it be, a comprehensive inquiry into the Fono's legislative intent in choosing the word "issue" while failing to define it, nor is that necessary for disposition. It is sufficient that it was used.

[8] Regretfully, the Fono did not supply indication of its intent in the word choice.

"The term may include an adopted child," Id. 445, but offers this without further reference or citation. Similarly, when defining "issue" this edition ends the entry for that term with the note, "Many state intestacy statutes provide that an adopted child is "issue" of her or her adopted parents," again with nothing further. Id. 831.

Clearly, what "issue" meant in 1960 and what it presently means are not in accord. Any disagreement is for the Fono to resolve.

APPLICABLE TERMS HAVE CHANGED OVER TIME

3) The Word "Issue" has evolved over time.

Both "issue" and "biology," as generally applied to adoption statutes,[9] have evolved over time throughout the jurisdictions, especially in response to changing social conventions, growing enlightenment and especially reproductive technology. While "issue" has evolved as in paragraph 2 above, "biology" has evolved to incorporate reproductive technologies which have vastly expanded the definition of "biological child" to refer to others not merely "not adopted." Most of these changes were not foreseeable in 1960 when the statute was changed, and Lena's trust prepared in response to it. Indeed, as a term of legal art, as BLACK'S suggests, "issue" may now have an *opposite* meaning. Numerous jurisdictions now recognize adoptees as legally equivalent in *all* ways to their non-adopted siblings; some still limit this equivalence by use of the "stranger-to-adoption" rule,[10] but the overwhelming majority have overturned it; some states limit only inheritance from non-adoptive grandparents (but not parents)

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[9] There is no provision for adoption in the common law.

[10] The "stranger-to-adoption" rule provides that when a settlor or trustor crates a class gift to "children" it will be assumed that he did not intend children adopted by persons other than himself to be included in the class gift, unless so expressly stated. *Ohio Citizens Bank v. Mills*, Ohio Sup. Ct., 45 Ohio St. 3rd 153 (1989).

and those more remote; a few other statutes consider an adopted child a "natural child" unless deemed otherwise, where a written, affirmative intention to exclude is found. Some states mandate that adoptees be included in class gifts, including those in trusts, and some require an inclusion presumption in wills, but only where the will is otherwise silent about adoptees. The greatest variation is not that these occur at all, but instead, the greatest variation occurs in the ages when the inclusion provision takes effect. Some adoption statutes take effect any age, while others specify an age of adoption requirement, often occurring as late at age 15-18; Indiana permits adoption up to age 21, Florida to age 13.

This brief summary is not intended to be exhaustive, but merely to hint at the complexity the matter of adoptees raises across the jurisdictions. See Jackie Messler, "*The Inconsistent Inheritance Rights of adult Adoptees,*" Marquette Law Rev. 1042 (2012).

Because of the increasing use of new reproductive technologies not available in 1960, where the word "issue" meant "heirs of the body" the presumption that a genetic relationship coincides with a natural birth or a "lawful marriage" was prevalent. That is no longer tenable or legally supportable today. The new opportunities to create parenthood have naturally expanded categories of increasing complexity and statutory inclusivity as well which were not anticipated in 1960.[11] A further complication is that A.S.C.A. § 37.0205 requires that eligible "issue" must also be children of a "lawful

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[11] Consider this array: putative fatherhood, step children, adopted, legal, equitable, and even invalid, and other children who are recognized but may have no genetic relationship to either or both parent, since "biologically" born trustor's children,

marriage," which presents another rapidly evolving legal concept[12]. See especially the provocative review "*Adoptions Shall Not be Recognized: The Unintended Consequences for Dynasty Trusts*," Kristen S. Knaplund, UC Irvine Law Review, 545 (2017), where previously unimaginable combinations occur.

None of this is to argue that the court ought to disregard that the word "issue" has been firmly cemented into the statute for many generations, (now 60 years) or ask the court to reconsider its conclusion that the statute enabling trusts for non-natives beneficiaries initially required a biological relationship between parents and "issue" *when it was written*. It is obviously no good legal argument in a Motion for Reconsideration to say that "times have changed," that the chosen words are outdated, or to speculate that the complexity of present day parentage renders the statute unenforceable. But considering the alternative, nothing could be more odious than presenting the court with the option of disinheriting adopted beneficiaries by the exclusion of individual SGBs who do not meet a genetic litmus or DNA test or other proof of strict biological parentage. The court would not and did not make any such census among the Kneubuhl family beneficiaries, since it was not asked to do so, nor was the family tree submitted for microscopic inspection, since any such determination of new restrictive qualifications would be beyond the claims of the litigation which is now, in part, concluded, and therefore beyond the scope of the present Judgment.

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[12] Consider gay marriage, domestic partnerships, civil unions, common law marriages, all of which are "lawful" marriages in some but not all states; consider also that this trend is acknowledged in American Samoa with A.S.C.A. _____ which confers legitimacy retroactively on American Samoan children earlier born whose parents were not yet wed.

What is clear is that the unintended results and precedential effect of an order disinheriting adoptee beneficiaries under the trust statute would have wide, unpredictable and destabilizing ramifications throughout the American Samoan community and would likely foment further litigation, contrary to the stated goals of the declaratory relief act to act so as to deter further litigation (see Declaratory Judgment , P.____).

The court also noticed reliance considerations (Judgment p. 11), which are substantial in some cases, given the size of the Taputimu land and the length of time it has been enjoyed. If the court agrees that this is a valid consideration, it may also consider what effect, if any, an explicit order excluding non-biological adoptees would have on settled understandings and the now 60 year old reliance interests in the broader community, especially for those born elsewhere whose claims must be considered in light of the rule of comity and the full faith and credit clause of the US Constitution (citations omitted). Since these are cumulative issues not necessary to disposition of this motion, we mention but do not fully address them in this memorandum. SGBs were mostly born off island and the possibility is undeniable that the second generation beneficiaries could assert the laws of their birth states where they are deemed to be "natural children," thereby presenting new conflict of law issues requiring disparate treatment under the statute in American Samoa. See *Southwest Marine of Samoa, Inc. v S & S Contracting, Inc.*, 6 ASR 2d 62 (_____), addressing conflict of laws.

AMERICAN SAMOA CASE AND CUSTOMARY LAW

4) American Samoan Jurisprudence and Customary Law. Exclusion of Adoptees is Not Favored.

While the gravamen of this motion is to request reconsideration of the "clarifying" term "biological" when applied to trust beneficiaries not otherwise qualified to own or transfer land, it must be emphasized that the movant(s) recognize(s) that the statute used a term of art ("issue"), whose meaning was not favorable to adoptees at the time that Lena wrote her trust (1960), and that while Lena may have intended all her children and grandchildren be treated equally, the court has clarified that the statutory provisions take precedence over the intent of the donor (citations omitted), and finally, that Lena P. Kneubuhl was charged with knowledge when she wrote the trust with knowledge and understanding the contemporary legal nomenclature.

Because the issue of SGB adoptees in the Kneubuhl Trust was neither litigated nor claimed, and because the term may be stricken on those grounds alone, it is unnecessary for disposition to review the then-applicable and/or currently prevailing American Samoan jurisprudence and customary law. While unnecessary, it may nevertheless be helpful in weighing the equities that guide this Motion (citations omitted).

> "Where a judgment is susceptible of two interpretations, that one will be adopted which renders it the more reasonable, effective and conclusive and which makes the judgment harmonize with the facts and law of the case and be such as ought to have been rendered." *Yuhashi v. Lopeti*, 3 ASR 322, (1958)., citing 49 *Corpus Juris Secundum*, pp. 863-866.

To restore the 1960 vocabulary to 2018 circumstances and realities when it is unnecessary to do so, is not reasonable or even effective, and may constitute impermissible trust modification.

American Samoan case law has advanced faster than the trust enabling statute. It has recognized, in part, the distinction between "heirs" and "issue" by noting that "heirs" are distinguished from "issue" because heirs cannot be identified until the donor or testator dies, whereas "issue" are identifiable when born. *Yuhashi v. Lopeti*, Id. *Atufili v. Timoteo*, 3 ASR 395 (1959) clarifies that "issue of a marriage" does not necessarily include all "descendants" nor entitle all descendants to beneficial status. Holding that "children means children" and does not refer to "all lineal descendants," the court resisted an exclusionary opportunity while avoiding the tendency to apply concepts of distant hypothetical persons in favor of those present, writing, "True, 'issue' has been construed in some cases to include all lineal descendants. 33 *Corpus Juris* 820. However, "In the ordinary parlance of laymen, 'issue' means children, and only children." Id. In *Atufili*, as in the instant case, it was not necessary to decide many issues since these were "beyond the scope" of the facts. The tension between adoptees and "true descendants" (likely meaning blood relatives) is also addressed in *Sagapalu v. Tanielu*, No 19-1921, October 16, 1922, where the preference for primogeniture is strong, especially when choosing successor matai. But, *contra*, the preference disappears somewhat in *Leaasiolagi v. Fao*, HCCA Trial Div. No. 12-1949 (May 4, 1949) conferring equality on adoptees in rights over family communal lands; statutory equality is conferred on immigrant children immigration matters by A.S.C.A. §41.0406[13], and, most prescient of all, A.S.C.A. 45.0424(b) authorizes a new birth certificate for adopted children.

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[13] Notably the American Samoa requirement is more strict than many mainland counterparts, imposing a 12 year age requirement, and requiring 5 years of prior residency.

It is widely recognized, and the court may take judicial notice, that adoption is frequent and integral to fa'a Samoa. Lena herself had an adopted ½ sibling of "biological relatedness" but not "lineal" descent. The relief requested in this Motion (see *infra*) is entirely consistent with Samoan customary law, and, for that reason alone ought not be denied, especially where the rationale and impetus behind the land laws (*Craddick* and its progeny) is the preservation of the Samoan culture.

CONCLUSION

In conclusion, whether or not the language of the statute addressing qualifications to be a beneficiary, i.e. persons who were "issue" and born to a "lawful marriage" began to become obsolete in 1960 when the trust was written,, as reflected in the matai cases. biological" is to avoid reverting to a more retrograde time, and to avoid the unintended consequences of disrupting the longstanding reliance interests of beneficiaries who may be adoptees.

The question of who may be a beneficiary is indeed the province of the court, but more so of the legislature. The close examination of the qualifications of individual beneficiaries is instead a managerial task best addressed by the Trustee, and best accomplished when brought to his attention and not to the court. The plain meaning of the words of the trust clearly indicates that Lena did not distinguish between her grandchildren, but treated them all equally. More importantly, the trust law requires that the court defer to a trustee's broad discretion to administer the trust, which discretion is especially broad in the Lena P. Kneubuhl Trust. She conferred on him to power to manage the parcels at Olo in whatever manner "he deems best." (Trust, p. 3)

In conclusion, where, in the distant past, the words of the statute could have been interpreted to exclude adoptees, the same words are nowadays broadly interpreted to

include them. Excision of the word "biological" from the meaning of "issue" will avoid returning to an earlier time when the consequences of strict application of the ancient meanings, originating in the medieval European environment of serfdom and primogeniture, would have serious and significant consequences for adopted SGBs.

Relief Requested:

Plaintiff requests that the word "biological" be stricken where it appears in the court's judgment of July 9, 2018. No revision or replacement is necessary, since the remaining words adequately restore harmony to previously discordant circumstances with a grave potential for disinheritance and the unwanted litigation it would resurrect.

The requested excisions/requested relief are:

Page 17: ". . . rather it [the interest] must necessarily pass to the issue, i.e. the ~~biological~~ children of the FGB. FN6"

Page 23: "IV. Conclusion. (A.) "[An FGB's life estate] is transferred to the FGB's ~~biological~~ children immediately upon that FGB's death; (C.) [T]he FGB's ~~biological~~ children take equal, undivided interests in that FGB's separate interests."

These three excisions are sufficient to constitute the entire relief requested in this single Motion for Reconsideration of the July 9, 2018 Declaratory Judgment to be brought by this plaintiff.

Dated this 16th of July, 2018.

Robin Alexandra Kneubuhl

Robin Alexandra Kneubuhl, Pro se

Certification of Service:

I certify, under penalty of perjury, that I have sent a true and exact copy of the foregoing Motion for Reconsideration/Clarification and Memorandum of Points and Authorities in Support of same, signed on July 16, 2018, to the following, on the indicated day(s) as follows:

On Monday July 16, 2018, by electronic transmission (e-mail) and US Postage Prepaid Express to:

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Robin Alexandra Kneubuhl 7-16-2018

Robin Alexandra Kneubuhl, Plaintiff, *pro se* Date