

EXHIBIT A

EXHIBIT A

Program Name: ADVERTIST COMMUNITY SERVICES

Date: 9/14/15

associate

certify that my household's current monthly income does not exceed 150% of poverty as listed on this form. All information is true and correct. I understand that misrepresentation of need, sale, exchange, or misuse of USDA commodity is prohibited and could result in fine, imprisonment or both.

SIGNATURE: Eleanor Ahern

Monthly Gross Income Scale

Household Size	Monthly Gross Income	Household Size	Monthly Gross Income
1	\$1,458.75	5	\$3,488.75
2	1,966.25	6	3,996.25
3	2,473.75	7	4,503.75
4	2,981.25	8	5,011.25

For households over 8, add \$507.50 per additional member per month.

Name / Phone	Check if Resident of Home	Total number people in Household	Number Adults ages 18-59	Number Children ages 0-17	Number Seniors ages 60+
NAME: <u>Eleanor AHERN</u>					
PHONE: <u>256 283 5867</u>	<input checked="" type="checkbox"/>	<u>1</u>			<u>1</u>

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Program Name: ADVERTIST COMMUNITY SERVICES

Date: 10/18/15

associate

certify that my household's current monthly income does not exceed 150% of poverty as listed on this form. All information is true and correct. I understand that misrepresentation of need, sale, exchange, or misuse of USDA commodity is prohibited and could result in fine, imprisonment or both.

SIGNATURE: Eleanor Ahern

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Name / Phone	Check if Resident of Home	Total number people in Household	Number Adults ages 18-59	Number Children ages 0-17	Number Seniors ages 60+
NAME: <u>ELEONOR AHERN</u>					
NAME: <u>ELEONOR AHERN</u>	<input checked="" type="checkbox"/>	<u>1</u>			<u>1</u>

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DOING THE
MOST GOOD

October 29, 2015

To whom it may concern,

On August 26, 2015 Mrs. Ahern came in to our Salvation Army as a new client she registered as a new client in our facility and received 20 Pounds of food from our local Pantry. On September 1, 2015 she returned for additional assistance as she is having financial difficulty. Due to our food pantry policy we were unable to provide food for her at that time but would be eligible for the food pantry on September 9th, 2015. On September client returned, and was provided with 20 pounds of food for that day. Client stated she is still having financial difficulties and needed help with food. On October 29, 2015 client came in to Salvation Army requesting information regarding assistance provided to her in time of need.

Thank You,

Cristina Angulano

Salvation Army

Case Worker

VIRGIN VALLEY FAMILY SERVICES, INC.
Virgin Valley Community Food Bank and Thrift Shop
P O Box 1436 Mesquite Nevada, 89024
702-346-7277 Office 702-346-0900 Thrift Shop

February 8, 2016

To whom it may concern,

Eleanor Ahern is a client at our Food Bank. She receives a box of staples from us twice a month. Each box estimated value \$40.

Very truly yours,

A handwritten signature in cursive script that reads "Leslee Montgomery". The signature is fluid and elegant, with a long, sweeping underline.

Leslee Montgomery
Manager VVCFB
702-540-3368



City of Mesquite Athletics & Leisure Services

Senior Center Division

102 West Old Mill Road

Mesquite NV 89027

Phone: 702-346-5290

www.mesquitenv.com

02/09/2016

To whom it may concern,

Elanor Ahern has been receiving the homebound meals, along with the frozen meals on the weekend, and a ½ gallon of milk here at the Mesquite Senior Center.

If you have any questions please feel free to contact the Senior Center.

Krissy Hall

Krissy Hall

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

IN THE MATTER OF: THE W.N.
CONNELL AND MARJORIE T.
CONNELL LIVING TRUST, DATED
MAY 18, 1972, AN INTER VIVOS
IRREVOCABLE TRUST.

JACQUELINE M. MONTOYA; AND
KATHRYN A. BOUVIER,

Appellants,

vs.

ELEANOR CONNELL HARTMAN
AHERN; AND FREDERICK P.
WAID, COURT APPOINTED
TRUSTEE,

Respondents.

Electronically Filed
Supreme Court No.: 69737
Feb 18 2016 02:14 p.m.
Tracie K. Lindeman
Clerk of Supreme Court
District Court Case No.:
P-09-066425-T

Appeal from the Eighth Judicial
District Court, The Honorable Gloria
Sturman Presiding

RESPONSE TO EMERGENCY MOTION UNDER NRAP 27(e)

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Attorneys for Appellant

Eleanor Connell Hartman Ahern

Eleanor C. Ahern a/k/a Eleanor Connell Hartman Ahern, by and through her counsel of record, the law firm of Brownstein Hyatt Farber Schreck, LLP, hereby files this Response to the Emergency Motion Under NRAP 27(e) submitted by Jacqueline Montoya and Katherine Bouvier (the "Sisters").

I. INTRODUCTION AND BACKGROUND

This appeal arises out of two Sisters' desire to deprive their 79 year old mother, Respondent Eleanor Ahern, of income from the multi-million dollar W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972 (the "Trust"), in which Ms. Ahern is at least a 35% beneficiary. Pending final resolution of this case in the coming months, the District Court ordered that Ms. Ahern should receive minimal advancements from the Trust, secured by her interest, to cover Ms. Ahern's living expenses and the (partial) cost of her defense against the Sisters' barrage legal attacks concerning Ms. Ahern's alleged missteps as the former trustee (the "Funds Order"). The Funds Order specifically states that the Interim Trustee, Fred Waid, "is only required to advance funds if such funds are available." (*See Funds Order*, Mot. at Ex. 6, p. 3:1.)

Several months ago, on April 16, 2015, the District Court entered a Summary Judgment order stating that "35% of the Texas oil property income shall be distributed to [Ms. Ahern] as [a] beneficiary" of the Trust. (Mot. at Ex. 1, p. 15:15-17.) In September 2015, Ms. Ahern moved the District Court to

enforce the Summary Judgment order and to require the Interim Trustee to distribute part of Ms. Ahern's 35% stake. Ms. Ahern did not ask for her entire 35%. She asked for a minimal monthly living stipend and resources to pay partially for counsel until resolution of this matter, in which her daughters now seek to deprive her of her interest in the Trust through surcharge and/or enforcement of a no-contest clause.¹ The District Court fashioned an order directing the Interim Trustee to advance limited funds to Ms. Ahern directly and through counsel for living expenses and legal fees, with such advances to be secured by Ms. Ahern's interest in the Trust.

Accordingly, the Sisters' Motion and the underlying Funds Order are about payments of money, and so not surprisingly the Sisters' Motion fails to identify any irreparable harm that will be suffered by the Sisters if a stay is not granted. Rather, in their Motion, the Sisters set forth their distasteful and baseless *speculation* that, if they should ultimately prevail in the underlying

¹ After requesting leave of this Court to exceed the page limit set forth NRAP 27, the Sisters spend nearly two pages arguing that a stay should be granted because the District Court erred when it refused "disinherit" Ms. Ahern as a matter of law through the Sisters' *Motion for Assessment of Damages Against Eleanor Ahern; Enforcement of No-Contest Clause; and Surcharge of Eleanor's Trust Income* (the so-called "Motion to Disinherit"). (Mot. at 17-18.) Not only was the Sisters' legal position regarding that motion terribly flawed, but (1) that motion is not presently before this Court and (2) the District Court's denial of that motion in favor of an evidentiary hearing was not and is not appealable. Thus, it is unclear what gain the Sisters attempt by adding these two pages to their already distended brief.

case, their mother will die before her monthly Trust income accumulates in sufficient amounts to repay the advances ordered by the District Court.² However, speculation about irreparable harm is not enough.

Certainly, if Ms. Ahern were deprived of any and all income until the final resolution of this case, the Sisters' quest to strip their mother of her Trust interest would be far easier, as Ms. Ahern would struggle to put food on her table, much less have funds available to hire competent counsel. Thus, the only person at risk of irreparable harm in this case is Ms. Ahern if she does not have immediate access to the funds ordered by the District Court.³ Imposing a stay now would simply provide the Sisters a total victory on this appeal (and likely the case below) without having to obtain a decision on the merits, and would do so based on the risk of purely monetary harm to the Sisters.

The District Court, with full knowledge of the facts of this case that has

² See Mot. at p. 3 ("Ms. Ahern is not likely to receive enough regularly scheduled distributions in her lifetime to extinguish her liabilities...[F]orcing a party to relinquish its property with no hope of recovery is the very definition of irreparable harm.").

³ This appeal is nothing more than a demonstration of the Sisters' intent to do anything in their power to delay the court-authorized advancements to Ms. Ahern until this case is over and it is too late. Further demonstrating this intent is the Sisters' recent letter to the Interim Trustee threatening to hold him personally liable for amounts advanced in compliance with the District Court's order, as well as a prior letter to the Interim Trustee demanding that he cease his accounting of the Trust assets.

been ongoing in various forms since 2009, validly authorized these advances to Ms. Ahern and affirmed this ruling after a motion for reconsideration.⁴ This Court should not intervene now to deprive Ms. Ahern of monthly subsistence and legal counsel pending resolution of the case below simply because the Sisters speculate that their mother, who apart from the general malaise of increasing age has no terminal illnesses, will soon die.

II. LEGAL STANDARD FOR OBTAINING A STAY

In deciding whether to issue a stay, the Court generally considers the factors set forth in NRAP 8(c). *See also Hansen v. Eighth Judicial District Court*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). Importantly, a reviewing court should not issue a stay pending appeal when to do so would essentially grant the movant relief it was unable, after hearing, to obtain from the lower court and would effectively reverse the lower court's decision. *See Jimenez v. Barber*, 252 F.2d 550, 553 (9th Cir. 1958) (denying a stay pending appeal where "the effect will be to give appellant the fruits of victory whether or not the appeal has merit."). Under the District Court's order, Ms. Ahern is entitled to the advancements authorized by the District Court only until such time as this

⁴ *See Nelson v. Heer*, 121 Nev. 832, 836, 122 P.3d 1252, 1253 (2005), *as modified* (Jan. 25, 2006) (noting that NRAP 8(a) requires that an application be made to the district court because of "the district court's vastly greater familiarity with the facts and circumstances of the particular case.") (emphasis added).

case is resolved in the coming months. This Court's grant of a stay at this juncture, in light of the anticipated duration of an appeal process, will render Ms. Ahern's relief moot, and will provide victory to the Sisters without a decision on the merits of this appeal. The Court should deny the Motion.

III. DISCUSSION

A. The Sisters Never Moved In The District Court For A Stay Pending Appeal.

NRAP 8(a)(1) states that "[a] party must ordinarily move first in the district court for...a stay of the judgment or order of, or proceedings in, a district court *pending appeal or resolution of a petition to the Supreme Court...*" (Emphasis added). This rule advises that the party moving for a stay must inform the district court that a stay is requested for the purpose of a *pending appeal*.

Here, the Sisters for some reason do not tell this Court that they filed a separate "motion to stay" at the District Court. Perhaps this intentional omission is due to the limited scope of the Sisters' request before the District Court: they requested only that execution of the Funds Order be postponed *until the Court could hear the motion for reconsideration*. (See Sisters' Mot. to Stay at District Court at 7:10-12 ("Jacqueline and Kathryn, at this time, are merely asking that this Court suspend the effectiveness of the Order until such time that it may hear

the Motion for Reconsideration.") For all practical purposes, the District Court granted the Sisters' request when it heard the motion on an order shortening time prior to the expiration of the ten-day automatic stay period. That the Sisters did not inform this Court of their separate motion to stay at the District Court demonstrates that the Sisters did not intend that motion to constitute a request for a stay pending appeal pursuant to NRAP 8. Accordingly, NRAP 8(a)(1) has not been satisfied.

Faced with this reality, the Sisters attempt to argue that their motion for reconsideration *alluded* to a stay pending discovery of more evidence and, because the District Court declined to reconsider its ruling, a request for a stay *pending appeal* would have been futile. (Mot. at 11.) Not so. The motion for reconsideration requested only that the District Court "temporarily suspend" the Funds Order "pending further investigation of the relevant facts." (Mot. at 10.) Such a request is not equivalent or equatable to a request to stay *pending appeal* after the order has been affirmed. The Sisters provide no support for their contention that the District Court would not have granted a stay pending appeal, had the Sisters actually asked, except a quote of the District Court reaffirming the findings in the original Funds Order. (*See* Mot. at 11-12.) In sum, the Sisters did not ask for a stay below, such a request would not have been outright futile if the Sisters had provided a valid argument, and, therefore, the Motion

before this Court should be denied.

B. The Object of The Appeal Will Not Be Defeated If This Court Denies A Stay.

This appeal is about payments of money. Ms. Ahern will receive minimal advancements of her Trust interest (if Trust funds are available) to eat and pay legal expenses as needed until this case is resolved. The order appealed from even requires Ms. Ahern to pay back the advancements: "IT IS FURTHER ORDERED that the advanced funds are to be repaid by Eleanor upon settlement or resolution of this case." (Funds Order, Mot. Ex. 6 at 3:1-2.) The Sisters' only gripe with the Funds Order is based on their speculation that Ms. Ahern will pass away prior to repayment. This is a mere recasting of the Sisters' baseless argument regarding the existence of irreparable harm, discussed more fully below. A stay should not be granted on this basis.

C. The Sisters Will Not Suffer Irreparable Harm And, To The Contrary, Ms. Ahern Will Suffer Irreparable Harm If A Stay Is Granted.

The Sisters' argument for their alleged irreparable harm is based on their distasteful speculation that Ms. Ahern will die before she can repay the advancements. This speculation cannot form the basis for a finding of irreparable harm. That is, where contingencies must occur before an injury would become concrete, the injury is "too speculative to constitute an irreparable harm..." *Nev. Rest. Serv. v. City of Las Vegas*, No. 2:15-cv-2240-GMN-GWF,

2015 U.S. Dist. LEXIS 162891, at *5 (D. Nev. Dec. 3, 2015) (citing *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 675 (9th Cir. 1988)); *see also Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919 (D. Nev. 2006) (refusing to rely on "possibility" to find "the existence of an irreparable harm").

In addition to speculating about the span of Ms. Ahern's life, the Sisters also speculate about the price of oil (which impacts the value of the monthly Trust income): "It is estimated that it will take anywhere from 5 to 8 years for Jacqueline and Kathryn to be put back to square and made whole, **but this is entirely unknown as it is dependent on the price of oil and oil production.**" (See Mot. for Reconsideration at 11:1-3 (emphasis added).)

The Court should disregard the Sisters' attempts to quantify the repayment periods based on inflated calculations of the amount owed and speculation as to the oil commodities market.⁵ As recently as 2014 the price of oil was over \$105 per barrel. Even the Federal Reserve Chairwomen, Janet Yellen, has stated recently that she could not have predicted the drop to today's oil prices. The Sisters' calculations are based on improper and unreliable speculation.

⁵ Contrary to the contentions in the Motion, Ms. Ahern is not a judgment debtor in the amount of \$2.5+ million dollars.⁵ The Sisters have a judgment (subject to reversal on a separate appeal) in the amount of \$400,000 for attorneys' fees awarded in connection with the prior Summary Judgment order. Since then, however, the Sisters have received more than a million dollars from the Trust in satisfaction of the amounts now alleged to be owed by Ms. Ahern and the final Trust accounting has yet to be completed.

As a result, the only person who will suffer irreparable harm is Ms. Ahern, if the Court grants a stay. The Sisters wish to vilify Ms. Ahern before she has had her day in Court, and indeed want to deprive Ms. Ahern of the ability to fund her defense with income she is entitled to from the Trust. Moreover, the District Court is not "awarding attorneys' fees"; rather, the District Court is permitting advancements of funds that, while disputed, currently belong to Ms. Ahern (over \$600,000 are in currently held in Trust on Ms. Ahern's behalf). Because the Sisters' only basis for irreparable harm is their own speculation regarding their mother's death prior to repayment of the advancement, as well as the volatile global oil markets, the Court should deny the Sisters' Motion.

D. Ms. Ahern Is Likely To Prevail On The Merits.

Citing to the definitions of "petition" and "verification" in NRS 132, the Sisters contend that this Court must treat every motion as one for summary judgment. (Mot. at 16.) Nothing in NRS 132 requires such a standard, and nothing prohibited the District Court from hearing and deciding Ms. Ahern's original motion. In fact, NRS 155.180 states that "[e]xcept as otherwise specially provided in this title, all the provisions of law and the Nevada Rules of Civil Procedure regulating proceedings in civil cases apply in matters of probate, when appropriate, or may be applied as auxiliary to the provisions of this

title..." *See also Waldman v. Maini*, 124 Nev. 1121, 1129-30, 195 P.3d 850, 856 (2008) (citing NRS 155.180) (The Nevada Supreme Court "treat[s] probate matters in the same manner as all other civil cases.").

The Sisters' suggestion that Ms. Ahern was required to file what is tantamount to a motion for summary judgment in order to move the Court to enforce, effectuate, clarify, or tailor its prior summary judgment within the context of this litigation defies credulity.⁶ Nonetheless, to support her motion, Ms. Ahern provided proof that she is the 35% beneficiary of the Trust income, provided proof that she has not received any Trust income since the Interim Trustee was appointed, provided proof that she has been obtaining assistance from food banks⁷ and living in temporary housing, and has demonstrated that she is not of working age. Ms. Ahern satisfied her burden, and the Court properly heard and decided Ms. Ahern's original motion.

IV. CONCLUSION

In light of the foregoing, Ms. Ahern respectfully requests that the Court immediately deny the Sisters' motion to stay and permit the Interim Trustee to advance funds in accordance with the District Court's order.

⁶ Equally baseless is the Sisters' suggestion that the District Court, having taken jurisdiction over the Trust, did not have the power to order advancements or otherwise fashion an order giving effect to the Summary Judgment in light of the circumstances of this case.

⁷ *See* Letters of Confirmation from Food Banks, attached as **Exhibit A**.

The Preceding Response is DATED this 18th of February, 2016.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: /s/ Tamara Beatty Peterson
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed and served the foregoing **RESPONSE TO EMERGENCY MOTION UNDER NRAP 27(e)** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on February 18, 2016 upon the following:

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*Attorneys for Fredrick P. Waid,
Court-appointed Trustee*

I hereby certify that on February 18, 2016, I served a copy of this document by mailing a true and correct copy, postage prepaid, via U.S. Mail, addressed to the following:

RUSSEL GEIST
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