with this additional evidence at its disposal.[8] Accordingly, consistent with the foregoing, we grant petitioners' writ petition in part and deny the petition in part, and we direct the clerk of this court to issue a writ of prohibition instructing the district court to vacate its order denying petitioners' motion to dismiss.[9]

DOUGLAS and CHERRY, JJ., concur.

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ROGELIO MARTINORELLAN AKA ROGELIO MARTINEZ-ORELLANO, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 58904

February 26, 2015 343 P.3d 590

En banc reconsideration of a panel order affirming a judgment of conviction, pursuant to a jury verdict, of burglary while in possession of a deadly weapon, attempted robbery with the use of a deadly weapon, and battery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Susan Scann, Judge.

The supreme court, DOUGLAS, J., held that: (1) failure to instruct the jury to restart deliberations when an alternate juror replaces an original juror is an error of constitutional dimension, (2) unpreserved errors are reviewed for plain error regardless of whether they are of constitutional dimension, and (3) failure to instruct jury to restart deliberations was not prejudicial.

**Affirmed.**

SAITTA, J., with whom CHERRY, J., agreed, dissented.

*Philip J. Kohn*, Public Defender, and *Sharon G. Dickinson*, Deputy Public Defender, Clark County, for Appellant.

*Adam Paul Laxalt*, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
If a district court fails to instruct the jury to restart deliberations after an alternate juror replaces a regular juror, it commits an error that, in appro-

[8]In this regard, Verano's December 17, 2014, motion to file a supplemental appendix is denied. *See Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983) ("This court is not a fact-finding tribunal . . . .").

[9]In light of our resolution of this writ petition, the stay imposed by our November 21, 2014, order is vacated.

priate circumstances, can require reversal despite overwhelming evidence of guilt. NRS 175.061(4).

2. Jury.
   Failure to instruct the jury to restart deliberations when an alternate juror replaces an original juror is an error of constitutional dimension; it can create the risk of the original jurors exerting undue influence on the alternate juror. NRS 175.061(4).
3. Criminal Law.
   The supreme court reviews de novo whether an error is of constitutional dimension.
4. Criminal Law.
   An error is of constitutional dimension if it impairs a defendant's constitutional rights.
5. Jury.
   A criminal defendant has a Sixth Amendment right to a fair trial by an impartial jury. U.S. Const. amend. 6.
6. Jury.
   An error which violates defendant's right to a fair trial by an impartial jury is of constitutional dimension. U.S. Const. amend. 6.
7. Criminal Law.
   Unpreserved errors are reviewed for plain error regardless of whether they are of constitutional dimension.
8. Criminal Law.
   The supreme court ordinarily reviews an error that was not preserved in the district court for plain error.
9. Criminal Law.
   To amount to plain error, the error must be so unmistakable that it is apparent from a casual inspection of the record.
10. Criminal Law.
    To amount to plain error, the defendant must demonstrate that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice.
11. Criminal Law.
    Reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.
12. Criminal Law.
    The district court's error in failing to instruct the jury to restart deliberations when an alternate juror replaced an original juror was not prejudicial in prosecution for possession of a deadly weapon, among other charges, where jury deliberated for approximately one hour and 15 minutes before the district court convened a hearing to replace an original juror with an alternate juror, the reconstituted jury then deliberated for nearly four hours and 30 minutes before convicting, and, thus, nearly all of the jury's deliberation time occurred after the alternate juror replaced the original juror.

Before the Court En Banc.

## OPINION

By the Court, DOUGLAS, J.:

[Headnote 1]

In the present case, we consider the effect of the district court's failure to instruct the jury to restart deliberations as is required by NRS 175.061(4) after an alternate juror replaced a regular juror. NRS 175.061(4) provides that "[i]f an alternate juror is required to replace a regular juror after the jury has retired to consider its verdict, the judge shall recall the jury, seat the alternate and resubmit the case to the jury." Thus, if a district court fails to instruct the jury to restart deliberations, it commits an error that, in appropriate circumstances, can require reversal despite overwhelming evidence of guilt. *Carroll v. State*, 111 Nev. 371, 372-74, 892 P.2d 586, 587-88 (1995).

Appellant Rogelio Martinorellan[1] did not object to the district court's failure to instruct the reconstituted jury to restart deliberations. At issue here is (1) whether the district court's failure was an error of constitutional dimension, (2) which standard of review applies to an unpreserved constitutional error, and (3) whether the district court committed a reversible error in this case. We hold that although the district court's error was of constitutional dimension, it is subject to plain error review because Martinorellan did not preserve this issue. Therefore, we affirm the conviction because Martinorellan did not demonstrate that the district court's failure to instruct the reconstituted jury to restart deliberations rose to the level of plain error.

### *FACTUAL AND PROCEDURAL HISTORY*

Martinorellan entered a smoke shop and stabbed the store's owner while attempting to commit a robbery. At trial, the jury deliberated for approximately 1 hour and 15 minutes before the district court convened a hearing, dismissed a juror who stated that he knew the victim, and replaced that juror with an alternate juror. The district court did not recall the jury to the courtroom or instruct it to restart deliberations. Martinorellan did not object to the district court's de-

[1]The judgment of conviction shows the defendant's name as Rogelio Martinorellan. However, throughout the trial and on appeal, Rogelio is referred to as Rogelio Martinez-Orellano. We follow the name that appears on the judgment of conviction.

cision not to recall the jury and instruct it to restart deliberations.[2] The reconstituted jury deliberated for nearly 4 hours and 30 minutes over two days and viewed a playback of testimony before convicting Martinorellan of burglary while in possession of a deadly weapon, attempted robbery with the use of a deadly weapon, and battery with the use of a deadly weapon.

After Martinorellan appealed, a panel of this court affirmed his conviction, holding in a footnote that Martinorellan's assignment of error regarding the district court's failure to instruct the jury to restart deliberations was without merit. The panel denied Martinorellan's petition for rehearing, and he filed a petition for en banc reconsideration. This court granted the petition for en banc reconsideration to address the district court's failure to instruct the jury to restart deliberations when the alternate juror replaced the original juror.

## *DISCUSSION*

We first consider the nature of the error of failing to instruct a jury to restart deliberations when an alternate juror replaces an original juror. We next address the standard of review to be applied to this error if it is unpreserved. Finally, we determine if the district court committed reversible error in this case.

### *The failure to instruct the jury to restart deliberations when an alternate juror replaces an original juror is an error of constitutional dimension*

[Headnotes 2, 3]

Martinorellan argues that the failure to instruct the jury to restart deliberations after an alternate juror replaced an original juror was an error of constitutional dimension because it interfered with his constitutional right to a trial by a fair and impartial jury.[3] The State argues that this error was not of constitutional dimension because the district court did not prevent the jury from restarting deliberations after the alternate juror was seated. We review de novo whether an

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[2]Martinorellan argues that the remaining original jurors deliberated after the juror who knew the victim was removed and before the alternate juror joined the jury. However, the record does not demonstrate that the jury deliberated during the period of time between the removal of the juror who knew the victim and the seating of the alternate juror. Therefore, this argument is without merit.

[3]Although Martinorellan argued in his briefing in support of his petition for en banc reconsideration that the district court's failure to instruct the jury to restart deliberations violated NRS 16.080, he contended at oral argument before the en banc court that NRS 175.061(4) is the statute that applies. In relevant part, NRS 16.080 provides that in a civil trial the district court shall recall the jury and resubmit the case when replacing an original juror with an alternate juror during deliberations. Although NRS 16.080's provision is analogous to NRS 175.061(4), which governs criminal trials, it does not apply to the present case. Therefore, we limit our consideration to NRS 175.061(4).

error is of constitutional dimension. *See Jackson v. State*, 128 Nev. 598, 603, 291 P.3d 1274, 1277 (2012) (reviewing constitutional issues de novo).

NRS 175.061(4) provides that "[i]f an alternate juror is required to replace a regular juror after the jury has retired to consider its verdict, the judge shall recall the jury, seat the alternate and resubmit the case to the jury." While we have not expressly addressed whether the error in this circumstance is of constitutional dimension, we have determined that a district court's failure to instruct a reconstituted jury to restart deliberations violates NRS 175.061 and can constitute reversible error. *See Carroll*, 111 Nev. at 372-74, 892 P.2d at 587-88.

In *Carroll*, the district court failed to instruct the jury to restart deliberations when an alternate juror replaced an original juror after two days of deliberations. *Id.* at 373, 892 P.2d at 587-88. The reconstituted jury then deliberated for "only a couple of hours before the final verdict was rendered." *Id*. at 373, 892 P.2d at 588. Although there was overwhelming evidence of the defendant's guilt, the *Carroll* court held that the district court's failure to instruct the jury to restart deliberations, as required by NRS 175.061, was not harmless because the relatively short length of time of the post-substitution deliberations "may [have] indicate[d] that the alternate juror was unduly influenced by the rest of the jury." *Id*. at 373, 892 P.2d at 587-88. As a result, it reversed the defendant's conviction. *Id*. at 374, 892 P.2d at 588. The *Carroll* court, however, did not address whether the failure to instruct the reconstituted jury to restart deliberations was an error of constitutional dimension. *See id.* at 372-74, 892 P.2d at 587-88. Therefore, we address this issue now.

[Headnotes 4-6]

An error is of constitutional dimension if it impairs a defendant's constitutional rights. *See Dickson v. State*, 108 Nev. 1, 3, 822 P.2d 1122, 1123 (1992). A criminal defendant has a "Sixth Amendment right to a fair trial by an impartial jury." *Valdez v. State*, 124 Nev. 1172, 1185, 196 P.3d 465, 474 (2008). An error which violates this right is of constitutional dimension. *See id*. at 1188, 196 P.3d at 476.

The failure to instruct a jury to restart deliberations after an alternate juror replaces an original juror during deliberations can create the risk of the original jurors exerting undue influence on the alternate juror. *Carroll*, 111 Nev. at 373, 892 P.2d at 588. Thus, this failure infringes on a defendant's right to a trial by an impartial jury. *See Viray v. State*, 121 Nev. 159, 163-64, 111 P.3d 1079, 1082 (2005) (observing that a juror exercising improper influence on another juror could prejudice the defendant). Therefore, we now hold that the failure to instruct the jury to restart deliberations when an alternate

juror replaces an original juror is an error of constitutional dimension because it impairs the right to a trial by an impartial jury.

*Unpreserved errors are reviewed for plain error regardless of whether they are of constitutional dimension*

[Headnotes 7, 8]

We ordinarily review an error that was not preserved in the district court for plain error. *Valdez*, 124 Nev. at 1190, 196 P.3d at 477; *Nelson v. State*, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007). Martinorellan, however, argues that the standard of review for an unpreserved constitutional error should be the same as that for a preserved constitutional error. Thus, he contends that this court should review an unpreserved constitutional error to determine if it was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (setting forth the standard of review for preserved constitutional error).

Instead of using the ordinary standard of review that applies to preserved constitutional errors, we have reviewed unpreserved constitutional errors for plain error. *See Maestas v. State*, 128 Nev. 124, 146, 275 P.3d 74, 89 (2012) (reviewing an unpreserved First Amendment claim for plain error). Our review of unpreserved constitutional errors for plain error is consistent with the United States Supreme Court's caselaw which provides that unpreserved constitutional errors are to be reviewed for plain error. *See Johnson v. United States*, 520 U.S. 461, 465-66 (1997) (reviewing an unpreserved Sixth Amendment jury right violation for plain error). Therefore, we hold that all unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension.

*Martinorellan did not demonstrate that the district court's failure to instruct the jury to restart deliberations after the alternate juror replaced the original juror was plain error*

Martinorellan argues that the district court's failure to instruct the jury to restart deliberations was prejudicial to his right to a trial by an impartial jury because of the relatively short amount of time that the jury deliberated after the alternate juror was seated. We now address the nature of our review of the district court's error and whether reversal is warranted.

*The district court's error is subject to review for plain error*

Martinorellan did not object when the district court failed to instruct the reconstituted jury to restart deliberations. Therefore, we review this error for plain error. *Valdez*, 124 Nev. at 1190, 196 P.3d at 477.

[Headnotes 9-11]

"To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" *Vega v. State*, 126 Nev. 332, 338, 236 P.3d 632, 637 (2010) (quoting *Nelson*, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate[ ] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Here, the error is readily apparent from the record. The trial transcripts presented in the record do not show that the district court gave any instruction to the reconstituted jury when the alternate juror joined it. The question then is whether Martinorellan has demonstrated that this error had a prejudicial effect on his substantial rights.

*Martinorellan did not demonstrate that the district court's error had a prejudicial effect on his right to a jury trial*

[Headnote 12]

When determining whether an error relating to the substitution of an alternate juror for an original juror is prejudicial, courts "consider[ ], among other factors, the length of the jury's deliberations before and after the substitution." *United States v. Virgen-Moreno*, 265 F.3d 276, 289 (5th Cir. 2001). Thus, if most of the jury's deliberation time occurs before an error relating to the replacement of an original juror, this can demonstrate that the error was prejudicial. *See Carroll*, 111 Nev. at 373, 892 P.2d at 588 (holding that because the jury reached a verdict "only a couple of hours" after an alternate juror joined the jury two days into deliberations, the district court's failure to instruct the jury to restart deliberations was a prejudicial error); *see also United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (holding that because a jury reached a verdict only 29 minutes after an alternate juror joined it following nearly 4 hours of deliberations, there was "impermissible coercion upon the alternate juror"); *cf. State v. Guytan*, 968 P.2d 587, 594 (Ariz. Ct. App. 1998) (holding that the trial court's failure to instruct the jury to restart deliberations after replacing a juror 30 minutes into deliberations was harmless error, in part because the reconstituted jury deliberated for 5 hours before reaching a verdict).

Here, the jury deliberated for approximately 1 hour and 15 minutes before the district court convened a hearing to replace an original juror with an alternate juror. The reconstituted jury then deliberated for nearly 4 hours and 30 minutes before convicting Martinorellan. Thus, over 75 percent of the jury's deliberation time occurred after

the alternate juror joined the jury. As a result, this case is distinct from *Carroll* and *Lamb* where the vast majority of the jury's deliberation time occurred before the alternate juror replaced the original juror. Instead, it is similar to *Guytan* where nearly all of the jury's deliberation time occurred *after* the alternate juror replaced the original juror. Because the relative lengths of time that the jury deliberated before and after the alternate juror replaced an original juror do not demonstrate that the district court's error was prejudicial, Martinorellan failed to demonstrate that the district court's failure to instruct the reconstituted jury to restart deliberations rose to the level of plain error. Therefore, this unpreserved error does not warrant reversal of Martinorellan's conviction, and we affirm the judgment of conviction.

Hardesty, C.J., and Parraguirre, Gibbons, and Pickering, JJ., concur.

Saitta, J., with whom Cherry, J., agrees, dissenting:

Although I agree with the majority's conclusion that a district court's failure to instruct the jury to restart deliberations after an alternate juror replaces an original juror impairs a defendant's constitutional right to a trial by an impartial jury, I believe that this failure is a structural error which requires that Martinorellan's conviction be reversed and his case be remanded for a new trial. Therefore, I respectfully dissent.

Because this type of error can substantially alter how the jury deliberates, it "affect[s] the very 'framework within which the trial proceeds'" and is thus a structural error. *Cortinas v. State*, 124 Nev. 1013, 1024, 195 P.3d 315, 322 (2008) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)). Without an instruction from the district court to begin deliberating anew, there is a significantly greater risk that the original jurors will improperly impose upon the alternate juror any conclusions that they reached before the original juror's removal.

In addition, the district court's failure to instruct the jury to begin deliberating anew impliedly allows the jury to rely on the deliberations of the removed juror—a person who is not part of the jury actually deciding the defendant's guilt. Because this error undermines the defendant's right to an impartial jury by allowing a removed juror's deliberations to be considered and permitting the original jurors to improperly impose their previously reached conclusions onto a newly seated juror, it is a structural error. Therefore, I would reverse Martinorellan's conviction and remand this case for a new trial.

HAREL ZAHAVI, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 59815

February 26, 2015 343 P.3d 595

Appeal from an amended judgment of conviction, pursuant to a jury verdict, of four counts of drawing and passing a check without sufficient funds in drawee bank with intent to defraud, presumptions of intent to defraud (felony), in violation of NRS 205.130 and NRS 205.132. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Defendant was convicted in the district court of violating bad check statute after $384,000 in casino markers payable to four casinos were returned for insufficient funds. Defendant appealed. The supreme court, Hardesty, C.J., held that: (1) evidence was sufficient for conviction; (2) instruction that a casino's knowledge of insufficient funds negated the intent to defraud element was not warranted; and (3) bad check statute does not violate constitutional provision that prohibits imprisonment for failing to pay a debt, except in cases of fraud.

**Affirmed.**

*Nguyen & Lay* and *D. Matthew Lay*, Las Vegas, for Appellant.

*Adam Paul Laxalt*, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Bernard B. Zadrowski*, Deputy District Attorney, Clark County, for Respondent.

1. False Pretenses; Gaming and Lotteries.
   Evidence that defendant failed to pay $384,000 in casino markers was sufficient for conviction for violation of prior version of bad check statute, where the markers indicated that they were payable upon demand or identical to a personal check. NRS 205.130 (2007).
2. Criminal Law.
   Whether the jury instruction was an accurate statement of the law is a legal question subject to de novo review.
3. Criminal Law.
   Instruction that a casino's knowledge of insufficient funds negated the intent-to-defraud element of bad check statute was not warranted in prosecution for violation of the statute by defendant whose $384,000 in casino markers payable to four casinos were returned for insufficient funds, where defendant failed to affirmatively disclose to the casinos that he lacked sufficient funds in either of his accounts, when he signed the markers, he guaranteed to the casinos that there were sufficient funds available, and casinos were not aware when they extended the markers that defendant had insufficient funds. NRS 205.130 (2007).

4. False Pretenses; Gaming and Lotteries.
   The element of intent to defraud under prior version of bad check statute may be negated by a showing that a casino had knowledge that the person obtaining a marker did not have sufficient funds to cover the marker at the time it was executed. NRS 205.130 (2007).
5. False Pretenses.
   The factors in determining whether intent element of intent to defraud, under prior version of bad check statute, may be negated include what the payor represented and what information was available to the payee. NRS 205.130 (2007).
6. False Pretenses.
   A payee's knowledge of insufficient funds is not an affirmative defense to charge of violating bad check statute. NRS 205.130 (2007).
7. Constitutional Law; False Pretenses.
   Bad check statute does not violate constitutional provision that prohibits imprisonment for failing to pay a debt, except in cases of fraud; convictions are based on committing a fraudulent act, not on incurring a debt. Const. art. 1, § 14; NRS 205.130(1)(e) (2007).
8. Criminal Law.
   A de novo standard of review is applied to issues of constitutionality. NRS 205.130 (2007).
9. Constitutional Law.
   The supreme court presumes that statutes are constitutional, and the party challenging a statute has the burden of making a clear showing of invalidity.
10. False Pretenses.
    The elements of the crime of issuing a check against insufficient funds are: (1) intent to defraud, (2) the making or passing of a check for the payment of money, and (3) without sufficient funds in the drawee institution to cover said check in full upon its presentation. NRS 205.130 (2007).

Before the Court En Banc.

## OPINION

By the Court, Hardesty, C.J.:

Appellant Harel Zahavi was convicted of violations of NRS 205.130, Nevada's so-called bad check statute, when $384,000 in casino markers, payable to four Las Vegas casinos, were returned for insufficient funds.

In this appeal, we must determine whether the district court erred when it refused to instruct the jury that a casino's knowledge of insufficient funds negates the intent-to-defraud element under NRS 205.130 or, alternatively, constitutes an affirmative defense. If not, we must consider whether NRS 205.130 violates the Nevada Constitution.

While we conclude that a casino's knowledge of insufficient funds may negate the intent to defraud, we find no basis for a separate jury instruction, or alternatively, an affirmative defense. Furthermore, we conclude that the district court did not commit any additional errors,

and that NRS 205.130 is constitutional. As such, we affirm Zahavi's convictions.

*FACTS AND PROCEDURAL HISTORY*

Beginning in the late 1990s, Zahavi began gambling, obtaining lines of credit, and executing markers at various Las Vegas casinos. In order to obtain credit and receive markers at a casino, the casino requires the patron to complete a credit application. The casino then obtains a credit report which shows a past history of the player and his play at other casinos, including any amounts owed in markers to other casinos. The credit application also requires the patron to provide bank account information and the casino often checks directly with the bank to determine the balances in those accounts. If the casino determines the patron to be creditworthy, it grants a line of credit and the patron may obtain markers that can be exchanged on the casino floor for gaming chips. Each marker contains language that informs the patron that the marker is like a personal check and may be withdrawn at any time from the patron's bank account, and it must be signed by the patron before use. However, it appears that casinos generally do not immediately deposit the markers and often agree, as a courtesy to their customers, to hold gaming markers until a designated disposition date, or longer if the patron is working with the casino to pay off any remaining balance on the marker.

Over the years, Zahavi would regularly accumulate large amounts of debt to various Las Vegas casinos and then slowly pay back the money owed on the markers. Prior to the events that led to Zahavi's conviction in this case, no casino had ever deposited one of Zahavi's markers and had it returned for insufficient funds. In September 2008, Zahavi liquidated many of his available assets and paid approximately $700,000 worth of outstanding debt owed on various casino markers.

At issue in this matter is the execution of 14 casino markers, totaling $384,000, that were obtained on existing and new lines of credit by Zahavi between October and December 2008 at four Las Vegas casinos. In October 2008, Zahavi increased his existing line of credit at the Venetian Resort and Casino, and executed nine different markers at the Venetian and the Palazzo Hotel and Casino,[1] ranging from $2,000 to $50,000 each, totaling $184,000. When he signed each marker, Zahavi represented that he understood that the credit instrument was identical to a personal check and that it was payable upon demand. The evidence introduced during trial shows that at the time the Venetian and Palazzo extended Zahavi's line of credit and issued him the $184,000 worth of markers, they had Zahavi's credit report from August 2008 on file. The evidence showed he had an

[1]The Palazzo and the Venetian are owned by the same corporation, and a customer may use the same line of credit at either casino.

average of $25,000 to $50,000 in one bank account and an average of $50,000 to $75,000 in another. The evidence also showed actual amounts in the two accounts ranging from $7,500 to $10,000, and $100,000 to $250,000.[2] When Zahavi failed to timely pay the markers, they were presented for payment from Zahavi's bank accounts and returned for insufficient funds.

Also in October 2008, after completing a credit application and establishing a $100,000 credit line at the Hard Rock Hotel and Casino, Zahavi executed two $50,000 markers at the Hard Rock. Again, upon signing the markers, Zahavi represented that he understood the credit instrument was identical to a personal check and that the marker was payable upon demand. The Hard Rock obtained information concerning Zahavi's bank accounts from the Wynn Hotel and Casino, which reported that as of August, he had an average balance of between $40,000 and $60,000 in one account, and an actual balance of $7,000 to $9,000. The other account had an average balance of between $40,000 to $60,000, and an actual balance of $100,000 to $300,000. The Hard Rock also knew he had roughly $487,500 in outstanding markers but had no knowledge of his recent payments. Two days after issuing him the markers, the Hard Rock obtained actual bank statements from Zahavi, indicating a total balance of roughly $27,000 between the two accounts. Zahavi failed to timely repay his outstanding marker balance, and the Hard Rock presented the two markers for payment from Zahavi's bank accounts, both of which were returned for insufficient funds.

In December 2008, Zahavi then drew three additional markers, based on an existing line of credit established at Caesars Palace Hotel and Casino. In signing the markers, Zahavi made similar representations that the markers were payable on demand and he had sufficient funds. There was no evidence introduced during the trial that Caesars Palace had any knowledge of the present state of Zahavi's accounts and that the credit report they had on file for Zahavi dated back to 2005. After multiple collection efforts were made, Caesars presented the three markers, totaling $100,000, for payment from Zahavi's bank accounts, all of which were returned due to insufficient funds.

Upon receipt of the returned markers, all four casinos sent Zahavi a required ten-day demand letter requesting payment. Zahavi again failed to pay. Subsequently, all 14 unpaid markers were sent to the Clark County District Attorney's Office for criminal prosecution under the bad check statute. The State filed an indictment against

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[2]When providing information to casinos, the banks often will not give specific dollar amounts in the accounts, but rather state the balance in more general terms, such as "medium five" or "low six." A Hard Rock employee testified that a "medium five" would be $40,000 to $60,000.

Zahavi for writing checks with insufficient bank funds with intent to defraud. The indictment included four counts, one for each casino from which Zahavi had executed the 14 markers: the Venetian, Palazzo, Hard Rock, and Caesars.

At trial, the district court gave jury instruction 18, over Zahavi's objection, which stated that "[w]hether a payee chooses to cash a check immediately or at a later date does not alter the character of the instrument. The mere fact that a marker is held for a period of time prior to deposit does not convert the instrument into a post dated contract." Zahavi proposed, and the district court rejected, jury instructions stating that a casino's knowledge of insufficient funds negated Zahavi's intent to defraud or, alternatively, served as an affirmative defense. The jury found Zahavi guilty on all four counts. Zahavi now appeals.

## *DISCUSSION*

On appeal, Zahavi argues that: (1) the district court erred in instructing the jury that a casino's choice to hold a marker does not alter the marker into a post-dated contract; (2) the district court erred in refusing to give Zahavi's proposed jury instruction that a casino's knowledge of insufficient funds negates the intent-to-defraud element under NRS 205.130 or, alternatively, constitutes an affirmative defense; and (3) NRS 205.130 violates the Nevada Constitution.

### *The district court did not err in instructing the jury that a casino's choice to hold markers does not alter the marker into a short-term loan or post-dated check*

[Headnotes 1, 2]

"[W]hether the jury instruction was an accurate statement of the law is a legal question subject to de novo review." *Berry v. State*, 125 Nev. 265, 273, 212 P.3d 1085, 1091 (2009), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010). Zahavi argues that jury instruction 18 was a misstatement of the law because gaming markers are the equivalent of short-term loans or post-dated checks, and thus, are outside the purview of NRS 205.130.

At the time of Zahavi's markers, NRS 205.130(1) (2007) provided:

> Except as otherwise provided in this subsection and subsections 2 and 3, a person who willfully, with an intent to defraud, draws or passes a check or draft to obtain:
>
> (a) Money;
>
> (b) Delivery of other valuable property;
>
> (c) Services;
>
> (d) The use of property; or
>
> (e) Credit extended by any licensed gaming establishment,

> drawn upon any real or fictitious person, bank, firm, partnership, corporation or depositary, when the person has insufficient money, property or credit with the drawee of the instrument to pay it in full upon its presentation, is guilty of a misdemeanor. If that instrument, or a series of instruments passed in the State during a period of 90 days, is in the amount of $250 or more, the person is guilty of a category D felony and shall be punished as provided in NRS 193.130. In addition to any other penalty, the court shall order the person to pay restitution.[3]

Jury instruction 18 states: "[t]he mere fact that a marker is held for a period of time prior to deposit does not convert the instrument into a post dated contract."

In *Nguyen v. State*, this court considered whether a gaming marker was a "check or draft" under NRS 205.130(1) and rejected the appellant's contention that "the practice of delaying payment of a marker renders the instrument a loan document." 116 Nev. 1171, 1176, 14 P.3d 515, 518 (2000). Looking to the definitions of "check" and "draft" in the Uniform Commercial Code, this court determined that "NRS 205.130 applies to instruments that are drawn upon a bank, payable on demand, signed by the payor, and which instruct the bank to pay a certain amount to the payee." *Id.* at 1175, 14 P.3d at 518. The gaming markers at issue in *Nguyen* satisfied that definition. *Id.* The court also reasoned that "[w]hether an obligee chooses to cash a check immediately or at a later date does not alter the character of the instrument." *Id.* at 1176, 14 P.3d at 518. This court further "decline[d] to hold . . . that . . . markers [are] 'pre-dated' checks, that is, checks held by the casinos pursuant to a contract of future deposit. . . . The mere fact that markers are held for a period of time prior to deposit does not evidence such a contract." *Id.* at 1176 n.6, 14 P.3d at 518 n.6.

Zahavi acknowledges our holding in *Nguyen* but argues that in *Nguyen* we left open the possibility that a marker may be deemed a short term loan if both parties mutually understood and agreed to such terms. He points to the following language in *Nguyen* to support that proposition: "[f]urther, there is no evidence that [appellant] and the casinos understood the marker to effect a contract for a loan." *Id.* at 1176, 14 P.3d at 518. We disagree with Zahavi's reading of *Nguyen* and take this opportunity to clarify our holding in that case.

First, we note that the language Zahavi refers to in *Nguyen* was dicta. This court was merely pointing to a flaw in the appellant's argument, which was the lack of any evidence to support his claim of an agreement to make a short term loan. However, to the ex-

[3]NRS 205.130(1) was amended in 2011 and now states that an instrument's amount must be greater than $650, not $250. 2011 Nev. Stat., ch. 41, § 11, at 162-63. This change in law is irrelevant to our rulings here.

tent *Nguyen* can be read as Zahavi urges, we clarify that *Nguyen* does not stand for the proposition that a casino marker bearing the phrase "payable upon demand" or similar language may be deemed a post-dated contract if both parties mutually understood and agreed that the marker would be held for a period of time prior to deposit.

The casino markers signed by the appellant in *Nguyen*, as well as the markers in Zahavi's case, all included some form of language indicating the marker was "payable upon demand," or was "identical to a personal check." Thus, Zahavi's argument—that the course of dealing between him and the casinos somehow demonstrates a mutual understanding that the markers would not be immediately deposited—fails in the face of the clear and unambiguous language of the markers. *See Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012) (stating that language that is "clear and unambiguous . . . will be enforced as written"). The result would be different only if the language of the marker somehow expressed that the casino would hold the marker for a period of time prior to deposit, thus removing it from the category of "check or draft" as defined in *Nguyen*. 116 Nev. at 1175, 14 P.3d at 517-18. Therefore, we conclude that jury instruction 18 is an accurate statement of the law, and the district court did not err in giving that instruction.

*The district court did not err in refusing to give Zahavi's proposed jury instruction that a casino's knowledge of insufficient funds negates the intent-to-defraud element or, alternatively, is an affirmative defense*

[Headnote 3]

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). "It is well established that a defendant is entitled to a jury instruction on his theory of the case, so long as there is evidence to support it," *Hoagland v. State*, 126 Nev. 381, 386, 240 P.3d 1043, 1047 (2010), and it correctly states the law, *see Crawford*, 121 Nev. at 748, 121 P.3d at 585. This rule, however, "does not give the defendant the absolute right to have his own instruction given, particularly when the law encompassed in that instruction is fully covered by another instruction." *Milton v. State*, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995) (internal quotations omitted).

Zahavi contends that the casinos had knowledge of his insufficient funds and inability to pay back the 14 gaming markers he obtained. Nevada's bad check statute, NRS 205.130(1), prohibits a

person "with an intent to defraud," from drawing or passing a check or draft to obtain credit extended by a licensed gaming establishment (commonly in the form of a casino marker). Here, the relevant inquiry is whether the district court should have instructed the jury that a casino's knowledge of insufficient funds in a casino patron's bank accounts at the time of the issuance of a marker negates the intent-to-defraud element of NRS 205.130(1)(e) or, alternatively, constitutes an affirmative defense.

Interpreting NRS 205.130 requires this court to first look to the "statute's plain meaning." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). "[W]hen a statute 'is clear on its face, a court can not go beyond the statute in determining legislative intent.'" *Id.* (quoting *Robert E. v. Justice Court of Reno Twp.*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983)). When construing various statutory provisions, which are part of a "scheme," this court must interpret them "harmoniously" and "in accordance with [their] general purpose." *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001).

NRS 205.130 is silent as to whether a licensed gaming establishment's knowledge that a patron had insufficient funds at the time he or she executed markers will negate the element of intent to defraud or may constitute an affirmative defense. The statutory provisions under NRS 205.132 explicitly provide three instances when the element of intent to defraud may be presumed under Nevada law: if the check is drawn on an account that does not exist; payment is refused by the drawee upon presentment of the check; and notice of refusal of payment that is mailed to the drawer by registered or certified mail is returned because of nondelivery. NRS 205.132(1). However, the statutory provisions under NRS 205.130 make no reference to negating the element of intent to defraud.

Zahavi asserts that other jurisdictions have held that bad check statutes similar to NRS 205.130 provide that an element of intent to defraud may be negated by a payee's knowledge of insufficient funds. *See State v. Zent*, 376 P.2d 861, 863 (Ariz. 1962) (explaining that a person's disclosure to a payee that he or she does not have sufficient funds to satisfy an executed check fails to constitute criminal intent to defraud); *People v. Poyet*, 492 P.2d 1150, 1152 (Cal. 1972) (finding that "with disclosure there can be no deception of a present insufficiency of funds" (emphasis omitted)). The West Virginia Supreme Court went further, holding that where a business has *reason* to believe there are insufficient funds, such belief negates the fraudulent intent. *State v. Orth*, 359 S.E.2d 136, 139-40 (W. Va. 1987) (after several checks executed to a dog racing track were returned due to insufficient funds, and the track continued to accept checks from the patron, the court held that the track "had reason to believe the appellant did not have sufficient funds on deposit"), *overruled*

*on other grounds by State v. Phillips*, 520 S.E.2d 670, 678 (W. Va. 1999).

The State argues that these cases are not applicable because Nevada's law regarding gaming markers is unique, and the cases from other states, aside from West Virginia, all involve an affirmative disclosure of insufficient funds by the defendant in the context of a personal check. Interestingly, the State also highlights the difference between personal checks and gaming markers—the payee on a personal check has no ability to verify the defendant's credit history with the company or verifying funds in the defendant's bank account, whereas casinos uniquely rely on other sources to determine these factors. Thus, in the case of a personal check, knowledge of insufficient funds can generally only be gained if the payee affirmatively discloses it. However, in the unique situation of casino gaming markers, the casino may gain this knowledge through other means.

[Headnotes 4, 5]

As such, we determine that the element of "intent to defraud" under NRS 205.130 may be negated by a showing that the casino had knowledge that the person obtaining the marker did not have sufficient funds to cover the marker at the time it was executed. The factors in determining whether intent may be negated include what the payor represented and what information was available to the payee. We decline to go as far as the *Orth* court, which stated the intent to defraud element may be negated if the payee had "reason to believe." Merely because the casinos have the ability to research a patron's financial status, they are under no obligation to do so, and under the *Orth* standard, the statute would be rendered useless as every gambler who failed to pay his markers would simply argue that the casino had "reason to believe" he could not pay his markers by virtue of information potentially available to the casinos.

Because we determine that the "intent to defraud" element may be negated by a disclosure of insufficient funds to the payee, Zahavi was entitled to have the jury so instructed if there was proof in the record supporting the instruction, s*ee Hoagland*, 126 Nev. at 386, 240 P.3d at 1047, and it was not adequately covered in other instructions, *Milton*, 111 Nev. at 1492, 908 P.2d at 687.

Under the first factor, Zahavi did not affirmatively represent he had insufficient funds. With the exception of *Orth*, unlike the cases cited above from other jurisdictions where the defendant personally informed the payee that he had insufficient funds and would not be able to cover the check at that time, here Zahavi failed to affirmatively disclose to the casinos that he lacked sufficient funds in either of his accounts. *See Zent*, 376 P.2d at 863; *Poyet*, 492 P.2d at 1152; *see also People v. Jacobson*, 227 N.W. 781, 782 (Mich. 1929) (hold-

ing that plaintiff's knowledge that defendant did not have funds in the bank negated any fraudulent intent). In fact, at the time Zahavi signed the markers, he guaranteed to the casinos that there were sufficient funds available, such that the markers were payable upon demand and could be executed at any time.

The second factor (information available to the payee) does not weigh in Zahavi's favor. Contrary to Zahavi's argument that the casinos had knowledge of his insufficient funds, the evidence indicates that at the time the casinos extended the line of credit, their records supported Zahavi's affirmative representation that he had sufficient funds. At trial, the executive director of cage and credit operations for the Hard Rock testified that prior to granting Zahavi credit and allowing him to take out $100,000 in markers, the Hard Rock obtained a credit report, as well as information from other casinos revealing that Zahavi had a total of $487,500 in outstanding markers. The Hard Rock did not know, however, whether Zahavi had made payments on this outstanding balance. Further testimony revealed that one month prior to issuance of the markers, the Hard Rock also knew that the balances in the two bank accounts provided by Zahavi had respective average balances of roughly $7,000 to $9,000, and $100,000 to $300,000.[4] It was not until two days after Zahavi signed the markers representing that he had sufficient funds that the Hard Rock learned he only had approximately $27,000 between the two accounts.

Additionally, the executive director of casino credit and director of collections at the Venetian and Palazzo testified that they had records dating from August 2008 that indicated Zahavi had actual balances in his accounts of $7,500 to $10,000 and $100,000 to $300,000. They further testified that the balances in Zahavi's accounts would have been enough to cover the $184,000 in markers that they extended to him.

Further, employees of Caesars Palace testified that they had no knowledge of his present accounts, with the most recent credit report in their possession dating back to 2005. Because Zahavi failed to make an affirmative disclosure to the casinos and the casinos had no present knowledge of his insufficiency of funds at the time the markers were executed, we conclude that there was no evidence to negate the intent-to-defraud element, and therefore the district court did not abuse its discretion by refusing the instruction.

Additionally, the district court did not abuse its discretion in rejecting Zahavi's proposed supplemental instruction on the intent to

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[4]The Hard Rock obtained Zahavi's bank information from the Wynn Las Vegas. The Wynn informed the Hard Rock that the bank account amounts had last been verified in August 2008.

defraud because it was adequately addressed by the other instructions. In pertinent part, jury instruction 17 informed the jury:

> To act with the "intent to defraud" means to act knowingly and with the specific intent to deceive or cheat someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to oneself or another to the detriment of a third party.

Zahavi was permitted to argue his theory regarding the casino's knowledge of his insufficient funds and the jury instructions given adequately addressed this theory.

[Headnote 6]

We further decline to hold that Zahavi was entitled to an instruction on an affirmative defense. None of the cases cited by Zahavi characterize the payee's knowledge of insufficient funds as establishing an affirmative defense, and therefore, we reject this argument as an inaccurate statement of the law. *See Zent*, 376 P.2d at 863; *Poyet*, 492 P.2d at 1152; *Jacobson*, 227 N.W. at 782. Thus, we conclude that the district court did not abuse its discretion in failing to instruct the jury on negating the intent-to-defraud element or, alternatively, in refusing to instruct the jury that it was an affirmative defense.

*NRS 205.130 is constitutional*

[Headnotes 7-9]

A de novo standard of review is applied to issues of constitutionality. *State v. Colosimo*, 122 Nev. 950, 954, 142 P.3d 352, 355 (2006). This court presumes "that statutes are constitutional," and "the party challenging a statute has the burden of making a clear showing of invalidity." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (internal quotations omitted). Zahavi challenges the constitutionality of NRS 205.130, arguing that it violates the provision in the Nevada Constitution that prohibits imprisonment for failing to pay a debt, except in cases of fraud. He bases his argument on the fact that NRS 205.130 only requires the "intent to defraud" and not the other elements of common law fraud, such as reliance. The State, however, argues that the statute is constitutional because it punishes a fraudulent act as encapsulated in the first element, not the mere accumulation of debt, and that this court has already determined that "intent to defraud" is sufficient to pass constitutional muster. We agree.

[Headnote 10]

The Nevada Constitution states that "there shall be no imprisonment for debt, except in cases of fraud." Nev. Const. art. 1,

§ 14. NRS 205.130(1)(e) provides that "a person who willfully, with an intent to defraud, draws or passes a check or draft to obtain . . . [c]redit extended by any licensed gaming establishment" above a certain amount "is guilty of a . . . felony."[5] "The elements of the crime of issuing a check against insufficient funds are (1) intent to defraud, (2) the making or passing of a check for the payment of money, and (3) without sufficient funds in the drawee institution to cover said check in full upon its presentation." *Garnick v. First Judicial Dist. Court*, 81 Nev. 531, 536, 407 P.2d 163, 165 (1965).

This court has previously held that a criminal statute allowing a defendant to be arrested for removing or disposing of his property with the intent to defraud his creditors did not conflict with Nevada Constitution Article 1, Section 14's provision against imprisonment for debt, except in cases of fraud. *Ex parte Bergman*, 18 Nev. 331, 341-42, 4 P. 209, 216 (1884).[6] Further, the court expressed that " 'the immunity contemplated by the second clause would be confined to debts or liabilities growing out of contracts, and not to liabilities resulting from crimes or torts.' " *Id.* at 342, 4 P. at 216 (quoting *McCool v. State*, 23 Ind. 127, 131 (1864) (referencing its own state constitution's prohibition against "imprisonment for debt, except in case of fraud")).

Other jurisdictions have also reviewed the constitutionality of convicting a defendant under a bad check statute under state constitutions that maintain similar language to Nevada Constitution Article 1, Section 14, and have held that including only the intent-to-defraud element of fraud in a criminal statute did not violate a constitutional prohibition against imprisonment for debt. *See*

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[5]Records of the 1863 Constitutional Convention suggest this section of the Nevada Constitution has its origins in article 1, section 22 of the Indiana Constitution. The language referring to imprisonment for debt is identical, *compare* Nev. Const. art. 1, § 14, *with* Ind. Const. art. 1, § 22, and was proposed at the convention by James Corey, an individual with roots in Indiana. *See* Andrew J. Marsh, Samuel L. Clemens & Amos Bowman, *Reports of the 1863 Constitutional Convention of the Territory of Nevada*, 171, 470 n.36 (William C. Miller et al. eds., 1972). As such, we find cases interpreting this section of the Indiana Constitution informative. Although Indiana's bad check statute is distinct from that of Nevada, the Indiana Supreme Court has interpreted statutes containing the "intent to defraud" language present in NRS 205.130 as constitutional. *See Clark v. State*, 84 N.E. 984, 985 (Ind. 1908) (finding that a statute prohibiting an individual from obtaining food or lodging with the intent to defraud an innkeeper did not violate the state constitution.); *Lower v. Wallick*, 25 Ind. 68, 73 (1865) ("If it had been the intention of the convention to abolish imprisonment for every moneyed liability, in criminal as well as civil cases, other terms and phrases would have been used.").

[6]Similar to NRS 205.130, the statute at issue in *Bergman* included only "intent to defraud," and did not reference reliance or other common law elements. *See* I Nev. Compiled Laws, § 73 (1873) (current version codified as NRS 31.480).

*State v. Meeks*, 247 P. 1099, 1101 (Ariz. 1926) ("Because one who gives a check with the intent to defraud, knowing he has no funds to meet it when presented, may be punished, does not mean that he may be imprisoned for debt, but rather for committing an offense based upon fraud."); *Ennis v. State*, 95 So. 2d 20, 23-25 (Fla. 1957) (holding that a state statute criminalizing the act of drawing a check from a bank account when insufficient funds exist and requiring the element of intent to defraud did not violate state constitutional provision against imprisonment for debt); *State v. Laude*, 654 P.2d 1223, 1228 (Wyo. 1982) (holding that "criminal intent to deceitfully issue an insufficient funds check [was] an essential element of the crime" of committing fraud by check and that a statute prohibiting such offense was not a violation of the state's constitutional ban "against imprisonment for debt"). Based on our prior decisions, and persuasive authority from other jurisdictions with similar constitutional prohibitions, we conclude that NRS 205.130 does not violate Article 1, Section 14 of the Nevada Constitution because Zahavi's conviction is based on committing a fraudulent act and not on incurring a debt.[7]

Accordingly, we affirm Zahavi's judgment of conviction.

PARRAGUIRRE, DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

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[7]Zahavi also argues that NRS 205.130 violates the United States Constitution. U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). However, he offers no further analysis or authority for this argument, instead focusing on the argument under the Nevada Constitution. We thus decline to address this argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider arguments not supported by relevant authority and cogent argument).

IN THE MATTER OF THE ESTATE OF
ROBERT C. MURRAY, DECEASED.

POLLY O'NEAL AND GARY STINNETT, APPELLANTS, *v.*
JOYCE SLAUGHTER, RESPONDENT.

No. 63284

March 5, 2015 344 P.3d 419

Appeal from a district court order appointing respondent as the administrator of the decedent's estate in a probate proceeding. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Decedent's daughter petitioned for revocation of letters of special administration and for appointment as special administrator of father's estate, asserting that she had priority in appointment over father's siblings. The district court entered an order appointing daughter as administrator of father's estate, and siblings appealed. The supreme court, CHERRY, J., held that: (1) parentage challenge brought by decedent's siblings against decedent's daughter in probate proceeding was governed by the Nevada Parentage Act, (2) decedent's siblings lacked standing to establish or challenge the presumptive legitimacy of decedent's daughter, and (3) the three-year period for siblings to challenge paternity began to run on the date daughter reached the age of majority.

**Affirmed.**

*Lawyerswest, Inc*., and *Robert C. Graham*, Las Vegas, for Appellants.

*Denton Lopez & Cho* and *Alice S. Denton* and *Jarien L. Cho*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews questions of statutory interpretation and other legal issues de novo.
2. STATUTES.
   The supreme court's goal in interpreting statutes is to effectuate the Legislature's intent; to do so, it must give a statute's terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory.
3. STATUTES.
   When separate statutes are potentially conflicting, the supreme court attempts to construe both statutes in a manner to avoid conflict and promote harmony.
4. DESCENT AND DISTRIBUTION; PARENT AND CHILD.
   Parentage challenge brought by decedent's siblings against decedent's daughter in probate proceeding was governed by the Nevada Parentage Act. NRS 126.071(1).

5. Parent and Child.
   To determine parentage in Nevada, courts must look to the Nevada Parentage Act, which is modeled after the Uniform Parentage Act (UPA). NRS 126.011.
6. Descent and Distribution; Parent and Child.
   Decedent's siblings, as potential heirs to decedent's estate, did not constitute "interested third parties" under the Parentage Act, and thus, lacked standing to establish or challenge the presumptive legitimacy of decedent's daughter in probate proceeding; siblings did not seek to assert paternity and asserted no personal interest in determining the existence or nonexistence of a filial relationship, but rather sought to illegitimatize daughter solely to make themselves eligible to inherit decedent's estate. NRS 126.071(1).
7. Limitation of Actions.
   The three-year period for decedent's siblings to challenge paternity with regard to decedent's presumed daughter began to run on the date daughter reached the age of majority. NRS 126.071(1), 126.081(1).

Before Hardesty, C.J., Douglas and Cherry, JJ.

## OPINION

By the Court, Cherry, J.:

This appeal requires us to decide whether, in a probate proceeding, the parentage of a potential heir can be contested under NRS Chapter 132, Nevada's probate statutes, or NRS Chapter 126, the Nevada Parentage Act. We hold that the Nevada Parentage Act controls for parentage determinations, including determinations sought for probate matters. NRS 126.071(1) limits those who can make challenges under the Parentage Act to interested parties, however, which appellants are not. Further, under NRS 126.081(1), any challenge to parentage is barred if made more than three years after the child reaches the age of majority. In the instant case, NRS 126.081 precludes appellants from contesting the heir's parentage because more than three years have passed since the heir reached the age of majority.

### *FACTS AND PROCEDURAL HISTORY*

Respondent Joyce Slaughter, the claimed heir, was born on January 26, 1949, in Wabbaseka, Arkansas. Her delayed birth certificate, issued by the State of Arkansas on July 15, 1952, identifies her as "Joyce Ann Murray"; the decedent, Robert Murray, as "Father"; and Margaret Polk as "Mother."[1] Robert was 17 years old when Joyce was born, and under Arkansas law, he could not marry without parental consent. After Robert turned 19, he married then-21-year-

[1]The delayed birth certificate was notarized on July 15, 1952, but the notary indicated on the birth certificate that her commission expired on July 7, 1952.

old Margaret in Jefferson County, Arkansas. Robert and Margaret moved to Las Vegas, Nevada, in the early 1950s, where together they raised Joyce. The couple remained married until Margaret's death in 1990. In his lifetime, Robert never commenced proceedings to formally establish or challenge his status as Joyce's father.

Robert died intestate in August 2012 in Las Vegas at the age of 80. The assets of his estate were derived from his and Margaret's nearly 40-year marriage. His obituary identified Joyce as his sole living child, and Joyce arranged and paid for Robert's funeral services.

Nevertheless, a few months later, Robert's sister and nephew, appellants Polly O'Neal and Gary Stinnett, respectively, filed an ex parte petition for appointment as special administrators of Robert's estate. The ex parte petition identified Robert's siblings and their issue as his heirs under NRS 134.060 (stating that when there exists no issue, surviving spouse, or father or mother, a decedent's estate goes to the decedent's siblings and their issue); Joyce was identified as Robert's stepdaughter. The district court entered an order making appellants co-administrators of the estate.

*Probate proceedings*

Upon learning of appellants' appointment, Joyce filed a petition for revocation of the letters of special administration and for appointment as the special administrator. Joyce asserted that appellants' appointment was the product of a misrepresentation to the court, namely, that she was the decedent's "stepdaughter," rather than his daughter. Joyce also argued that, as Robert's child, she had priority in appointment. Joyce attached to the petition a certified copy of her Arkansas delayed birth certificate and her affidavit. Joyce later provided affidavits from her mother's siblings, which stated that their sister and the decedent had held themselves out as a married couple when Joyce was born and that the decedent had always treated Joyce as his daughter.

Appellants responded to Joyce's petition for revocation and argued that the Arkansas birth certificate was invalid; that Joyce's claim of paternity did not satisfy Nevada's Parentage Act, NRS Chapter 126; that Joyce knew that she was not the decedent's biological child; and that DNA testing was necessary to confirm biological parentage. Noting that stepchildren are not entitled to inherit under Nevada's probate statutes, NRS 132.055, appellants attached affidavits from various members of Robert's family stating that Joyce was Robert's stepdaughter and that she was aware of that fact.

At a hearing, the probate commissioner explained that the delayed birth certificate must be given full faith and credit and that, absent fraud, Robert was the only individual with a right to fight the birth certificate. After the hearing, the probate commissioner issued a report and recommendation that determined that (1) Joyce's Ar-

kansas delayed birth certificate was entitled to full faith and credit in Nevada; (2) a legal presumption arose that Joyce was the decedent's child under NRS 126.051(1)(c) and (d) because Robert and Margaret had resided together with Joyce and held themselves out to be husband and wife, and because Robert had received Joyce into his home, held her out to be his natural child, and allowed her to be known by his surname; (3) Robert's siblings lacked standing to contest Joyce's paternity pursuant to NRS 126.071(1); and (4) Robert's siblings were time-barred from contesting Joyce's paternity pursuant to NRS 126.081(1). Accordingly, the probate commissioner suggested that the district court find that Joyce is Robert's child and entitled to appointment as administrator.

Appellants objected to the probate commissioner's report and recommendation. At the district court's hearing, appellants argued for an evidentiary hearing and asserted that discovery was ongoing. The district court explained that appellants needed to overcome the standing and timeliness issues before an evidentiary hearing could be considered. The district court then entered an order finding that the commissioner's recommendations were not clearly erroneous and ordered that the report and recommendation be fully accepted and adopted. This appeal followed.

## *DISCUSSION*

In this appeal, we examine whether issues concerning Joyce's parentage for inheritance purposes are governed by the probate statutes of NRS Chapter 132 or by the parentage statutes of NRS Chapter 126. After determining which set of statutes applies, we consider whether appellants met the standing and timing requirements for contesting parentage under those statutes.

[Headnotes 1-3]

We review questions of statutory interpretation and other legal issues de novo. *Rennels v. Rennels*, 127 Nev. 564, 569, 257 P.3d 396, 399 (2011). Our goal in interpreting statutes is to effectuate the Legislature's intent. *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513 (2000). To do so, "this court must give [a statute's] terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." *S. Nev. Homebuilders v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal quotation omitted). In addition, "when separate statutes are potentially conflicting, [this court] attempt[s] to construe both statutes in a manner to avoid conflict and promote harmony." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 587, 97 P.3d 1132, 1140 (2004).

Under the probate statutes, when there is no surviving spouse, an intestate decedent's estate succeeds to the decedent's child.

NRS 134.090. "Child" is circularly defined as "a person entitled to take as a child by intestate succession . . . and excludes a person who is a stepchild." NRS 132.055. No other probate statute further governs the determination of who is a child entitled to succeed to her father's estate. Accordingly, we must look elsewhere to determine whether Joyce was Robert's child for inheritance purposes.

*Nevada's Parentage Act*

[Headnotes 4, 5]

We have explained that, "[t]o determine parentage in Nevada, courts must look to the Nevada Parentage Act, which is modeled after the Uniform Parentage Act (UPA). The Nevada Parentage Act is 'applied to determine legal parentage.'" *St. Mary v. Damon*, 129 Nev. 647, 652, 309 P.3d 1027, 1031 (2013) (quoting *Russo v. Gardner*, 114 Nev. 283, 288, 956 P.2d 98, 101 (1998)). Nevada's Parentage Act provides rules and methods for establishing paternity for "all persons, no matter when born." NRS 126.011.

NRS 126.021(3) provides that a "'[p]arent and child relationship' means the legal relationship existing between a child and his or her natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations. It includes the mother and child relationship and the father and child relationship." Although Nevada's Parentage Act was adopted in large part for reasons relating to the financial support of children, *see* NRS Chapter 126 reviser's notes; *Willerton v. Bassham*, 111 Nev. 10, 19-20, 889 P.2d 823, 828-29 (1995), we have previously recognized that minor children have "legal interests that flow from a determination of paternity beyond the right to collect support. Such interests include . . . the right to an inheritance." *Willerton*, 111 Nev. at 21-22, 889 P.2d at 830. Indeed, we have referred to the parentage statutes in determining heirship in the past. *See In re Parrott's Estate*, 45 Nev. 318, 329, 203 P. 258, 260 (1922) (proceeding with the question of unintentional omission from a will based on an objection sufficient to show that the objector was the deceased's child under a former parentage statute).

We acknowledge that, under the parentage statutes, "a determination of parentage rests upon a wide array of considerations rather than genetics alone." *St. Mary*, 129 Nev. at 653, 309 P.3d at 1032 (citing *Love v. Love*, 114 Nev. 572, 578, 959 P.2d 523, 527 (1998) (providing that the Nevada Parentage Act "clearly reflects the legislature's intent to allow nonbiological factors to become critical in a paternity determination")). A man may be legally presumed to be a child's father if, for example, "[w]hile the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child." NRS 126.051(1)(d). Further, presumably to promote early establishment of the filial relationship

and family stability, Nevada's Parentage Act contains limitations on who can bring an action and when that action can be brought, and these provisions do not fit neatly into the structure of a probate proceeding. *See* NRS 126.071 (a child, natural mother, presumed and alleged fathers, and interested third parties may bring action); NRS 126.081 (action to declare existence or nonexistence of filial relationship must be brought within three years of child's attaining age of majority); NRS 126.101 (natural mother and presumed father must be made parties).

Even so, we believe that the Legislature, by adopting the UPA and failing to provide any independent means of determining parentage for inheritance purposes, intended for Nevada's parentage statutes to apply in these circumstances.[2] We are not persuaded that the manner in which a child's paternity is determined should change simply because a party is involved in a probate dispute instead of a custody or support dispute. We believe that deferring to the parentage act will equitably resolve paternity disputes when conflicts arise between presumptive and biological paternity in probate proceedings.

In so concluding, we are further persuaded by the reasoning in *In re Estate of Jotham*, 722 N.W.2d 447, 449-59 (Minn. 2006). In that case, the decedent's then-ex-wife gave birth to a second daughter 279 days after the parties' divorce. *Id.* at 449. The second daughter's birth certificate identified the decedent as her father, but paternity was not adjudicated and the decedent never acknowledged paternity in any written form. *Id.* Over 50 years later, the decedent died intestate. *Id.* His earlier-born daughter then challenged the status of the later-born daughter and sought to introduce evidence to rebut the statutory presumption that the later-born woman was also the decedent's daughter because she was born within 280 days of termination of the parties' marriage. *Id.* She argued that she was "simply litigating heirship in a probate proceeding," and thus, the proceeding was beyond the scope of the Minnesota Parentage Act. *Id.* at 451.

The district court concluded that the statute of limitations in Minnesota's Parentage Act barred the decedent's earlier-born daughter from challenging the paternity presumption. *Id.* at 449-50. The court of appeals determined that the Parentage Act's statute of limitations

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[2]In fact, the Legislature was expressly aware of the connection between the parentage statutes and the probate statutes. NRS 126.081(2) recognizes that, notwithstanding the parentage statutes, claims of "a right of inheritance or a right to a succession" must be asserted within "the time provided by law relating to distribution and closing of decedents' estates." NRS 126.091(3) provides that an action may be brought in the county in which a deceased alleged father's probate proceedings have been commenced. When a parentage issue arises in a probate proceeding, we see no reason to require the questions of standing and timing to proceed in a separate action under the Nevada Parentage Act. *Cf.* NRS 126.091(1) (stating that actions under the Parentage Act may be combined with actions for divorce, annulment, separate maintenance, or support).

did not apply in a probate proceeding and reversed based on error in failing to consider evidence offered to rebut the paternity presumption. *Id.* (citing *In re Estate of Jotham*, 704 N.W.2d 210, 215 (Minn. Ct. App. 2005)).

The Minnesota Supreme Court disagreed with the court of appeals, concluding that "the probate court must apply the Parentage Act in its entirety to determine paternity for purposes of intestate succession." *Id.* at 453. The court consequently determined that the earlier-born daughter did not meet the standing and timeliness requirements set forth in the Minnesota Parentage Act. *Id.* at 457. The court explained that, while "[t]he Parentage Act permits presumptions of paternity to be rebutted in 'an appropriate action' by clear and convincing evidence[,]"[3] this ambiguous term, "an appropriate action," is not defined. *Id.* at 454 (quoting Minn. Stat. § 257.55). Looking to the Minnesota Legislature's probable intent, the court noted that this term was likely meant to "restrict the circumstances in which a presumption of paternity under the Parentage Act may be rebutted." *Id*.

The court noted that interpreting "an appropriate action" in a manner that allows suits which do not satisfy standing and timeliness requirements would frustrate one of the primary purposes of the act—establishing parent-child relationships. *Jotham*, 722 N.W.2d at 455. The court also noted such a rule would conflict with public policy favoring presumptions of legitimacy and preserving family integrity. *Id.* Moreover, the court explained,

> [w]e do not believe that the legislature, which has unmistakably expressed its desire to foster and protect a child's legitimacy, meant in section 257.55 to permit an individual to challenge a sibling's parentage more than 50 years after her birth. Such belated challenges would be destructive of family harmony and stability and would undermine familial relationships long presumed to exist.

*Id.* Accordingly, the court held that "a Parentage Act paternity presumption may be rebutted only by one who meets the standing and timeliness requirements for an action to declare the nonexistence of the presumed father-child relationship." *Id*. *See also Garris v. Cruce*, 404 So. 2d 785 (Fla. Dist. Ct. App. 1981) (holding that a claimed heir's failure to bring an action for the determination of paternity within the statutory time limit for such actions barred her claim of heirship); *Estate of Lamey v. Lamey*, 689 N.E.2d 1265, 1269 (Ind. Ct. App. 1997) (concluding that there is not any "practical difference" between an action to determine paternity and an

[3]NRS 126.051(3) also provides that once a presumption of paternity is created under NRS 126.051(1), this presumption may "be rebutted in an appropriate action only by clear and convincing evidence."

action to determine heirship and holding that a third party who is not asserting paternity cannot challenge paternity to determine heirship).

Like the Minnesota Supreme Court, we conclude that the Nevada Parentage Act applies to parentage challenges in Nevada probate proceedings. Our conclusion is supported by the principle goal of intestacy law—"to effectuate the decedent's likely intent in the distribution of his property." Megan Pendleton, *Intestate Inheritance Claims: Determining a Child's Right to Inherit When Biological and Presumptive Paternity Overlap*, 29 Cardozo L. Rev. 2823, 2826 (2008). We therefore hold that paternity contests in intestacy proceedings are governed by the Nevada Parentage Act.

*Standing and timeliness requirements*

[Headnotes 6, 7]

The Nevada Parentage Act limits those who may initiate a paternity action. *See* NRS 126.071(1). Only "[a] child, his or her natural mother, a man presumed or alleged to be his or her father or *an interested third party*" has standing. *Id.* (emphasis added). Here, it is potential heirs who challenge paternity. Consequently, we must interpret the meaning of "an interested third party" in this context.

In the legal sense, "interested party" has been defined as someone who "has a recognizable stake (and therefore standing) in a matter." *Black's Law Dictionary* 1232 (9th ed. 2009). In a paternity action, this would generally be someone with a direct personal stake, either financial or social, in establishing or disestablishing the relationship. *See generally Matter of Paternity of Vainio*, 943 P.2d 1282, 1286 (Mont. 1997) (noting that, although "any interested party" may bring a paternity action under Montana statutes, the party must have a personal stake in the outcome of the controversy, and thus siblings had no standing to establish or contest the paternity of another sibling because any such determination would not affect their relationship).

Further, the person contesting paternity must bring the action within the period allowed by the Nevada Parentage Act. *See* NRS 126.081. The relevant statute of limitations for parentage contests is NRS 126.081(1). NRS 126.081(1) provides that "[a]n action brought under this chapter to declare the existence or nonexistence of the father and child relationship is not barred until 3 years after the child reaches the age of majority."

Here, Joyce is entitled to a presumption of paternity under NRS 126.051(1)(d), at least, because she demonstrated that, during her minority, Robert received her into his home and openly held her out as his natural child. While appellants contend that they should be allowed to rebut that presumption and any presumption attaching to Joyce's birth certificate, appellants' challenge to Joyce's parentage comes more than three years after Joyce reached the age of major-

ity. Moreover, appellants do not seek to assert paternity and have asserted no other personal interest in determining the nonexistence of Joyce and Robert's filial relationship. They seek to illegitimatize her solely to make themselves eligible to inherit Robert's estate. *See In re Trust Created by Agreement Dated Dec. 20, 1961*, 765 A.2d 746, 756-57 (N.J. 2001) (citing *Knauer v. Barnett*, 360 So. 2d 399 (Fla. 1978), and other cases for the proposition that third parties should not be allowed to challenge presumptive legitimacy, at least when established by acknowledgment, agreement, or decree, and noting that this proposition is supported by the policies underlying parentage acts). Accordingly, we conclude that appellants are time-barred by NRS 126.081(1) and lack standing under NRS 126.071(1) to challenge Joyce's paternity. *Jotham*, 722 N.W.2d at 455.

*CONCLUSION*

Although the Nevada Parentage Act applies to paternity questions arising during probate proceedings, here, appellants are time-bared by, and lack standing under, that Act to challenge Joyce's presumptive paternity. Further, we have considered appellants' remaining arguments and conclude that they are without merit. Thus, for the reasons set forth above, we affirm the decision of the district court.

HARDESTY, C.J., and DOUGLAS, J., concur.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF ML-CFC COMMERCIAL MORTGAGE TRUST 2007-7 COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-7, BY AND THROUGH MIDLAND LOAN SERVICES, AS ITS SPECIAL SERVICER, APPELLANT, *v.* PALMILLA DEVELOPMENT CO., INC., A NEVADA CORPORATION; AND HAGAI RAPAPORT, AN INDIVIDUAL, RESPONDENTS.

No. 62112

March 5, 2015 343 P.3d 603

Appeal from a district court order granting summary judgment in a deficiency judgment action. Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

Deed of trust beneficiary sought deficiency judgment after receiver's sale of real property securing the loan. The district court entered summary judgment in favor of borrower. Beneficiary appealed. The supreme court, DOUGLAS, J., held that: (1) receiver's sale was "foreclosure sale" within meaning of statute permitting deficiency judg-

ment upon timely application by deed of trust beneficiary after foreclosure sale, and (2) six-month period for beneficiary to apply for deficiency judgment began to run upon actual exchange of money with close of escrow.

**Reversed and remanded.**

[Rehearing denied May 29, 2015]

[En banc reconsideration denied September 3, 2015]

*Lewis Roca Rothgerber LLP* and *Joel D. Henriod, Daniel F. Polsenberg*, and *Robert M. Charles, Jr.*, Las Vegas, for Appellant.

*Deaner, Malan, Larsen & Ciulla* and *Brent A. Larsen*, Las Vegas; *Law Offices of Thomas D. Beatty* and *Thomas D. Beatty*, Las Vegas, for Respondents.

1. Appeal and Error.
   Questions of statutory interpretation are reviewed de novo.
2. Mortgages.
   Court-appointed receiver's sale of real property securing a loan pursuant to deed of trust was not a "trustee's sale" within meaning of statute permitting deficiency judgment upon timely application by deed of trust beneficiary after foreclosure sale or trustee's sale held pursuant to trustee's power of sale; since court-appointed receiver, involvement of the judicial machinery in receiver's sale was clearly contemplated. NRS 32.010(2), 40.455(1), 107.080.
3. Mortgages.
   Court-appointed receiver's sale of real property securing loan pursuant to deed of trust was "foreclosure sale" within meaning of statute permitting deficiency judgment upon timely application by deed of trust beneficiary after foreclosure sale or trustee's sale held pursuant to trustee's power of sale, even though receiver did not sell at public auction after judgment; since statute bifurcates "foreclosure sales" from nonjudicial trustees' sales, "foreclosure sale" had to mean sale of real property held to enforce obligation secured by mortgage or lien. NRS 21.150, 32.010(2), 40.430(4), 40.455, 40.462(4), 107.080.
4. Mortgages.
   Six-month period for deed of trust beneficiary to apply for deficiency judgment after court-appointed receiver's sale began to run upon actual exchange of money with close of escrow and did not begin to run earlier when receiver entered into purchase and sale agreement with third-party purchaser or when district court approved the sale. NRS 32.010, 40.455(1).

Before Hardesty, C.J., Douglas and Cherry, JJ.

## OPINION

By the Court, Douglas, J.:

This case presents the question of whether NRS 40.455, which governs the award of deficiency judgments, applies when a court-

appointed receiver sells real property securing a loan. More specifically, the parties dispute whether NRS 40.455(1)'s six-month filing deadline bars the mortgagee's recovery of any deficiency after such a receiver's sale when the application for a deficiency judgment is made more than six months after a purchase and sale agreement is entered into and judicial approval of said agreement is sought and given. We hold that a receiver sale of real property that secures a loan is a form of judicial foreclosure, and thus, to the extent that proceeds from such a sale are deficient, NRS 40.455 applies. We further hold that the relevant triggering event for the purposes of NRS 40.455(1)'s six-month time frame, when a receiver sale of real property securing a loan is at issue, is the date of the close of escrow rather than the date a purchase and sale agreement is formed or judicially sanctioned. And because, here, the mortgagee applied for a deficiency judgment within six months from when escrow closed on the sale in question, that application was timely. We therefore reverse the district court's grant of summary judgment and remand for further proceedings consistent with this opinion.

## *FACTS AND PROCEDURAL HISTORY*

Respondent borrower, Palmilla Development Co., took out a loan for $20.15 million from the predecessor-in-interest of appellant U.S. Bank.[1] The loan was secured by a deed of trust on a development of townhomes and personally guaranteed by respondent Hagai Rapaport, Palmilla's president. U.S. Bank became the legal holder of the loan note and all beneficial interest under the deed of trust, following which Palmilla defaulted and Rapaport failed to fulfill his guarantor obligations. U.S. Bank then instituted the underlying action seeking to appoint a receiver in order to collect rents from, to market, and to sell the secured property.

Following the district court's approval of this request, the receiver, through a real estate marketing company, listed the subject property and, over the course of several months, obtained 31 offers to purchase the property. From these offers, the receiver identified what it believed to be the best offer and entered into a purchase and sale agreement with that third-party purchaser for $9.5 million on February 5, 2010. U.S. Bank filed a motion to approve the sale, which the district court granted on March 26, 2010. Escrow closed on June 7, 2010, when the purchaser paid the agreed upon price and obtained the deed to the property.

On November 24, 2010, U.S. Bank filed an amended complaint, which sought to recover the amount of Palmilla's indebtedness that

[1]The appellant's full name is listed as U.S. Bank National Association, as trustee for the Registered Holders of ML-CFC Commercial Mortgage Trust 2007-7 Commercial Mortgage Pass-Through Certificate Series 2007-7, by and through Midland Loan Services, as its Special Servicer.

the net proceeds of the receiver sale did not satisfy. Respondents filed a motion for summary judgment, arguing that the relief sought in the amended complaint was, in essence, an application for a deficiency judgment under NRS 40.455(1), which U.S. Bank was precluded from seeking because (1) the receiver sale was not a "foreclosure sale or trustee's sale held pursuant to NRS 107.080," and absent either of those two types of sales, NRS 40.455(1) does not permit a deficiency judgment; and (2) even if NRS 40.455(1) could be used to seek a deficiency judgment following a receiver sale of real property securing a loan, U.S. Bank failed to comply with the section's time frame for so seeking. The district court granted respondents' motion, holding that, although U.S. Bank could utilize NRS 40.455(1) to seek a deficiency judgment following a receiver sale of real property securing a loan, U.S. Bank had to abide by NRS 40.455(1)'s six-month time frame in so doing, and that more than six months had passed between the date U.S. Bank filed its amended complaint and the date the district court approved the purchase and sales agreement. This appeal followed.

## *DISCUSSION*

### *A receiver sale of real property securing a loan is a "foreclosure sale" within the meaning of NRS 40.455(1)*

[Headnote 1]

U.S. Bank's appeal raises questions of statutory interpretation; our review is, therefore, de novo. *Pankopf v. Peterson*, 124 Nev. 43, 46, 175 P.3d 910, 912 (2008). As relevant to this appeal, NRS 40.455(1) states that

> [U]pon application of the judgment creditor or the beneficiary of the deed of trust within 6 months after the date of *the foreclosure sale or the trustee's sale held pursuant to NRS 107.080*, respectively, and after the required hearing, the court shall award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust if it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is a deficiency of the proceeds of the sale and a balance remaining due to the judgment creditor or the beneficiary of the deed of trust, respectively.

NRS 40.455(1) (emphasis added). As a preliminary matter, we must determine whether this section applies when the deficiency application in question is brought following a receiver sale of real property securing a loan. And, because we agree with respondents that NRS 40.455(1) only applies when there is a deficiency in the proceeds of a "foreclosure sale or [a] trustee's sale held pursuant to NRS 107.080," we therefore must resolve whether a receiver sale of real property securing a loan qualifies as either.

[Headnote 2]

We reject outright the proposition that such a sale is a "trustee's sale held pursuant to NRS 107.080." NRS 107.080 confers upon a trustee the "power of sale" in a nonjudicial foreclosure proceeding, wherein, it is almost so intuitive as to go without saying, "[n]o judicial proceeding is required." Restatement (Third) of Property (Mortgages) § 8.2 cmt. a (1997). But, in the context of receiver sales of real property securing a loan, a court "in which an action is pending" appoints the receiver in question, NRS 32.010(2), and thus, involvement of the judicial machinery in such circumstances is clearly contemplated. Indeed, as is evident from this court's recitation of the facts, here U.S. Bank's initiation of a judicial proceeding prompted the sale in question, and judicial approval of the purchase price was required, sought, and given. Inasmuch as the requirements in power of sale statutes like NRS 107.080 are only intended to ensure that "the mortgagee accomplishes the same purposes achieved by judicial foreclosure without the substantial additional burdens that the latter type of foreclosure entails," Restatement (Third) of Property (Mortgages) § 8.2 cmt. a (1997), their application in circumstances, such as these, where the judicial process is invoked would be needlessly duplicative. We therefore cannot accept a reading of NRS 40.455(1) that includes a receiver sale of real property securing a loan as a "trustee's sale held pursuant to NRS 107.080." NRS 40.455(1); *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) (noting that this court's interpretations should avoid absurd results).[2]

[Headnote 3]

This leaves only the former prospect, that is, that a receiver sale of real property securing a loan is a "foreclosure sale" within NRS 40.455(1)'s meaning. NRS 40.455 does not define "foreclosure sale," but a different section in the same subchapter does. In particular, NRS 40.462(4) defines the phrase as "the sale of real property to enforce an obligation secured by a mortgage or lien on the property, including the exercise of a trustee's power of sale pursuant to NRS 107.080." Likewise, *Black's* defines a foreclosure sale as "[t]he sale of mortgaged property, authorized by a court decree or a power-of-sale clause, to satisfy the debt." *Black's Law Dictionary* 1455 (9th ed. 2009). But, to the extent that NRS 40.455(1) bifurcates "foreclosure sale[s]" from nonjudicial trustees' sales held pursuant to NRS 107.080, within the section's confines, "foreclosure sale" must mean, more limitedly, only the former type of sale—namely, a sale of real property held to enforce an obligation secured by a mortgage or lien, other than those trustee's sales authorized by NRS 107.080.

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[2]Because such receiver sales are not "held pursuant to NRS 107.080," any failures alleged by respondents of U.S. Bank to meet NRS 107.080's requirements are beside the point.

A sale directed by a court-appointed receiver plainly falls within this definition. Pursuant to NRS 32.010(2), the statute under which the instant receiver was appointed, a court may appoint a receiver

> . . . [i]n an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

Inasmuch as NRS 32.010(2) states that a receiver may be appointed "in an action by a mortgagee for the foreclosure of the mortgage," it plainly envisages that a receiver sale of real property securing a loan is one of foreclosure. Indeed, the request for receiver under the section is only ancillary to such a sale. *See* 2 Baxter Dunaway, *The Law of Distressed Real Estate* § 16:32 (2014). And as this court has previously recognized, any property "[e]ntrusted to [a receiver's] care is regarded as being *in custodia legis*"; put differently, "the court itself [has] the care of the property by its receiver." *Bowler v. Leonard*, 70 Nev. 370, 383, 269 P.2d 833, 839 (1954) (internal quotations omitted). Even further, a receiver is merely the court's "creature or officer, having no powers other than those conferred upon him by the order of his appointment." *Id.* (internal quotations omitted). Thus, real property that secures a loan and is sold in a receiver sale is undoubtedly "sold through a court proceeding" inasmuch as the receiver, for all intents and purposes, acts as a court's proxy, facilitating the sale of property in the appointing court's care and only with its approval. *See id.*; *see also Campbell v. Parker*, 45 A. 116, 118 (N.J. Ch. 1900) ("[I]f a sale by a sheriff, by virtue of a writ directed to him by this court, is a judicial sale, a fortiori one made by a receiver, who is appointed by this court, and who is in a sense an arm of the court, and, so to speak, a part of it, is also a judicial sale."); Dunaway, *supra*, § 16:32 (identifying a receiver sale as a method of judicial foreclosure); 2 *Clark on Receivers* § 482 (3d ed. 1959) ("A receiver's sale is a judicial sale.").

In light of the strength of this reasoning, we reject respondents' arguments that a receiver sale of real property securing a loan is not a form of judicial foreclosure sale because, as occurred here, the property may not be sold at a public auction, *cf.* NRS 40.430(4) (indicating that a judicial foreclosure sale "must be conducted in the same manner as the sale of real property upon execution, by the sheriff"); NRS 21.150 (indicating that "[a]ll sales of property under execution shall be made at auction to the highest bidder"), or because there may be instances where, as here, no "judgment" is entered prior to the sale. Such arguments unnecessarily elevate form over substance. We therefore hold that a receiver sale of real

property securing a loan is a "foreclosure sale" within the meaning that NRS 40.455(1) ascribes to the phrase.

*NRS 40.455(1)'s six-month time frame was satisfied in the instant action*

[Headnote 4]

Thus having determined that NRS 40.455(1) governs actions for deficiency judgments following a receiver sale of real property securing a loan, we turn to the question of whether NRS 40.455(1), which requires an application for a deficiency judgment to be made "within 6 months after the date of the foreclosure sale," offers any relief to the respondents in the instant case. Specifically, respondents argue that U.S. Bank's filing for deficiency on November 24, 2010, was untimely pursuant to NRS 40.455(1), because the date of the "foreclosure sale" fell either on February 5, 2010, when the receiver entered into the purchase and sale agreement with the third-party purchaser or, at the very latest, March 26, 2010, the date when the district court approved the sale.

When the sale in question is a trustee's sale conducted pursuant to NRS 107.080, this court has held that the date of the sale for the purposes of NRS 40.455(1)'s time frame is that on which the auction was conducted. *Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 813, 824, 313 P.3d 849, 856 (2013); *Walters v. Eighth Judicial Dist. Court*, 127 Nev. 723, 728, 263 P.3d 231, 234 (2011). But the transaction that we presently consider was orchestrated pursuant to the method of judicial foreclosure sanctioned by NRS 32.010, not NRS 107.080. When a sale is conducted pursuant to NRS 107.080, it makes sense that the close of the auction triggers the start of NRS 40.455(1)'s time frame—the winning bidder typically pays the bid price at the auction's conclusion. *See Roark v. Plaza Sav. Ass'n*, 570 S.W.2d 825, 830 (Mo. Ct. App. 1978) ("The trustee must be able to exercise discretion in requiring bidders to satisfy him that they will be able to pay their bid in cash."); 2 Michael T. Madison, et al., *Law of Real Estate Financing* § 12:57 (2014) (collecting cases and noting that the trustee has discretion to require bidders to prove their ability to immediately pay the bid price). But, as discussed above, in the context of receiver sales of property securing a loan, an element of judicial review and approval is added separate and apart from any requirements that NRS 107.080 places on trustee's sales such that payment is not immediately made when a contract for purchase and sale is formed. Thus, other jurisdictions have reasoned that, where such judicial review and approval is mandated, a prospective purchaser's submission of the highest bid is merely an irrevocable offer to purchase, and have rejected the idea that any right to deficiency judgment vests by virtue of the sell-

er's acceptance of said offer alone. *See, e.g.*, *Leggett v. Ogden*, 284 S.E.2d 1, 3 (Ga. 1981); *Commercial Credit Loans, Inc. v. Espinoza*, 689 N.E.2d 282, 285 (Ill. App. Ct. 1997). We likewise hold that the receiver's mere entry into an agreement with a prospective purchaser in a receiver sale of real property securing a loan does not commence NRS 40.455(1)'s applicable six-month time frame.

Neither, in our view, does the date that judicial approval is given begin NRS 40.455(1)'s time frame in the context of such a receiver sale. It has been said that a judicial foreclosure sale is not "legally complete or binding until the purchaser has actually paid the amount bid." *In re Grant*, 303 B.R. 205, 210 (Bankr. D. Nev. 2003) (internal citations omitted); *see Matter of Kleitz*, 6 B.R. 214, 218 (Bankr. D. Nev. 1980). Prior to that time, if the court becomes satisfied that the purchaser will not or cannot pay the bid amount, the property must be re-advertised and re-sold. *See Dazet v. Landry*, 21 Nev. 291, 293-94, 30 P. 1064, 1066 (1892), *criticized on other grounds by Golden v. Tomiyasu*, 79 Nev. 503, 512, 387 P.2d 989, 993 (1963). Accordingly, in the context of receiver sales of real property securing loans, even after the sale has received judicial sanction, the mortgagee has no certainty as to whether that sale will come to fruition and thus cannot be sure of the existence of any deficiency resulting therefrom. It is this assurance of a recoverable deficiency's existence that triggers a mortgagee's opportunity to seek it and commences the applicable six-month limitations period, *see Sandpointe*, 129 Nev. at 824, 313 P.3d at 856 ("The trustee's sale marks the first point in time that an action for deficiency can be maintained and commences the applicable six-month limitations period."), and therefore, we hold that in the context of receiver sales of real property securing loans, it is not until the actual exchange of money, the close of escrow, that NRS 40.455(1)'s six-month time limit begins.

To be clear, we do not abrogate or overrule *Sandpointe*, only clarify that when a receiver conducts a sale of real property securing a loan, NRS 40.455(1) applies, and the triggering event for NRS 40.455(1)'s time frame is the date that escrow closes and payment is made. Given that, here, less than six months had elapsed between the payment of funds on June 7, 2010, and U.S. Bank's application for a deficiency judgment on November 24, 2010, U.S. Bank complied with NRS 40.455(1)'s requisite time frame. The district court therefore erred in granting summary judgment on those grounds; we reverse and remand for proceedings consistent with this opinion.

Hardesty, C.J., and Cherry, J., concur.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; AND DOUGLAS C. GILLESPIE, APPELLANTS, *v.* BLACKJACK BONDING, INC., RESPONDENT.

No. 62864

BLACKJACK BONDING, INC., APPELLANT, *v.* LAS VEGAS METROPOLITAN POLICE DEPARTMENT; AND DOUGLAS C. GILLESPIE, RESPONDENTS.

No. 63541

March 5, 2015 343 P.3d 608

Consolidated appeals from a district court order granting in part a writ of mandamus to compel compliance with a public records request and a post-judgment order denying a motion for attorney fees and costs. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Following denial of its request under the Nevada Public Records Act (NPRA), bond company petitioned for writ of mandamus to compel police department to provide records for telephones used by county jail inmates and moved for attorney fees and costs. The district court granted writ in part and denied motion. Department and company appealed. The supreme court, SAITTA, J., held that: (1) records were related to the provision of a public service and thus were public records under the NPRA, (2) records were within department's legal control, (3) department's interest in nondisclosure of records did not clearly outweigh public interest in access to records, and (4) company was a prevailing party and thus entitled to recover fees and costs associated with securing access to records.

**Affirmed in part, reversed in part, and remanded.**

[Rehearing denied May 29, 2015]

[En banc reconsideration denied July 6, 2015]

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1. Mandamus.
   The supreme court reviews a district court's grant or denial of a writ petition for an abuse of discretion.
2. Appeal and Error.
   The supreme court reviews the district court's interpretation of case-law and statutory language de novo.
3. Records.
   Records for telephones used by county jail inmates were related to the provision of a public service and thus were "public records" under the Nevada Public Records Act, even though private telecommunications provider contracted with county to provide telephone services to inmates and calls between private individuals were detailed in call histories; services assisted police department's facilitation of inmates' statutory right to use a telephone, and right contemplated making calls to private parties. NRS 171.153(1), (2), 228.308; NRS 239.001(4), 239.010(1), (3) (2011).
4. Records.
   Records for telephones used by county jail inmates were public records within county police department's legal control, and thus department had duty to disclose records under the Nevada Public Records Act, where private telecommunications provider contracted with county to provide telephone system to inmates that could generate "call detail records for use in administrative and investigative purposes." NRS 239.010(1), (3), (4), 239.620 (2011).
5. Records.
   The balancing-of-competing-interests test is employed when the requested public record is not explicitly made confidential by a statute and the governmental entity nonetheless resists disclosure of the information.
6. Records.
   The balancing-of-competing-interests test weighs the fundamental right of a citizen to have access to the public records against the incidental right of the agency to be free from unreasonable interference, and the government bears the burden of showing that its interest in nondisclosure clearly outweighs the public's interest in access.
7. Mandamus; Records.
   Police department's interest in nondisclosure of records for telephones used by county jail inmates did not clearly outweigh the public interest in access to records, in bond company's action seeking a writ of mandamus to compel department to provide records, where company agreed to redaction of inmates' names and identification numbers from records, and the district court required company to pay costs associated with production of records. NRS 239.010(1), (3), 239.052(1) (2011).
8. Appeal and Error.
   The supreme court reviews a district court's decision regarding an award of attorney fees or costs for an abuse of discretion.
9. Appeal and Error.
   An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or disregards controlling law.
10. Records.
    A requester who prevails in litigation under the Nevada Public Records Act has the right to recover attorney fees and costs, without regard to whether the requester is to bear the costs of production of the records. NRS 239.011 (2011).

11. Costs.
    A party may be a prevailing party entitled to recover attorney fees and costs if it succeeds on any significant issue in litigation that achieves some of the benefit it sought in bringing suit.
12. Costs.
    To be a prevailing party entitled to recover attorney fees and costs, a party need not succeed on every issue.
13. Records.
    Bond company that requested records for telephones used by county jail inmates from police department was a prevailing party under the Nevada Public Records Act, and thus, company was entitled to recover attorney fees and costs associated with securing access to records, despite fact that the district court ordered company to pay department for costs of production of records, when company obtained a writ of mandamus compelling nearly all information it sought in its petition. NRS 239.011 (2011).

Before Parraguirre, Saitta and Pickering, JJ.

## OPINION

By the Court, Saitta, J.:

The Nevada Public Records Act (NPRA) requires governmental agencies to make nonconfidential public records within their legal custody or control available to the public. NRS 239.010. It also entitles a requester who prevails in a lawsuit to compel the production of public records to recover reasonable attorney fees and costs. NRS 239.011.

In the present case, a private telecommunications provider contracted with Clark County to provide telephone services to inmates at a county jail and to make records of the inmates' calls available to the governmental agency operating the jail. At issue here is whether (1) this information was a public record within the agency's legal custody or control and thus subject to disclosure and (2) the requester of this information was entitled to recover attorney fees and costs. We hold that this information is a public record because it concerns the provision of a public service and is within the agency's legal control. We also hold that the requester was a prevailing party and thus entitled to recover attorney fees and costs pursuant to NRS 239.011.

### *FACTUAL AND PROCEDURAL HISTORY*

In 2011, Clark County and CenturyLink, a private telecommunications provider, entered into a contract for the provision of inmate telephone services for the Clark County Detention Center (CCDC). Under the contract, CenturyLink provides a telephone system that could generate records of inmate telephone calls "for use in admin-

istrative and investigative purposes." The records include, among other details, the number dialed, the call duration, the station originating the call, the call's cost, and the method of call termination. The system provides CCDC personnel with access to historical detail records containing multiple types of data, including calls to specified destination numbers, calls from specific inmates, completed and incomplete calls, and calls from specific inmate telephones. It allows the CCDC system administrators to print reports based on recorded data.

In 2012, Blackjack Bonding, Inc., made a public records request to the Las Vegas Metropolitan Police Department (LVMPD), the governmental entity that runs the CCDC. In the request, Blackjack sought "all call detail records from telephones used by [CCDC] inmates . . . for 2011 and 2012"—specifically, "a call log that details the description of the phone used . . . , the call start time, dialed number, complete code, call type, talk seconds, billed time, cost, inmate id, and last name." Additionally, Blackjack asked for "a list of all phones used by inmates and the phone description, including whether the phone is used to place . . . free calls, collect calls, or both." Blackjack subsequently narrowed the scope of the requested information to calls to "all telephone numbers listed on the various bail bond agent jail lists posted in CCDC in 2011 and 2012" and conveyed that it understood "that the inmate names and identification numbers may need to be redacted." LVMPD denied Blackjack's request, claiming that it did not possess the records.

Blackjack then petitioned the district court for a writ of mandamus to compel LVMPD to provide the requested records. In support of its petition, Blackjack submitted an affidavit from its president stating that before making the public records request at issue, Blackjack asked CenturyLink to provide call detail records regarding CCDC inmate calls to Blackjack's number and received this data on the day that it made the request. The district court granted in part Blackjack's request for mandamus relief, stating that (1) the requested records were public records that LVMPD had a duty to produce, (2) the inmates' names and identification numbers must be redacted before production, and (3) Blackjack would pay the costs associated with the production.

Blackjack also made a motion for attorney fees and costs. The district court denied Blackjack's motion because it found that (1) the order granting writ relief in part required Blackjack to pay the costs associated with the production of the records and precluded LVMPD from paying any expenses, including Blackjack's attorney fees and costs, and (2) Blackjack was not a prevailing party.

LVMPD appealed the district court's order granting partial writ relief to Blackjack. Blackjack appealed the district court's denial of its motion for attorney fees and costs.

*DISCUSSION*

*The district court did not err or abuse its discretion in granting in part Blackjack's petition for a writ of mandamus*

Pursuant to the NPRA, the public records and public books of a governmental entity are subject to inspection by the public:

> [A]ll public books and public records of a governmental entity, the contents of which are not otherwise declared by law to be confidential, must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records.[1]

NRS 239.010(1) (2011). If the public record contains confidential information that can be redacted, the governmental entity with legal custody or control of the record cannot rely on the confidentiality of that information to prevent disclosure of the public record:

> A governmental entity that has legal custody or control of a public book or record shall not deny a request made pursuant to [NRS 239.010(1)] . . . on the basis that the requested public book or record contains information that is confidential if the governmental entity can redact, delete, conceal or separate the confidential information from the information included in the public book or record that is not otherwise confidential.

NRS 239.010(3) (2011).

LVMPD argues that the requested records are not public records subject to disclosure because they (1) do not concern an issue of public interest, (2) involve communications between private entities, and (3) are not in LVMPD's legal custody or control.[2] Moreover, LVMPD contends that it need not produce the requested records because *Public Employees' Retirement System v. Reno Newspapers, Inc.* (*PERS*), 129 Nev. 833, 313 P.3d 221 (2013), prevents it from having to create a new document to satisfy a public records request. Alternatively, LVMPD argues that if the requested records are public records, then a balancing-of-competing-interests test weighs in

[1]We apply the version of the NPRA that was in effect in 2012 when Blackjack made its public records request. Thus, we do not address the subsequent amendments to the NPRA.

[2]LVMPD also argues that it had no duty to fulfill Blackjack's records request because Blackjack purportedly acted to serve a business interest. This argument is without merit because (1) LVMPD did not provide evidence to support its assertion about Blackjack's motive and (2) the NPRA does not provide that a requester's motive is relevant to a government entity's duty to disclose public records. *See* NRS 239.010 (2011).

favor of nondisclosure because of the inmates' privacy interests and the burdens associated with production.

Blackjack argues that because LVMPD can acquire the requested information from CenturyLink at no cost, the information is within LVMPD's control. Blackjack also contends that the balancing-of-competing-interests test does not preclude production of the documents because LVMPD failed to offer a legitimate interest for denying the request for disclosure and because Blackjack resolved any privacy concerns by agreeing to redact the inmates' names and identification numbers.

*Standard of review*

[Headnotes 1, 2]

We review a district court's grant or denial of a writ petition for an abuse of discretion. *DR Partners v. Bd. of Cnty. Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). However, we review the district court's interpretation of caselaw and statutory language de novo. *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151, 321 P.3d 875, 877-78 (2014) (reviewing de novo the meaning and application of caselaw); *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010) (reviewing de novo issues of statutory construction).

*LVMPD has a duty to provide nonconfidential public records over which it has legal custody or control*

Here, neither party disputes that LVMPD is a governmental entity subject to the NPRA. Therefore, we consider whether the requested information is a public record subject to LVMPD's legal custody or control.

*The requested information is a public record*

[Headnote 3]

NRS 239.001(4) mandates public access to "records relating to the provision of those [public] services" that are provided by "private entities" on behalf of a governmental entity. "[P]ublic service" has been broadly defined as "a service rendered in the public interest." *Merriam-Webster's Collegiate Dictionary* 942 (10th ed. 2000); *see also V & S Ry., LLC v. White Pine Cnty.*, 125 Nev. 233, 239-40, 211 P.3d 879, 883 (2009) (referring to a dictionary to ascertain the plain meaning of statutory language); *Black's Law Dictionary* 1352 (9th ed. 2009) (defining "public service" as "[a] service provided or facilitated by the government for the general public's convenience and benefit").

Often, the "use of a telephone is essential for a pretrial detainee to contact a lawyer, bail bondsman or other person in order to prepare his case or . . . exercise his [constitutional] rights." *Johnson v. Galli*, 596 F. Supp. 135, 138 (D. Nev. 1984) (finding that a detainee's reasonable access to a telephone is protected by the First Amendment). Nevada law protects a detainee's right to use a telephone while detained by providing that "[a]ny person arrested has the right to make *a reasonable number of completed* telephone calls from the police station or other place at which the person is booked." NRS 171.153(1) (emphasis added). "A reasonable number of calls must include one completed call to a friend or bail agent . . . ." NRS 171.153(2). NRS 171.153 does not limit a detainee's right to make telephone calls when a private entity provides the telephone services that are to be used by the detainee.

Here, the inmate telephone services provided by CenturyLink assist LVMPD's facilitation of detainees' statutory rights to use a telephone. The fact that telephone calls between private individuals are detailed in the call histories does not alter the public service at issue because NRS 171.153(2) contemplates detainees making telephone calls to private parties. Therefore, these calls relate to the provision of a public service and the public has an interest in having governmental entities honor inmates' statutory rights. *See* NRS 228.308 (defining "[p]ublic interest," albeit in the context of consumer protection, as "rights" that "arise" from "constitutions, court decisions and statutes"). Thus, the information that Blackjack requested is a public record because it relates to the provision of a public service.[3]

*The requested information was within LVMPD's legal control*

[Headnote 4]

Since the information that Blackjack requested was a public record, we now address whether it was in LVMPD's legal custody or control. This issue is relevant because a governmental entity's duty to disclose a public record applies only to records within the entity's custody or control. *See* NRS 239.010(4) (2011).

Here, substantial evidence indicates that LVMPD has legal control over the requested information. Under the contract for inmate telephone services, CenturyLink provides a telephone system that could generate "call detail records for use in administrative and investigative purposes." Thus, this contract indicates that the requested information could be generated by the inmate telephone system

[3]Because the information that Blackjack requested is a public record pursuant to NRS 239.001(4), we decline to address whether it would also be a public record under NAC 239.091.

that CenturyLink provides and could be obtained by LVMPD.[4] Therefore, the information is in LVMPD's legal control.

*The recent PERS opinion does not preclude the duty to produce the requested information*

LVMPD argues that *PERS* precludes it from having to ask CenturyLink to generate a new document that does not yet exist and thus excuses it from fulfilling Blackjack's request.

In *PERS*, this court considered "the applicability of [the NPRA] to information stored in the individual files of retired employees that are maintained by [an agency]." 129 Nev. at 834-35, 313 P.3d at 222. After concluding that such information must be disclosed, this court held that to the extent that a records request required "PERS to create new documents or customized reports by searching for and compiling information from individuals' files or other records," the NPRA did not require their production and disclosure. *Id*. at 840, 313 P.3d at 225.

The scope of the holding in *PERS* is gleaned from the facts of that case. *See Liu*, 130 Nev. at 151-55, 321 P.3d at 878-80 (providing that the meaning of an opinion is ascertained by reading it as a whole and by considering the authorities on which it relies and the facts and procedure involved). In *PERS*, this court did not approve of the agency having to "search[ ] for and compil[e] information from individuals' files or other records." 129 Nev. at 840, 313 P.3d at 225. *PERS* did not address the situation where an agency had technology to readily compile the requested information. *See id*. Instead, when an agency has a computer program that can readily compile the requested information, the agency is not excused from its duty to produce and disclose that information. *See State, ex rel. Scanlon v. Deters*, 544 N.E.2d 680, 683 (Ohio 1989), *overruled on other grounds by State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 89 (Ohio 1994).

Unlike *PERS*, the record in this case reveals that Blackjack's request does not involve searching through individual files and compiling information from those files. Here, the inmate telephone services contract and the evidence showing that CenturyLink had previously fulfilled a similar records request demonstrate that CenturyLink had the capacity to readily produce the requested in-

[4]NAC 239.620 does not affect our holding that substantial evidence shows that LVMPD had legal custody of the requested records for two reasons. First, NAC 239.620 defines "legal custody" and does not address "legal control"; thus, it is inapposite to our holding. Second, NAC 239.620 applies to state agencies, a type of governmental entity that LVMPD has not demonstrated itself to be. *See* NAC 239.690 (defining a state agency as a part of the executive branch of the Nevada state government).

formation. Moreover, during a hearing on the writ petition, LVMPD admitted through its attorney that CenturyLink could produce the requested information. Therefore, the requested public records are readily accessible and *PERS* does not prevent their disclosure.

*The balancing-of-competing-interests test does not preclude disclosure*

[Headnotes 5, 6]

The balancing-of-competing-interests test is employed "when the requested record is not explicitly made confidential by a statute" and the governmental entity nonetheless resists disclosure of the information. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 879, 266 P.3d 623, 627 (2011). This test weighs "the fundamental right of a citizen to have access to the public records" against "the incidental right of the agency to be free from unreasonable interference." *DR Partners v. Bd. of Cnty. Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000) (internal quotations omitted). "The government bears the burden of showing that its interest in nondisclosure clearly outweighs the public's interest in access." *PERS*, 129 Nev. at 839, 313 P.3d at 225 (internal quotations omitted).

[Headnote 7]

Here, LVMPD fails to satisfy its burden under the test. Without explanation, LVMPD contends that the request compromises the private interests of inmates and is burdensome. However, LVMPD cannot deny a public records request on the basis of confidentiality if it "can redact, delete, conceal or separate the confidential information from the information included in the public book or record." NRS 239.010(3) (2011). Furthermore, Blackjack agreed to the redaction of inmate names and numbers from the requested information, and the district court's amended order required the redaction of the inmate names and identification numbers. Thus, LVMPD fails to demonstrate that the requested disclosure would compromise any privacy interests.

Moreover, the district court mitigated any burdens associated with the request by requiring Blackjack to pay the costs associated with the production of the requested documents.[5] Thus, LVMPD fails to demonstrate that the requested disclosure is financially burdensome. Therefore, the balancing-of-competing-interests test does not preclude its duty to produce the requested information.

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[5]The district court's requirement that Blackjack pay LVMPD's costs of production is consistent with NRS 239.052(1) (2011), which provides that "a governmental entity may charge a fee for providing a copy of a public record . . . [that shall] not exceed the actual cost to the governmental entity" of producing the record.

*The district court abused its discretion by refusing to award reasonable attorney fees and costs to Blackjack*

In its challenge to the denial of its motion for attorney fees and costs, Blackjack disputes the district court's findings that Blackjack was not a prevailing party and that the prior order granting writ relief in part precluded LVMPD from having to pay Blackjack's attorney fees and costs.

*Standard of review*

[Headnote 8]

We review a district court's decision regarding an award of attorney fees or costs for an abuse of discretion. *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006) (reviewing an award of attorney fees for an abuse of discretion); *Vill. Builders 96, L.P. v. U.S. Labs., Inc*., 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005) (reviewing an award of costs for an abuse of discretion).

[Headnote 9]

An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or disregards controlling law. *NOLM, LLC v. Cnty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004) (holding that relying on factual findings that "are clearly erroneous or not supported by substantial evidence" can be an abuse of discretion (internal quotations omitted)); *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (holding that a decision made "in clear disregard of the guiding legal principles" can be an abuse of discretion).

*NRS 239.011 entitles a prevailing requester to recover attorney fees and costs*

[Headnote 10]

NRS 239.011 (2011) provides that "[i]f the requester prevails, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." It does not preclude a prevailing requester from recovering costs when the requester is to pay the agency for the expenses associated with the production. *See id*. Thus, by its plain meaning, this statute grants a requester who prevails in NPRA litigation the right to recover attorney fees and costs, without regard to whether the requester is to bear the costs of production.[6]

[6]To the extent that the parties raise policy arguments that conflict with NRS 239.011's plain meaning, they are without merit and do not alter our analysis.

*The district court abused its discretion in failing to find that Blackjack was a prevailing party*

[Headnotes 11, 12]

A party prevails "if it succeeds on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit." *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (emphasis added) (internal quotations omitted). To be a prevailing party, a party need not succeed on every issue. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (observing that "a plaintiff [can be] deemed 'prevailing' even though he succeeded on only some of his claims for relief").

[Headnote 13]

Here, the district court ordered LVMPD to produce nearly all of the information that Blackjack sought in its petition for a writ of mandamus. Since the record demonstrates that Blackjack obtained a writ compelling the production of the telephone records with CCDC's inmates' identifying information redacted, it succeeded on a significant issue and achieved at least some of the benefit that it sought. Thus the district court abused its discretion by relying on the clearly erroneous finding that Blackjack was not a prevailing party. *See NOLM, LLC*, 120 Nev. at 739, 100 P.3d at 660-61.

Blackjack was a prevailing party and is entitled to recover attorney fees and costs associated with its efforts to secure access to the telephone records, despite the fact that it was to pay the costs of production. *See* NRS 239.011 (2011). Accordingly, we reverse the district court's order denying Blackjack's motion for attorney fees and costs and remand the matter for the district court to enter an award for reasonable attorney fees and costs consistent with this opinion.[7] *See DR Partners*, 116 Nev. at 629, 6 P.3d at 473 (remanding a case where a public records requester prevailed "for an award to the [requester] of attorney's fees and costs pursuant to NRS 239.011").

PARRAGUIRRE and PICKERING, JJ., concur.

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*See Williams v. United Parcel Servs.*, 129 Nev. 386, 392, 302 P.3d 1144, 1147 (2013) (refusing to deviate from the plain meaning of a statute and rejecting arguments that would require the court to read additional language into the statute).

[7]We have considered the parties' remaining arguments, including those based on other jurisdictions' public records caselaw and the NPRA's legislative history, and conclude that they are without merit.