JED PROPERTY, LLC, a Nevada Limited Liability Company, Appellant, *v.* COASTLINE RE HOLDINGS NV CORP., a Nevada Corporation, Respondent.

No. 63092

JED PROPERTY, LLC, a Nevada Limited Liability Company, Appellant, *v.* COASTLINE RE HOLDINGS NV CORP., a Nevada Corporation, Respondent.

No. 63359

March 5, 2015 343 P.3d 1239

Consolidated appeals from a district court order granting a motion for summary judgment and a post-judgment award of attorney fees and costs. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

In an effort to foreclose on real property that was used to secure a debt by a limited liability company (LLC), holder of the security, or its trustee, recorded a notice of a trustee's sale. After holding company initiated a civil action against LLC, the LLC filed counterclaims against holding company asserting a claim for wrongful foreclosure. The district court granted summary judgment to holding company. LLC appealed. The supreme court, Saitta, J., held that notice requirement of new foreclosure sale information, under statute governing trustee's power of sale, is not triggered unless, after the third oral postponement has been given, the sale's date, time, or place is later changed.

Affirmed.

Marquiz Law Office and *Craig A. Marquiz*, Henderson; *Bogatz Law Group* and *Scott Bogatz* and *Charles M. Vlasic III*, Las Vegas, for Appellant.

Gordon Silver and *Kenneth E. Hogan* and *Erika A. Pike Turner*, Las Vegas; *Lewis Roca Rothgerber LLP* and *Joel D. Henriod* and *Daniel F. Polsenberg*, Las Vegas, for Respondent.

1. Mortgages.
   Notice requirement of new foreclosure sale information, under statute governing a trustee's power of sale, is not triggered unless, after the third oral postponement has been given, the sale's date, time, or place is later changed. NRS 107.080, 107.082(2).
2. Appeal and Error.
   Statutory interpretation is an issue of law that the supreme court reviews de novo.
3. Appeal and Error.
   Generally, the supreme court reviews decisions awarding or denying attorney fees for abuse of discretion; but when the attorney fees matter concerns questions of law, the proper review is de novo.

4. Appeal and Error.
   The supreme court reviews a district court's grant of summary judgment de novo.
5. Statutes.
   The supreme court interprets an unambiguous statute based on its plain meaning by reading it as a whole and giving effect to each word and phrase.
6. Statutes.
   In interpreting a statute, the supreme court does not look to other sources, such as legislative history, unless a statutory ambiguity requires the court to look beyond the statute's language to determine the legislative intent.
7. Appeal and Error.
   In determining whether the district court erred in granting summary judgment, the supreme court resolves whether genuine issues of material fact remained, such that a rational trier of fact could return a verdict for the nonmoving party.

Before Parraguirre, Saitta and Pickering, JJ.

OPINION

By the Court, Saitta, J.:

If a trustee's sale under NRS 107.080 "has been postponed by oral proclamation three times, any new sale information must be provided by notice as provided in NRS 107.080." NRS 107.082(2). At issue here is whether NRS 107.082(2) requires another notice of the sale's time and place, as provided in NRS 107.080, after a third oral postponement of a trustee's sale or if the notice of sale requirement is not triggered unless, after the third oral postponement has been given, the sale's time or place subsequently changes.

[Headnote 1]

We hold that NRS 107.082(2)'s notice of sale requirement is not triggered unless, after the third oral postponement has been given, the sale's date, time, or place is later changed. Therefore, the district court did not err in granting summary judgment and in subsequently awarding attorney fees and costs.

FACTUAL AND PROCEDURAL HISTORY

In an effort to foreclose on real property in Las Vegas that was used to secure a debt by appellant JED Property, LLC, respondent Coastline RE Holdings NV Corp. or its trustee recorded a notice of a trustee's sale. The trustee's sale was orally postponed three times before the property was sold, with the sale occurring on the date and at the place set by the third oral postponement.

After Coastline initiated a civil action against JED, JED filed counterclaims against Coastline, asserting a claim for, among other things, wrongful foreclosure. In particular, JED contended that Coastline violated NRS 107.082(2) when it orally postponed the sale three times without effectuating a written notice of the sale's time and place as provided in NRS 107.080. Coastline then filed a motion for summary judgment, arguing that JED premised its counterclaims on an erroneous interpretation of NRS 107.082(2). The district court granted summary judgment in favor of Coastline upon concluding that the three oral postponements did not trigger NRS 107.082(2)'s notice requirement because the sale occurred on the date set by the third oral postponement. Subsequently, the district court granted Coastline an award of attorney fees and costs.

JED now appeals the summary judgment order. JED also appeals the award of attorney fees and costs to the extent that the award must be reversed if JED prevails in this proceeding by compelling the reversal of the summary judgment. In so doing, JED raises the following issue: whether the district court erred in granting summary judgment in favor of Coastline as to the counterclaims against it upon concluding that the three oral postponements of the trustee's sale did not trigger NRS 107.082(2)'s notice requirement.

DISCUSSION

On appeal, JED argues that the district court's reading of NRS 107.082(2) deviated from the statute's plain meaning, which JED reads as requiring a written notice of new sale information upon the third oral postponement of the sale.

Coastline contends that NRS 107.082(2) unambiguously permits three oral postponements of a sale and requires the notice of any new sale information only for postponements that follow the third oral postponement.

Standard of review

[Headnotes 2-4]

The parties' arguments concern summary judgment, the interpretation of NRS 107.082(2), and the legal basis for the award of attorney fees and costs. Therefore, de novo review applies. *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006) (employing de novo review in ascertaining a statute's meaning); *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) (providing that a denial of attorney fees is generally reviewed for abuse of discretion but that de novo review applies when an attorney fees matter concerns questions of law); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026,

1029 (2005) (employing de novo review in evaluating a summary judgment).

NRS 107.082(2)'s plain meaning

[Headnotes 5, 6]

This court interprets an unambiguous statute based on its plain meaning by reading it as a whole and "giv[ing] effect to each . . . word[ ] and phrase[ ]." *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012). We do not look to other sources, such as legislative history, unless a statutory ambiguity requires us to look beyond the statute's language to determine the legislative intent. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000).

NRS 107.082(2) states: "If such a sale *has been* postponed by oral proclamation three times, any *new sale information* must be provided by *notice* as provided in NRS 107.080." (Emphases added.) Ascertaining NRS 107.082(2)'s meaning and its application to the facts of this appeal thus primarily involves resolving the meaning of the phrases "has been" and "new sale information" and the term "notice" in the statute.

The plain meaning of NRS 107.082(2) and its "new sale information" and "notice" language is clear when reading that statute in conjunction with the statute that it references: NRS 107.080. NRS 107.080 requires two notices: (1) a notice of the default and of the election to sell under NRS 107.080(2)(c) and NRS 107.080(3) and (2) a notice of the trustee sale's time and place under NRS 107.080(4).[1] NRS 107.080(4)'s notice of the trustee sale's date, time, and place encompasses, by its nature, the new sale information referred to in NRS 107.082(2), as it contains information about the sale that potential buyers would need in order to participate.[2]

The content of the notice of the sale's time and place as provided in NRS 107.080(4) is primarily the same as the content that would be conveyed in an oral postponement of the sale—that being the sale's date, time, and place. *See* NRS 107.082(1) (providing that if

[1]NRS 107.080(4) requires the notice of the sale's time and place to be effectuated in a series of ways, specifically: (1) recording the notice; (2) giving the notice to the parties who are statutorily required to receive it; (3) posting the notice for 20 consecutive days; and (4) publishing the notice "three times, once each week for 3 consecutive weeks, in a newspaper of general circulation."

[2]Although the language of NRS 107.080(4) only refers to "time and place," "time" in this context necessarily includes both the date and time of day. Otherwise, notice under NRS 107.080(4) would not have to include the date that the sale is to occur. *See City Plan Dev. v. State, Labor Comm'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005) ("When interpreting a statute, this court will . . . seek to avoid an interpretation that leads to an absurd result.").

a sale is orally postponed it must be postponed "to a later date at the same time and location"). Once a sale "has been" orally postponed for a third time, the information about the postponed sale has already been communicated. NRS 107.082(2). Therefore, as long as the information regarding the sale's date, time, and place remains the same after the third oral postponement, there is no new sale information to provide that would require a new notice under NRS 107.082(2).

But, if the sale's date, time, or location changes after the third oral postponement, then there *is* new sale information. NRS 107.082(2). Thus, if the sale's date, time, or location changes after the third oral postponement, NRS 107.082(2) requires that this new sale information be noticed as provided in NRS 107.080(4).

The district court did not err in granting summary judgment

[Headnote 7]

In determining whether the district court erred in granting summary judgment, this court resolves whether genuine issues of material fact remained, such that "a rational trier of fact could return a verdict for the nonmoving party." *Wood*, 121 Nev. at 731, 121 P.3d at 1031.

Here, Coastline would only be required to give notice under NRS 107.082(2) if the day, time, or place of the trustee's sale was changed *subsequent* to the third oral postponement. Neither party disputes that the trustee's sale was orally postponed three times and that it occurred on the date that was identified in the third oral postponement. Likewise, the record is devoid of any evidence suggesting that the time or place of the trustee's sale was changed after the third oral postponement was submitted. Thus, the record does not demonstrate that the time or place of the sale was changed after the third oral postponement. Therefore, the district court did not err by granting summary judgment in favor of Coastline.

The district court did not err when awarding attorney fees

JED asserts that the award of attorney fees and costs to Coastline must be vacated if JED prevails on its appeal and the summary judgment order is reversed. Because we find that the district court did not err in granting summary judgment in favor of Coastline, the district court likewise did not abuse its discretion in awarding attorney fees and costs to Coastline.

CONCLUSION

The plain meaning of NRS 107.082(2) provides that if the time or place of a trustee's sale changes after the third oral postponement, a new notice of sale under NRS 107.080 is required. Therefore, be-

cause JED failed to submit any evidence that the day, time, or place of the trustee's sale in this case changed after the third postponement, we affirm the district court's grant of summary judgment in favor of Coastline. Consequently, we also affirm the district court's award to Coastline of attorney fees and costs.

PARRAGUIRRE and PICKERING, JJ., concur.

ADAM J. BREEDEN; AND BREEDEN & ASSOCIATES, A LEGAL PROFESSIONAL LIMITED LIABILITY COMPANY, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE, RESPONDENTS, AND ELVIA GONZALEZ, REAL PARTY IN INTEREST.

No. 66876

March 5, 2015 343 P.3d 1242

Motion to voluntarily dismiss an original petition for extraordinary writ relief from a district court order adjudicating attorney liens.

In personal injury action, attorney and law firm filed petition for extraordinary writ relief from order of the district court adjudicating attorney liens and distributing settlement funds. Attorney and firm also filed separate contract action against client to enforce fee-sharing arrangement. Attorney and firm filed motion to voluntarily dismiss petition after filing of answer, and client sought attorney fees and costs. The supreme court, PICKERING, J., held that: (1) client was not entitled to attorney fees, and (2) client was not entitled to costs.

Motion granted; petition dismissed.

Breeden & Associates and *Adam J. Breeden*, Las Vegas, for Petitioners.

Law Offices of David J. Churchill and *David J. Churchill* and *Jolene J. Manke*, Las Vegas, for Real Party in Interest.

1. ATTORNEY AND CLIENT.
   A lawyer seeking to recover fees may proceed by separate contract action or by lien proceeding, depending on circumstances.
2. COSTS.
   Rule permitting dismissal of appeal on appellant's motion on terms agreed to by the parties or fixed by the supreme court did not authorize

imposition of attorney fees on a party who sought to voluntarily dismiss a nonfrivolous writ petition after an answer had been filed. NRAP 42(b).

3. Costs.
   Rule permitting dismissal of appeal on appellant's motion on terms agreed to by the parties or fixed by the supreme court does not provide authority for routine awards of attorney fees as a condition of voluntary dismissal, but attorney fees may be awarded under NRAP 38 if an appeal or writ proceeding is frivolous. NRAP 38, 42(b).
4. Costs.
   Costs, as distinguished from attorney fees, are routinely available when an appellant voluntarily dismisses an appeal.
5. Costs.
   Appellate costs are allowable as of right in context of voluntary dismissal of appeal or original writ proceeding but only as provided by rule that requires party seeking costs to file a bill of costs with the supreme court. NRAP 39(c)(3).
6. Costs.
   Attorney's voluntary dismissal of writ petition did not entitle client to costs in absence of bill of costs filed with the supreme court. NRAP 39(c)(3).

Before Saitta, Gibbons and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

Rule 42(b) of the Nevada Rules of Appellate Procedure provides that, "An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court." We consider whether this rule authorizes the imposition of attorney fees on a party who seeks to voluntarily dismiss a nonfrivolous writ petition after an answer has been filed. We conclude that it does not and thus grant the petitioners' motion to dismiss without requiring, as a condition of the dismissal, payment of the other side's attorney fees.

Attorney Adam J. Breeden and his law firm Breeden & Associates (Breeden) filed a petition in this court for extraordinary writ relief, challenging a district court order adjudicating attorney liens and distributing settlement funds in a personal injury action. The real party in interest, Elvia Gonzalez, is Breeden's former client. As ordered, Gonzalez filed an answer to Breeden's writ petition. Breeden also has a separate contract action underway against Gonzalez and others, seeking to enforce an alleged fee-sharing agreement.

After receiving Gonzalez's answer, Breeden decided it was more prudent to pursue the contract action than writ relief and moved to dismiss the writ petition under NRAP 42(b). Gonzalez opposes the motion. She asks that we resolve the petition on the merits but, if we do not, that we require Breeden to pay her costs and attorney fees.

[Headnotes 1, 2]

A lawyer seeking to recover fees may proceed by separate contract action or by lien proceeding, depending on circumstances. For this reason, among others, we decline to perpetuate this undecided writ proceeding if Breeden wishes to abandon it in favor of his currently stayed contract action. The question remains, though, whether we may condition the dismissal on Breeden repaying Gonzalez for the costs and attorney fees she incurred defending this now-abandoned writ petition.

[Headnote 3]

NRAP 42(b) draws its language from Rule 42(b) of the Federal Rules of Appellate Procedure. Almost without exception, federal courts have rejected the argument that, in allowing voluntary dismissal "on terms . . . fixed by the court," federal Rule 42(b) authorizes an award of attorney fees against the party moving to dismiss. *See, e.g.*, *Am. Auto. Mfrs. Ass'n v. Comm'r, Mass. Dep't of Envtl. Prot.*, 31 F.3d 18, 28 (1st Cir. 1994); *Waldrop v. U.S. Dep't of Air Force*, 688 F.2d 36, 37 (7th Cir. 1982). Like NRAP 38, Rule 38 of the Federal Rules of Appellate Procedure authorizes fee-shifting but limits the authorization to frivolous filings. Normally, courts encourage rather than discourage voluntary, self-determined case resolutions. It does not make sense to penalize a party who voluntarily dismisses a nonfrivolous appeal when, under Rule 38, the same party with the same nonfrivolous appeal would not have to pay the other side's fees if he or she stayed with the appeal to the bitter end. *Waldrop*, 688 F.2d at 38 ("No appellant, unless his appeal was frivolous, would move to dismiss it if he thought that by doing so he was making himself liable to pay the appellee's attorney's fees."). We therefore hold that NRAP 42(b) does not "provide[ ] authority for routine awards of attorney[ ] fees as a condition of voluntary dismissal," but that attorney fees may be awarded under NRAP 38 if an appeal or writ proceeding is frivolous.[1] *Am. Auto. Mfrs. Ass'n*, 31 F.3d at 28; *see In re Vincent*, 105 F.3d 943, 945 (4th Cir. 1997) (applying Fed. R. App. P. 38 when considering whether to award attorney fees for a frivolous writ petition); *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, 48 F.3d 742, 751 (3d Cir. 1995) (same). The petition in this case was not frivolous, so we deny Gonzalez's request for attorney fees. NRAP 38(b).

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[1]*Waldrop* and *American Automobile Manufacturers Ass'n* apply federal Rule 42(b) to appeals, not writ proceedings. While the second sentence of NRAP 42(b) states that "*an appeal* may be dismissed on the appellant's motion," (emphasis added), the first sentence of NRAP 42(b) refers to the voluntary dismissal of "an appeal or other proceeding," and NRAP 1(e)(1) indicates that "appellant" and "petitioner" are interchangeable in the NRAP where appropriate. For this and the policy reason of not penalizing voluntary dismissals of nonfrivolous petitions or appeals, we apply NRAP 1(e)(1) to the second sentence of NRAP 42(b) and hold that the entirety of NRAP 42(b) governs voluntary dismissals of writ petitions as well as appeals.

[Headnotes 4-6]

But costs, as distinguished from fees, are "routinely available" when an appellant voluntarily dismisses an appeal. *Am. Auto. Mfrs. Ass'n*, 31 F.3d at 28. In the context of a federal writ petition, an original proceeding, federal courts have awarded costs under Rule 54(d)(1) of the Federal Rules of Civil Procedure. *E.g.*, *Cotler v. Inter-County Orthopaedic Ass'n, P.A.*, 530 F.2d 536, 538 (3d Cir. 1976) (awarding costs to a successful petitioner); *see also Ariz. v. U.S. Dist. Court*, 709 F.2d 521, 523 (9th Cir. 1983) (agreeing with *Cotler* and awarding costs to a real party in interest after dismissing the petition). The Nevada Rules of Civil Procedure, however, do not contain a counterpart to federal Rule 54(d)(1), and NRS Chapter 18, which permits cost awards in Nevada district courts, is not well-suited to awarding costs in an appellate court. Appellate costs are allowable as of right in the context of the voluntary dismissal of an appeal or original writ proceeding but only as provided by NRAP 39. NRAP 39(c)(3) requires the party seeking costs to file a bill of costs with this court, which Gonzalez has not done. We therefore deny Gonzalez's countermotion for costs without prejudice to her right to seek allowable costs via a bill of costs under NRAP 39. The motions for leave to file a reply in support of the motion to dismiss and a reply in support of the petition are denied. The clerk of this court shall reject the reply to the petition received via E-Flex on January 29, 2015.

Saitta and Gibbons, JJ., concur.

BULLION MONARCH MINING, INC., Appellant, *v.*
BARRICK GOLDSTRIKE MINES, INC., Respondent.

No. 61059

March 26, 2015 345 P.3d 1040

Certified questions under NRAP 5 concerning whether the rule against perpetuities applies to an area-of-interest provision in a commercial mining agreement for the payment of royalties and, if so, whether reformation of the agreement is available under NRS 111.1039. United States Court of Appeals for the Ninth Circuit; Sidney R. Thomas, Chief Circuit Judge, M. Margaret McKeown and William A. Fletcher, Circuit Judges.

Property owner brought action against mine operator, seeking royalty payments from after-acquired claims in area of interest. The federal district court granted summary judgment in favor of operator. Property owner appealed. The United States Court of Appeals for the Ninth Circuit certified questions to the Nevada Supreme

Court. The supreme court, CHERRY, J., held that common-law rule against perpetuities did not apply to area-of-interest royalties created by commercial mining agreements.

Question answered.

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

Parsons, Behle & Latimer and *Michael R. Kealy*, Reno; *Parsons, Behle & Latimer* and *Francis M. Wikstrom*, Salt Lake City, Utah, for Respondent.

Baker & Hostetler LLP and *Mary P. Birk*, Denver, Colorado, for Amicus Curiae Mary Ann Schmidt.

1. PERPETUITIES.
   Nevada's common-law rule against perpetuities, as codified by state constitution, which stated that no interest was good unless it was required to vest, if at all, not later than 21 years after some life in being at the creation of the interest, did not extend to area-of-interest royalties created by commercial mining agreements; courts developed the rule to promote public policy by ensuring that property remained alienable, applying the rule to area-of-interest royalty agreements did not further public policy, and Legislature had said as much by exempting commercial, nondonative transfers from the statutory rule against perpetuities. Const. art. 15, § 4.
2. FEDERAL COURTS.
   When answering certified questions, the supreme court's review is limited to the facts provided by the certification order.
3. PERPETUITIES.
   The common-law rule against perpetuities states that no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

The Ninth Circuit Court of Appeals certified two questions to this court concerning Nevada's rule against perpetuities. The first question asks whether Nevada's "Rule Against Perpetuities appl[ies] to an area-of-interest provision in a commercial mining agreement." The second asks whether, if the rule applies, courts may reform such agreements under NRS 111.1039(2). We accepted the certified questions and directed briefing.

[Headnote 1]

We conclude that Nevada's common-law rule against perpetuities does not extend to area-of-interest royalties created by commercial

mining agreements. Courts developed the rule to promote public policy by ensuring that property remained alienable. Applying the rule to area-of-interest royalty agreements does not further public policy. Our Legislature has said as much by exempting commercial, nondonative transfers from the statutory rule against perpetuities. Even though the statutory rule was not in effect when this agreement was made, we see no reason to disagree with the Legislature in our own policy analysis. Because we answer the first question negatively, we do not need to consider the second.

FACTS AND PROCEDURAL HISTORY

[Headnote 2]

"This court's review is limited to the facts provided by the certification order . . . ." *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 570, 289 P.3d 1199, 1207 (2012). Those facts are as follows.

Bullion Monarch Mining, Inc. (Bullion), alleges that Barrick Goldstrike Mines, Inc. (Barrick), owes royalty payments to Bullion under an area-of-interest provision in a 1979 agreement. According to Bullion, its predecessor-in-interest entered into the agreement with a mine operator, Barrick's predecessor-in-interest, to develop Bullion's predecessor's mining claims in the Carlin Trend.

The area-of-interest provision requires the mine operator to pay Bullion a royalty on production resulting from the operator's mining claims that the operator might subsequently acquire within the area of interest. Under the agreement, Bullion is to receive royalty payments on production from after-acquired claims in the area of interest for 99 years.

Bullion filed suit in Nevada federal district court seeking royalty payments on production from after-acquired claims in the area of interest. Barrick argued that it did not owe royalties because the area-of-interest provision is void under the rule against perpetuities. Bullion responded that the rule does not apply to area-of-interest royalty agreements. In the alternative, Bullion sought reformation of the agreement under NRS 111.1039(2).

The federal district court granted summary judgment to Barrick based on the rule against perpetuities. Bullion appealed. The Ninth Circuit Court of Appeals then certified these questions to this court.

DISCUSSION

[Headnote 3]

"The common-law rule [against perpetuities] is usually stated thus: No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." *Sarrazin v. First Nat'l Bank of Nev.*, 60 Nev. 414, 418, 111 P.2d 49, 51 (1941) (internal quotation omitted). In Nevada, the rule

is codified in our Constitution: "No perpetuities shall be allowed except for eleemosynary purposes." Nev. Const. art. 15, § 4. But in 1987, Nevada adopted a statutory rule against perpetuities. *See* NRS 111.1031; 1987 Nev. Stat., ch. 25, §§ 2-8, at 62-65. The new statutes added a wait-and-see provision, which, as amended, gives contingent property interests 365 years to vest before they are invalidated. *See* NRS 111.1031(1)(b). The statutory scheme exempts nondonative transfers from the rule against perpetuities. NRS 111.1037(1). It also lets courts reform agreements made before its enactment to bring them into conformity with the rule. NRS 111.1035. Nevada's statute was not in effect at the time of the agreement at issue in this case.

We are thus confronted with the question of whether Nevada's common-law rule against perpetuities, as codified by the Nevada Constitution, applies to commercial mining agreements for the payment of area-of-interest royalties. We hold that it does not.

Barrick argues that the perpetuities provision in the Nevada Constitution confines our analysis of the rule. It argues that we ought to apply the rule as it existed when the Constitution was adopted. It then asserts that, because commercial agreements may have been subject to the rule in 1864, all commercial agreements are still subject to the common-law rule. We disagree.

As a creature of the common law, the rule against perpetuities is not static. Our Constitution may have adopted the common-law rule, but it did not freeze the rule's application. *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 Const. Comment. 427, 433 (2007). The meanings of the Constitution's words remain constant, but their application may vary with the circumstances of time and place. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95-118 (2010) (distinguishing between discovery of textual meaning and application of text to case at bar). For example, when interpreting the Second Amendment, the United States Supreme Court reasoned that "arms" was not limited to weapons in existence at our nation's founding:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e. g.*, *Reno v. American Civil Liberties Union*, 521 U. S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e. g.*, *Kyllo v. United States*, 533 U. S. 27, 35–36 (2001), the Second Amendment extends, prima facie, to all instruments that constitute

> bearable arms, even those that were not in existence at the time of the founding.

District of Columbia v. Heller, 554 U.S. 570, 582 (2008).

We confronted a similar issue in *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974). There, this court considered NRS 1.030, which states that " '[t]he common law of England, so far as it is not . . . in conflict with [Nevada or federal law] shall be the rule of decision in all courts of this State.'" *Id.* at 399, 528 P.2d at 1014 (quoting NRS 1.030). In spite of this statute, this court refused to apply the old common-law rule of interspousal immunity. *Id.* at 404, 528 P.2d at 1017. This court noted that "[h]aving been created and preserved by the courts, the doctrine is subject to amendment, modification and abrogation by the courts if current conditions so dictate." *Id.* at 399, 528 P.2d at 1014. The court concluded that "we believe that the time has arrived to abrogate the doctrine [of interspousal immunity]." *Id.* at 403, 528 P.2d at 1017. The common law, though adopted in broad form by statute, continued to evolve as new circumstances required new application.

Likewise, in our case, the word "perpetuities" in the Nevada Constitution applies to precisely that: perpetuities. But we must for the first time decide whether an area-of-interest royalty is indeed an unenforceable perpetuity under the common law of Nevada. This inquiry into the common law is informed by both precedent and policy.

Nineteenth century legal dictionaries define perpetuities in reference to donative transfers, not commercial ones. An 1888 legal dictionary provides an example of a trust income that, upon the death of the beneficiary, is conferred upon his son, and after the son's death to his son, and so on:

> Perpetuity properly signifies a disposition of property by which its absolute vesting is postponed forever; as, for instance, if property were conveyed to trustees upon trust to pay the income of A. for life, and after his death to his eldest son for life, and after *his* death to *his* eldest son, and so on. Such dispositions are contrary to the policy of the law, because they "tie up" property and prevent its free alienation.

2 Stewart Rapalje and Robert L. Lawrence, *A Dictionary of American and English Law* 953 (Jersey City, N.J., Frederick D. Linn & Co., 1888), *available at* http://goo.gl/yiEmzA. An 1850 legal dictionary defines perpetuity as "[t]he condition of an estate being rendered *perpetually* . . . unalienable by the act of the proprietors." Henry James Holthouse, *A New Law Dictionary* 302 (Boston, Charles C. Little and James Brown, 2d ed. 1850), *available at* http://goo.gl/ABNUp5. These definitions do not appear to contem-

plate a business agreement that might outlive the real persons executing it, but won't outlive the business entities that own the interest. And because royalty interests can be exchanged, bought, or sold, there is no obvious restraint on alienation. Indeed, Barrick and Bullion were not the original parties to the agreement; they acquired those interests. This shows that alienation is not restricted in the traditional sense, where property is tied up with descendants through the dead-hand power of century-ago settlors. So it is not obvious from the definition of "perpetuity" that it encompasses commercial mining interests.

While the traditional articulation of the rule against perpetuities does not distinguish between commercial and donative transfers, *see Sarrazin*, 60 Nev. at 418, 111 P.2d at 51 (stating common-law rule without distinguishing between commercial and donative transfers), the modern trend is to not apply the rule rigidly or mechanistically. 70 C.J.S. *Perpetuities* § 10 (2014). Many courts refuse to apply the rule where its purposes will not be served. *Id.* The rule developed "to curb excessive dead-hand control of property retained in families through intergenerational transfers." Restatement (Third) of Prop.: Servitudes § 3.3 cmt. b (2000). Thus, courts have held that certain commercial agreements are not subject to the common-law rule against perpetuities because to hold otherwise would contravene public policy. *See Atl. Richfield Co. v. Whiting Oil & Gas Corp.*, 320 P.3d 1179, 1184 (Colo. 2014) ("[W]e have avoided applying the rule against perpetuities to certain types of interests in commercial settings where we have concluded that the purposes of the common law rule would not be advanced.").[1]

[1]*See also Weber v. Texas Co.*, 83 F.2d 807, 808 (5th Cir. 1936) ("The [oil lease] option under consideration is within neither the purpose of nor the reason for the rule. . . . [The option] does not restrain free alienation by the lessor. He may sell at any time . . . . The option is therefore not objectionable as a perpetuity."); *Bauermeister v. Waste Mgmt. Co. of Neb.*, 783 N.W.2d 594, 600 (Neb. 2010) ("There are sound public policy reasons which support the conclusion that contractual options to repurchase, such as the one at issue in this case, are not subject to the rule against perpetuities."); *Metro. Transp. Auth. v. Bruken Realty Corp.*, 492 N.E.2d 379, 385 (N.Y. 1986) ("[W]e hold that the rule against remote vesting does not apply to preemptive rights in commercial and governmental transactions . . . ."); *Rich, Rich & Nance v. Carolina Constr. Corp.*, 558 S.E.2d 77, 80 (N.C. 2002) ("[O]ur common law rule against perpetuities does not exclude commercial interests from its application. . . . [However, c]ommercial transactions that do not violate the underlying policies behind the rule against perpetuities . . . do not fit under the umbrella of the common law rule."); *Producers Oil Co. v. Gore*, 610 P.2d 772, 774 (Okla. 1980) (agreeing with federal district court that the rule against perpetuities "should not apply and no worthwhile social or economic purpose is served by applying it to this common, frequent and useful type of oil and gas transaction. The provision in question does not clog alienation." (citation omitted)); *Robroy Land Co., Inc. v. Prather*, 622 P.2d 367, 371-72 (Wash. 1980) ("By so holding, we believe we more nearly meet the needs of a commercial society than by strictly enforcing the rule against perpetuities as it has come to us from the common law.").

For example, in *Juliano & Sons Enterprises, Inc. v. Chevron, U.S.A., Inc.*, 593 A.2d 814, 818-19 (N.J. Super. Ct. App. Div. 1991), a New Jersey appellate court decided that the rule against perpetuities does not apply to commercial transactions. *Juliano* is similar to this case because the transaction at issue took place before the enactment of New Jersey's statutory rule. *Id.* at 815, 817. Even though the statutory rule was not in effect at the time of the transaction, the court applied it anyway in order "to effectuate the current policy declared by the legislative body." *See id.* at 819. The court noted that "[t]he fact that nondonative commercial transactions are excluded from the Act is not dispositive" of the issue. *Id.* at 818. The court acknowledged that the "Legislature, as the authoritative source of public policy, has now decided the types of transactions which should be subject to the rule against perpetuities and which should not." *Id.* at 819. The court reasoned that "[n]either the Legislature nor this court can perceive any danger to titles or alienability of real properties requiring continued application of the rule to nondonative commercial transactions even where they occurred prior to the effective date of the Act." *Id*. The court concluded that "the nondonative commercial transaction . . . is no longer subject to the common-law rule against perpetuities." *Id.* at 815.

The Colorado Supreme Court very recently refused to apply the rule against perpetuities to a 25-year option to repurchase a shale oil property. *Atl. Richfield Co.*, 320 P.3d at 1181. The court said that "we will apply the rule against perpetuities only where the purposes of the rule are served." *Id.* at 1187 (quotation omitted). "Looking to whether the purposes of the common law rule are served," the court reasoned "that the . . . option did not discourage valuable improvements to the land" because each party possessed sufficient incentives to improve or invest in the land. *Id.* at 1190. Accordingly, the court held that the common-law rule against perpetuities did not apply. *See id.* at 1181.

An area-of-interest royalty agreement is an agreement whereby one party agrees to pay a portion of not-yet-acquired mineral interest's output to the other party because that mineral interest lies within an area of interest. The provision may exist, for example, in an agreement for the sale of a mineral interest. The mineral interest's current owner is often "of the opinion that it is as a result of his efforts that the [interest buyer] is in the 'area' and that he should participate in any proceeds derived from that locale." Larry D. Clark, *Area of Interest Provisions*, 12C Rocky Mtn. Min. L. Inst. 6, 6-1 (1981). It is often unclear how far a mineral vein will run. The owner of the interest wishes to receive, in a sense, a finder's fee in the form of a royalty, in case the mine operator discovers that the vein runs farther than the location of the conveyed mineral interest. *See* Mark T. Nesbitt, *Area of Interest Provisions—Two-Edged Swords*, 35 Rocky Mtn. Min. L. Inst. 21, § 21.02 (1989).

We are persuaded that public policy weighs against applying the rule against perpetuities to area-of-interest royalty agreements. Because such provisions compensate explorers, applying the rule this way appears efficient. And because the agreement is a commercial one, there is no human decedent exercising dead-hand control over still-living descendants. *Cf. Atl. Richfield*, 320 P.3d at 1184 ("[T]he vesting period of the common law rule, based on lives in being plus twenty-one years, makes little sense in the world of commercial transactions."). Further, as noted above, even if the interest remains on the land, nothing appears to prohibit alienation of the interest. Bullion and Barrick are both successors in interest, not by birth, but by commercial exchange. This is not the kind of "entailed estate[ ]" that the rule against perpetuities was intended to prevent. *Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 741 (Andrew J. Marsh off. rep. 1866); *see* Restatement (Third) of Prop.: Servitudes § 3.3 cmt. b (2000). Our Legislature has determined that, as a matter of policy, nondonative transfers should not be subject to the rule against perpetuities. *See* NRS 111.1037. We see no reason to disagree with this policy in our application of the rule. *Cf. Juliano*, 593 A.2d at 819 ("Neither the Legislature nor this court can perceive any danger . . . requiring continued application of the rule to nondonative commercial transactions even where they occurred prior to the effective date of the Act.").

Therefore, in response to the first certified question, we answer that the rule of perpetuities does not apply to area-of-interest royalty provisions in commercial mining contracts. Because the rule does not apply, there is no need to address the second certified question.

HARDESTY, C.J., and PARRAGUIRRE, DOUGLAS, SAITTA, GIBBONS, and PICKERING, JJ., concur.

MICHAEL M. BLUESTEIN, APPELLANT, *v.* ELLEN G. BLUESTEIN, NKA ELLEN GREEN, NKA ELLEN GREEN-MILLER, RESPONDENT.

No. 62308

March 26, 2015 345 P.3d 1044

Appeal from a post-divorce decree order regarding child custody. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Ex-wife requested that the court modify the child custody designation to provide her with primary physical custody so as to modify child support. The district court granted ex-wife's request, and

ex-husband appealed. The supreme court, DOUGLAS, J., held that: (1) child's best interest must be the primary consideration for modifying custody, and the *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), 40-percent guideline shall serve as a tool in determining what custody arrangement is in the child's best interest; and (2) the district court abused its discretion by failing to set forth specific findings that modifying the parties' custodial agreement to designate ex-wife as primary physical custodian, so as to modify child support, was in the best interest of the child.

Reversed and remanded.

Urban Law Firm and *Seth T. Floyd*, Las Vegas, for Appellant.

McFarling Law Group and *Emily M. McFarling*, Las Vegas, for Respondent.

1. CHILD CUSTODY.
   The district court has authority to review and modify a custodial agreement once a modification request is made by either party.
2. CHILD CUSTODY.
   Child's best interest must be the primary consideration for modifying custody, and the *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), 40-percent guideline, providing that if each parent has physical custody of the child at least 40 percent of the time, they share joint physical custody, serves as a tool in determining what custody arrangement is in the child's best interest.
3. CHILD SUPPORT.
   Physical custody arrangement governs the child support award.
4. CHILD SUPPORT.
   When parties share joint physical custody of a child, the higher-income parent is obligated to pay the lower-income parent the difference between the parents' statutorily calculated child support amounts.
5. CHILD SUPPORT.
   When one parent has primary physical custody, the noncustodial parent must pay child support based on the statutory formulas. NRS 125B.070, 125B.080.
6. CHILD CUSTODY.
   Public policy encourages parents to enter into private custody agreements for co-parenting. As such, parties in family law matters are free to contract regarding child custody, and such agreements are generally enforceable; terms upon which the parties agree will control until one or both of the parties move the court to modify the custody agreement.
7. CHILD CUSTODY.
   Once parties move the court to modify an existing private child custody agreement, the court must use the terms and definitions provided under Nevada law, and the parties' definitions no longer control.
8. CHILD CUSTODY.
   Parties' agreement to share joint physical custody controlled until ex-wife filed her motion requesting that the district court modify the custody agreement and designate her as the primary physical custodian, and once ex-wife filed her motion, the district court had authority to review the parties' timeshare arrangement, determine whether the parties shared joint

physical custody under Nevada law, and modify the agreement accordingly; while ex-wife did not request a modification of the actual timeshare arrangement, by requesting a modification to the physical custody designation, she was asking the district court to review the parties' child custody agreement and apply current Nevada law.

9. Child Custody.

The district court abused its discretion by failing to set forth specific findings that modifying the parties' custodial agreement to designate ex-wife as primary physical custodian, so as to modify child support, was in the best interest of the child; instead of considering the child's best interest in interpreting and modifying the parties' custodial arrangement, the district court applied the *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), 40-percent guideline, providing that if each parent has physical custody of the child at least 40 percent of the time, they share joint physical custody, to determine if ex-husband had the child at least 40 percent of the time, and therefore, shared joint physical custody of the child with ex-wife, and the district court strictly applied *Rivero*'s 40-percent guideline as the sole factor in deciding ex-wife's motion to modify the parties' custody agreement. NRS 125.510(2).

10. Child Custody.

The *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), 40-percent guideline, providing that if each parent has physical custody of the child at least 40 percent of the time, they share joint physical custody, should not be so rigidly applied that it would preclude joint physical custody when the district court has determined in the exercise of its broad discretion that such a custodial designation is in the child's best interest; *Rivero*'s 40-percent guideline does not abrogate the district court's focus on the child's best interest.

11. Child Support.

When a party is seeking a modification to the custodial designation solely to receive a decrease in his or her child support obligation, it is vital that the district court consider whether such modification is in the child's best interest.

Before the Court En Banc.

OPINION

By the Court, Douglas, J.:

In this child custody case, the parties entered into an agreement for joint custody at the time of their divorce, and seven years later the mother requested that the district court modify the child custody designation to provide her with primary physical custody, so as to modify child support, in accordance with *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009). *Rivero* established a workable formula to assist courts in determining when a joint physical custody arrangement exists by providing that if each parent had physical custody of the child at least 40 percent of the time, they shared joint physical custody. Here, the mother requested that the district court modify the joint custody designation to provide her with primary physical custody because the father did not have the child at least 40 percent

of the time under the parties' custodial agreement. The district court granted the mother's request based on the amount of time the father had the child each week but failed to consider whether the modification was in the child's best interest.

[Headnotes 1, 2]

We hold that a district court has authority to review and modify a custodial agreement once a modification request is made by either party. We further hold that the child's best interest must be the primary consideration for modifying custody and *Rivero*'s 40-percent guideline shall serve as a tool in determining what custody arrangement is in the child's best interest. Because the district court did not consider the child's best interest when modifying custody, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Ellen and Michael Bluestein were married for 13 years and had one child together. In 2004, they entered a stipulated divorce decree, which provided that Michael would have the child from 5 p.m. on Thursday to 9:30 a.m. on Sunday, Ellen would have the child the rest of the week, and the parties would alternate custody on holidays. The decree did not identify whether this arrangement was joint or primary physical custody, but one month after the divorce decree was entered, the parties filed a parenting agreement that was adopted by the court and provided that they shared joint legal and physical custody of the child. As for child support, it was not addressed in either the divorce decree or the parenting agreement, and the parties indicated that neither party was obligated to pay support.

[Headnotes 3-5]

In 2011, Michael began receiving public assistance and the Nevada Department of Health and Human Services, through a proceeding separate from the divorce matter, sought reimbursement from Ellen for a portion of the state aid received by Michael as her child support obligation.[1] A hearing master recommended that Ellen reimburse the state $82 each month for child support. Ellen objected to the master's recommendation and filed the underlying motion in the divorce matter requesting that the district court designate her as the child's primary physical custodian in accordance with *Rivero*, 125 Nev. 410, 216 P.3d 213, which was decided after the court ad-

[1]The physical custody arrangement governs the child support award. When parties share joint physical custody of a child, the higher-income parent is obligated to pay the lower-income parent the difference between the parents' statutorily calculated child support amounts. *Rivero*, 125 Nev. at 437, 216 P.3d at 232; *Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998). When one parent has primary physical custody, the noncustodial parent must pay child support based on the statutory formulas. *See* NRS 125B.070; NRS 125B.080; *Rivero*, 125 Nev. at 436, 216 P.3d at 231.

opted the parties' parenting agreement. Ellen argued that Michael only had the child 38 percent of the time under the agreed custodial arrangement.

The district court held a hearing on Ellen's motion and considered, among other evidence, the child's statement that for as long as the child could remember, Michael's custodial time lasted from 5 p.m. on Thursdays until 9:30 a.m. on Sundays. Based on that evidence and the timeshare set forth in the parties' agreement, the district court entered an order concluding that Ellen had primary physical custody of the child because Michael had the child only 38.393 percent of the time. The court further stated that even if it were to assume that Michael picked the child up from school on Thursdays, thereby adding two extra hours to his weekly timeshare, his resulting total timeshare would only be 39.583 percent.

Upon Michael's motion for reconsideration, the district court held an evidentiary hearing. Because Thursday was the only custodial day in dispute at that point, the court heard evidence regarding the time that each party spent with the child and their responsibilities regarding the child on Thursdays. After the hearing, the district court entered an order providing that "only one parent should be assigned as the custodial parent on Thursdays . . . [and] the mother was the primary parent who provided supervision for the child and made decisions regarding the child for the majority of the time on Thursdays." Thus, the court designated Ellen as the child's primary physical custodian. The court's order did not state whether this modification was in the child's best interest. Instead, the court rested the decision on its factual determination that Ellen had the child 260 days and Michael had the child 105 days in 2011, and therefore, Ellen had primary physical custody. The court remanded the matter to the child support master for further determination as to child support. Michael appeals and challenges the designation of Ellen as the child's primary physical custodian.

DISCUSSION

Modifying custody agreements

On appeal, we must decide whether the district court properly modified an agreed-upon custodial arrangement in accordance with *Rivero*, 125 Nev. 410, 216 P.3d 213; NRS 125.480(1); and NRS 125.510(2). As a threshold matter, we must determine whether the district court appropriately considered Ellen's motion when she did not request a change in the parties' timeshare arrangement, and instead, only requested a change in the custody designation. Michael argues that because Ellen did not request a change in the actual timeshare, the district court lacked authority to modify custody and should have enforced the agreement as written.

[Headnotes 6, 7]

Public policy encourages parents to enter into private custody agreements for co-parenting. *See St. Mary v. Damon*, 129 Nev. 647, 658-59, 309 P.3d 1027, 1035-36 (2013); *Rennels v. Rennels*, 127 Nev. 564, 569, 257 P.3d 396, 399 (2011). As such, parties in family law matters are free to contract regarding child custody, and such agreements are generally enforceable. *Rivero*, 125 Nev. at 429, 216 P.3d at 226-27 (acknowledging that courts will generally enforce parenting agreements as long as "they are not unconscionable, illegal, or in violation of public policy"). The terms upon which the parties agree will control until one or both of the parties move the court to modify the custody agreement. *Id.* at 429, 216 P.3d at 226. "[O]nce parties move the court to modify an existing child custody agreement, the court must use the terms and definitions provided under Nevada law, and the parties' definitions no longer control." *Id.* at 429, 216 P.3d at 227.

[Headnote 8]

In this case, the parties' agreement to share joint physical custody controlled until Ellen filed her motion requesting that the district court modify the custody agreement and designate her as the primary physical custodian. While Ellen did not request a modification of the actual timeshare arrangement, by requesting a modification to the physical custody designation, she was asking the district court to review the parties' child custody agreement and apply current Nevada law. Therefore, we conclude that once Ellen filed her motion, the district court had authority to review the parties' timeshare arrangement, determine whether the parties shared joint physical custody under Nevada law, and modify the agreement accordingly. *See Rennels*, 127 Nev. at 569, 257 P.3d at 399 (explaining that this court reviews purely legal matters de novo).

Child's best interest is paramount when modifying custody

[Headnote 9]

Once the issue of custody is brought before the court, the standards under Nevada law for modifying custody control. When modifying a joint custody agreement, the court must consider whether such modification is in the child's best interest. NRS 125.510(2). Instead of considering the child's best interest in interpreting and modifying the parties' custodial arrangement here, the district court applied *Rivero*'s 40-percent guideline to determine if Michael had the child at least 40 percent of the time, and therefore, shared joint physical custody of the child with Ellen without considering the child's best interest.

In *Rivero*, the parties had agreed to joint physical custody during their divorce but had created a timeshare arrangement where the

mother had the child five days each week. 125 Nev. at 418, 216 P.3d at 219. A year after the divorce, the mother filed a motion requesting that the court recognize that she had de facto primary physical custody or, in the alternative, modify custody. *Id.* The father filed a countermotion requesting a modification to the timeshare arrangement to reflect the parties' agreement to share joint physical custody. *Id.* The district court concluded that the parties had intended a joint physical custody arrangement and thus ordered a modification to give the parties an equal timeshare. *Id.* at 419, 216 P.3d at 220.

On appeal, in recognizing that the Nevada Legislature had not explicitly defined joint custody, this court set forth parameters for the purpose of clarifying which timeshare arrangements qualified as joint physical custody. *Id.* at 423, 216 P.3d at 222-23. This court began by recognizing that "'[i]n determining custody of a minor child . . . the sole consideration of the court is the best interest of the child.'" *Id.* at 423, 216 P.3d at 223 (alteration in original) (quoting NRS 125.480(1)). Further, it is in the child's best interest to "'have frequent associations and a continuing relationship with both parents . . . and [t]o encourage such parents to share the rights and responsibilities of child rearing.'" *Id.* (alterations in original) (quoting NRS 125.460). As such, there is a presumption that joint physical custody is in the best interest of the child if the parties agree. *Id.*; NRS 125.490(1). While a joint physical custody arrangement presumes a 50/50 timeshare, this court acknowledged that "there must be some flexibility in the timeshare requirement." *Rivero*, 125 Nev. at 424-25, 216 P.3d at 223-24.

Rivero provided a guideline to assist courts in determining when a timeshare arrangement qualifies as joint physical custody. *Id.* at 426, 216 P.3d at 224 (explaining that "we adopt this *guideline* to provide needed clarity for the district courts" (emphasis added)). This court held that if each parent had physical custody of the child at least 40 percent of the time, equal to at least 146 days over one calendar year, the parents shared joint physical custody. *Id.* at 427, 216 P.3d at 225. Regardless of this guideline, we reiterated that in custody matters, the child's best interest is paramount. *Id.* (providing that "absent evidence that joint physical custody is not in the best interest of the child, if each parent has physical custody of the child at least 40 percent of the time, then the arrangement is one of joint physical custody").

In this case, the district court strictly applied *Rivero*'s 40-percent guideline as the sole factor in deciding Ellen's motion to modify the parties' custody agreement. Absent from the court's order was any findings or evaluation of whether the modification is in the child's best interest. *See* NRS 125.510(2) (prohibiting a modification of a custodial arrangement unless the modification is in the child's best interest). Instead, the court focused on the exact time each parent

spent with the child to arrive at the conclusion that Michael had physical custody just a fraction short of 40 percent, and thus, Ellen was the child's primary physical custodian.

[Headnotes 10, 11]

We take this opportunity to clarify that our decision in *Rivero* was intended to provide consistency in child custody determinations, but it was never meant to abrogate the court's focus on the child's best interest. Thus, *Rivero*'s 40-percent guideline should not be so rigidly applied that it would preclude joint physical custody when the court has determined in the exercise of its broad discretion that such a custodial designation is in the child's best interest. *See Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007) (providing that the district court has broad discretionary powers when resolving issues of child custody). Considering the child's best interest is especially important in a case such as this where the district court has determined that one parent has the child almost 40 percent of the time and the timeshare allows the child frequent associations with both parents. *See* NRS 125.460(1) (providing that Nevada's policy is to "ensure that minor children have frequent associations and a continuing relationship with both parents after the parents . . . have dissolved their marriage"). Further, when a party is seeking a modification to the custodial designation solely to receive a decrease in his or her child support obligation, it is vital that the district court consider whether such modification is in the child's best interest. *See, e.g.*, *Rivero*, 125 Nev. at 431, 216 P.3d at 228 (explaining that the district court can modify a child support order if there has been a change in circumstances and such modification is in the best interest of the child); *see also* NRS 125B.030 (providing that the parent with physical custody may recover child support from the noncustodial parent).

Here, the district court abused its discretion by failing to set forth specific findings that modifying the parties' custodial agreement to designate Ellen as primary physical custodian was in the best interest of the child. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996) (this court reviews a district court's decision concerning custody for an abuse of discretion). On that basis, we reverse the district court's order and remand for further proceedings consistent with this opinion.

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

THE CADLE COMPANY, AN OHIO CORPORATION, APPELLANT, *v.* WOODS & ERICKSON, LLP, A NEVADA LIMITED LIABILITY PARTNERSHIP, RESPONDENT.

No. 63382

THE CADLE COMPANY, AN OHIO CORPORATION, APPELLANT, *v.* WOODS & ERICKSON, LLP, A NEVADA LIMITED LIABILITY PARTNERSHIP, RESPONDENT.

No. 63790

March 26, 2015 345 P.3d 1049

Consolidated appeals from a district court judgment in a collection and fraudulent transfer action and from a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Judgment creditor sued law firm client and law firm alleging client had fraudulently transferred assets in order to escape execution of the judgment and that the law firm had unlawfully facilitated the fraudulent transfers. Following a bench trial, the district court found in favor of creditor against client, but in favor of law firm on all claims, and awarded law firm costs and attorney fees. Creditor's appeals were consolidated. The supreme court, CHERRY, J., held that: (1) Nevada law does not recognize accessory liability for fraudulent transfers, and (2) the district court abused its discretion in awarding costs.

Affirmed in part as modified and reversed in part.

Adams Law Group and *James R. Adams* and *Assly Sayyar*, Las Vegas, for Appellant.

Royal & Miles, LLP, and *Gregory A. Miles*, Henderson, for Respondent.

1. FRAUDULENT CONVEYANCES.
   Nevada law does not recognize claims against nontransferees, those who have not received or benefited from the fraudulently transferred property, under theories of accessory liability. NRS 112.210.
2. APPEAL AND ERROR.
   A respondent may, without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument.
3. APPEAL AND ERROR.
   The supreme court will affirm a correct decision even if it was decided for the wrong reasons.
4. CONSPIRACY.
   In Nevada, civil conspiracy liability may attach where two or more persons undertake some concerted action with the intent to commit an unlawful objective, not necessarily a tort.

5. Fraudulent Conveyances.
   Creditors do not possess legal claims for damages when they are the victims of fraudulent transfers; instead, creditors have recourse in equitable proceedings in order to recover the property, or payment for its value, by which they are returned to their pre-transfer position. NRS 112.210, 112.220(2).
6. Fraudulent Conveyances.
   Nontransferee law firm could not be held liable to its client's judgment creditor for the client's fraudulent transfers under accessory liability theories of conspiracy, aiding and abetting, or concert of action. NRS 112.210.
7. Fraudulent Conveyances.
   Language in fraudulent transfers statute, permitting creditors to obtain "any other relief the circumstances may require," was intended to codify an existing but imprecise system, not to create a new cause of action. NRS 112.210(1).
8. Fraudulent Conveyances.
   Fraudulent transfers statute gives the creditor an equitable right to the property, not a claim for damages. NRS 112.210(1).
9. Costs.
   Statutes permitting recovery of costs give the district courts wide, but not unlimited, discretion to award costs to prevailing parties. NRS 18.020, 18.050.
10. Costs.
    Costs awarded must be reasonable, but parties may not simply estimate a reasonable amount of costs. NRS 18.005.
11. Appeal and Error.
    The supreme court will reverse a district court decision awarding costs if the district court has abused its discretion in so determining.
12. Costs.
    In order to retax and settle costs upon motion of the parties, a district court must have before it evidence that the costs were reasonable, necessary, and actually incurred. NRS 18.110.
13. Costs.
    The district court abused its discretion by awarding law firm costs for photocopies, runner service, and deposition transcripts in defending fraudulent transfer action, where law firm had not presented the district court with evidence enabling the district court to determine that those costs were reasonable, necessary, and actually incurred. NRS 18.005, 18.110.

Before the Court En Banc.

OPINION

By the Court, Cherry, J.:

In this case, we consider whether, under Nevada's fraudulent transfer law, a nontransferee law firm may be held liable for its client's fraudulent transfers under the accessory liability theories of conspiracy, aiding and abetting, or concert of action. We hold that Nevada, like most other jurisdictions, does not recognize accessory liability for fraudulent transfers. We therefore affirm the district court's judgment in favor of the law firm. We further hold, however,

that the district court abused its discretion by awarding costs to the law firm without sufficient evidence showing that each cost was reasonable, necessary, and actually incurred. Thus, we reverse, in part, the district court's post-judgment order awarding costs.

FACTS AND PROCEDURAL HISTORY

In 2004, Robert Krause retained respondent law firm Woods & Erickson, LLP, for estate planning services. The following year, Woods & Erickson created for Krause various legal entities, including an asset protection trust, into which Krause eventually transferred his assets. Meanwhile, appellant The Cadle Company (Cadle) was attempting to collect on a California judgment against Krause. After learning of the transferred assets, Cadle sued Krause and Woods & Erickson in the underlying action, alleging that Krause had fraudulently transferred assets in order to escape execution of the judgment and that Woods & Erickson had unlawfully facilitated the fraudulent transfers.

The district court dismissed Cadle's claims against Woods & Erickson without prejudice. Cadle later filed a second amended complaint asserting claims for conspiracy, aiding and abetting, and concert of action against Woods & Erickson, all arising from the fraudulent transfers. After the district court denied Woods & Erickson's motion to dismiss the second amended complaint or for summary judgment, Woods & Erickson offered Cadle $8,000 to settle the claims, which Cadle refused. The case went to trial.

During the bench trial, Cadle called Robert Woods of Woods & Erickson to testify as a witness. Woods testified that, at the time Woods & Erickson performed Krause's estate planning, the firm was not aware of Cadle's judgment against Krause. Woods further testified that he discussed Cadle's judgment with Krause after he learned of it. Krause told Woods that the judgment was not valid and that Krause was going to take care of it. Woods testified that he informed Krause that transfers of assets into Krause's trust could be set aside by a creditor. After hearing the evidence, the district court found in favor of Cadle against Krause. Concluding, however, that Cadle had not shown clear and convincing evidence of Woods & Erickson's intent to defraud or deceive, the district court entered judgment in favor of Woods & Erickson on all claims.

After trial, Woods & Erickson filed a memorandum of costs. Cadle moved to retax costs, arguing that Woods & Erickson did not sufficiently document the purported costs. Woods & Erickson opposed the motion to retax, attaching additional documentation to support its request for costs. The documentation consisted of an affidavit stating the approximate number and cost of photocopies, a process server bill, bills for deposition transcripts, filing fee invoices, and parking receipts. After a hearing, the district court awarded

Woods & Erickson the costs it requested, reducing only the runner service costs.

Woods & Erickson also filed a motion for attorney fees, arguing that it was entitled to them because Cadle rejected its $8,000 offer of judgment. After argument, the district court found that Woods & Erickson's offer of judgment was reasonable in amount and timing, that Cadle was unreasonable in rejecting the offer, and that the amount of attorney fees sought by Woods & Erickson was reasonable. The court thus awarded Woods & Erickson attorney fees.

Cadle separately appealed the judgment and the award of costs and attorney fees. We consolidated the appeals.

DISCUSSION

Accessory liability for fraudulent transfers

[Headnotes 1-3]

Cadle argues that the district court erred because it required Cadle to show actual intent to defraud or deceive in order to establish its accessory liability claims. Woods & Erickson asserts that, regardless of intent, Nevada does not recognize common-law civil conspiracy, aiding and abetting, or concert of action in the context of fraudulent transfers.[1] We agree with Woods & Erickson that nontransferees, *i.e.*, those who have not received or benefited from the fraudulently transferred property, are not subject to accessory liability for fraudulent transfer claims.

[Headnote 4]

A majority of jurisdictions appear to agree that there is no accessory liability for fraudulent transfers, albeit for different reasons. *See GATX Corp. v. Addington*, 879 F. Supp. 2d 633, 648-50 (E.D. Ky. 2012) (discussing the majority of courts' interpretation of accessory liability in the context of fraudulent transfers). Some courts reason that fraudulent transfers are not independent torts to which accessory liability can attach. *See FDIC v. S. Prawer & Co.*, 829 F. Supp. 453, 455-57 (D. Me. 1993).[2] In Nevada, however, civil con-

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[1]Cadle contends that this court does not have jurisdiction to address Woods & Erickson's argument because Cadle did not raise it on appeal and Woods & Erickson did not cross-appeal. "A respondent may, however, without cross-appealing, advance any argument in support of the judgment even if the district court rejected or did not consider the argument." *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994). And this court will affirm a correct decision even if it was decided for the wrong reasons. *Id.* at 756, 877 P.2d at 549. Thus, we may consider whether such claims exist in Nevada.

[2]*See also Wortley v. Camplin*, No. 01-122-P-H, 2001 WL 1568368, at *9 (D. Me. Dec. 10, 2001) (stating that "violation of Maine's Uniform Fraudulent Transfers Act . . . does not constitute a tort for purposes of liability for civil conspiracy" or aiding and abetting); *cf. Arena Dev. Grp., LLC v. Naegele Commc'ns, Inc.*, No. 06-2806 ADM/AJB, 2007 WL 2506431, at *5 (D. Minn.

spiracy liability may attach where two or more persons undertake some concerted action with the intent to commit an unlawful objective, not necessarily a tort. *See Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998). Hence, this reasoning is not applicable to Nevada law.

Other courts have rejected accessory liability because their respective state's fraudulent transfer statutes do not recognize claims against a nontransferee. *See FDIC v. Porco*, 552 N.E.2d 158, 160 (N.Y. 1990) (holding that the New York debtor and creditor statute did not create a remedy against nontransferees who have no control over the asset or have not benefited from the conveyance).[3] And a subset of these courts have reasoned that fraudulent transfer claims are traditionally claims for equitable relief, noting that it makes little sense to impose an equitable remedy against someone who never had possession of the property. *See, e.g.*, *Forum Ins. Co. v. Devere Ltd.*, 151 F. Supp. 2d 1145, 1148-49 (C.D. Cal. 2001); *GATX*, 879 F. Supp. 2d at 648. Likewise, federal courts making bankruptcy decisions have refused to create liability for nontransferees when statutes do not. *See Robinson v. Watts Detective Agency, Inc.*, 685 F.2d 729, 737 (1st Cir. 1982); *Mack v. Newton*, 737 F.2d 1343, 1357-58, 1361 (5th Cir. 1984); *Jackson v. Star Sprinkler Corp.*, 575 F.2d 1223, 1234 (8th Cir. 1978).

[Headnotes 5, 6]

We find this second line of reasoning persuasive. Creditors do not possess *legal* claims for damages when they are the victims of fraudulent transfers. Instead, creditors have recourse in *equitable* proceedings in order to recover the property, or payment for its value, by which they are returned to their pre-transfer position. *See*

Aug. 30, 2007) ("[W]hether a fraudulent transfer under the UFTA is a tort is uncertain. Accordingly, [the defendant] can not be held personally liable for aiding and abetting or conspiring to commit a violation of the UFTA.").

[3]*See also GATX*, 879 F. Supp. 2d at 648; *In re Total Containment, Inc.*, 335 B.R. 589, 615-16 (Bankr. E.D. Pa. 2005) (predicting that Pennsylvania law does not hold nontransferees liable); *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, No. 1:03-CV-0132-DFH, 2004 WL 771230, at *14 (S.D. Ind. Mar. 24, 2004) (holding that the Indiana Uniform Fraudulent Transfer Act's savings clause (or "catch-all provision") permits courts to creatively construct equitable remedies but does not create a substantive right of action); *Forum Ins. Co. v. Devere Ltd.*, 151 F. Supp. 2d 1145, 1148 (C.D. Cal. 2001) (holding that a nontransferee was not liable because California's Fraudulent Transfer Act only creates equitable remedies, not liability for damages); *FDIC v. White*, No. 3:96-CV-0560-P, 1998 WL 120298, at *2 (N.D. Tex. Mar. 5, 1998) (holding that the Texas fraudulent conveyance statute does not create liability for nontransferee coconspirator and it does not permit a court to create new substantive rights of action); *Warne Invs., Ltd. v. Higgins*, 195 P.3d 645, 656 (Ariz. Ct. App. 2008) (holding that the Arizona catchall provision does not create liability for aiding and abetting); *Freeman v. First Union Nat'l Bank*, 865 So. 2d 1272, 1276 (Fla. 2004) (reasoning that Florida's savings clause permitted the court to award other equitable relief but did not create new causes of action).

NRS 112.210; NRS 112.220(2). Nevada law does not create a legal cause of action for damages in excess of the value of the property to be recovered.

As federal courts have recognized, the long-standing distinction between law and equity, though abolished in procedure, continues in substance. *Coca-Cola Co. v. Dixi-Cola Labs.*, 155 F.2d 59, 63 (4th Cir. 1946); 30A C.J.S. *Equity* § 8 (2007). A judgment for damages is a legal remedy, whereas other remedies, such as avoidance or attachment, are equitable remedies. *See* 30A C.J.S. *Equity* § 1 (2007). Nevada's fraudulent transfer statute creates equitable remedies including avoidance, attachment, and, subject to principles of equity and the rules of civil procedure, injunction, receivership, or other relief. *See* NRS 112.210. This is in accord with the general rule that "the relief to which a defrauded creditor is entitled in an action to set aside a fraudulent conveyance is limited to setting aside the conveyance of the property." 37 C.J.S. *Fraudulent Conveyances* § 203 (2008).[4] There is generally no personal action against transferees unless specially authorized by statute. *Id.* § 202.

As an exception to the general rule, NRS 112.220(2) permits actions resulting in judgments against certain transferees. But such judgments are only in the amount of either the creditor's claim or the value of the transferred property, whichever is less. *Id.* The statutory scheme does not allow a creditor to recover an amount in excess of the transferred property's value, or to recover against a nontransferee. And no similar exceptional authorization creates claims against nontransferees.

[Headnote 7]

Furthermore, it does not make sense to apply an equitable remedy, voiding a transfer of property, against a party who never had possession of the transferred property. First, the third party has no control over the property and, therefore, cannot return it to the creditor. Second, once a creditor is made whole by a successful action against the transferor or transferee, he is no longer in need of an equitable remedy against a third party. True, NRS 112.210(1) permits creditors to obtain "any other relief the circumstances may require." But we agree with other jurisdictions that this language, taken from the Uniform Fraudulent Transfer Act, "was intended to codify an existing but imprecise system," not to create a new cause of action. *Freeman v. First Union Nat'l Bank*, 865 So. 2d 1272, 1276 (Fla. 2004); *see* NRS 112.250 ("This chapter must be applied and construed to effectuate its general purpose to make uniform the law with respect

[4]History also shows that avoidance was the proper remedy for fraudulent transfers. A 1377 enactment declared that, if a debtor colluded with friends to avoid collection by transferring assets to them and then fleeing to debtor sanctuary, the creditor may petition the king for a writ directing execution on the asset as if the transfers had never occurred. Melville Madison Bigelow, *The Law of Fraudulent Conveyances* 11-12 (rev. ed. 1911) (1890).

to the subject of this chapter among states enacting it."). *Compare* Unif. Fraudulent Transfer Act § 7, 7A U.L.A. 155-56 (2006), *with* NRS 112.210.

[Headnote 8]

Thus, NRS 112.210(1) gives the creditor an equitable right to the property, not a claim for damages. The Legislature did not create a claim against nontransferees. And although NRS 112.240 incorporates the traditional rules of law and equity into the statutory fraudulent transfer law, we agree with other states that such savings clauses do not create entirely new causes of action, such as civil conspiracy. *See Forum Ins. Co.*, 151 F. Supp. 2d at 1148; *Freeman*, 865 So. 2d at 1276. We therefore conclude that Nevada law does not recognize claims against nontransferees under theories of accessory liability. Because we so conclude, we do not need to decide whether the district court properly analyzed the accessory liability issues or whether the district court's factual findings on these issues were supported by substantial evidence. We affirm the district court's judgment.

Proper documentation of costs

The second contested order in these consolidated appeals concerns the district court's award of costs to Woods & Erickson. Cadle argues that the district court erred because the documentation was insufficient to justify some of the costs awarded. We agree.

[Headnotes 9-11]

NRS 18.020 and NRS 18.050 give district courts wide, but not unlimited, discretion to award costs to prevailing parties. Costs awarded must be reasonable, NRS 18.005; *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998), but parties may not simply estimate a reasonable amount of costs. *See Gibellini v. Klindt*, 110 Nev. 1201, 1205-06, 885 P.2d 540, 543 (1994) (holding that a party may not estimate costs based on hours billed). Rather, NRS 18.110(1) requires a party to file and serve "a memorandum [of costs] . . . verified by the oath of the party . . . stating that to the best of his or her knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding." Thus, costs must be reasonable, necessary, and actually incurred. We will reverse a district court decision awarding costs if the district court has abused its discretion in so determining. *Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005).

[Headnote 12]

In *Bobby Berosini, Ltd.*, we explained that a party must "demonstrate how such [claimed costs] were necessary to and incurred in the present action." 114 Nev. at 1352-53, 971 P.2d at 386. Although

cost memoranda were filed in that case, we were unsatisfied with the itemized memorandum and demanded further justifying documentation. *Id.* It is clear, then, that "justifying documentation" must mean something more than a memorandum of costs. In order to retax and settle costs upon motion of the parties pursuant to NRS 18.110, a district court must have before it evidence that the costs were reasonable, necessary, and actually incurred. *See Gibellini*, 110 Nev. at 1206, 885 P.2d at 543 (reversing award of costs and remanding for determination of actual reasonable costs incurred).

[Headnote 13]

Without evidence to determine whether a cost was reasonable and necessary, a district court may not award costs. *PETA*, 114 Nev. at 1353, 971 P.2d at 386. Here, the district court lacked sufficient justifying documentation to support the award of costs for photocopies, runner service, and deposition transcripts.[5] Woods & Erickson did not present the district court with evidence enabling the court to determine that those costs were reasonable and necessary.

Photocopies

Woods & Erickson did not submit documentation about photocopies other than an affidavit of counsel stating that each and every copy made was reasonable and necessary. In *PETA*, we rejected a claim for photocopy costs because only the date and cost of each copy were provided. *See PETA*, 114 Nev. at 1353, 971 P.2d at 386. We have also held that documentation substantiating the reason for each copy "is precisely what is required under Nevada law." *Vill. Builders 96*, 121 Nev. at 277-78, 112 P.3d at 1093.

Here, Woods & Erickson failed to show why the copying costs were reasonable or necessary. The affidavit of counsel *told* the court that the costs were reasonable and necessary, but it did not "*demonstrate* how such fees were necessary to and incurred in the present action." *PETA*, 114 Nev. at 1352-53, 971 P.2d at 386 (emphasis added). Because the district court had no evidence on which to judge the reasonableness or necessity of each photocopy charge, we conclude that the court lacked justifying documentation to award photocopy costs.

Runner service

The district court concluded that it lacked documentation for runner service costs. It awarded costs for runner service anyway, albeit for the lower amount of $350, because $581.65 was "an odd number." Because the district court lacked documentation, there is

[5]The other costs awarded, however, service costs, parking fees, and filing fees, were supported by sufficient justifying documentation, including receipts or court records, and we affirm the remainder of the order awarding costs.

no way that it could have determined whether the cost was reasonable or necessary. In addition, the $350 figure appears to be the kind of guesstimate of which we disapproved in *Gibellini v. Klindt*, 110 Nev. at 1206, 885 P.2d at 543 (holding that a party may not estimate costs based on hours billed). The district court therefore erred by awarding runner service costs after concluding that it lacked sufficient justifying documentation.

Deposition transcripts

The district court awarded costs for deposition transcription in the amount of $1,921.25. Yet the record shows that Woods & Erickson only submitted transcription invoices totaling $1,116.75. In an affidavit, Woods & Erickson's counsel stated that counsel was "only able to track down invoices for certain of the transcript expenses." The affidavit does not provide any itemization of, or justification for, the transcripts without invoices. *Cf. Vill. Builders*, 121 Nev. at 277-78, 112 P.3d at 1093 (holding Nevada law requires justifying documentation to substantiate the reason for each photocopy). Because there was no documentation of costs exceeding $1,116.75, the district court lacked sufficient evidence to award $1,921.25, and the award for this item must be reduced to $1,116.75.

CONCLUSION

We hold that Nevada law does not recognize accessory liability for fraudulent transfers. Therefore, we affirm the district court's judgment on the merits. We further hold that the district court erred by awarding photocopy costs, runner service costs, and deposition transcription costs above $1,116.75 because no evidence was presented showing that those costs were reasonable, necessary, and actually incurred. We thus reverse the portion of the district court's order awarding costs for the photocopy and runner service expenses, and we affirm as modified the award of costs for deposition transcripts. We have considered Cadle's other arguments, including those concerning the attorney fees award, and conclude that they lack merit. Accordingly, we affirm in part and reverse in part, as specified above.

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