In re PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.

PAMTP, LLC, Appellant, *v.* KENNETH F. POTASHNER; VTB HOLDINGS, INC.; STRIPES GROUP, LLC; SG VTB HOLDINGS, LLC; JUERGEN STARK; and KENNETH FOX, Respondents.

No. 83598

In re PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.

KENNETH F. POTASHNER; VTB HOLDINGS, INC.; STRIPES GROUP, LLC; SG VTB HOLDINGS, LLC; JUERGEN STARK; and KENNETH FOX, Appellants, *v.* PAMTP, LLC, Respondent.

No. 84971

In re PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION.

PAMTP, LLC, Appellant, *v.* KENNETH F. POTASHNER; VTB HOLDINGS, INC.; STRIPES GROUP, LLC; SG VTB HOLDINGS, LLC; JUERGEN STARK; and KENNETH FOX, Respondents.

No. 85358

June 6, 2024 549 P.3d 1189

Consolidated appeals from district court orders granting judgment on partial findings under NRCP 52(c) (Docket No. 83598), denying attorney fees (Docket No. 84971), and awarding costs (Docket No. 85358) in a corporate shareholder action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Affirmed (Docket No. 83598), reversed and remanded (Docket No. 84971), and affirmed in part and reversed in part (Docket No. 85358).

[Rehearing denied July 22, 2024]

[En banc reconsideration denied September 3, 2024]

McDonald Carano LLP and *George F. Ogilvie III*, *Rory Kay*, and *Chelsea Latino*, Las Vegas; *Holwell Shuster & Goldberg LLP* and *Daniel M. Sullivan*, *Scott M. Danner*, and *Jordan Pietzsch*, New York, New York, for PAMTP, LLC.

Holland & Hart LLP and *J. Stephen Peek* and *Robert J. Cassity*, Las Vegas; *Sheppard, Mullin, Richter & Hampton LLP* and *John P. Stigi, III*, Los Angeles, California, for Kenneth F. Potashner.

Snell & Wilmer, LLP, and *Richard C. Gordon*, *Kelly H. Dove*, and *Bradley T. Austin*, Las Vegas; *Dechert LLP* and *Joshua D. N. Hess*, San Francisco, California, and *David A. Kotler*, New York, New York, for Kenneth Fox; SG VTB Holdings, LLC; Juergen Stark; Stripes Group, LLC; and VTB Holdings, Inc.

Before the Supreme Court, Stiglich, Pickering, and Parraguirre, JJ.

OPINION

By the Court, Parraguirre, J.:

In *Parametric Sound Corp. v. Eighth Judicial District Court* (*Parametric I*), 133 Nev. 417, 401 P.3d 1100 (2017), a group of shareholders filed a class action lawsuit challenging Parametric Sound Corporation's merger with VTB Holdings, Inc. (VTBH). On writ review, we determined that the complaint should be dismissed for failure to plead a direct, as opposed to a derivative, claim but granted the class leave to replead certain claims (equity expropriation claims) that *may* have been direct pursuant to *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), *overruled by Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021). *Parametric I*, 133 Nev. at 428-29, 401 P.3d at 1109-10. The *Parametric I* parties subsequently settled, but PAMTP, LLC—comprising former shareholders who opted out of the *Parametric I* class settlement—brought this distinct case in May 2020. Adhering to *Parametric I*, PAMTP's complaint couched its claims as "equity expropriation" claims that were direct under *Gentile*. The district court disagreed, finding that PAMTP had failed to plead a direct claim, and granted respondents judgment under NRCP 52(c) in September 2021.

We conclude that the district court correctly determined that PAMTP failed to plead a direct claim. Following the judgment, but prior to PAMTP's appeal, the Delaware Supreme Court overruled *Gentile* and held that most equity expropriation claims are "exclusively derivative." *Brookfield*, 261 A.3d at 1266. *Gentile*'s overruling largely forecloses a direct claim under a theory of equity expropriation. Moreover, we conclude that PAMTP has not satisfied Delaware's "direct harm test" adopted by this court in *Parametric I*. 133 Nev. at 427, 401 P.3d at 1108. Thus, the district court did not err in granting respondents judgment under NRCP 52(c), and we affirm the appeal in Docket No. 83598. However, we reverse in part the district court's costs award to respondents in consolidated Docket No. 85358 and reverse and remand the district court's order denying respondents attorney fees in consolidated Docket No. 84971.

FACTS AND PROCEDURAL HISTORY

Parametric was a small, Nevada-incorporated, publicly traded company that produced audio technology for home entertainment, video games, and other related uses. In January 2014, Parametric merged with VTBH, a larger company that was most well-known for producing audio headsets for video games via its subsidiary, Turtle Beach. As we explained in *Parametric I*, the parties structured the merger as a "reverse triangular merger," whereby VTBH would merge into a Parametric subsidiary, and Parametric would issue new shares to VTBH owners as consideration. 133 Nev. at 419, 401 P.3d at 1102-03. Thus, unlike in a traditional merger, Parametric's shareholders did not receive cash or stock in exchange for their shares. Rather, they kept their shares, but their combined ownership was reduced from 100% to roughly 19% due to the dilutive effect of the new share issuance. VTBH owners, meanwhile, received about 81% of shares in the newly created company, which was renamed Turtle Beach Corporation.

Following the merger, a group of Parametric shareholders filed a class action lawsuit against Parametric, VTBH, and all six members of Parametric's board of directors, which included Parametric's CEO, Kenneth Potashner. *See Parametric I*, 133 Nev. at 420, 401 P.3d at 1103. The complaint alleged (1) breach of fiduciary duties as to Parametric's board and (2) aiding and abetting these fiduciary breaches by Parametric and VTBH. *Id.* As explained above, we determined on writ petition that the complaint should be dismissed for failure to plead a direct claim but granted the class members leave to replead under *Gentile*. *Id.* at 428-29, 401 P.3d at 1109-10. The class repleaded, but the parties stipulated to a settlement in November 2019. Pursuant to the settlement, the district court entered a final judgment and order of dismissal with prejudice on May 19, 2020.

PAMTP—comprising former Parametric shareholders[1] who opted out of the *Parametric I* class settlement—brought this distinct case on May 20, 2020. Similar to *Parametric I*, the complaint alleged claims for (1) breach of fiduciary duty against five of the six members of Parametric's board[2] (collectively Directors) and (2) aiding and abetting this breach of fiduciary duty against VTBH; VTBH's

[1]The district court found that each individual member of PAMTP "held Parametric common stock on the date the merger closed. Each of them, however, sold that stock prior to assigning their claims to [PAMTP] in April 2020." This presents a factual difference from *Parametric I*, where class members still held shares at the time we issued our decision. *See Parametric I*, 133 Nev. at 427-28, 401 P.3d at 1108.

[2]These included Potashner, Elwood Norris, Seth Putterman, Robert Kaplan, and Andrew Wolfe. Director James Honoré, whom the *Parametric I* complaint had named but not made any allegations against, was not named in PAMTP's complaint. 133 Nev. at 420 n.7, 401 P.3d at 1103 n.7.

owners Stripes Group, LLC, and SG VTB Holdings, LLC; VTBH's CEO Juergen Stark; and Kenneth Fox, Managing General Partner of Stripes Group and manager of SG VTB Holdings.

On the eve of the August 2021 bench trial, PAMTP settled with all Directors except Potashner. Accordingly, the breach of fiduciary duty claim proceeded *only* against Potashner, whose conduct over the course of the merger forms the basis of PAMTP's allegations with regard to the breach of fiduciary duty claim. PAMTP asserts that Potashner knew the merger would be unfair to Parametric but misled Parametric's shareholders and directors by painting an overly optimistic financial outlook resulting from the merger while withholding information that was vital to an accurate evaluation. PAMTP also alleges that Potashner purposefully stalled efforts to grow Parametric's business in the months leading up to the merger so that the company would not increase in value and the merger would be less costly to VTBH. PAMTP further alleges that Potashner took these actions in order to enrich himself via the merger.

Despite remarking that "this case smells so bad," the district court granted judgment for VTBH, Potashner, Stripes Group, SG VTB Holdings, Stark, and Fox (hereinafter, respondents) pursuant to NRCP 52(c). The district court denied respondents' subsequent motion for attorney fees but granted respondents $1,169,983.86 in costs. PAMTP now appeals the judgment (Docket No. 83598) and the costs order (Docket No. 85358). Respondents appeal the order denying attorney fees (Docket No. 84971).

DISCUSSION

The district court did not err in granting respondents judgment pursuant to NRCP 52(c)

"NRCP 52(c) allows the district court in a bench trial to enter judgment on partial findings against a party when the party has been fully heard on an issue and judgment cannot be maintained without a favorable finding on that issue." *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012). "[I]n entering a Rule 52(c) judgment, the trial judge is not to draw any special inferences in the nonmovant's favor . . . [and] since it is a nonjury trial, the court's task is to weigh the evidence." *Id.* (internal quotation marks omitted). "Where a question of fact has been determined by the trial court, this court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence." *Id.* (quoting *Kockos v. Bank of Nev.*, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974)).

Here, the district court granted respondents an NRCP 52(c) judgment on three bases. First, PAMTP failed to establish that its claims were direct, as opposed to derivative. Second, PAMTP failed to rebut the business judgment rule presumption under NRS 78.138(3) and failed to show "actual fraud in the transaction" as required by NRS 78.211(1). Third, because PAMTP failed to establish a breach of fiduciary duty claim against Potashner, it had no claim for aiding and abetting against the nondirector parties.

As discussed below, we conclude that the district court correctly found that PAMTP failed to plead a direct claim. This finding alone warrants an NRCP 52(c) judgment in favor of respondents. Thus, we need not address the district court's other bases for granting respondents judgment.

PAMTP did not plead a direct claim

"A *derivative* claim is one brought by a shareholder on behalf of the corporation to recover for harm done to the corporation." *Parametric I*, 133 Nev. at 423, 401 P.3d at 1105 (emphasis added) (quoting *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 19, 62 P.3d 720, 732 (2003)). "Alternatively, shareholders have standing to bring suit for *direct* injuries they have suffered and that are separate from any injury the corporation may have suffered . . . ." *Id.* (emphasis added).

In *Parametric I*, this court "align[ed] [its] jurisprudence with Delaware's" and adopted the "direct harm test" set forth in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), to determine whether an action is direct or derivative. 133 Nev. at 427, 401 P.3d at 1108. This test asks "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* (quoting *Tooley*, 845 A.2d at 1033).

The *Parametric I* class pleaded their claims as direct pursuant to *Cohen v. Mirage Resorts, Inc.*, which held that shareholder claims challenging the validity of a merger due to director misconduct are direct. *Parametric I*, 133 Nev. at 422, 424, 401 P.3d at 1104, 1106. This court held that the class action could not proceed as direct under *Cohen* because their claims did not challenge a merger, given that the *Parametric I* shareholders still held shares of Parametric pursuant to the reverse triangular structure. *Id.* at 427-28, 401 P.3d at 1108. Still, this court noted that the class had alleged "[e]quity [d]ilution"—"that their stock's value was improperly diluted when Parametric issued new shares to compensate the [VTBH] shareholders." *Id.* at 428, 401 P.3d at 1109. The court explained that, under *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006), Delaware recognized "a certain class of equity dilution claims," called "*equity expropriation claims*," as both direct and derivative in nature. *Id.* at 429, 401 P.3d at 1109 (emphasis added). "Equity expropriation claims involve a controlling shareholder's or director's expropriation of value from the company, causing other shareholders' equity to be diluted." *Id.* Because the class complaint "suggest[ed] equity dilution," this court "conclude[d] that the shareholders should be allowed to amend their complaint to articulate equity expropriation claims, *if any such claims exist*." *Id.* at 429, 401 P.3d at 1109 (emphasis added).

Heeding *Parametric I*'s direction, PAMTP couched its claims—which were nearly identical to those brought in *Parametric I*—as direct "Equity Expropriation" claims pursuant to *Gentile*. PAMTP alleged that the merger, accomplished via breaches of fiduciary duty, diluted Parametric shareholders' equity interests. The district court disagreed, concluding that because PAMTP failed to prove that Parametric had a controlling shareholder, the complaint had not met an essential element of equity expropriation under Nevada law. *Cf. Parametric I*, 133 Nev. at 429, 401 P.3d at 1109 (explaining that "[e]quity expropriation claims involve a *controlling shareholder's* or director's *expropriation* of value from the company" (emphases added)). We note that this conclusion was erroneous because *Parametric I* clearly allowed for a *Gentile* claim via a "controlling shareholder's *or director's* expropriation of value," *id.* (emphasis added), and Potashner's director status thus may have foreseeably given rise to a direct equity expropriation claim.[3] As we explain below, however, the district court's error was harmless as a result of *Gentile*'s overruling by *Brookfield Asset Management v. Rosson*, 261 A.3d 1251 (Del. 2021).

The Delaware Supreme Court overruled *Gentile* only days after the district court issued its order granting NRCP 52(c) relief. *Brookfield*, 261 A.3d at 1280. *Brookfield* concluded that "when a corporation exchanges equity for assets of a stockholder who is already a controlling stockholder for allegedly inadequate consideration, the dilution/overpayment claim is *exclusively derivative*." 261 A.3d at 1266 (emphasis added). However, the court noted that these claims may become direct if the transaction results "in a shift in control from a diversified group of public equity holders to a controlling interest," a circumstance where *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (1986), "already provides for a direct claim."[4] *Brookfield*, 261 A.3d at 1266-67.

On appeal, PAMTP argues that its claims are direct under both *Brookfield* and *Tooley*. First, it argues that its claims fall into the subset of claims deemed direct in *Brookfield* because they "arise

[3]We further note that the district court erroneously concluded that Potashner's severance package—which included a severance payment and accelerated vesting of incentive stock options—was the "expropriation" giving rise to PAMTP's claim.

[4]*Revlon* holds that when the takeover of a company is inevitable, directors owe a fiduciary duty of "maximization of the company's value at sale for the stockholders' benefit," i.e., "getting the best price for the stockholders at a sale of the company." 506 A.2d at 182.

out of an improper *transfer* of the *shareholders' control* over Parametric to a *new controlling shareholder*." (Emphases added.) Second, it asserts the claims are direct under *Tooley* because (1) the shareholders suffer the harm of losing control of the corporation and (2) relief—compensation for the loss of control—would go to the shareholders rather than the corporation. *See* 845 A.2d at 1033.

We agree with respondents, however, that *Gentile*'s overruling largely foreclosed a direct claim under the theory of equity expropriation set forth in PAMTP's complaint. That said, *Gentile*'s overruling is not *completely* dispositive. As PAMTP's briefing indicates, *Tooley*'s analysis of whether the harm and benefit is directed at shareholders or the corporation is pivotal to a determination of whether a claim is direct or derivative. After all, *Brookfield* overruled *Gentile* because, in part, *Gentile* was in "analytical tension" and "irreconcilable" with *Tooley*. *Brookfield*, 261 A.3d at 1267. Pursuant to *Tooley*, *Brookfield* determined that harm incurred by stockholders in an equity expropriation via the dilution of economic and voting power "was not *independent* of the harm to the [corporation], but rather flowed indirectly to them in proportion to, and via their shares in, [the corporation]" and thus could only support a derivative claim. 261 A.3d at 1268. Here, PAMTP's complaint alleged that "[respondents] conspired to expropriate significant value from [Parametric], which caused all other stockholders' equity interests to be diluted" and that "[the] stock issuance . . . specifically diluted plaintiffs' and the rest of Parametric's stockholder base." Like *Brookfield*, it is challenging to see how this alleged harm, while plausibly direct in some respects, was entirely *independent* of the harm incurred by Parametric pursuant to *Tooley*.

We further agree with respondents that PAMTP's claims do not intuitively fit within the "shift in control" exception identified in *Brookfield*. First, PAMTP failed to plead a *Revlon* claim because it alleged that the shareholders were harmed by a *dilution* of their equity interest due to expropriation and not the *sale* of their shares for which the directors failed to fetch a fair price for surrendering control of the company. *Cf. Revlon*, 506 A.2d at 182 (holding that when the takeover of a company is inevitable, directors owe a fiduciary duty of "maximization of the company's value at sale for the stockholders' benefit"). Second, *Brookfield* implied that its exception applies where there is a change in control from a "diversified investor base to a *single controlling stockholder*." *Brookfield*, 261 A.3d at 1276 n.133 (emphasis added) (internal quotation marks omitted). This was not the case here, where PAMTP's control of the company was diluted by issuance of new shares amongst VTBH shareholders and not transferred to a single person or entity.[5]

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[5]Finally, we also note that *Revlon* appears to be in tension with Nevada corporate law, but we will not directly address that issue here, seeing that PAMTP

Thus, we conclude that while the district court applied erroneous reasoning to reach its determination, it correctly determined that PAMTP failed to plead direct claims. Because PAMTP's claims are not direct, respondents were entitled to judgment under NRCP 52(c). As comprised of former shareholders, PAMTP has no standing to pursue a derivative claim. *Cf. Cohen*, 119 Nev. at 19, 62 P.3d at 732. Therefore, we need not address the merits of PAMTP's breach of fiduciary duty and aiding and abetting claims because the district court correctly granted judgment to respondents.

The district court abused its discretion in awarding respondents pre-complaint costs

Following judgment, the district court awarded respondents a total of $1,169,983.86 in costs as the "prevailing party" under NRS 18.020. Nearly 70% of this sum (about $857,000) included costs that respondents incurred litigating the class action claims in *Parametric I*, before PAMTP filed its complaint on May 20, 2020. PAMTP challenges the entire costs award and alternatively asserts that the pre-complaint costs must be stricken.

"A district court's decision regarding an award of costs will not be overturned absent a finding that the district court abused its discretion." *Vill. Builders 96, LP v. U.S. Labs., Inc.*, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005). Here, because the district court did not err in entering an NRCP 52(c) judgment for respondents, they were entitled to costs as the "prevailing party" pursuant to NRS 18.020. Thus, the district court did not abuse its discretion in awarding respondents costs.

We agree with PAMTP, however, that the district court abused its discretion by awarding pre-complaint costs. To provide brief additional background, in January 2019—following the *Parametric I* decision and the shareholders' subsequent amended complaint in that action—the district court certified a class consisting of "[a]ll persons and/or entities that held shares of [Parametric] common stock on January 15, 2014," ostensibly for purposes of reaching a settlement. Shareholders were provided notice and opportunity to opt out of the class and, later, to object to the stipulated settlement. PAMTP members opted out of the settlement class and filed a new, separate complaint. PAMTP later agreed to consolidate its new lawsuit with the settled class action in June 2020.

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has not pleaded a *Revlon* claim. *See* NRS 78.138(5) ("Directors and officers are not required to consider, as a dominant factor, the effect of a proposed corporate action upon any particular group or constituency having an interest in the corporation."); *Guzman v. Johnson*, 137 Nev. 126, 131-32, 483 P.3d 531, 537 (2021) (holding that the "inherent fairness standard," which obligated directors "to show [a transaction's] inherent fairness from the viewpoint of the corporation and those interested therein," no longer applies in Nevada (internal quotation marks omitted)).

In awarding pre-complaint costs, the district court relied on the following language from PAMTP's complaint identifying the shareholder plaintiffs:

> The shareholders identified in the immediately preceding paragraph lawfully and validly *assigned* to [PAMTP] their *rights, titles and interests in any claims* arising from their ownership of Parametric stock, including any and all claims arising from or related to the Merger against Parametric or any other entity or individual that could be liable for the acts and/or omissions alleged in the litigation entitled *In re Parametric Sound Corporation Shareholders' Litigation* . . . (the "Class Action Litigation").

(Emphases added.) The district court read this paragraph to mean that by virtue of PAMTP's "assign[ment]" of certain shareholders' "rights, titles and interests" arising from the January 2014 merger, PAMTP "received and accepted all risks and benefits of the class litigation starting from when the individual assignors became involved in the lawsuit." This was a misreading. Instead, the paragraph explains that shareholders who opted out of the settlement assigned PAMTP their rights to pursue claims arising from the *same factual allegations* as the class action. Thus, PAMTP merely incorporated by reference the allegations in the class action. There is nothing to suggest that by doing so, PAMTP "accepted all risks and benefits of the class litigation," including liability for fees in that action. As PAMTP persuasively notes, "the whole point of opting out was to *forgo*" the risks and benefits of the class action—including any share of the settlement.[6]

Nor is the district court's second reason for awarding pre-complaint costs persuasive. The court concluded that because PAMTP would have sought "entitlement to pre-judgment interest accruing from the date of dilutive issuance, January 15, 2014," had it been the prevailing party, it would be inconsistent to bar respondents from recovering costs incurred over the same period. But as PAMTP again persuasively argues, this "interest" it would have foreseeably sought pertained to its prospective *damages*, a distinct category from *costs*.[7]

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[6]To this point, we note that PAMTP stipulated to consolidation on the basis that the district court's findings, prior rulings, and discovery in the previous class action suit would make subsequent litigation more efficient. But PAMTP emphasized that it would "not be bound by" the district court's May 2020 order dismissing the class action pursuant to the settlement.

[7]We also agree with PAMTP that the June 2020 consolidation does not create liability for pre-complaint costs because "[c]onsolidated cases retain their separate identities." *In re Est. of Sarge*, 134 Nev. 866, 870-71, 432 P.3d 718, 722 (2018).

Thus, seeing that the district court's award of pre-complaint costs was an abuse of discretion, we reverse in part that portion of the costs award in Docket No. 85358. The remainder of the costs award is affirmed.

The district court abused its discretion in denying respondents' motion for attorney fees

"We review a district court's decision regarding an award of attorney fees . . . for an abuse of discretion." *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 89, 343 P.3d 608, 614 (2015). Following trial, respondents moved for attorney fees under NRCP 68, which permits an award of attorney fees and costs to a party who makes an offer of judgment when "the offeree rejects an offer and fails to obtain a more favorable judgment." NRCP 68(f)(1). Respondents previously made two offers of judgment to PAMTP, initially for $1 on May 20, 2020, and later for $150,000 on May 28, 2021, both of which excluded a separate award of costs, attorney fees, and interest, and both of which PAMTP rejected. The district court denied respondents' motion for attorney fees. On appeal, respondents argue that NRCP 68 entitles them to fees because PAMTP failed to obtain a judgment in its favor at trial, as the district court granted an NRCP 52(c) judgment to respondents and PAMTP received $0.

The district court correctly concluded that the $1 offer did not entitle respondents to fees under NRCP 68 because this offer was neither reasonable nor made in good faith. *Cf. Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983) (explaining that in exercising its discretion to award fees and costs under NRCP 68, the district court must evaluate, among other factors, "whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith" and "whether the fees sought by the offeror are reasonable and justified in amount"). We see no error with respect to this conclusion.

With respect to the $150,000 offer, the district court determined that "the burden is upon [respondents], as the movants, to demonstrate the $150,000 exceeded the amount [PAMTP] incurred in attorney's fees, costs and expenses between May 20, 2020 and May 28, 2021." The district court also surmised that because *respondents* had incurred over $3 million in attorney fees during the period between the two offers of judgment, *PAMTP's* pre-offer legal fees likely exceeded $150,000. The court thus denied attorney fees to respondents with respect to the $150,000 offer because respondents "did not meet their burden." This was an abuse of discretion, as it was not respondents' burden to offer proof of PAMTP's attorney fees. *See Aguilar v. Lucky Cab Co.*, 140 Nev. 1, 3-4, 6-7, 540 P.3d 1064, 1067, 1069 (2024) (indicating that it is an NRCP 68 offeree's burden to establish its costs, expenses, interest, and allowable attorney fees that were otherwise excluded from the offer of judgment). Moreover, it was improper for the district court to have considered PAMTP's attorney fees because there is no indication that PAMTP is entitled to fees "by law or contract" pursuant to NRCP 68(g). *See id.* at 5, 540 P.3d at 1068; *see also Lee v. Patin*, No. 83213, 2024 WL 238082, at *2 (Nev. Jan. 22, 2024) (Order of Affirmance) (holding that NRCP 68(g) permits courts to consider attorney fees only when fees are "permitted by law or contract" and that appellant, who rejected offer of judgment and then lost at the summary judgment stage, "point[ed] to no underlying contract or statute supporting his argument that his fees should have been considered" for NRCP 68(g) purposes). It was also improper for the district court to have guessed as to the amount of PAMTP's fees without any evidence before it.

Further, without any evidence as to PAMTP's pre-offer taxable costs, expenses, or interest, it is plain that PAMTP did not attain a judgment at trial more favorable than respondents' $150,000 offer.[8] *See* NRCP 68(g). Thus, respondents are entitled to attorney fees pursuant to NRCP 68(f). We reverse the district court's order denying attorney fees to respondents and remand for the district court to determine the amount of fees it may properly award pursuant to *Beattie* and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).[9]

CONCLUSION

We affirm in part and reverse in part the consolidated appeals. The district court did not err in granting judgment on partial findings to respondents, given PAMTP's failure to plead direct claims. Therefore, we affirm the appeal in Docket No. 83598. We reverse in

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[8]We are not persuaded that, under these facts, PAMTP's $400,000 pretrial settlement with the Directors may be considered as a judgment for purposes of NRCP 68 analysis.

[9]The district court properly demonstrated that it considered the first three *Beattie* factors with respect to each offer. *Schwartz v. Est. of Greenspun*, 110 Nev. 1042, 1049, 881 P.2d 638, 642 (1994) ("The district court need not . . . make explicit findings as to all of the factors where support for an implicit ruling regarding one or more of the factors is clear on the record."). However, we see no indication that the district court considered whether the fees sought by respondents were "reasonable and justified in amount" pursuant to the fourth *Beattie* factor. 99 Nev. at 588, 668 P.2d at 274. The district court must, therefore, consider whether respondents' requested $3,915,171.30 in attorney fees incurred from the time of the second offer is "reasonable and justified" under *Beattie* and *Brunzell*. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 81, 319 P.3d 606, 615 (2014) (explaining that the district court must consider the *Brunzell* factors as part of its analysis under *Beattie*'s fourth factor).

part the costs award in Docket No. 85358, however, because the district court erroneously determined that respondents were entitled to costs predating PAMTP's May 2020 complaint. Finally, we reverse the district court's order denying respondents' request for attorney fees in Docket No. 84971 and remand for the district court to determine the amount of fees to which respondents are entitled pursuant to *Beattie* and *Brunzell*.

Stiglich and Pickering, JJ., concur.

IN THE MATTER OF THE PETITION OF KATHERINE ANNE P. AND MICHAEL ALLEN P. FOR THE ADOPTION OF A MINOR CHILD.

KATHERINE ANNE P. AND MICHAEL ALLEN P., APPELLANTS, *v.* ANGELA P. AND RANDALL B., RESPONDENTS.

No. 86192

June 6, 2024 549 P.3d 478

Appeal from a district court order setting aside an adoption decree. Eighth Judicial District Court, Family Division, Clark County; Bill Henderson, Judge.

Reversed.

Hutchison & Steffen, LLC, and *Todd L. Moody* and *Joseph C. Reynolds*; *Reese Ring Velto, PLLC*, and *Alex Velto*, Reno, for Appellants.

Willick Law Group and *Marshal S. Willick* and *Trevor M. Creel*, Las Vegas, for Respondents.

Before the Supreme Court, STIGLICH, PICKERING, and PARRAGUIRRE, JJ.

OPINION

By the Court, STIGLICH, J.:

The finality of district court orders is of substantial concern to the judicial system. In the context of an adoption proceeding, finality plays a particularly elevated role because adoptions provide needed stability to children and their adoptive families. Accordingly, only parties to the proceeding, entities in privity with those parties, or nonparties whose rights are directly affected by the court order have standing to seek NRCP 60(b) relief from an adoption decree.

In the underlying matter, the district court adjudicated an adoption petition while a petition for guardianship filed by the child's grandparents was pending. Given that the grandparents were not parties to the adoption proceeding, were not in privity with any such party, and did not have interests directly affected by the proceeding, they lacked standing to file an NRCP 60(b) motion to set aside the adoption, and the court therefore erred in granting their motion. We conclude that neither the grandparents' familial relation with their grandchild, standing alone, nor the pending guardianship petition conferred standing to challenge the adoption. We therefore reverse the district court order setting aside the adoption.

FACTS AND PROCEDURAL HISTORY

When G.P.'s birth mother was pregnant with G.P., she contacted G.P.'s step-great-grandmother and great-grandfather, appellants Katherine and Michael, to see if they would accept temporary guardianship of G.P. Katherine and Michael agreed and, soon after G.P.'s birth, petitioned the Second Judicial District Court in Washoe County, where G.P. was born, for temporary guardianship, which the court granted. G.P.'s grandparents, respondents Angela and Randall, filed a competing petition for guardianship, and the Second Judicial District Court set the matter for mediation.

Meanwhile, G.P.'s birth parents provided written consent to terminate their parental rights and to G.P.'s adoption by Katherine and Michael. With these consents in hand, Katherine and Michael filed a petition for adoption with the Eighth Judicial District Court in Clark County, where they resided.

After filing the petition for adoption, Katherine and Michael attended the previously scheduled guardianship hearing in the Second Judicial District Court. At the hearing, the court, unaware of the adoption petition pending in the Eighth Judicial District Court, denied Angela and Randall's petition for temporary guardianship but set a trial date for the competing guardianship requests.

A few days after the guardianship hearing, Katherine and Michael, alone, attended the adoption hearing in the Eighth Judicial District Court, during which the judge granted the adoption. In light of the adoption, Katherine and Michael moved to vacate the guardianship trial pending in the Second Judicial District Court. The Second Judicial District Court denied the motion to vacate after it contacted the Eighth Judicial District Court and learned that the Eighth Judicial District Court had no knowledge of the guardianship case in the Second Judicial District Court. The Second Judicial District Court then held the case in abeyance and ruled that any further proceedings must take place in the Eighth Judicial District Court.

After learning of the adoption, Angela and Randall moved to set aside the adoption in the Eighth Judicial District Court pursuant to NRCP 60(b). The Eighth Judicial District Court granted NRCP 60(b)(3) relief due to misrepresentation and misconduct in omitting "essential information" regarding the guardianship case in the Second Judicial District Court. It also found that the Second Judicial District Court was the proper venue. In the Second Judicial District Court, the court determined that Katherine and Michael's temporary guardianship would remain in effect and set dates for mediation and trial. Katherine and Michael appeal the Eighth Judicial District Court's order setting aside G.P.'s adoption.

DISCUSSION

Standard of review

A district court generally "has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)." *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996). "Its determination will not be disturbed on appeal absent an abuse of that discretion." *Id.* at 182, 912 P.2d at 265. "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." *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (internal quotation marks omitted). A district court also abuses its discretion in an NRCP 60(b) ruling if it disregards legal principles. *See Vargas v. J Morales Inc.*, 138 Nev. 384, 387, 510 P.3d 777, 780 (2022).

The district court abused its discretion when it granted NRCP 60(b) relief requested by a nonparty

Katherine and Michael argue that the district court abused its discretion in setting aside G.P.'s adoption pursuant to NRCP 60(b) because Angela and Randall lacked standing to bring the motion. The parties do not dispute that Angela and Randall were not parties in the adoption proceedings. Angela and Randall counter, however, that they have standing because their pending guardianship petition established an interest that was directly affected by the adoption. We conclude that neither Angela and Randall's status as grandparents nor the pending guardianship matter conferred standing.

NRCP 60(b) provides various grounds to set aside a final judgment. *Vargas*, 138 Nev. at 384, 510 P.3d at 778. NRCP 60(b) permits relief from a final judgment, order, or proceeding where there is "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." NRCP 60(b)(3). Relief pursuant to NRCP 60(b) may be provided to the parties to an action, those in privity with the parties, or to those directly affected by the judgment. *Pickett v. Comanche Constr., Inc.*, 108 Nev. 422, 427, 836 P.2d 42, 45 (1992). In *Pickett*, homeowners sought to set aside a judgment foreclosing on mechanic's liens that arose from proceedings in which they were not parties. *Id.* at 424-25, 836 P.2d at 43-44. This court determined that the judgment directly affected the nonparty homeowners in subjecting them to liability such that they could seek NRCP 60(b) relief. *Id.* at 427, 836 P.2d at 45. That is, in *Pickett*, nonparties had standing to challenge an order directly affecting them by subjecting them to legal liability even though they were not parties in the proceedings giving rise to the liability.

Federal courts have approached this standard similarly for nonparties directly affected by a judgment. *Cf. Willard v. Berry-Hinckley*

Indus., 139 Nev. 516, 523, 539 P.3d 250, 257 (2023) ("[W]here the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this court in applying the Nevada Rules." (internal quotation marks omitted)); *Bonnell v. Lawrence*, 128 Nev. 394, 398, 282 P.3d 712, 714 (2012) (recognizing that NRCP 60(b) is modeled on FRCP 60(b)). The Eleventh Circuit Court of Appeals looked to whether nonparties had legal rights "so intimately bound up with the parties" that a judgment would "directly affect any property or other legal right" of the movant. *Kem Mfg. Corp. v. Wilder*, 817 F.2d 1517, 1520 (11th Cir. 1987). The Second Circuit Court of Appeals likewise concluded that a nonparty had standing to seek FRCP 60(b) relief because it was "strongly affected" by a settlement agreement with a defendant where the plaintiff intended to use the judgment to collect alleged fraudulent conveyances from the nonparty. *Grace v. Bank Leumi Tr. Co.*, 443 F.3d 180, 188-89 (2d Cir. 2006). The Bankruptcy Appellate Panel of the Ninth Circuit ruled comparably and held that a nonparty had standing to seek Rule 60(b) relief from an order that directly and adversely affected his property rights by reinstating a lien on real property. *In re La Sierra Fin. Servs., Inc.*, 290 B.R. 718, 729, 731 (B.A.P. 9th Cir. 2002). In contrast, the Ninth Circuit ruled that nonparty shareholders lacked standing where they sought relief for fraud because they would not recover any money even if their allegations were borne out and so any alleged fraud did not directly affect their rights or interests. *Herring v. Fed. Deposit Ins. Corp.*, 82 F.3d 282, 284-85 (9th Cir. 1995). And the Second Circuit limited its decision to the facts presented and stressed that standing for nonparties directly affected by a judgment was "an exceedingly narrow exception" to the general rule that nonparties may not challenge an order. *Grace*, 443 F.3d at 188-89. Thus, for nonparties to have standing to set aside a court order, they must show privity with a party or that their rights or interests are directly affected by the court's decision.

Adoption proceedings are creatures of statute without origins in the common law, 2 C.J.S. *Adoption of Persons* § 2 (2023), and courts generally have concluded that grandparents lack an interest in such proceedings solely by virtue of the familial relation, *see, e.g.*, *In re Marriage of Herreras*, 768 P.2d 673, 674 (Ariz. 1989) ("The Arizona courts, however, have not recognized the grandparental relationship as an interest or right which is entitled to protection except in the limited manner provided by the statute at issue."); *In re S.R.*, 352 N.W.2d 141, 144 (Neb. 1984) ("We hold that grandparents, as such, do not have standing to interfere with the process of termination of parental rights and the adoptive procedures provided by our statutes."), *superseded by statute on other grounds as stated* *in In re Artharena D.*, 571 N.W.2d 608 (Neb. 1997). Although this court has not determined that such an interest exists, *see generally Bopp v. Lino*, 110 Nev. 1246, 1250-51, 885 P.2d 559, 562 (1994) (recognizing that, historically, biological grandparents have no legally enforceable rights with respect to their grandchildren after adoption), Angela and Randall urge us to recognize their standing based on their grandparent relationship and their pending guardianship application. Thus, we consider grandparents' statutory and constitutional rights to determine their interest in an adoption.

Nevada law provides that a court may require notice of adoption proceedings to interested persons, who may in turn object to the adoption. NRS 127.210(3). No provision specifically designates grandparents as interested parties entitled to notice. By way of contrary example, notice *must* be provided to a child's legal custodian or guardian. NRS 127.123. Nor have the parties pointed to any statute conferring on grandparents an applicable interest or right in a grandchild's care or in adoption proceedings. *Cf. Bopp*, 110 Nev. at 1250-51, 885 P.2d at 562 (explaining that when grandparent visitation rights provided for in certain circumstances under more recent statutory provisions are not exercised pre-adoption, the mere existence of those statutes does not confer any right on grandparents). Therefore, the Nevada statutes governing adoption do not confer standing on grandparents on the basis of that relationship. *Cf. In re Adoption of J.J.G.*, 736 So. 2d 1037, 1040 (Miss. 1999) (concluding grandparents lacked standing to object to the adoption of their grandchildren where no statute granted them standing); *R.K. v. A.J.B.*, 666 A.2d 215, 217-18 (N.J. Super. Ct. Ch. Div. 1995) (concluding that grandparents lacked standing to object to an adoption where the adoption statutes did not entitle them to notice of the proceeding and thus with a right to object).

Turning to constitutional law, grandparents generally do not have a constitutional interest conferring standing to intervene in an adoption proceeding, *see L.F.M. v. Dep't of Soc. Servs.*, 507 A.2d 1151, 1154 (Md. Ct. Spec. App. 1986) ("We do not question the sincerity or the depth of the affection that appellants feel for their grandchildren. That affection, however, simply does not translate into a constitutionally protected liberty interest."), absent a countervailing consideration, such as a court order entitling them to visitation rights, *see In re Adoption of a Minor Child*, 593 So. 2d 185, 189 (Fla. 1991) (finding that grandparents had a legal interest in maintaining a relationship with a minor child under the due process clause of the Florida Constitution after being given visitation rights by a New Jersey court); *but see Faust v. Messinger*, 497 A.2d 1351, 1353 (Pa. Super. Ct. 1985) (concluding that statutory grandparent visitation rights do not constitute constitutionally protected liberty interests that implicate procedural due process).

Although Angela and Randall petitioned for guardianship, they were not G.P.'s legal guardians and thus lacked an interest on that basis. The pending guardianship petition created a prospective interest in the adoption, but such a prospective interest is distinguishable from the present and extant rights and liabilities that this court in *Pickett*, and analogous federal authorities, have held to confer standing to nonparties challenging a judgment directly affecting them. Therefore, their interests were not directly affected by the adoption. Nor have Angela and Randall identified any statutory provision conferring standing to them as nonparty grandparents seeking to set aside the adoption, and we have found none. Finally, we conclude that the pending guardianship proceeding did not establish a constitutional interest implicating procedural due process rights because their interest remained prospective. Because Angela and Randall were not parties in G.P.'s adoption proceedings, do not have a legal interest that was directly affected by the adoption, and lack any other statutory or constitutional basis for standing, we conclude that the district court abused its discretion in setting aside G.P.'s adoption pursuant to NRCP 60(b).[1]

CONCLUSION

We clarify that a motion to set aside a judgment pursuant to NRCP 60(b) may be brought by a party to the proceeding, an entity in privity with one of the parties, or a nonparty with interests directly affected by the judgment. A nonparty may bring such a motion only in exceptional circumstances, and its interest will be directly affected only where it has a discrete legal right or interest concretely affected by the judgment. A prospective interest such as that created by a pending petition for guardianship will not confer standing under this exception. We also recognize that grandparents do not have standing to move to set aside an adoption involving a grandchild solely on the basis of the familial relationship. Angela and Randall lacked standing to move to set aside the adoption because they were not parties in the proceeding, did not have rights directly affected by that proceeding, and have not shown another statutory or constitutional basis for standing. Accordingly, we conclude that the district court abused its discretion and reverse its order setting aside G.P.'s adoption.

Pickering and Parraguirre, JJ., concur.

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[1]Given our disposition, we need not address Katherine and Michael's remaining claims.

IN THE MATTER OF THE APPLICATION OF NAME CHANGE FOR CHRISTOPHER LOWRY.

CHRISTOPHER LOWRY, APPELLANT.

No. 87153

June 6, 2024 549 P.3d 483

Appeal from a district court order denying a petition for an adult change of name. Eleventh Judicial District Court, Pershing County; Jim C. Shirley, Judge.

Reversed and remanded.

Christopher Lowry, Lovelock, Pro Se.

Before the Supreme Court, HERNDON, LEE, and BELL, JJ.

OPINION

By the Court, HERNDON, J.:

While in prison, appellant Christopher Lowry filed a petition to legally change his name for religious reasons. The district court denied Lowry's petition based on the legislative history of the name-change statutes. It found that because Lowry was convicted of a sexual offense against a minor and could not seal his records, he also could not change his name. Lowry contends this was error. We agree and hold that the name-change statutes permit incarcerated felons to change their names, regardless of the offense for which they were convicted, as long as good reason exists for the change. The district court's concerns about certain felons obviating the record-sealing requirements are not salient here because the name-change statutes require that an applicant's criminal history follows them to their new identity. The district court erred in its analysis and applied an incorrect legal standard to Lowry's petition, so it lacked a substantial basis to deny Lowry's requested name change. Accordingly, we reverse the order denying the name-change petition and remand the matter to the district court for a determination under the correct standard.[1]

BACKGROUND

Lowry was convicted of attempted lewdness with a minor, a felony offense. As a result, he is currently incarcerated at the Lovelock Correctional Center. While incarcerated, Lowry sought to legally

[1]This appeal is unopposed, as no objection was filed to the name-change petition below. *See* NRS 41.290(1) (providing for the filing of written objections to name-change petitions).

assume the name Dominic Vito Giambatista Billini for religious reasons. He petitioned the district court to change his name. Although no objection was filed, the district court denied the name-change petition. It reasoned that Lowry was an inmate convicted of a felony against a minor, so public policy and the record-sealing statutes precluded him from changing his name. Lowry appealed.

DISCUSSION

The district court applied an incorrect legal standard to Lowry's petition

Lowry asserts that the district court erred by applying the statutes pertinent to sealing one's records rather than the statutes related to name-change petitions. We review the denial of a name-change petition for an abuse of discretion. *In re Salazar*, 138 Nev. 725, 727, 518 P.3d 873, 874 (2022). A "district court abuses its discretion when it denies a petition for a name change without providing any substantial basis for doing so." *Id.*

The district court began by analyzing the legislative history of the name-change statutes. It erred by doing so before it interpreted the plain meaning of those statutes. *Cf. Sonia F. v. Eighth Jud. Dist. Ct.*, 125 Nev. 495, 499, 215 P.3d 705, 707 (2009) ("When a statute is facially clear, this court will give effect to the statute's plain meaning and not go beyond the plain language to determine the Legislature's intent."). As we explain, the name-change statutes are unambiguous; thus, we need not address their legislative history.

Incarcerated individuals may petition to change their names

We first address the district court's suggestion that public policy generally prohibits felons from changing their names, at least before the time when they can also ask to seal their criminal records. This presents a question of law, which we review de novo. *Nev. Dep't of Corr. v. York Claims Servs., Inc.*, 131 Nev. 199, 203, 348 P.3d 1010, 1013 (2015). Our resolution of that question calls for us to construe the name-change statutes, which we also perform de novo. *Id.* In interpreting the statutes, "our analysis begins with the text." *Sierra Nev. Adm'rs v. Negriev*, 128 Nev. 478, 481, 285 P.3d 1056, 1058 (2012). "We construe a plain and unambiguous statute according to its ordinary meaning." *Id.*

NRS 41.270-.290 supply the relevant standards for a court to apply to a name-change petition. Pursuant to those statutes, "[a]ny natural person, except an unemancipated minor, desiring to have his or her name changed may file a verified petition with the clerk of the district court of the district in which the person resides." NRS 41.270. The statutes do not exclude convicted felons, and "omissions of subject matters from statutory provisions are presumed to have been intentional." *Dep't of Tax'n v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005).

In fact, the statutory scheme contemplates that some applicants may have criminal records. It requires petitioners to state whether they have been convicted of a felony, and petitioners with criminal records must provide a complete set of fingerprints with their petition. NRS 41.270. If the petition is granted, a copy of the order and the fingerprints go to the Central Repository for Nevada Records. NRS 41.290(3). And in determining whether to grant a name-change petition, NRS 41.290(1) requires the court to "specifically take into consideration the applicant's criminal record, if any[.]" These provisions would not exist if the Legislature intended to prohibit convicted felons from petitioning to change their names. Therefore, we hold that convicted felons may petition to change their name so long as they otherwise comply with the name-change statutes.

A change of name does not circumvent the record-sealing requirements

The district court found that a person convicted of a felony against a child cannot petition to change their name because a person with such a conviction would not be able to seal their records pursuant to NRS 179.245. It expressed concern that a felon changing his name would circumvent the waiting period for sealing their records. However, the name-change statutes contain provisions to obviate that concern.

Nothing in the name-change statutes automatically seals a petitioner's criminal record. *See* NRS 41.270-.290. As noted, they include a logistical provision to certify the name change in the Central Repository for Nevada Records of Criminal History. NRS 41.290(3). An inmate's record thus would accompany him with his new name—it would not be automatically sealed, as the district court feared. These principles are reflected in the fact that it is more difficult for an individual to satisfy the record-sealing statutes than the name-change statutes. The prerequisites to sealing one's record are more restrictive than those for changing one's name. *Compare* NRS 41.290, *with* NRS 179.245. The benefits conferred upon someone with a sealed record are far higher as well. Upon sealing, that person reobtains the rights to vote, hold office, and serve on a jury; the proceedings underlying their offense are "deemed never to have occurred." NRS 179.285(1)(a). By contrast, the name-change statutes do not contemplate such benefits. The Legislature created separate subchapters to address separate issues.

The district court may have analogized the separate sets of statutes in an attempt to glean the purpose of NRS 41.290(1)'s requirement that the court consider the applicant's criminal record before deciding whether to grant a name-change petition. We observe that the requirement must be read in harmony with the surrounding name-change statutes. *See Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 827, 192 P.3d 730, 734 (2008) ("Whenever possible, we will interpret a statute in harmony with other rules and statutes."). The requirement that "the court shall specifically take into consideration the applicant's criminal record," NRS 41.290(1), serves both logistical and substantive purposes that harmonize it with the surrounding statutory provisions. Logistically, the court must consider whether the applicant has a criminal record before it can fulfill any duty to "transmit a certified copy of the order to the Central Repository for Nevada Records of Criminal History[.]" NRS 41.290(3). Substantively, the court must consider the applicant's criminal record, in addition to any other relevant evidence, to determine whether "good reason exists" for the name change. NRS 41.290(1). We need not decide here what constitutes good reason, as that is a decision best left, in the first instance, to the discretion of the district courts based on the facts and circumstances present in a given case.

CONCLUSION

The district court resorted to the legislative history of the name-change statutes without first considering their plain language and compounded that misstep by conflating those statutes with the record-sealing statutes. As a result, the district court lacked a substantial basis to deny Lowry's petition. Therefore, we conclude that the district court abused its discretion in denying Lowry's petition. Application of the governing statutes, NRS 41.270-.290, demonstrates that individuals presently incarcerated, regardless of their offense, may file a name-change petition with "the clerk of the district court in which the person resides." NRS 41.270.

Accordingly, we reverse the order of the district court and remand this matter for proceedings consistent with this opinion.

Lee and Bell, JJ., concur.

IN THE MATTER OF J.B., A MINOR.

CLARK COUNTY DEPARTMENT OF FAMILY SERVICES; AND CLARK COUNTY DISTRICT ATTORNEY'S OFFICE, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE DAVID S. GIBSON, JR., DISTRICT JUDGE, RESPONDENTS, AND J.B., A MINOR; MILES STANO JR.; AND LINDSEY B., REAL PARTIES IN INTEREST.

No. 87588

June 13, 2024 550 P.3d 333

Original petition for a writ of mandamus challenging a district court order determining placement of a minor child in NRS Chapter 432B proceedings.

Petition granted.

[Rehearing denied September 6, 2024]

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Payal V. Patel*, Deputy District Attorney, Clark County, for Petitioners.

Joseph Dalia, Jr., Las Vegas, for Real Party in Interest J.B.

The Grigsby Law Group and *Abira Grigsby*, Las Vegas, for Real Party in Interest Miles Stano Jr.

The Law Offices of Frank J. Toti, Esq., and *Frank J. Toti*, Las Vegas, for Real Party in Interest Lindsey B.

Hutchison & Steffen, LLC, and *Joseph C. Reynolds* and *Todd L. Moody*, Las Vegas, for Amici Curiae Becky Whipple and Jay Whipple.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, BELL, J.:

Nevada law describes the procedure required to place a child in need of protection outside of the home. Historically, the child welfare statutes provided preference for relative placement only; however, in 2021, the legislature expanded the statutory placement

[1]The Honorable Patricia Lee, Justice, being disqualified, did not participate in the decision of this matter.

preference to include fictive kin—persons who are "not related by blood" but who have "a significant emotional and positive relationship with the child." *See* NRS 432B.0657. Today, Nevada law provides that when consistent with a child's best interest, placement preference should be given to an adult with a preexisting relationship with the child. *See* NRS 432B.390; NRS 432B.550. In this case, the district court ordered placement of a child based on blood relations alone. We now clarify that the term "fictive kin" requires an evaluation of the relationship from the perspective of both the child and the adult and makes clear that blood relatives do not enjoy a legal placement preference over fictive kin. We also emphasize that placement decisions must be based on a child's best interest and recognize that, to this end, a child must be meaningfully represented in all stages of a placement proceeding.

FACTS AND PROCEDURAL HISTORY

The parents of Real Party in Interest J.B. were arrested for the homicide of J.B.'s older sibling. Nine months later, J.B. was born. At the time, both of J.B.'s parents were still incarcerated. J.B.'s mother, Real Party in Interest Lindsey B., provided Petitioner Department of Family Services (DFS) the names of J.B.'s maternal grandmother, J.B.'s maternal aunt, and the custodian of J.B.'s surviving sibling as possible placements for J.B. J.B.'s father, Real Party in Interest Miles Stano Jr., requested a paternity test but also offered J.B.'s paternal grandfather, Miles Stano Sr., and a paternal aunt as possible placements.

At the initial protective custody hearing, the district court inquired about possible relative or fictive kin placement. DFS had not yet solidified a placement, so the court placed J.B. in the temporary custody of UMC hospital. The court ordered DFS to provide for the placement, care, and supervision of J.B. Within a few days, DFS placed J.B. with Amici Curiae Becky and Jay Whipple. The Whipples were friends of J.B.'s grandmother and were not licensed foster parents at the time of placement. The district court later signed an order affirming J.B.'s placement with the Whipples, who were described as "Unlicensed Fictive Kin" in the order. No party objected to DFS's initial placement or the district court's designation of the Whipples as J.B.'s fictive kin.

Months after J.B.'s placement with the Whipples, Miles Jr.'s paternity was established. After the paternity determination, Miles Jr. requested again that J.B. be placed with Miles Sr. in Illinois. DFS submitted an Interstate Compact on the Placement of Children (ICPC) request, which was required to place J.B. out of state with Miles Sr. DFS received the completed ICPC approving Miles Sr. as a possible placement nearly nine months after J.B.'s initial placement with the Whipples. By that point, the Whipples had become licensed foster parents.

After the ICPC completion, the district court scheduled a placement hearing. Rather than taking evidence concerning J.B.'s placement and best interest at the hearing, the court summarily held as a matter of law that Miles Sr. enjoyed a statutory preference over the Whipples because Miles Sr. was a blood relative. The district court apparently no longer considered the Whipples fictive kin, commenting that "fictive kin cannot be created through placement" and that even if the Whipples were fictive kin, they would still be "secondary to a blood relative." The district court's order contains no factual findings related to J.B.'s best interest, instead resting entirely on the district court's belief that Miles Sr. enjoyed a familial preference over the Whipples and that the preference itself established the best interest of J.B.

Unfortunately, J.B.'s counsel failed to appear at the placement hearing. The court had previously appointed a Children's Attorney Project (CAP) attorney for J.B., but J.B. suffered from minimal representation throughout these proceedings. The district court first ordered "a CAP attorney be appointed" to represent J.B. in an order filed February 15, 2023. Despite this order, no attorney appeared for J.B. until May 15. After the May hearing, no attorney appeared for J.B. at the next five proceedings. In August, DFS raised concerns that J.B. was unrepresented. At that time, court personnel indicated the case was assigned to a specific pro bono CAP attorney. Even so, no notice of appearance was filed until October 30, 2023, nearly nine months after the court initially appointed a CAP attorney for J.B. and a few weeks after the placement hearing.

Prior to the placement hearing, J.B.'s counsel informally asked the district attorney for more time to prepare for the hearing; however, the parties did not stipulate to continuing the matter. J.B.'s counsel failed to appear for the hearing. The State informed the court of counsel's request for additional time, but the district court declined to postpone the hearing. Without J.B.'s counsel present, the court ordered DFS to place J.B. with Miles Sr.

At the hearing on DFS's subsequent motion for reconsideration—at which J.B.'s counsel again failed to appear—the district court did not find the absence of J.B.'s attorney at the placement hearing a compelling reason for reconsideration. During the reconsideration hearing, the district court reiterated its view that a suitable blood relative would always be preferred in placement decisions over unrelated fictive kin: "Whether you believe me or not and whether I've stated it sufficiently clearly or not, I have made a best interest analysis. It is in a child's best interest to be placed with safe family over literally anyone else." The district court indicated frustration with DFS for continuing to argue that the Whipples were fictive kin. Despite the court's initial order designating the Whipples as fictive kin and despite the Whipples being unlicensed at the time of placement, the court noted, "we keep talking about this family as fictive kin when they're not, when this was originally a foster placement while waiting for paternity and an ICPC for the family who was coming forward asking from the first day for placement of the child." The court emphasized that fictive kin lack equal footing to blood relatives for placement purposes and denied the motion for reconsideration.

After the court denied reconsideration, DFS and the Clark County District Attorney filed a petition for a writ of mandamus challenging the district court's decision placing J.B. with Miles Sr. We directed answers and stayed the district court's placement order pending our consideration of the matter. Lindsey filed a joinder to the petition, and J.B. filed a response in support of the requested relief. Miles Jr. filed an answer in support of the placement decision and opposing issuance of a writ. The Whipples filed an amici brief arguing that J.B.'s best interest would be served by continued placement with the Whipples.

DISCUSSION

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Mandamus will not issue when the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. The district court's placement order here is not appealable, so writ relief is appropriate. *See Philip R. v. Eighth Jud. Dist. Ct.*, 134 Nev. 223, 226, 416 P.3d 242, 246 (2018).

Writ relief is discretionary. *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Still, this court may exercise its discretion to consider a petition when doing so "presents an opportunity to clarify an important issue of law and . . . serves judicial economy." *Dekker/Perich/Sabatini Ltd. v. Eighth Jud. Dist. Ct.*, 137 Nev. 525, 527, 495 P.3d 519, 522 (2021). The present petition raises an important question of law, namely, how to evaluate a possible fictive kin relationship in a placement proceeding. Because the modifications to Nevada's placement preference scheme through the addition of fictive kin have yet to be addressed by this court, we grant the petition to determine, first, how to evaluate a newborn child's possible fictive kin and, second, whether Nevada's familial preference prioritizes placement with blood relatives over fictive kin.

The Whipples are J.B.'s fictive kin

Given the court's original uncontested determination at the time of placement, the Whipples are J.B.'s fictive kin, and the district court arbitrarily and capriciously abused its discretion in later finding otherwise. *See Div. of Child & Fam. Servs. v. Eighth Jud. Dist.*

Ct., 120 Nev. 445, 449, 92 P.3d 1239, 1242 (2004) (noting writs of mandamus serve "to control an arbitrary or capricious exercise of discretion" (internal quotation marks omitted)). DFS first identified the Whipples as J.B.'s fictive kin in the preliminary protective hearing report filed before the original protection hearing. Miles Jr. proffered no contest to J.B.'s initial placement with the Whipples, who at that point were not licensed foster parents. In a March 28, 2023, order, the district court expressly ratified J.B.'s placement with the Whipples as J.B.'s fictive kin. Again, no one objected.

The Whipples have been designated as J.B.'s fictive kin from the genesis of this case. The district court placed J.B. with the Whipples as fictive kin and cannot change the settled legal designation of a placement when no new relevant facts are before it and no party has challenged that designation. Irrespective of our other conclusions, the category of fictive kin cannot be used to temporarily place children with unlicensed, unrelated custodians until a "better option" comes along. Doing so runs contrary to the state's paramount obligation in placing a child outside the home: the child's best interest. *See* NRS 432B.390(6); 432B.550(6) (allowing placement for children in need of protective custody with hospitals, kin, or licensed shelters). The fact that the Whipples later became licensed foster parents does not invalidate the initial fictive kin designation. The district court provided no rationale for its conflicting orders, and none are clear to this court.

NRS 432B.0657 defines "fictive kin" as "a person who is not related by blood to a child but who has a significant emotional and positive relationship with the child." The district court offered, and Miles Jr. echoes, a reading of the statute that requires the child to have a meaningful relationship with the potential fictive kin before placement. Looking at the relationship only from the perspective of the child would preclude a newborn from being placed with fictive kin, given that a newborn is incapable of having formed a preexisting relationship.

This interpretation is inconsistent with the plain text of the statute. *See Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020) ("[W]e will interpret a statute or regulation by its plain meaning unless the statute or regulation is ambiguous"). The statute's applicability does not depend solely upon the child's perception of the relationship. Instead, to be considered fictive kin, the statute requires a significant emotional and positive relationship between the adult and child. When deciding whether a nonrelated party can be designated as a child's fictive kin, the court should look for manifestations of care from the perspectives of both the prospective custodian and the child. In the case of an infant, analysis of fictive kin may be guided heavily or entirely by the bond the prospective custodian has with the child. Prospective custodians who have a connection with the family and demonstrate a commitment and willingness to care for the infant can qualify as fictive kin even though the newborn is not yet in a position to have developed a reciprocal bond.

We additionally find it unlikely that the legislature would have enacted a statute implicitly excluding an infant from being placed with fictive kin. Nothing in the statute suggests the legislature intended to prevent a newborn from being placed with a meaningful, responsible person in the child's life merely because the adult and child do not share the same DNA. Nor does the statutory scheme support placing an infant in a foster home with strangers when an unrelated but bonded adult is willing to take care of the infant. *See Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) ("[A] statute's language should not be read to produce absurd or unreasonable results." (internal quotation marks omitted)). Under the clear language of the statute, infants do not face any barrier to placement with fictive kin.

Nevada law does not privilege blood relatives over all nonrelated parties in child placement matters

The district court grounded its placement decision on its stated belief that Nevada law "favors family over [all] others" for placement. This is incorrect. *See Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014) (reviewing issues of statutory construction de novo).

Even prior to the legislature's addition of a fictive kin status, this court recognized that the mere existence of a suitable blood relative does not relieve the district court of its obligations to place a child according to the child's best interest. *See Clark Cnty. Dist. Att'y v. Eighth Jud. Dist. Ct.*, 123 Nev. 337, 346, 167 P.3d 922, 928 (2007) (noting "suitable relatives are not necessarily entitled to custody" and clarifying that the primary focus of a placement proceeding should be on the child's best interest). Indeed, this court has held that if a nonfamily placement is made and a relative later comes before the court, the district court must "determine whether the familial preference exists and, if so, consider placing the child with the relatives, if this placement serves the child's best interest." *Id.* This was the case here, yet the district court made no findings on J.B.'s best interest. The court instead decided to place J.B. based solely on the bare assertion of biological superiority. Nevada law does not support the court's doing so.

By its plain text, Nevada's statutory placement preference scheme offers no differentiation between a child's blood relative and fictive kin. *See Chandra v. Schulte*, 135 Nev. 499, 501, 454 P.3d 740, 743 (2019) ("Where a statute is clear and unambiguous, this court gives effect to the ordinary meaning of the plain language of the text without turning to other rules of construction.”). NRS 432B.550(6) sets out Nevada’s relevant placement preferences. First, it is “presumed to be in the best interests of the child to be placed together with the [child’s] siblings.” NRS 432B.550(6)(a). After consideration of this factor, NRS 432B.550(6)(b) requires that

> [p]reference must be given to placing the child in the following order:
>
> (1) With any person related within the fifth degree of consanguinity to the child or a fictive kin, and who is suitable and able to provide proper care and guidance for the child, regardless of whether the relative or fictive kin resides within this State.
>
> (2) In a foster home that is licensed . . . .

While this statute unambiguously creates a preference for relatives and fictive kin over foster homes, it does not prefer relatives over fictive kin; it puts relatives and fictive kin on a par with each other.

This is evident from the statute’s structure, which sets out two categories of placements: (1) relatives or fictive kin and (2) foster homes. After listing blood relatives and fictive kin, the statute notes both must be suitable, further suggesting the two are on equal footing. The West Virginia Court of Appeals considered a similar statute in *In re G.G.*, 896 S.E.2d 662, 672 (W. Va. 2023). The West Virginia statute provided, in relevant part, that “[w]hen a child is removed from his or her home, placement preference is to be given to relatives or fictive kin of the child.” W. Va. Code § 49-4-601a (2020). Referencing this statute, a plurality of the court concluded that “there is no statutory preference for permanent placement of a child with blood relatives of that child” over fictive kin. *In re G.G.*, 896 S.E.2d at 675 (Wooton, J., concurring). Based upon Nevada’s analogous statutory placement provisions, we similarly conclude that there is no preference for blood relatives over fictive kin under Nevada law.

Here, the district court’s order placing J.B. with Miles Sr. was premised on a biological-familial preference that does not exist in Nevada law. The order is vacated. On further proceedings to determine the child’s placement, we direct the district court to hear evidence, make express findings regarding J.B.’s best interest, and place J.B. accordingly. *See Clark Cnty. Dist. Att’y*, 123 Nev. at 348, 167 P.3d at 929 (“Given the importance of the district court’s child placement decisions as well as the inherent difficulties in reviewing matters within the district court’s discretion, written factual findings, both with respect to credibility determinations as well as evaluations of the child’s best interest, must be made.”); *Monahan v. Hogan*, 138 Nev. 58, 67-68, 507 P.3d 588, 595-96 (Ct. App. 2022) (explaining how to conduct a general best interest analysis absent more specific statutory authority).

The district court abused its discretion in placing J.B. when J.B.'s counsel was absent

We also address the impact of J.B.'s counsel's absence throughout the proceedings. Nevada law requires that a child subject to protectionary proceedings "must be represented by an attorney at all stages of any proceedings held pursuant to NRS 432B.410 to 432B.590." NRS 432B.420(2). While the court originally appointed a CAP attorney for J.B., we are troubled by the several instances where the district court disregarded J.B.'s statutory right to representation. Moreover, while J.B.'s appointed attorney should have formally requested a continuance of the hearing or ensured someone appeared for J.B., counsel's failures do not relieve the district court of its responsibility to ensure statutory compliance in the proceedings. The paramount importance of a child having representation in such proceedings, especially when the child is preverbal, has been established by statute and rule. NRS 432B.420; *see also* Nevada Rules of Professional Conduct 1.14.

Even absent a formal motion to continue, the district court has discretion to grant or deny a continuance and otherwise retains broad scheduling powers. *See Bongiovi v. Sullivan*, 122 Nev. 556, 570, 138 P.3d 433, 444 (2006); NRCP 16(b)(4) ("A schedule may be modified by the court for good cause."). We do not seek to unduly limit the district court's discretion on these matters but recognize the district court abuses its discretion when the court, with knowledge that a child's attorney is not present at the placement hearing and seeks a continuance, offers no reason why a continuance could not be made and no compelling reason to proceed without counsel present. We conclude the legislature clearly intended children to have a voice in placement determinations and effectuated that intent by enacting mandatory provisions requiring children be represented in placement hearings. The strong language of NRS 432B.420 mandating counsel compels the finding that it was an abuse of the district court's broad discretion to proceed with a change in J.B.'s placement absent any meaningful representation for J.B.

This matter must be heard by a different district court judge

Lastly, DFS brings to our attention certain troubling statements made by the district judge on the record in this case, including, during the hearing on DFS's motion for reconsideration, the judge's assertion that he "wasn't going to reconsider that order," calling DFS's claim that allegations of abuse exist against Miles Sr. "a real convenient argument to make" and disparaging foster parents as mere "placeholder[s]."

This court exercises its independent review of the undisputed facts to determine if a judge's impartiality might objectively be questioned. *See Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272

(2011) ("Ultimately, we must decide 'whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [the judge's] impartiality.'" (quoting *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 431, 438, 894 P.2d 337, 341 (1995), *overruled on other grounds by Towbin Dodge, LLC v. Eighth Jud. Dist. Ct.*, 121 Nev. 251, 112 P.3d 1063 (2005))). A judge is presumed impartial, *Ybarra*, 127 Nev. at 51, 247 P.3d at 272; however, in evaluating whether a case should be reassigned, we consider, among other things, "whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of [the judge's] mind previously-expressed views or findings determined to be erroneous." *Roe v. Roe*, 139 Nev. 163, 180, 535 P.3d 274, 291 (Ct. App. 2023) (quoting *Smith v. Mulvaney*, 827 F.2d 558, 562 (9th Cir. 1987)).

Here, the district court expressly indicated an unwillingness to reconsider DFS's arguments regarding fictive kin and manifested a fundamental misunderstanding of the Whipples' legal status. We are not convinced the district judge will be able to set aside his view in this case that "[i]t is in a child's best interest to be placed with safe family over literally anyone else," and so, we order the case transferred to a different judge for all further proceedings.

CONCLUSION

A fictive kin is a person who has a significant emotional and positive relationship with a child. The legislature's inclusion of fictive kin as an alternative placement to relatives recognizes the significant role certain unrelated people can play in a child's life and indicates an intent for children to be placed, when possible, into a home uniquely interested in the well-being of the child. No preference for placement with extended biological family over fictive kin exists in Nevada law. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus vacating the order placing J.B. with Miles Sr. Further, the writ of mandamus shall compel the chief judge of the Eighth Judicial District Court to reassign the case to a different district judge to hold further proceedings to determine placement based on J.B.'s best interest. We note the continuing requirement that J.B. be represented by counsel at future proceedings. In light of this decision, we vacate our November 30, 2023, stay.

Cadish, C.J., and Stiglich, Pickering, Herndon, and Parraguirre, JJ., concur.

DIGNITY HEALTH, DBA ST. ROSE DOMINICAN HOSPITAL-SIENA CAMPUS; LILIANA RUIZ-LEON, D.O.; TIMOTHY SAUTER, M.D.; AND DAMON MASAKI, M.D., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOSEPH HARDY, JR., DISTRICT JUDGE, RESPONDENTS, AND SAEED GOHARI, AS GUARDIAN AD LITEM OF NAMMI GOHARI, A MINOR, REAL PARTY IN INTEREST.

No. 86606

June 20, 2024 550 P.3d 341

Original petition for a writ of mandamus challenging a district court order denying a motion to dismiss in a medical malpractice action.

Petition denied.

Hall Prangle & Schoonveld, LLC, and *Tyson J. Dobbs*, *Kenneth M. Webster*, and *Tania Dawood*, Las Vegas, for Petitioner Dignity Health.

John H. Cotton & Associates, Ltd., and *John H. Cotton* and *Brad J. Shipley*, Las Vegas, for Petitioners Liliana Ruiz-Leon, D.O., and Timothy Sauter, M.D.

McBride Hall and *Robert C. McBride* and *T. Charlotte Buys*, Las Vegas, for Petitioner Damon Masaki, M.D.

Claggett & Sykes Law Firm and *Micah S. Echols*, *Charles L. Finlayson*, and *David P. Snyder*, Las Vegas; *Springberg Law Firm, P.C.*, and *Laurence B. Springberg*, Las Vegas, for Real Party in Interest Saeed Gohari.

Before the Supreme Court, STIGLICH, PICKERING, and PARRAGUIRRE, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

NRS 41A.097(5) allows a plaintiff to sue healthcare providers on behalf of a child for brain damage or a birth defect as late as the child's 10th birthday. Here, we consider whether that limitations period was tolled by a pair of gubernatorial emergency directives issued during the COVID-19 pandemic in 2020, such that a 2022 complaint alleging brain damage and birth defects filed 72 days *after* a child's 10th birthday is timely. We hold that the district court correctly concluded that the directives tolled the limitations period in NRS 41A.097(5) for 122 days, and thus the complaint was timely filed. In so holding, we deny the instant petition, as petitioners' argument that the directives' tolling effect was inapplicable under these facts is unsupported by the plain language of the directives.

FACTS AND PROCEDURAL HISTORY

Nammi Gohari was born prematurely on September 19, 2012, and developed irreversible brain damage. Nammi's family attributed Nammi's condition to professional negligence on the part of medical staff at facilities operated by petitioner Dignity Health. Over a decade after Nammi's birth, on November 30, 2022, real party in interest Saeed Gohari (hereinafter Gohari), acting as Nammi's guardian ad litem, filed medical malpractice claims against Dignity Health and several individuals[1] who provided medical care to Nammi's mother, Afsaneh Amin-Akbari.

Dignity Health moved to dismiss the complaint as untimely under NRS 41A.097. NRS 41A.097(2) provides, in relevant part, that "an action for injury or death against a provider of health care may not be commenced *more than 3 years* after the date of injury *or 1 year* after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, *whichever occurs first*." (Emphases added.) However, NRS 41A.097(5) provides an exception to the limitations periods in NRS 41A.097(2):

> 5. For the purposes of this section, the parent, guardian or legal custodian of any minor child is responsible for exercising reasonable judgment in determining whether to prosecute any cause of action limited by subsection 1, 2 or 3. If the parent, guardian or custodian fails to commence an action on behalf of that child within the prescribed period of limitations, the child may not bring an action based on the same alleged injury against any provider of health care upon the removal of the child's disability, *except that in the case of:*
>
> (a) *Brain damage or birth defect, the period of limitation is extended until the child attains 10 years of age.*

(Emphases added.)[2] Given that Gohari's claims pertain to Nammi's brain damage and/or birth defects and there is no dispute that Nammi's parent or guardian did not previously bring a timely suit under NRS 41A.097(2), NRS 41A.097(5) would foreseeably allow

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[1]These include petitioners Liliana Ruiz-Leon, D.O., Timothy Sauter, M.D., and Damon Masaki, M.D., who filed joinders in the instant writ petition.

[2]We note that, prior to the 2023 legislative session, NRS 41A.097(5)'s provisions were listed at NRS 41A.097(4) and contained identical language. *See* 2023 Nev. Stat., ch. 493, § 3, at 3024. Because the proceedings below took place and the instant writ petition was filed before this amendment took effect on October 1, 2023, much of the record and briefing refers to NRS 41A.097(4).

until Nammi's 10th birthday (September 19, 2022) for Gohari to file a complaint. However, Dignity Health claimed the complaint was also untimely under NRS 41A.097(5) because it was filed in November 2022, after Nammi's 10th birthday.

Gohari opposed Dignity Health's motion to dismiss, arguing that the complaint was still timely under NRS 41A.097(5) pursuant to a pair of emergency directives issued by Governor Steve Sisolak during the COVID-19 pandemic. On April 1, 2020, Governor Sisolak issued Declaration of Emergency Directive 009 (Revised), which stated, in relevant part, that

> *[a]ny specific time limit* set by state statute or regulation for the commencement of *any legal action* is hereby tolled from the date of this Directive until 30 days from the date the state of emergency declared on March 12, 2020 is terminated.

(Emphases added.) On June 29, 2020, Governor Sisolak issued Declaration of Emergency Directive 026, which ordered that "Directive 009 (Revised) shall terminate on June 30, 2020 at 11:59 pm. All time tolled by Section 2 shall recommence effective July 31, 2020 at 11:59 pm."

The district court, reading Directives 009 and 026 together, determined that the directives tolled the limitations period in NRS 41A.097(5) for 122 days (April 1 to August 1, 2020), such that Gohari's complaint was timely when filed on November 30, 2022, 72 days after Nammi's 10th birthday. Accordingly, the court denied Dignity Health's motion to dismiss. Dignity Health subsequently filed the instant petition for a writ of mandamus, asking this court to vacate the district court order and direct the district court to dismiss the case because Gohari's complaint was untimely under NRS 41A.097(5) and its timeliness was not preserved by the directives.

DISCUSSION

We elect to entertain Dignity Health's petition, as we are persuaded that it satisfies the circumstances under which this court may consider a petition challenging a motion to dismiss. *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197-98, 179 P.3d 556, 558-59 (2008); *see also Cervantes-Guevara v. Eighth Jud. Dist. Ct.*, 138 Nev. 87, 90, 505 P.3d 393, 397 (2022) (concluding that the applicability of the tolling provisions within Directives 009 and 026 was "an important issue of law requiring clarification [whose resolution] w[ould] promote judicial economy"). We are not persuaded, however, that Dignity Health is entitled to the mandamus relief it seeks.

"A writ of mandamus is available [(1)] to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or [(2)] to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at

558 (footnote omitted). Dignity Health argues that the tolling provisions of Directives 009 and 026, by their plain language and intent, apply *only* to actions where the limitations period expired *during* the April 1 to August 1, 2020, tolling period and *not* where the statute of limitations expired sometime *outside* this tolling period, as was the case with Gohari's complaint.[3]

This court applies "principles of statutory interpretation to executive orders and directives." *Cervantes-Guevara*, 138 Nev. at 91, 505 P.3d at 397. "When interpreting a statute, we look to its plain language." *Id*. (quoting *Smith v. Zilverberg*, 137 Nev. 65, 72, 481 P.3d 1222, 1230 (2021)). Here, we see no support for Dignity Health's argument in the directives' plain language. Directive 009 states that its tolling period applies to "*[a]ny specific time limit* set by state statute or regulation for the *commencement of any legal action*." (Emphases added.) Dignity Health fails to explain how this plainly broad, all-encompassing language supports a narrow interpretation that the provision only pertains to actions with deadlines falling within the tolling period. Indeed, it is difficult to see how the time limit under NRS 41A.097(5) for Gohari to commence an action by Nammi's 10th birthday would fall outside Directive 009's expansive scope. Furthermore, Directive 009 "tolled" limitations periods for "any legal action," a clear order that limitations periods for "any" pending legal action stop running. *See Toll*, *Black's Law Dictionary* (11th ed. 2019). Directive 026 then recommenced the tolled limitations periods beginning August 1, 2020. Thus, the directives' plain, unambiguous language supports the district court's conclusion that the directives tolled Gohari's limitations period for 122 days without need for further analysis. *See Smith*, 137 Nev. at 72, 481 P.3d at 1230 ("If a statute's language is plain and unambiguous, we enforce the statute as written, without resorting to the rules of construction.").

CONCLUSION

In sum, we are not persuaded that the district court either arbitrarily or capriciously abused its discretion by applying Directives 009 and 026 or that the law requires dismissal of Gohari's complaint as untimely. *See Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. Accordingly, we deny the petition.

Stiglich and Pickering, JJ., concur.

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[3]Dignity Health's petition alternatively argued that NRS 41A.097(5) qualifies as a statute of repose, rather than a statute of limitations, such that it cannot be tolled by the directives. However, Dignity Health subsequently withdrew this argument in its reply in support of its petition. Therefore, we do not consider this argument here.