EL JEN MEDICAL HOSPITAL, INC., DBA EL JEN CONVALESCENT HOSPITAL AND RETIREMENT CENTER, A DOMESTIC CORPORATION; TOOMEY REAL ESTATE, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND JAMES TOOMEY, INDIVIDUALLY AND AS ADMINISTRATOR, APPELLANTS, *v.* STACY TYLER, INDIVIDUALLY, AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF GARY TYLER, AND AS LEGAL GUARDIAN FOR OMEGA TYLER, A MINOR; AZIAH TYLER, AS STATUTORY HEIR TO GARY TYLER; AND HEAVEN TYLER, AS STATUTORY HEIR TO GARY TYLER, RESPONDENTS.

No. 83945

September 21, 2023 535 P.3d 660

Appeal from a district court order denying, in part, a motion to compel arbitration in a wrongful death action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Affirmed.

Lewis Brisbois Bisgaard & Smith LLP and *S. Brent Vogel*, *Adam Garth*, *Robert D. Rourke*, and *Ethan M. Featherstone*, Las Vegas, for Appellants.

Cogburn Law and *Jamie S. Cogburn* and *Hunter S. Davidson*, Henderson; *Cameron Law* and *Daven P. Cameron*, Las Vegas, for Respondents.

Before the Supreme Court, CADISH, PICKERING, and BELL, JJ.

OPINION

By the Court, PICKERING, J.:

Nevada's wrongful death statute, NRS 41.085, provides separate causes of action for the decedent's estate and the statutory heirs. Following the death of her husband, Gary Tyler, respondent Stacy Tyler asserted wrongful death claims individually and on behalf of Gary's estate and their minor child, and was joined by two adult statutory heirs, against appellant El Jen Convalescent Hospital and Retirement Center (El Jen). The district court compelled the estate's claims to arbitration pursuant to an arbitration agreement signed during Gary's admission to El Jen but found that the statutory heirs were not bound by the agreement, which they did not sign, and declined to compel arbitration of their claims.

El Jen appeals, and we affirm. Arbitration is a matter of contract. NRS 41.085 provides the statutory heirs with separate causes of

action arising upon the death of the decedent that require the heirs' agreement if arbitration is to be compelled. While the heirs' claims derive from the injury to the decedent, that does not authorize the decedent to bind the heirs to arbitration absent their agreement, which the district court correctly determined was lacking here.

I.

A.

After suffering a series of strokes, 54-year-old Gary Tyler was admitted to El Jen for long-term care. During his admission, Gary's wife, Stacy Tyler, provided El Jen with two documents—a Nevada general durable power of attorney and a durable power of attorney for healthcare decisions (together, power of attorney documents)—both of which designated her as Gary's agent in the event of his disability or incapacity. As part of El Jen's admission paperwork, Stacy signed an arbitration agreement on Gary's behalf as "the Resident." This agreement subjected any claim related to El Jen's services or care of Gary to arbitration and purported to bind all claims "derived through or on behalf of the Resident," including claims by Gary's heirs, to arbitration as well.

Gary was wheelchair-bound throughout his time at El Jen. At his family's request, El Jen arranged for the Regional Transportation Commission of Southern Nevada (RTC) to transport Gary to and from church. One Sunday, when the transport driver returned Gary to El Jen and found no El Jen staff member at the front desk, the driver left Gary alone in his wheelchair in El Jen's lobby. Gary stood up and fell, hitting his head on the floor. He later died, allegedly from complications stemming from the fall.

B.

Stacy and Gary's children (collectively, the Tylers) and Gary's estate sued El Jen, RTC, and others, asserting negligence, wrongful death, and survivorship claims. El Jen moved to compel arbitration of the claims against it pursuant to the arbitration agreement Stacy had signed on Gary's behalf. After requesting and receiving the power of attorney documents and supplemental briefing, the district court concluded that the estate's claims against El Jen were subject to the arbitration agreement. But the district court denied the motion as to Stacy's and the statutory heirs' individual wrongful death claims, finding that arbitration is a matter of contract and that neither Stacy nor the other heirs agreed to arbitrate their claims. Although the district court stayed litigation of the statutory heirs' claims against El Jen pending the outcome of this appeal, it denied El Jen's request to stay the litigation pending the conclusion of the arbitration proceedings between El Jen and the estate.

El Jen appeals. It argues that the Tylers, as nonsignatory statutory heirs, are bound by the arbitration agreement because a statutory heir's claim under NRS 41.085 is "entirely derivative" of the decedent's claim. Alternatively, El Jen argues that the district court abused its discretion under NRS 38.221(7) by failing to stay the litigation until the estate's arbitration concludes.

II.

A district court's order resolving a motion to compel arbitration may involve mixed questions of law and fact. *See Gonski v. Second Judicial Dist. Court*, 126 Nev. 551, 557, 245 P.3d 1164, 1168 (2010), *overruled on other grounds by U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 415 P.3d 32 (2018). We review purely legal questions de novo, *Clark Cty. Pub. Emps. Ass'n v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990), and defer to the district court's factual findings unless they are clearly erroneous or not based on substantial evidence, *see May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005).

A.

El Jen argues that nonsignatory statutory heirs asserting wrongful death claims under NRS 41.085 are bound by a decedent's pre-death arbitration agreement. But as a predicate matter, the Tylers argue that the arbitration agreement is unenforceable because Stacy lacked legal authority to bind anyone since her powers of attorney were invalid. *See id.* at 672, 119 P.3d at 1257 (stating that enforceable contracts require acceptance by the offeree). Because the question of Stacy's legal authority is a question of fact, *see Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 130 Nev. 540, 549, 331 P.3d 850, 856 (2014), we defer to the district court unless its finding is clearly erroneous or not based on substantial evidence.

Nevada has adopted the Uniform Power of Attorney Act (2006), 8B U.L.A. 175 (2014) (Uniform Act), codified at NRS 162A.200 through NRS 162A.660. NRS 162A.220(2) requires that a certificate of the principal's competency be attached to a power of attorney if, at the time of its execution, "the principal resides in a hospital, residential facility for groups, facility for skilled nursing or home for individual residential care." *See* NRS 162A.790(5) (2019) (imposing the same requirement for a durable power of attorney for healthcare decisions). The Tylers argue that this statute invalidates Stacy's powers of attorney because no certificate of competency was attached, and Gary signed them while he was a patient at Mountain's Edge Hospital. Further, citing deposition testimony from litigation involving another facility that cared for Gary, the Tylers allege that Gary may have lacked mental competency when he signed the power of attorney documents. *See* 2A C.J.S. *Agency* § 28 (2023) (defining

competency to sign powers of attorney as "whether that person is able to understand and comprehend their own actions").

The district court rejected these challenges. It noted that the powers of attorney were signed two years before El Jen accepted Gary for long-term care and that they were notarized and appeared regular on their face. Under the Uniform Act, "[a] person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is . . . invalid" may rely on the power of attorney as valid. NRS 162A.360(2); *see* NRS 162A.815(2) (making similar provision for good faith reliance on a durable power of attorney for healthcare decisions). Even crediting the heirs' argument that a certificate of competency should have been attached, the arbitration agreement was nevertheless enforceable because the heirs failed to demonstrate that El Jen did not rely in good faith on the powers of attorney Stacy furnished. A properly executed and acknowledged power of attorney permits a party "to rely in good faith on the validity of the power of attorney, the validity of the agent's authority, and the propriety of the agent's exercise of authority"—and thus carry out the agent's instructions in effecting a transaction—"unless the person has actual knowledge to the contrary." Unif. Power of Attorney Act § 119 cmt., 8B U.L.A. 214.

The Tylers argue that the district court's finding of El Jen's good faith reliance was not supported by substantial evidence. Pointing to other admission documents that Stacy signed as "immediate family member" or "spouse," they maintain that she did not sign the arbitration agreement under her powers of attorney. But Stacy signed the arbitration agreement as "Resident/Representative," with "Resident" referring to Gary, and provided El Jen with the power of attorney documents identifying her as Gary's agent. Considering this evidence, the district court found that, while it was "difficult to tell" Stacy's intent when signing the arbitration agreement, "[i]t does appear that it was represented to [El Jen] that [Stacy] held power of attorney" when El Jen "entered into this agreement to take this person as a patient." The district court also found that the admission documents did not reasonably provide El Jen with knowledge of Gary's residency at Mountain's Edge Hospital or possible lack of competency two years earlier when he signed the power of attorney documents.

This sufficiently supports the district court's finding that El Jen did not have actual knowledge of the possible invalidity of Stacy's powers of attorney and thus relied on them in good faith when it agreed to provide service and care to Gary. *See McClanahan v. Raley's, Inc.*, 117 Nev. 921, 924, 34 P.3d 573, 576 (2001) ("Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion.") (internal quotation marks omitted). The lack of actual knowledge, as well as Stacy's signature as the "Resident/Representative" on the arbitra-

tion agreement pursuant to notarized powers of attorney identifying her as Gary's agent, allowed El Jen to rely on Stacy's authority to effectuate the arbitration agreement as Gary's attorney-in-fact. Based on the materials submitted to it, the district court properly rejected the Tylers' challenge to the arbitration agreement's validity.

B.

El Jen argues that the district court should have enforced the arbitration agreement against the statutory heirs as well as the estate. It maintains that, as written, the arbitration agreement subjects *all* claims arising from the care El Jen gave Gary to arbitration:

> It is the intention of the parties to this Arbitration Agreement that it shall in[ ]ure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility, and all persons who[se] claim is derived through or on behalf of the Resident, including that [of] any parent, spouse, child, guardian, executor[,] administrator, legal representative, or heir of the Resident.

Contracts that involve interstate commerce, like the arbitration agreement in this case, are subject to the Federal Arbitration Act (FAA). 9 U.S.C. §§ 1-16 (2012); *Maide, LLC v. DiLeo*, 138 Nev. 80, 82, 504 P.3d 1126, 1128 (2022). While the FAA "reflects a liberal federal policy favoring arbitration agreements," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (internal quotation marks omitted), its goal is "to make arbitration agreements as enforceable as other contracts, but not more so," *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). An enforceable arbitration agreement requires offer, acceptance, meeting of the minds, and consideration. *See May*, 121 Nev. at 672, 119 P.3d at 1257. And "[a]s a general rule, no one can be forced to arbitrate unless they have agreed to do so." 1 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration* § 8:1 (3d ed. Supp. 2023); *see also Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 634, 189 P.3d 656, 660 (2008) (stating that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit") (internal quotation marks omitted). "There are exceptions when a nonsignatory may be bound to arbitrate," but "[a] signatory to an arbitration agreement has the burden to establish facts that would compel a resistant nonsignatory to arbitrate." Oehmke, *supra*, § 8:1.

The statutory heirs did not sign the arbitration agreement, nor is there any evidence they assented to its terms.[1] However, "nonsig-

[1]Although Stacy signed the arbitration agreement as "Resident/Representative," the district court found that Stacy "did not agree to be bound individually" to the arbitration agreement, nor did she intend to bind the remaining statutory

natories to an agreement subject to the FAA may be bound to an arbitration clause when rules of law or equity would bind them to the contract generally." *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009); *see Truck Ins. Exch.*, 124 Nev. at 634-35, 189 P.3d at 660 (noting theories by which courts have bound nonsignatories to arbitration, including incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel). El Jen argues that the heirs' wrongful death claims under NRS 41.085 are derivative in nature and that the heirs, therefore, are bound by the arbitration agreement, which requires any claimant to arbitrate claims arising out of the care El Jen provided Gary.

"Wrongful death is a cause of action created by statute having no roots in the common law." *Alsenz v. Clark Cty. Sch. Dist.*, 109 Nev. 1062, 1064, 864 P.2d 285, 286 (1993). Nevada's wrongful death statute, NRS 41.085, provides that "[w]hen the death of any person . . . is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death." NRS 41.085(2); *see* NRS 41.085(1) (defining "heir" in this context to mean "a person who, under the laws of this State, would be entitled to succeed to the separate property of the decedent if the decedent had died intestate"). "The NRS 41.085 statutory scheme creates two separate wrongful death claims, one belonging to the heirs of the decedent and the other belonging to the personal representative of the decedent, with neither being able to pursue the other's separate claim." *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014); *see also Alsenz*, 109 Nev. at 1064, 864 P.2d at 286 ("Under [NRS 41.085], both the decedent's heirs and representatives can maintain a cause of action for wrongful death. In this respect, NRS 41.085 is bifurcated."). The statutory heirs' damages include those that are personal to the heirs themselves—such as for the heir's "grief or sorrow[and] loss of probable support [and] companionship"—and the heirs' damages "are not liable for any debt of the decedent." NRS 41.085(4). The estate's damages include special damages that "the decedent incurred or sustained before the decedent's death, and funeral expenses," *see* NRS 41.085(5)(a), and "penalties . . . that the decedent would have recovered if the decedent had lived," *see* NRS 41.085(5)(b). The damages awarded to the estate "are liable for the debts of the decedent unless exempted by law." *Id.*

Although NRS 41.085 creates separate claims for both the statutory heirs and the estate, we have not addressed whether an heir's wrongful death claim is "wholly derivative" of the decedent's rights

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heirs, including her minor child. El Jen does not dispute this finding, nor does it argue that Stacy intended to sign the arbitration agreement in her individual capacity as statutory heir.

such that the decedent may bind nonsignatory statutory heirs to arbitration. States elsewhere are split on this issue and reach different conclusions based on a variety of considerations, including the language of their wrongful death statutes. *See, e.g.*, *Boler v. Sec. Health Care, LLC*, 336 P.3d 468, 472-76 (Okla. 2014) (categorizing states that hold their wrongful death statutes are "wholly derivative" of, as opposed to "independent and separate" from, the decedent's claims); James E. Rooks, Jr., *Recovery for Wrongful Death* §§ 9:4 & 9:5 (2022) (collecting cases). States that conclude that claims under their wrongful death statutes are "wholly derivative" generally rely on statutory language that limits the heirs' recovery to instances where the decedent would otherwise have been entitled to pursue an action for the underlying injury.[2] *See Laizure v. Avante at Leesburg, Inc.*, 109 So. 3d 752, 760 (Fla. 2013) (noting that "the language of the Act makes clear a cause of action for wrongful death that is predicated on the decedent's entitlement to maintain an action and recover damages if death had not ensued" and holding that this makes the heirs' claim "wholly derivative") (internal quotation marks omitted); *Labatt*, 279 S.W.3d at 644 (emphasizing that "wrongful death beneficiaries may pursue a cause of action only if the individual injured would have been entitled to bring an action for the injury if the individual had lived" and holding that this makes their claims "wholly derivative") (internal quotation marks omitted); *see also Ballard v. Sw. Detroit Hosp.*, 327 N.W.2d 370, 371 (Mich. Ct. App. 1982) (similar); *Cleveland v. Mann*, 942 So. 2d 108, 118 (Miss. 2006) (similar). These courts reason that the statutory limitation places the heirs in the same "legal shoes" as the estate—those of the decedent—and empowers the decedent to preclude the heirs' claims altogether by settling globally pre-death and releasing the defendant from liability. *See, e.g.*, *Labatt*, 279 S.W.3d at 645-46. In their view, since the decedent can bar the heirs' subsequent recovery through pre-death settlement agreements, the decedent may also bind the heirs to pre-death arbitration agreements. *Id.*

A growing majority of courts disagree and conclude that, under their wrongful death statutes, the decedent cannot bind the heirs to arbitrate their claims. These courts hold that, where a wrongful death statute establishes a distinct claim to compensate heirs for their individual loss, the heir's claim is separate from the dece-

[2]El Jen also directs us to the California Supreme Court case *Ruiz v. Podolsky*, which held that wrongful death claims of nonsignatory statutory heirs may be bound to an arbitration agreement that is governed by California's Medical Injury Compensation Reform Act (MICRA) if the agreement demonstrates an intent to bind those claims to arbitration. 237 P.3d 584, 592 (Cal. 2010). However, this holding rests on the policy considerations underlying MICRA; outside of these specific arbitration agreements, a decedent's arbitration agreement generally does not bind nonsignatory statutory heirs. *See Daniels v. Sunrise Senior Living, Inc.*, 151 Cal. Rptr. 3d 273, 280-81 (Ct. App. 2013).

dent's and not subject to the decedent's pre-death contracts, unless those contracts extinguish the defendant's liability altogether. *See, e.g.*, *Carter v. SSC Odin Operating Co.*, 976 N.E.2d 344, 359 (Ill. 2012) (holding that "[a]lthough a wrongful-death action is dependent upon the decedent's entitlement to maintain an action for his or her injury, had death not ensued, neither the Wrongful Death Act nor this court's caselaw suggests that this limitation on the cause of action provides a basis for dispensing with basic principles of contract law in deciding who is bound by an arbitration agreement"); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581, 599 (Ky. 2012) (holding that because "the wrongful death claim is not derived through or on behalf of the [decedent], but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss, . . . a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim"). In these states, "a wrongful death action, while derivative in the sense that it will not lie without a viable underlying personal injury claim, is a separate claim that comes into existence upon the death of the injured person." *Bybee v. Abdulla*, 189 P.3d 40, 46 (Utah 2008). The heirs pursuing a wrongful death claim thus "stand in, at most, one shoe of the decedent." *Id*. While the wrongful death claim may depend on the decedent having had a viable personal injury claim at time of death, that does not give the decedent the power to bind the heirs to pre-death contracts, such as arbitration agreements, that do not affect the viability of the personal injury claim. *Id.* at 47; *see Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. Ct. 2013) (stating that "wrongful death actions are derivative of decedent's injuries but are not derivative of decedent's rights").[3]

Considering this split authority, we conclude that NRS 41.085 does not allow a decedent to bind a statutory heir's wrongful death claim to arbitration without the heir's consent. First, unlike the statutes in the derivative states, NRS 41.085(4) creates an independent cause of action in the heirs that is distinct from both the decedent's claim and that of the estate. Unlike Nevada, some derivative states require the *estate* to pursue damages on behalf of the decedent's heirs through a single action. *See* Fla. Stat. Ann. § 768.20 (West 2011) ("The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages . . . ."); Mich. Comp. Laws Ann. § 600.2922(2) (West 2010) ("Every action under this section shall

[3]A split of authority exists as to whether a release of liability by the decedent also releases the heirs' separate damages claim, with most jurisdictions holding that it does. 1 Jacob A. Stein, *Stein on Personal Injury Damages Treatise* § 3:48 (3d ed. 2023). Our holding that a pre-death contract not affecting the viability of the personal injury claim requires the heirs' consent as a matter of contract law makes it unnecessary to resolve this issue. *See Bybee*, 189 P.3d at 44 n.3 (similar).

be brought by, and in the name of, the personal representative of the estate of the deceased."). Other derivative states allow the heirs to pursue a wrongful death claim but require interested parties to pursue all recoverable damages through a single action. *See, e.g.*, Miss. Code Ann. § 11-7-13 (2019) (stating that "there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned"). Nevada's wrongful death statute, by contrast, allows both the statutory heirs and the estate to "*each* maintain an action for damages," NRS 41.085(2) (emphasis added), giving statutory heirs a cause of action separate and distinct from that of the estate. *Alcantara*, 130 Nev. at 256, 321 P.3d at 914; *see Fernandez v. Kozar*, 107 Nev. 446, 449, 814 P.2d 68, 70 (1991) (holding that a "wrongful death action . . . creates an independent right in designated survivors for damages they sustain by reason of the decedent's death") (omission in original) (internal quotation marks omitted).

Second, while Nevada's wrongful death statute limits the estate's recovery to "special damages . . . incurred or sustained before the decedent's death," "funeral expenses," and "penalties . . . that the decedent would have recovered if the decedent had lived," and makes those awards liable for the decedent's debts, NRS 41.085(5), the heir's award is not similarly liable for the decedent's debts and includes no statutory limitation based on the decedent's right to pursue a claim for the underlying injury, *see* NRS 41.085(4). This differentiates NRS 41.085 from nearly all the derivative states cited by El Jen. *See Laizure*, 109 So. 3d at 760; *Ballard*, 327 N.W.2d at 371; *Labatt*, 279 S.W.3d at 644. Instead, Nevada's wrongful death scheme more closely aligns with the wrongful death statutes in states that provide a separate claim that arises upon the death of the decedent and compensates the statutory heirs for their individual loss. *Compare, e.g.*, *Gilloon v. Humana, Inc.*, 100 Nev. 518, 520, 687 P.2d 80, 81 (1984) (stating that "NRS 41.085 creates an independent cause of action in the heirs and personal representatives of one whose death is caused by the wrongful act or neglect of another" and that "has no existence before the death of the decedent has occurred"), *with Carter*, 976 N.E.2d at 360 (noting that "a wrongful-death action does not accrue until death and is not brought for the benefit of the decedent's estate, but for the next of kin who are the true parties in interest"). To illustrate, statutory heirs in Nevada may pursue "their respective damages" for losses that the heirs suffered individually, such as "grief or sorrow" and "loss of probable support, companionship, society, comfort and consortium," which are not liable for payment of the decedent's debts. NRS 41.085(4). "[O]n behalf of the decedent's estate," the estate's personal representatives may also pursue damages, which *are* liable for payment of the decedent's debts and include penalties "that the decedent would have recovered if the decedent had lived" and dam-

ages incurred before the decedent's death (plus funeral expenses). NRS 41.085(5)(a), (b). This provides statutory heirs with a separate and independent claim to compensate them for their personal losses resulting from the decedent's death.

We acknowledge that the damages a statutory heir may recover under NRS 41.085(4) complicates our analysis because these damages include not only those that are personal to the heirs—such as for the heirs' grief or sorrow—but also "damages for pain, suffering or disfigurement of the *decedent*" (emphasis added). While pain and suffering damages are traditionally personal to the decedent plaintiff, *see, e.g.*, NRS 41.100(3) (providing for the survival of a deceased plaintiff's claims for pain and suffering, to be recovered by the decedent's administrator), we do not believe that, by including them in the recovery available to the statutory heirs in a wrongful death suit, the Legislature viewed the heirs' claim as derivative, given the dual-claim structure of wrongful death claims in Nevada, the statutory language particular to heirs' claims, and the other categories of damages personal to the heirs. In so deciding, we do not determine whether that particular category of damages is subject to the decedent's pre-death contracts, since NRS 41.100(3) excepts the estate's wrongful death action from its purview and the parties have not briefed this issue. *See Badillo v. Am. Brands, Inc.*, 117 Nev. 34, 42, 16 P.3d 435, 440 (2001) (declining to "consider an issue that has not been fully raised by appellants or meaningfully briefed by either party").

El Jen further argues that the heirs' claims, being derivative of the underlying injury, are also derivative of the decedent's/estate's right to bring a claim and the damages recoverable based on that claim. El Jen supports its argument by comparing wrongful death claims under NRS 41.085 to loss of consortium claims at common law, where we have held that a spouse's loss of consortium claim is a "derivative claim" that is "dependent upon" the success of the underlying negligence claim. *Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 221-22 & n.31, 180 P.3d 1172, 1178 & n.31 (2008) (citing *Gunlock v. New Frontier Hotel Corp.*, 78 Nev. 182, 185 n.1, 370 P.2d 682, 684 n.1 (1962), *abrogated on other grounds by Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 291 P.3d 150 (2012)). Loss of consortium claims depend upon the underlying injury and are "derivative in the sense that the beneficiaries would be required to establish [defendant] was liable [to the decedent] for the[ ] . . . underlying injury in order to recover damages." *Labatt*, 279 S.W.3d at 646. But a claim for loss of consortium is not "derivative of" the decedent's claim for the purpose of binding a claimant to arbitration agreements because loss of consortium provides a surviving spouse "an independent action for negligence" that is individual to the surviving spouse. *Bennett v. Topping*, 102 Nev. 151, 153, 717 P.2d 44,

45 (1986); *see also Labatt*, 279 S.W.3d at 646 ("[L]oss of consortium claims are not entirely derivative as are wrongful death claims [in Texas]; . . . they are separate and independent claims distinct from the underlying action.").

All wrongful death statutes, whether "derivative" or "separate," require the plaintiff to prove the defendant's liability for the underlying injury to the decedent. In this sense, wrongful death claims brought by statutory heirs always derive from the decedent's underlying injury. *See Pisano*, 77 A.3d at 659. But the fact that a wrongful death claim is "derivative" in the sense that it derives from the injury to the decedent "does not mean that [the claimant] is subject to any and all contractual limitations—such as an agreement to arbitrate—that are applicable to the decedent." *Carter*, 976 N.E.2d at 359; *see Bybee*, 189 P.3d at 47 (holding that, while a wrongful death claim is subject to decedent-created defenses that "go to the viability of the underlying personal injury action," that rule does not extend to contractual provisions such as arbitration agreements that do not affect the action's viability).

Although El Jen argues otherwise, the holdings in *Carter* and *Bybee*, which we adopt as most consistent with Nevada wrongful death statutes and caselaw, do not run afoul of *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012). In *Marmet*, the United States Supreme Court struck down "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes" as "a categorical rule prohibiting arbitration of a particular type of claim [that] is contrary to the terms and coverage of the FAA." *Id*. at 533. But unlike the categorical prohibition in *Marmet*, the rule that a party to an agreement cannot bind a nonparty applies to all sorts of agreements, not just agreements to arbitrate. "Indeed, had the decedent's agreement [in *Carter*] been about choice of law, judicial forum, allocation of costs and fees, confidentiality, or any number of standard contract provisions, the results would have been the same"—the decedent could not have bound the wrongful death claimant to its terms. *Cole v. Granite Nursing & Rehab. Ctr., LLC*, No. 22-cv-312-JPG, 2022 WL 1306333, at *4 (S.D. Ill. 2022) (rejecting argument that the FAA preempts the holding in *Carter*). "[F]ederal law does not force arbitration upon a party that never agreed to arbitrate in the first place under the guise of preemption principles." *Richmond Health Facilities v. Nichols*, 811 F.3d 192, 201 (6th Cir. 2016).

C.

El Jen offers two additional arguments in favor of compelling the heirs to arbitration. First, since both the statutory heirs' claims and the estate's claim must prove the same question of fact—whether the defendant was liable for the decedent's injuries—El Jen argues

that as a prudential matter, both claims must proceed in the same venue. Second, El Jen argues that the heirs are equitably estopped from objecting to arbitration. Neither argument carries.

In *Alcantara*, we held that issue preclusion barred the statutory heir from relitigating the issue of liability because the estate had failed to prove liability in a previous case and "the issue of liability is interrelated because both claims are based on the same wrong." 130 Nev. at 262, 321 P.3d at 918. Although it is true that proving a wrongful death claim requires the claimant to prove the same underlying negligence, this does not make a wrongful death claim wholly derivative of the decedent's claim such that the heirs can be compelled to arbitration, despite not having agreed to it. Moreover, as El Jen concedes, issue preclusion as to the common issue of liability does not apply here because El Jen's liability has not yet been litigated. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (outlining the four elements of issue preclusion).

El Jen next argues that equitable estoppel binds nonsignatory statutory heirs where they "knowingly exploit[ ] the agreement containing the arbitration clause despite having never signed the agreement." *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1046 (9th Cir. 2009) (internal quotation marks omitted). However, under the doctrine of "direct benefits estoppel," a nonsignatory is not bound to an arbitration agreement simply because its claim relates to a contract containing the arbitration provision. *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 741 (Tex. 2005). Instead, this doctrine applies only if the nonsignatory party "seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision." *Id.* Here, although the statutory heirs' claims relate to the services El Jen provided Gary, the heirs' wrongful death claims seek to derive privileges granted to them by statute and do not seek a direct benefit from the admission paperwork that included the arbitration agreement. Equitable estoppel thus does not apply.

III.

El Jen alternatively argues that the district court abused its discretion by failing to stay its proceedings under NRS 38.221(7) pending the outcome of arbitration of the estate's claim against it. An order resolving a request for a stay is reviewed for abuse of discretion, and we will affirm such an order unless the district court's decision is not supported by substantial evidence. *Maheu v. Eighth Judicial Dist. Court*, 89 Nev. 214, 216-17, 510 P.2d 627, 629 (1973).

Nevada has adopted the Uniform Arbitration Act of 2000, 7 U.L.A. 25 (part 1A) (West 2009), codified at NRS 38.206 through NRS 38.248. Under NRS Chapter 38, "[i]f the court orders arbi-

tration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration." NRS 38.221(7). However, "[i]f a claim subject to the arbitration is severable, the court may limit the stay to that claim." *Id*. El Jen argues that NRS 38.221(7) requires the district court to stay the litigation by the heirs against El Jen and RTC because it compelled the estate to arbitration against El Jen. We disagree. As set forth above, NRS 41.085 allows the statutory heirs to pursue separate wrongful death claims that the statutory heirs did not agree to arbitrate. Since the statutory heirs' claims are not subject to an arbitration agreement, it follows that NRS 38.221(7) did not require the district court to stay litigation of their claims. *See also Mendez v. Puerto Rican Int'l Cos.*, 553 F.3d 709, 711-12 (3d Cir. 2009) (applying 9 U.S.C. § 3 to facts analogous to the present case and concluding a stay of proceedings was not required under the FAA). We therefore conclude that the district court did not abuse its discretion in refusing to stay litigation of the statutory heirs' claims against El Jen and the other defendants.

CONCLUSION

Nevada's wrongful death statute creates a separate cause of action in favor of a decedent's statutory heirs. The heirs' claims are derivative in the sense that they depend on the decedent's personal injury, but they are otherwise independent. As such, a nonsignatory heir's wrongful death claim is not bound to an agreement, like the arbitration agreement in this case, that does not implicate the viability of the underlying personal injury claim. Since the heirs are nonsignatories who are pursuing their own individual claims, we also conclude that the district court did not abuse its discretion in refusing to stay the litigation while the estate proceeds to arbitration against El Jen. We affirm.

Cadish and Bell, JJ., concur.

ZANE MICHAEL FLOYD, Appellant, *v.* THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS; and JAMES DZURENDA, Director, Nevada Department of Corrections, Respondents.

No. 84081

September 28, 2023 536 P.3d 445

Appeal from a district court order dismissing a complaint for declaratory relief challenging the Legislature's delegation of authority in NRS 176.355. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Affirmed.

Rene L. Valladares, Federal Public Defender, and *Jocelyn S. Murphy*, *David Anthony*, and *Bradley D. Levenson*, Assistant Federal Public Defenders, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, *Steven G. Shevorski*, Chief Litigation Counsel, and *Jeffrey M. Conner*, Deputy Solicitor General, Carson City, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Parraguirre, J.:

Nevada's Constitution provides for three coequal branches of government and expressly prohibits each branch of government from exercising powers belonging to another branch of government. Nev. Const. art. 3, § 1. Consistent with that separation of powers, Nevada's Legislature cannot delegate its lawmaking authority to another branch of government, such as the executive branch. This court has recognized that the Legislature does not impermissibly delegate its lawmaking authority so long as the Legislature establishes " 'suitable' standards to govern the manner and circumstances under which an executive agency can exercise its delegated authority." *Nat'l Ass'n of Mut. Ins. Cos. v. State, Dep't of Bus. & Indus.*, 139 Nev. 18, 34, 524 P.3d 470, 484 (2023) (quoting *Sheriff v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985)).

Appellant Zane Michael Floyd is a death-row inmate who contends that NRS 176.355—Nevada's statute providing that an execution must be effectuated by "injection of a lethal drug"—unconstitutionally delegates lawmaking authority to respondents, the Nevada Department of Corrections and its Director, James Dzurenda (collectively, the Director). Although NRS 176.355 pro-

vides that the method of execution must be by lethal injection, Floyd contends that the statute is unconstitutional because it gives the Director discretion to determine the process by which a lethal injection is administered.

We disagree with Floyd and conclude that NRS 176.355, combined with the U.S. Constitution's Eighth Amendment prohibition on cruel and unusual punishment, provides the Director with suitable standards to determine the process by which a lethal injection is to be administered. We therefore affirm the district court's order dismissing Floyd's declaratory relief action.

FACTS AND PROCEDURAL HISTORY

In the early 2000s, Floyd was convicted by a jury and sentenced to death for killing four people in 1999. *See generally Floyd v. State*, 118 Nev. 156, 42 P.3d 249 (2002) (recounting the circumstances of the murders and affirming the jury's imposition of the death penalty). Throughout the next roughly two decades, Floyd's collateral challenges to his convictions and death sentences were unsuccessful. Consequently, in April 2021, the Clark County District Attorney began the process of obtaining an order of execution and warrant to carry out Floyd's death sentence.

In response, Floyd filed the underlying action against the Director.[1] Therein, he sought a declaration that NRS 176.355 violates the separation-of-powers clause and cannot be enforced. More specifically, Floyd sought a declaration that NRS 176.355 unconstitutionally delegates to the Director the legislative authority to determine how a lethal injection should be administered.

The Director moved to dismiss Floyd's complaint. In the motion, the Director argued generally that NRS 176.355 provides "suitable standards" for the Director in carrying out a death sentence. *Luqman*, 101 Nev. at 153, 697 P.2d at 110. The district court entered a written order granting the Director's motion to dismiss, reasoning that NRS 176.355, combined with the Eighth Amendment's prohibition on cruel and unusual punishment, provides the Director with suitable standards to determine the process by which a lethal injection is to be administered. This appeal followed.

DISCUSSION

Floyd's constitutional challenge to NRS 176.355 presents a question of law that we review de novo. *State v. Second Judicial Dist. Court (Hearn)*, 134 Nev. 783, 786, 432 P.3d 154, 158 (2018) (observing that "the constitutionality of a statute," including whether a statute violates the separation-of-power doctrine, is a "question of

[1]Floyd also sued NDOC's Chief Medical Officer, Ihsan Azzam. Dr. Azzam filed a motion to dismiss, which the district court granted, and Dr. Azzam is not a party to this appeal.

law, which this court reviews de novo" (internal quotation marks omitted)). We presume the statute is valid and hold the challenger to the burden of showing that it is not. *Taylor v. Colon*, 136 Nev. 434, 436, 482 P.3d 1212, 1215 (2020) ("[S]tatutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional." (quoting *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 796, 358 P.3d 234, 237-38 (2015))); *see also McNeill v. State*, 132 Nev. 551, 556, 375 P.3d 1022, 1025 (2016) ("Because we presume that the Legislature is aware that it may not delegate the power to legislate pursuant to the separation of powers, we presume that it acted in accordance.").

The Nevada Constitution divides the powers of state government into "three separate departments"—the legislative, executive, and judicial departments—and provides that "no persons charged with the exercise of powers properly belonging to one of those departments shall exercise any functions, appertaining to either of the others." Nev. Const. art. 3, § 1. The question at issue is whether the Legislature unconstitutionally delegated its lawmaking authority to an executive branch official, the Director. Our decision in *Luqman* provides the general framework for answering that question.[2]

In *Luqman*, we considered an amendment to the Uniform Controlled Substances Act (UCSA) that delegated authority to an executive branch agency, the State Board of Pharmacy, to categorize drugs into various "schedules." Two defendants charged with illegal possession of certain drugs argued that because the scheduling of drugs determined the penalty they faced, the amendment impermissibly delegated lawmaking authority to the Pharmacy Board. 101 Nev. at 152-53, 697 P.2d at 109-10. In rejecting that argument, we observed that "[a]lthough the legislature may not delegate its power to legislate, it may delegate the power to determine the facts or state of things upon which the law makes its own operations depend." *Id.* at 153, 697 P.2d at 110. From that premise, we reasoned that "the legislature can make the application or operation of a statute complete within itself dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the administrative agency." *Id.* In other words, if "the legislature vests the agency with mere fact finding authority," the Legislature has not delegated its lawmaking authority. *Id.* We determined that so long as legislation provides the agency with "suitable standards," meaning those that are "sufficient to guide the agency with respect to the purpose of the law and the power authorized," the Legislature has not delegated its

[2]In his reply brief, Floyd relies on *McNeill v. State*, 132 Nev. 551, 375 P.3d 1022 (2016). We are not convinced that *McNeill* is relevant. Our decision in that case primarily addressed whether an administrative agency had exceeded its statutory grant of authority in enacting a regulation, not whether the Legislature had improperly delegated lawmaking authority to the agency. *Id.* at 555-57, 375 P.3d at 1025-26.

lawmaking authority. *Id.* at 153-54, 697 P.2d at 110. Applying that test, we determined that the amendment to the UCSA was constitutional because the Legislature provided the Pharmacy Board with "specific guidelines listing various factors which are to be taken into account . . . when scheduling drugs as well as delineating the requirements by which a drug is classified in an appropriate schedule." *Id.* at 154, 697 P.2d at 110.

The statute challenged in this case specifies the manner in which the Director must carry out a death sentence—"by an injection of a lethal drug"—and authorizes the Director to determine which drug or combination of drugs to use after consulting with NDOC's Chief Medical Officer. NRS 176.355(1), (2)(b). In its entirety, the statute provides as follows:

> 1. The judgment of death *must be inflicted by an injection of a lethal drug.*
>
> 2. *The Director of the Department of Corrections shall*:
>
> (a) Execute a sentence of death within the week, the first day being Monday and the last day being Sunday, that the judgment is to be executed, as designated by the district court. The Director may execute the judgment at any time during that week if a stay of execution is not entered by a court of appropriate jurisdiction.
>
> (b) *Select the drug or combination of drugs to be used for the execution after consulting with the Chief Medical Officer.*
>
> (c) Be present at the execution.
>
> (d) Notify those members of the immediate family of the victim who have, pursuant to NRS 176.357, requested to be informed of the time, date and place scheduled for the execution.
>
> (e) Invite a competent physician, the county coroner, a psychiatrist and not less than six reputable citizens over the age of 21 years to be present at the execution. The Director shall determine the maximum number of persons who may be present for the execution. The Director shall give preference to those eligible members or representatives of the immediate family of the victim who requested, pursuant to NRS 176.357, to attend the execution.
>
> 3. The execution must take place at the state prison.
>
> 4. A person who has not been invited by the Director may not witness the execution.

NRS 176.355 (emphases added).

Floyd contends that NRS 176.355 lacks suitable standards because, aside from declaring that an execution must be "inflicted by injection of a lethal drug," it affords the Director complete discretion to determine the types, dosages, and sequencing of drugs to be used in the execution. According to Floyd, "a statute that does

nothing more than state a means of execution does not provide suitable and sufficient standards" for the Director to implement the lethal-injection process.[3]

We are not persuaded by Floyd's argument. Most significantly, NRS 176.355 must be read in context with NRS 200.030, which authorizes the imposition of the death penalty and lists the crimes for which execution is the appropriate punishment. In these statutes, the Legislature has identified the types of crimes that are punishable by death and determined the manner of execution—injection of a lethal drug—thereby exercising its exclusive authority to define crimes and penalties. *See Lapinski v. State*, 84 Nev. 611, 613, 446 P.2d 645, 646 (1968) ("The power to define crimes and penalties lies exclusively in the legislature."). By specifying the manner of execution, the Legislature has given the Director clear guidance with respect to the delegated authority to determine the execution protocol.

Moreover, the Director's discretion in choosing the drug or combination of drugs is not unguided; rather, the Director must make those decisions "after consulting with the Chief Medical Officer." NRS 176.355(2)(b). The Chief Medical Officer is appointed by the Director of the Nevada Department of Health and Human Services, NRS 439.085, and must be a licensed physician or administrative physician, eligible for a license as a physician or administrative physician, or a physician or administrative physician who has a master's degree or doctoral degree in public health or a related field, NRS 439.095(3). Among other duties, the Chief Medical Officer is responsible for "[e]nforc[ing] all laws and regulations pertaining to the public health." NRS 439.130(1)(a). By requiring consultation with the Chief Medical Officer, the Legislature has ensured the Director will ascertain facts and conditions relevant to making operation of the death penalty statute complete. This fits within the "fact finding" that *Luqman* recognized may be appropriately delegated.

In addition to the statutory guidance, the Eighth Amendment's prohibition on cruel and unusual punishment further guides and limits the Director's discretion. *See Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012) (pointing to the Cruel and Unusual Punishment Clause as an implicit guide and limit on the Department of Corrections' discretion in developing a lethal injection protocol); *cf. State v. Gee Jon*, 46 Nev. 418, 437, 211 P. 676, 682 (1923) ("We must presume that the officials [e]ntrusted with the infliction of the

[3]Floyd identifies ten concerns with NRS 176.355, many of which are redundant and some of which have only marginal relevance. We have considered all of them in deciding this case. Relatedly, Floyd suggests that the Chief Medical Officer may simply refuse to consult with the Director, thereby leaving the Director with unfettered and uninformed discretion regarding how to administer a lethal injection. We find this suggestion implausible. In this, we note that Floyd's record citations do not establish a factual basis for that argument.

death penalty . . . will carefully avoid inflicting cruel punishment."). Specifically, to comply with the Eighth Amendment, the protocol approved by the Director must avoid inflicting severe pain. *See Glossip v. Gross*, 576 U.S. 863, 882 (2015) ("[A]n inmate challenging a protocol bears the burden to show, based on evidence presented to the court, that there is a substantial risk of severe pain.").

We are not alone in rejecting a separation-of-powers challenge to a statute addressing the manner of carrying out a death sentence. Several other courts have rejected similar separation-of-powers challenges.[4] *See, e.g.*, *Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at *8 (W.D. Mo. Nov. 16, 2012); *Cook*, 281 P.3d at 1056; *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 309 (Ct. App. 2018); *Sims v. State*, 754 So. 2d 657, 669-70 (Fla. 2000); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981); *State v. Ellis*, 799 N.W.2d 267, 289-90 (Neb. 2011); *O'Neal v. State*, 146 N.E.3d 605, 621 (Ohio Ct. App. 2020); *State v. Hawkins*, 519 S.W.3d 1, 55, 60-61 (Tenn. 2017); *Ex parte Granviel*, 561 S.W.2d 503, 514-15 (Tex. Crim. App. 1978); *Brown v. Vail*, 237 P.3d 263, 270 (Wash. 2010). At least four of these courts have based their analyses in part on pragmatic considerations, namely, that an administrative agency is often better-equipped than a legislature to deal with the granular details of formulating an execution protocol. *See, e.g.*, *Ex parte Granviel*, 561 S.W.2d at 514 ("When the Legislature itself cannot practically or efficiently perform the functions required, it has the authority to designate some agency to carry out the purposes of such legislation . . . ."); *see also Zink*, 2012 WL 12828155, at *8 (observing that it is "impracticable" for a legislature to provide details in legislation when "the relations to be regulated are highly technical or where the regulation requires a course of continuous decision" and that, in such instances, "the agency official is better qualified to make the policy" regarding certain details (internal quotation marks omitted)); *Cook*, 281 P.3d at 1056 (observing that the Arizona Department of Corrections' execution protocol is 35 pages long and that it would be "impracticable for the Legislature to supply the details of the execution process itself"); *Ellis*, 799 N.W.2d at 289 (recognizing that the nondelegation doctrine "permit[s] delegation of details that the legislature cannot practically or efficiently perform itself").[5]

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[4]While Floyd urges us to disregard these decisions and instead follow the Arkansas Supreme Court's analysis in *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012), we are not persuaded that our suitable-standards test requires the Legislature to provide the level of specificity that the *Hobbs* court deemed necessary under Arkansas law.

[5]At oral argument, Floyd suggested for the first time that these states' nondelegation tests are less stringent than *Luqman*. We do not perceive any substantive difference between our suitable-standards test and those states' analogous tests.

We share these pragmatic concerns, particularly given that our Legislature convenes for only 120 days every other year. *See* Nev. Const. art. 4, § 2. An execution protocol must take into account ever-changing resources, such as personnel, facilities, and drugs, and coordinate a complex procedure. *See generally Glossip*, 576 U.S. at 869-71 (discussing "obstacle[s]" to lethal injection protocols presented by the changing availability of drugs used to carry out death sentences); *Cook*, 281 P.3d at 1056 (discussing the kind of details covered in an execution protocol). Having determined which offenses may carry the penalty of death and specified the manner in which a death sentence must be inflicted, it was within the Legislature's authority to delegate the details of implementing the death penalty to the Director, who is in a better position to consider all relevant facts and ensure that the death penalty is implemented consistent with legislative directive and the Eighth Amendment.

CONCLUSION

In sum, we conclude that the Legislature has provided suitable standards and safeguards to guide the Director in exercising the authority delegated in NRS 176.355. We therefore affirm the district court's order dismissing Floyd's complaint.

Stiglich, C.J., and Cadish, Pickering, Herndon, Lee, and Bell, JJ., concur.

IN THE MATTER OF THE GUARDIANSHIP OF D.M.F., A PROTECTED MINOR.

D.M.F., APPELLANT, *v.* YALONDA F.; ALEXIS M.; AND ANTONIO B., RESPONDENTS.

No. 84274

September 28, 2023 535 P.3d 1154

Appeal from a district court order removing a minor's guardian and terminating the guardianship. Eighth Judicial District Court, Family Division, Clark County; Denise L. Gentile, Judge.

Reversed and remanded with instructions.

Legal Aid Center of Southern Nevada, Inc., and *Marina F. Dalia-Hunt* and *Kerri J. Maxey*, Las Vegas, for Appellant.

Alexis M., North Las Vegas, Pro Se.

Antonio B., North Las Vegas, Pro Se.

Yalonda F., North Las Vegas, Pro Se.

Before the Supreme Court, EN BANC.

OPINION

By the Court, CADISH, J.:

In this appeal, we consider whether a district court's sua sponte decision to remove a protected minor's guardian and terminate that protected minor's guardianship based on an ex parte communication was within the court's power. We also consider whether the court's actions violated procedural due process protections and whether the court abused its discretion by failing to comply with the pertinent statutory requirements related to guardianship proceedings. Further, we consider whether the district court exceeded its authority in directing Child Protective Services (CPS) to take certain actions regarding the placement of the protected minor.

Regarding the district court's authority to sua sponte remove a guardian and terminate a guardianship, we conclude that the district court has such authority even in the absence of a petition seeking removal and termination. As to the due process question, we conclude the proceedings and resultant order did not comport with due process, as the court did not give proper notice that it was contemplating removal and termination such that the parties had a meaningful opportunity to be heard on the issue. We further conclude the district court abused its discretion by failing to apply the

applicable statutes and factors for removal and termination, and it also made unsupported and clearly erroneous factual determinations in reaching its decision. Finally, we hold that while portions of the district court order stated what CPS should do going forward, its ultimate order in this regard was simply to refer the matter to CPS for "action as they deem fit," which is not an abuse of discretion. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Investigations into the protected minor's safety

At birth, D.M.F. and A.F., his twin, tested positive for opiates and amphetamines. Respondent Alexis M., the mother, and respondent Antonio B., the father, admitted to methamphetamine use during the pregnancy. As a result, CPS began an investigation into possible abuse or neglect. The parents then agreed to allow respondent Yalonda F., the twins' paternal grandmother, to serve as a temporary guardian via a notarized temporary-guardianship appointment while the parents sought treatment.

As noted in the CPS records, Yalonda allowed the parents to stay at her home; however, if the parents' drug-use treatment ceased or they relapsed, Yalonda promised both to make them move out and to seek a court-ordered general legal guardianship over the twins. CPS noted that Yalonda provided for the twins' needs and that Yalonda had been assessed "appropriate and aligned with the twins." Ultimately, CPS permitted the hospital to release the twins to Yalonda.

A CPS specialist discussed with Yalonda and the parents the expectations for the newborns' care, including that the parents could support Yalonda in the care of the twins, but they could not sleep in the same room as the twins. Yalonda confirmed that she had placed the twins' bassinets in her room. In subsequent follow-ups, CPS observed that the twins appeared in "good physical health with no obvious signs of abuse or neglect." While CPS observed that the parents helped Yalonda care for the twins, it was noted that Yalonda was the primary caregiver and managed mainly on her own. Yalonda also described herself as very strict regarding the parents' drug treatment, and CPS confirmed that both parents had been participating in drug treatment services.

Before CPS closed its investigation, A.F. died in a co-sleeping incident with the parents. Police and CPS investigated the death. The investigations revealed that the twins, three months old at that time, had been fussy, prompting Antonio to help Yalonda care for them by taking A.F. to another room to calm him. Meanwhile, Yalonda calmed D.M.F. and put him to sleep in the bassinet in her room, at which time she also fell asleep. Antonio placed A.F. to sleep on a pillow in the bed he shared with Alexis. Eventually, Anto-

nio and Alexis fell asleep with A.F. on the bed. When Antonio woke up in the morning, he found A.F. face down on the pillow and unresponsive. Yalonda unsuccessfully attempted to resuscitate A.F.

As part of the investigations, CPS documented that D.M.F. appeared healthy and showed no obvious signs of abuse or neglect. Yalonda also told CPS that the parents had, up to that point, followed her rules prohibiting the parents from sleeping with the twins in their room. Ultimately, police reported no concerns of abuse or neglect related to A.F.'s death and described A.F., based on physical observations, as a well-cared-for baby. The coroner ruled the cause of death positional asphyxia due to co-sleeping. The investigations ultimately concluded that A.F.'s death did not result from abuse or neglect. Accordingly, no charges were brought.

However, the CPS investigation also revealed that Alexis and Antonio had relapsed with methamphetamine. CPS described that the testing, which was done the day after A.F. died, appeared to confirm Alexis's statement of a one-time relapse; however, the testing also appeared to show that Antonio had used more than one time. When Yalonda learned of the relapse, she expressed her plan to seek general legal guardianship over D.M.F.

CPS reported that Yalonda exhibited adequate caregiver skills and met D.M.F.'s basic needs. While CPS found reasonable cause to believe that the parents presented a physical risk to D.M.F. because of the drug relapse and the incident of co-sleeping with A.F., two specialists ultimately deemed D.M.F. safe in Yalonda's care, closed the investigation, and issued final approval of Yalonda as caregiver for D.M.F.

Petition for appointment of guardianship

About one month after A.F.'s death, Yalonda petitioned the district court for appointment of guardianship over D.M.F.[1] D.M.F. was a little over four months old at that time. In the petition, Yalonda indicated that she had been D.M.F.'s temporary guardian since his birth because of the parents' drug use. She noted the agreement between her and the parents for her to serve as D.M.F.'s temporary guardian after he had been born substance exposed. She further stated, "Our agreement was that if they relapsed I would file for legal guardianship." She explained in the petition that both parents were unable to presently care for D.M.F. because they were active drug users.

[1]Although the CPS case was officially closed after Yalonda petitioned the court for appointment as legal guardian, the records indicate that the investigation was concluded before Yalonda sought legal guardianship. The initial assessment report concluding that D.M.F. was safe in Yalonda's care was also pending final approval by a supervisor in early March before Yalonda sought legal guardianship. The records note that she asked CPS for advice on how to obtain guardianship and kept CPS updated on her efforts to do so.

Notarized consents from the parents and documentation of the temporary guardianship were attached to the petition for legal guardianship. The petition listed the same address for Yalonda, D.M.F., and the parents. Finally, Yalonda checked a box indicating that the guardianship was "NOT requested because of an investigation of abuse or neglect conducted by . . . [CPS] or law enforcement." Following a short hearing, the district court granted the petition and appointed Yalonda as guardian. D.M.F., who was represented by counsel at the hearing, did not object to the guardianship.

Receipt of ex parte communication

Six months later, the district court issued an order stating that it had reviewed, under the Nevada Statewide Rules for Guardianship (NSRG), an ex parte communication from another judge suggesting that there were possible misrepresentations made in Yalonda's petition.[2] Citing NSRG 5 and NRS 159.046,[3] the district court appointed a guardianship-compliance investigator, set a hearing on the ex parte communication, and ordered a response from Yalonda concerning the communication, including the failure to inform the district court of A.F.'s death and CPS's subsequent investigation thereof.

With respect to the guardianship-compliance investigator, the district court directed the investigator to examine D.M.F.'s placement, health, welfare, education, and financial status. The court also instructed the investigator to determine Yalonda's suitability as guardian and to explore her failure to inform the court of A.F.'s death or CPS's ensuing investigation. The district court further requested that the investigator determine who resided in the home, whether CPS had any open investigations concerning D.M.F., and whether any unsupervised contact between the parents and D.M.F. occurred.

Guardianship-compliance investigator's report

The investigator filed a report with the district court. Even though the district court had tasked the investigator with determining Yalonda's suitability and D.M.F.'s status, the report did not contain any conclusions in that regard. The investigator noted the existence of established sleeping arrangements for the children at the time of A.F.'s death but did not describe those arrangements. There was no

[2]The other judge obtained information about A.F.'s death from CPS records in an unrelated matter regarding D.M.F.'s half-sibling, who was in the care of a different paternal grandmother, nonparty Jane Morales.

[3]Although the district court cited NRS 159.046, that provision applies to adult guardianships. Authority to appoint an investigator in minor guardianships is set forth in NRS 159A.046. Additionally, NSRG 5, which governs appointing an investigator in response to ex parte communications, appears to contain a typographical error in cross-referencing NRS 159.l46, rather than NRS 159A.046.

indication in the investigator's report that Yalonda or the parents had previously co-slept with the twins.

The report provided that Yalonda had informed the investigator that D.M.F. was safe, immunized, treated by a cardiologist for a heart murmur, and enrolled in early intervention services. Yalonda also told the investigator that she did not permit the parents to have unsupervised contact with D.M.F. and established back-up care for D.M.F. if she needed someone to watch him. She stated that both parents were sober again. The report did not reveal any effort to independently verify the information provided by Yalonda.

As to Yalonda's failure to inform the court of A.F.'s death and the ensuing investigation, the investigator stated that Yalonda had worked with a nonprofit organization to finish the guardianship paperwork, which had told her to submit the paperwork as completed. Additionally, the investigator noted that Yalonda did not believe she needed to inform the court of A.F.'s passing because, so she thought, the CPS investigation had been closed.

Hearing on the ex parte communication

At the hearing to address the ex parte communication regarding A.F.'s death, the district court questioned Yalonda's judgment as a caregiver and expressed concern for D.M.F.'s safety, because Yalonda's "decision . . . put [A.F.] in the position that he was in, in the first place," despite that the "parents were on drugs and the children were born . . . with drugs in their system." The district court then discussed, hypothetically, the options that were available in the event it deemed Yalonda an inappropriate guardian, including allowing CPS to make a placement determination. The court observed that "grandma can get the guardianship through [an NRS Chapter 432B] case," if CPS deems a guardianship appropriate, and purported to "just really weigh[ ] what this [c]ourt should do in terms of . . . whether this person is an appropriate person." Despite stating that no "disqualifying factors" existed, the district court nevertheless listed what it viewed as concerning issues regarding Yalonda's suitability as guardian: (1) allowing the parents to remain in the home, (2) deciding to leave a child with "those people who were obviously very careless," and (3) permitting the parents continued access to D.M.F. The district court acknowledged that Yalonda was not allowing the parents to watch D.M.F. without supervision, but the court questioned its ability to prevent unsupervised contact between the parents and D.M.F.

D.M.F.'s counsel argued "[D.M.F.] deserves somebody who's gonna take care of him, somebody who's gonna provide him with the basic necessities and keep him safe . . . . And that is what Ms. [Yalonda] is doing. And that's what our statutes concentrate on." D.M.F.'s attorney proposed that the court order quarterly, rather

than yearly, reports from Yalonda, require the parents to leave the home, or preclude the parents from unsupervised contact. Moreover, D.M.F.'s attorney suggested that the court could refer the matter to CPS but that CPS would likely abide by its decision. Lastly, D.M.F.'s counsel argued that Yalonda's failure to inform the court of A.F.'s death was not intentional.

At the hearing, Yalonda asserted that "everything is . . . about keeping [D.M.F.] safe." She noted that she never missed D.M.F.'s doctor appointments, kept him clean, and put him to sleep in a pack-and-play in her room. Yalonda also stated that she never left him alone with the parents and had back-up care if necessary, and she volunteered to make the parents leave her home. She mentioned that Alexis was sober and employed at Amazon, which tested for drugs. She also told the court that she did not intentionally omit A.F.'s death or the investigation, explaining that she had sent a copy of the guardianship petition to a nonprofit organization, who reviewed it for her and noted no concerns.

The district court stated that it believed the omission was unintentional. The court also remarked that Yalonda "had no ill intentions" and that she was "overly protective of this one." However, the district court expressed concerns regarding D.M.F.'s environment because the parents continued to live there. The court considered whether it could order that the parents no longer live with Yalonda, as it concluded that the parents are the issue. Yet the court indicated that it was reluctant to do so without an independent person in the home who could monitor the family on a day-to-day basis. Ultimately, the court stated that it would either set another hearing or issue an order. The district court barred the parents from any unsupervised contact with D.M.F. in the interim.

Removal of the guardian and termination of the guardianship

Thereafter, the district court entered an order removing Yalonda as guardian and terminating D.M.F.'s guardianship. The order cited only NSRG 5 as authority. The district court found that Yalonda had failed to reveal prior history with the parents of the children, citing three incidents in the CPS records that occurred before D.M.F.'s birth.

The district court then discussed the CPS investigations into the parents' drug use and A.F.'s death. Noting that the investigations were ultimately closed, the district court found that "this guardianship was granted under false pretenses" based on the following:

> [T]he Petition for Appointment was filed just shortly after the twin died in the care of grandmother, and she chose not to reveal this information, and unilaterally deemed that this information was not necessary. . . . At the hearing on this matter, . . . this [c]ourt queried [Yalonda] for the reason to conceal

> this information. She indicated that she did not intentionally conceal the information, but yet, this tragedy happened only days prior to the filing of the petition.

Further, the court expressed that Yalonda's

> judgment relating to her responsibility to care for the child is not adequate, given that she was handed the twin children by CPS after an investigation of the parents, and within a few days, one of the twins was deceased due to her choice to allow the parents to care for the child because both of them were fussy.

The district court acknowledged that Yalonda was willing to require the parents move out to maintain the guardianship over D.M.F., but it claimed that it was unable to have the oversight necessary to prevent any continued exposure to the parents.

Thus, the district court found removal of Yalonda as guardian in D.M.F.'s best interests and referred the matter to CPS for further investigation. The court reasoned that this was necessary based upon

> the lack of judgment displayed when the children were placed in the care of the paternal grandmother by CPS, the lack of candor to the [c]ourt of the surrounding circumstances and the death of [D.M.F.'s] twin brother, the fact that the troubled parents remain in the household with [Yalonda and D.M.F.], and said fact was concealed from this court, that the parents were found to have been under the influence of methamphetamine at the time they were in charge of their child who died and this fact was concealed from the [c]ourt, [and] the need for this family to have oversight by Department of Family Services.

In discussing the referral to CPS, the court stated it "FINDS" that even if CPS assessed Yalonda as an appropriate caregiver of D.M.F., "a case should be opened with [the] Juvenile Court, so that placement can be made through the Juvenile Court" and "the family can obtain the resources available to them through that process." In the end, however, the court simply ordered "that this matter shall be referred to Child Protective Services again for further investigation and action as they deem fit." D.M.F. appeals.

DISCUSSION

Standard of review

We do not disturb a guardianship determination absent an abuse of discretion. *Jason S. v. Valley Hosp. Med. Ctr.* (*In re Guardianship of L.S. & H.S.*), 120 Nev. 157, 163, 87 P.3d 521, 525 (2004). An abuse of discretion occurs where the district court fails to supply appropriate reasons to support the determination, *see id*., "exceeds the bounds of law or reason," or makes an "arbitrary or capricious"

decision, *State v. Eric A.L.* (*In re Eric A.L.*), 123 Nev. 26, 33, 153 P.3d 32, 36-37 (2007). And the district court also abuses its discretion when it "bases its decision on a clearly erroneous factual determination" or "disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016). However, questions of law within a guardianship determination are reviewed de novo. *See Tahja L. v. State, Dep't of Family Servs.* (*In re Parental Rights as to L.L.S.*), 137 Nev. 241, 245, 487 P.3d 791, 796 (2021) (reviewing "constitutional issues such as a parent's right to due process in a termination proceeding de novo"); *Potter v. Potter*, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005) (reviewing questions of statutory interpretation de novo).

The district court has authority to remove a guardian and terminate a guardianship, even absent a petition

D.M.F. contends that even though NSRG 5 gives the district court "numerous options" to respond to an ex parte communication, it does not "empower[ ]" the court "to unilaterally remove a guardian." D.M.F. further argues that the absence of the district court as a party who may petition for the removal of a guardian under NRS 159A.1853 means that the provision "does not include the district court, especially on a sua sponte basis." D.M.F. thus contends that the district court lacked any power to act because no petition for removal had been filed. Similarly, he asserts that no provision allows a court to sua sponte terminate a guardianship.[4]

This court recently held, in the context of an adult guardianship proceeding under NRS Chapter 159, that "separate from an individual formally petitioning the court, the district court has its own ability to remove a guardian if it determines that one or more of the conditions set forth in NRS 159.185 have been satisfied." *Jones v. Friedman (In re Guardianship of Jones)*, 139 Nev. 139, 145, 531 P.3d 1236, 1243 (2023). NRS Chapter 159A governs guardianship proceedings concerning minors, including the instant case, and NRS 159A.185 contains provisions analogous to those we relied on in *Jones*. Specifically, NRS 159A.185(1) outlines conditions for removal of a guardian and states that the district court "may remove a guardian if the court determines" one or more of those conditions exists. Looking to our prior caselaw and that of other states, we held in *Jones* that while various statutory provisions contemplate the filing of a petition for removal of a guardian by a party, "inherent in the district court's jurisdiction over the guardianship is the power to appoint and remove guardians." *Id.* at 144-45, 531 P.3d at 1242-43. We see no reason to hold differently in a minor guardianship proceeding and thus conclude that the district court has the authority to sua sponte remove a minor's guardian if one or more of the condi-

[4]Respondents, who are all pro se and who were in favor of the guardianship during the district court proceedings, did not file answering briefs.

tions set forth in NRS 159A.185 is satisfied and all other applicable requirements are met.[5]

The district court denied D.M.F. due process of law when it removed D.M.F.'s guardian and terminated the guardianship after the NSRG 5 hearing

D.M.F. argues that the district court violated his due process rights and abused its discretion, as he and other interested persons did not receive notice regarding the prospect of removal or termination, and the district court did not hold a hearing regarding the same. D.M.F. contends that the NSRG 5 order failed to indicate that the district court was considering removal and termination, particularly where "no one requested that Yalonda be removed as guardian or the guardianship terminated." We agree.

The district court's actions implicate D.M.F.'s procedural due process rights to notice and a meaningful opportunity to be heard. *See Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007); *see also* NRS 159A.1855(1) (requiring the court to issue and petitioner to serve a citation on the guardian and all interested parties when a petition to remove the guardian has been filed). Both the United States Constitution and the Nevada Constitution provide that no person shall be deprived of a protected life, liberty, or property interest without due process of law. U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(2).

The district court's decision here affects several protected interests. This court has held when a court sua sponte removes a guardian, without the formal filing of a petition, the court "[risks] depriv[ing] a protected person of their autonomy and imping[ing] on the protected person's rights." *Jones*, 139 Nev. at 146, 531 P.3d at 1243. Other courts have concluded that a minor possesses a constitutionally protected liberty interest in "familial companionship." *See, e.g.*, *Smith v. City of Fontana*, 818 F.2d 1411, 1414, 1417-18 (9th Cir. 1987) (recognizing a child's "interest in the continued companionship" of a parent in the context of a 42 U.S.C. § 1983 claim). The premature termination of the guardianship may also jeopardize D.M.F.'s relationship with his parents, who consented to the guard-

[5]We note also that under NSRG 5(A), "[i]n order to carry out the court's oversight and enforcement of compliance in guardianship proceedings," the court may receive and review ex parte communications ordinarily prohibited by the Nevada Code of Judicial Conduct, "if such communications raise a significant concern about a guardian's compliance with his or her statutory duties and responsibilities, or the protected person's welfare." In response to such communications, the court may take numerous steps, including taking any action supported by the record, notifying any appropriate government agency, appointing an investigator (as it is authorized to do "at any time" under NRS 159A.046(1)), and setting a hearing. NSRG 5(B). It would be anomalous to allow the court to receive and follow up on such communications if the court were powerless to thereafter act to protect the welfare of the protected person.

ianship and still retain parental rights in the upbringing of their child. *See Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) ("[A] natural parent's 'desire for and right to the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right." (quoting *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 27 (1981))).

Moreover, the relationship between D.M.F. and his guardian, who is also his grandmother, fits into the protected parent-child paradigm because Yalonda has served as his primary caretaker since birth. *See Rivera v. Marcus*, 696 F.2d 1016, 1025 (2d Cir. 1982) (concluding that "custodial relatives" enjoy "due process protections when the state decides to remove a dependent relative from the family environment"). And finally, the district court's decision bears on the protection Yalonda affords to D.M.F. Indeed, a guardian has a liberty interest in the care, custody, and management of a child under their protection akin to, but not entirely coextensive with, the rights of a parent. *See, e.g.*, *Simuro v. Shedd*, 176 F. Supp. 3d 358, 384 (D. Vt. 2016) ("[P]arents and guardians of minor children have protected interests in the care, control, and custody of those children."). Thus, due process requires D.M.F., and those others holding protected interests, be afforded notice and an opportunity to be heard with respect to the removal of his guardian and termination of the guardianship.[6]

"The fundamental requisite of due process is the opportunity to be heard." *Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998) (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for [themself] whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Notice is sufficient to satisfy due process where it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*; *compare Jones*, 139 Nev. at 146-47, 531 P.3d at 1244 (concluding that various requests for removal, both oral and written, sufficiently put a protected person on notice of the potential removal of their guardian despite no formal petition being filed), *with Micone v. Micone*, 132 Nev. 156, 159, 368 P.3d 1195, 1197 (2016) (holding that the district court's sua sponte award of physical custody to nonparty paternal grandparents violated parents' right to due process because the parties' briefs and arguments concerned which parent should have custody and did not address the paternal grandparents). Generally, notice must be given before a party's substantive rights are

[6]We note that while D.M.F.'s due process rights are at issue in this appeal, Yalonda and D.M.F.'s parents' due process rights are also impacted by the district court's decision, as they all have liberty interests in the guardianship and care of D.M.F.

affected. *See Wiese v. Granata*, 110 Nev. 1410, 1412, 887 P.2d 744, 745-46 (1994) (concluding notice of a hearing that failed to mention or even hint at child custody as a subject of the hearing violated the appellant's due process rights when custody was changed as a result of the hearing).

D.M.F. proposes that the district court should have issued a citation to the guardian and any other interested person to show cause why the district court should not remove the guardian or terminate the guardianship, as required by NRS 159A.1855 and NRS 159A.1905 when a petition for removal or termination has been filed. *See* NRS 159A.1855(1) (requiring a citation to issue regarding a petition for removal of a guardian); NRS 159A.1905(4) (providing the same as to a petition for termination of a guardianship). Had the district court issued such citations, D.M.F. and all other interested parties, namely Yalonda and D.M.F.'s parents, would have been apprised of the possibility of removal of Yalonda as D.M.F.'s guardian and termination of the guardianship. However, no such citations were issued; thus we turn to the other actions of the district court to determine whether sufficient notice was provided.

We conclude that the notice provided by the district court was inadequate and did not afford D.M.F. due process of law. First, none of the district court's orders provided a clear indication that removal and termination would be at issue at the hearing or in the court's subsequent order. For example, the NSRG 5 order set a hearing on the issues raised by the ex parte communication, which were identified as misrepresentations made to the district court regarding D.M.F. and the adequacy of the petition to appoint a guardian, given Yalonda's failure to inform of A.F.'s death and CPS's investigation. Nothing within the order indicated that the significant actions of removal and termination were on the table; instead the order indicated an investigator would be appointed and a hearing would be held where Yalonda could respond regarding the issues raised.

Likewise, a second order, issued simultaneously with the first, appointed an investigator to prepare a report on Yalonda's suitability and her omission to the court, as well as on D.M.F.'s health and welfare. Although the order raised concerns regarding the guardian's suitability and the protected minor's welfare, it did not indicate the potential for the drastic step of removal and termination, such as directions to investigate potential substitute guardians or the necessity for the guardianship. Had the order unambiguously notified the interested parties of the prospect of removal and termination, as a citation would have, then those interested parties could have meaningfully addressed these issues. By failing to clearly notify the parties of the significance of the interests at stake, the district court's notice failed "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

Furthermore, even if D.M.F. received notice that guardianship was to be determined at the hearing on the ex-parte communication, the hearing D.M.F. actually received cannot be construed as having provided D.M.F. with due process of law. In the context of child custody cases, even when proper notice is provided, this court has held that "litigants . . . have the right to a full and fair hearing concerning the ultimate disposition of a child." *Moser v. Moser*, 108 Nev. 572, 576, 836 P.2d 63, 66 (1992). A full and fair hearing requires that the change in custody be supported by factual evidence and the party threatened with the loss of parental rights must be given the opportunity to rebut the evidence presented against them. *Id.* at 577, 836 P.2d at 66.

This court's opinion in *Wiese v. Granata* illustrates the requirements of a full and fair hearing regarding custody issues. 110 Nev. 1410, 887 P.2d 744 (1994). There, the father had full custody of the parties' child. *Id.* at 1410, 887 P.2d at 745. The mother obtained a temporary protective order against the father and sought to extend the order. *Id.* at 1411, 887 P.2d at 745. The father was served with the motion, an order to show cause, and the notice of hearing, wherein the mother sought modification of her visitation. *Id.* The notice indicated the district court would consider whether to extend, modify, or dissolve the temporary protective order and whether the father had violated the terms thereof. *Id.* The father did not appear at the hearing to extend the temporary protective order upon the advice of counsel, and the district court subsequently entered an order granting the mother physical custody of the child. *Id.* In response, the father filed an emergency motion to stay the order granting the mother physical custody and requested a hearing. *Id.* The hearing on the emergency motion to stay was limited to 30 minutes, and the mother did not present any evidence concerning custody. *Id.* at 1411-13, 887 P.2d at 745-46. The district court denied the father's request and affirmed its order granting the mother custody. *Id.* at 1411, 887 P.2d at 745. On appeal, this court concluded the notice was inadequate because nothing in the notice or the order to show cause could be fairly read as notice that custody determinations were to be made at this hearing. *Id.* at 1411-12, 887 P.2d at 745-46. Furthermore, this court held that even had the notice been sufficient, the hearing on the emergency motion to stay could not be construed as a full and fair hearing on the change of custody because the mother did not present any evidence supporting the change in custody and therefore the father was not given a meaningful opportunity to respond without being provided the information on which the district court relied. *Id.* at 1412-13, 887 P.2d at 745-46.

Here, the investigator filed a report that provided no recommendations or conclusions regarding Yalonda's suitability or D.M.F.'s health and welfare, thus giving no indication of the case (i.e., the

facts and arguments) regarding the need to remove Yalonda as guardian and terminate D.M.F.'s guardianship. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (noting that due process requires "notice of the case against [a person] and opportunity to meet it" (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring))). Because the report lacked specificity regarding the type of evidence amassed against the guardian and the guardianship, yet the district court relied on it, D.M.F. and Yalonda lacked the ability to adequately address these concerns at the hearing.

Furthermore, the district court held a hearing during which no testimony under oath was presented or considered. Moreover, because no party petitioned for Yalonda's removal or termination of the guardianship and the court did not clearly indicate it was sua sponte considering doing so, it was unclear that such serious actions were under consideration. The district court was also unclear throughout the hearing as to the purpose of the hearing and the actions that it intended to take. Because of the lack of clarity regarding the purpose of the hearing, the parties could not appropriately address the issues of removal and termination. As a consequence, they were not given a meaningful opportunity to be heard on the issues. *See Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

Thus, we conclude that the notice provided to D.M.F. in this case was inadequate because it did not fairly apprise him that Yalonda's removal as guardian was being considered or that the guardianship was at risk of termination during the hearing. Furthermore, D.M.F. did not receive a full and fair hearing because D.M.F. was not presented with the case for such actions and thus did not have a meaningful opportunity to be heard on the issues.

While the procedural due process violation requires reversal, D.M.F. also contends that the district court abused its discretion in its application of controlling law governing removal of guardians and termination of guardianships and exceeded its authority in referring the matter to CPS. Because these issues may persist on remand, we address them here.

The district court abused its discretion in removing Yalonda as guardian and terminating D.M.F.'s guardianship, but did not abuse its discretion in referring the matter to CPS

D.M.F. argues that the district court failed to apply clearly controlling Nevada law that governs the removal and termination of guardianships. As removal and termination involve separate inquiries, we discuss each in turn below.

Removal of Yalonda as guardian

D.M.F. argues that the district court's removal determination constituted an abuse of discretion because it did not consider whether Yalonda met any of the conditions for removal beyond a conclusory reference to D.M.F.'s "best interest" and relied on incorrect findings regarding Yalonda's perceived dishonesty to the court and the parents' intoxication while caring for A.F. Moreover, D.M.F. contends that the district court reached its determination without applying the mandatory best-interest factors laid out in NRS 159A.186.

As noted, a district court may remove a guardian if it determines that one or more of several disqualifying factors exist, including the guardian's negligence in performing their duties, resulting in injury or a likelihood of injury to the protected minor. NRS 159A.185(1). Yet the existence of a condition of removal and the court's election to exercise its discretion regarding such condition do not end the matter. "Notwithstanding any other provision of law, . . . the court *shall not* remove the guardian or appoint another person as guardian unless the court finds that removal of the guardian or appointment of another person as guardian is in the best interests of the protected minor." NRS 159A.186(1) (emphasis added); *see also* NRS 159A.186(2) (providing factors that the court must consider regarding the minor's best interests). The use of "shall" here makes the best-interests-of-the-child analysis mandatory. *See Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 627, 310 P.3d 560, 566 (2013). Therefore, a finding that removal serves the best interests of the protected minor does not by itself provide a basis for or trigger removal; instead, it overcomes NRS 159A.186(1)'s functional presumption against removal. Reading the removal provisions in harmony, the district court must first determine whether one of the enumerated conditions for removal under NRS 159A.185(1) exists and, if so, conduct a best-interests-of-the-child analysis. Relatedly, while NSRG 5's language is broad enough to include possible removal of a guardian in response to an ex parte communication that raises a "significant concern" about the guardian's compliance with their duties or the protected minor's welfare, removal initiated under NSRG 5 still needs to satisfy one of the conditions under NRS 159A.185(1) and serve the best interests of the minor under NRS 159A.186(2).

Applying these principles here, the district court abused its discretion when it removed Yalonda as guardian. The district court cited no law other than NSRG 5, simply concluding that concerns remained about Yalonda's compliance with her duties and that removal was in the best interests of D.M.F. The court did not identify which of the enumerated conditions for removal under NRS 159A.185(1) it found or even acknowledge the need for such a finding, nor did it address the mandatory best-interest factors under

NRS 159A.186(2). The district court justified removal based on its finding that Yalonda lied to the court to obtain the appointment. The district court also found that Yalonda had concealed "the fact that the troubled parents remain in household." However, Yalonda's petition listed the same address for herself and the parents. The petition also clearly stated the parents were active drug users. The basis for the court's findings about Yalonda's purported lying and concealment seems to stem from its misunderstanding that the time frame of the pertinent events was more compressed than it actually was, finding that A.F.'s death "happened only days prior to the filing of the petition," when Yalonda petitioned the court a month after A.F.'s death. Similarly, the court erroneously stated that A.F.'s death happened within a few days after Yalonda obtained temporary guardianship, when Yalonda had been caring for D.M.F. and A.F. for three months without incident. The court also seems to disagree with the conclusions of the police and CPS that A.F.'s death was not the result of abuse or neglect but rather a tragic accident. While the court's initial concerns are understandable, the record lacks any evidentiary support for a different conclusion.

As the district court failed to apply the mandatory best-interest factors in NRS 159A.186(2), failed to find a predicate condition for removal under NRS 159A.185(1), and relied on unsupported and clearly erroneous factual determinations, we agree with D.M.F. that the district court abused its discretion in removing Yalonda as guardian.

Termination of the guardianship

D.M.F. contends that the district court abused its discretion in terminating his guardianship because it did not apply any of the provisions concerning the termination of a guardianship and failed to make explicit findings explaining how terminating the guardianship was in D.M.F.'s best interests. He also argues that the district court failed to follow NSRG 10 because it removed a sole guardian from a child who still needed a guardian without either appointing a successor guardian or finding that D.M.F. no longer needed a guardian.

Under NSRG 10(A), "the court shall *not* terminate the guardianship . . . without making specific findings" regarding three things: (1) the protected minor's "current health and welfare," (2) the "reasons a guardianship does or does not remain necessary, including identifying the existence of less-restrictive alternatives," and (3) "[w]hether maintaining the guardianship would serve the protected person's best interests." The order here falls short of the NSRG 10 requirements. To the extent the district court's order considered D.M.F.'s current health or welfare, it focused on the supervised contact with "the troubled parents" and A.F.'s death. The order did not address how termination of the guardianship would improve or

maintain his health and welfare, given that it would place him back in the care and custody of those parents. The district court also did not identify any reason why the guardianship no longer remains necessary. Further, it summarily dismissed less-restrictive alternatives as impossible to implement. And its best-interests analysis looked at only one factor out of many and relied on unsupported and clearly erroneous findings, as discussed above. For these reasons, the district court abused its discretion in failing to make specific, supportable findings regarding the NSRG 10 factors before it terminated D.M.F.'s guardianship.

CPS referral

As noted, D.M.F. argues that the district court exceeded its authority in attempting to direct CPS to remove D.M.F. from his parents' and Yalonda's care and to institute a dependency proceeding under NRS Chapter 432B. While CPS may determine whether grounds exist for an investigation into possible abuse or neglect, the district court may not mandate that CPS find the existence of a statutory circumstance that warrants initiation of an investigation. Similarly, the district court does not possess the authority to direct CPS to open a case under NRS Chapter 432B regarding D.M.F.'s placement and make the placement through court order. But this did not occur here. While the district court did express its disagreement with CPS's actions and conclusions, finding that if CPS felt placement with Yalonda was appropriate then a case should be opened with the juvenile court and expressing concern that CPS had not previously proceeded with a dependency case, in the end it simply ordered the matter "referred to Child Protective Services again for further investigation and action as they deem fit." This order does not inappropriately direct the action CPS must take and does not constitute an abuse of discretion.

CONCLUSION

If it receives information causing concern regarding the propriety of a minor's guardianship, a district court may sua sponte initiate the process for removing a guardian and terminating a guardianship. In doing so, the court must protect the procedural due process rights of the protected minor, parents, and guardian by, at a minimum, giving notice of the contemplated action and holding a hearing on the prospect of removal and termination so that the parties have a meaningful opportunity to be heard. All the while, the court must adhere to the applicable statutes and rules under NRS Chapter 159A and the NSRG in determining whether removal of the guardian and termination of the guardianship are appropriate, making the required findings to support those decisions.

Here, the district court did not give notice to D.M.F., Yalonda, or D.M.F.'s parents regarding the prospect of removal or termination; nor did the court hold a hearing regarding the same. The court, therefore, violated the due process rights of D.M.F. and failed to comply with the statutory requirements for removal and termination, requiring reversal. Accordingly, we reverse and remand with instructions to reinstate the guardianship and reappoint Yalonda, provided she is willing and able, as guardian. If the district court determines that it should proceed with a hearing to consider removal of the guardian or termination of the guardianship, it must provide notice to D.M.F., Yalonda, and the parents that expressly advises of these potential consequences and hold a full hearing on the same. Should the district court, after the hearing, conclude that removal or termination is appropriate, the court must make the necessary findings and address the mandatory factors set forth in the applicable statutes and rules.

Stiglich, C.J., and Pickering, Herndon, Lee, Parraguirre, and Bell, JJ., concur.

BROOKE WESTLAKE KELLEY, Appellant, *v.* SCOTT G. KELLEY, Respondent.

No. 84685

September 28, 2023 535 P.3d 1147

Appeal from a district court order in post-divorce decree custody litigation awarding a parent sole legal custody for the limited purpose of vaccinating a minor child against COVID-19. Second Judicial District Court, Family Division, Washoe County; Frances Doherty, Sr. Judge.

Affirmed.

Attorney Marilyn D. York, Inc., and *Marilyn D. York* and *Chloe L. McClintick*, Reno, for Appellant.

Scott G. Kelley, Sparks, Pro Se.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Stiglich, C.J.:

The best-interest-of-the-child standard is ubiquitous in child custody matters, and the Legislature and this court often guide such analysis by providing factors for district courts to weigh in making best-interest determinations. We now hold that when parents with court-ordered joint legal custody of a minor child disagree on medical decisions concerning that child, the district court breaks the tie by determining which course of action is in the child's best interest. Because district courts lack guidance on how to apply the best-interest-of-the-child standard in this context, we adopt nonexhaustive factors for district courts to consider in making such determinations: (1) the seriousness of the harm the child is suffering or the substantial likelihood that the child will suffer serious harm; (2) the evaluation or recommendation by a medical professional; (3) the risks involved in medically treating the child; and (4) if the child is of a sufficient age and capacity to form an intelligent preference, the expressed preference of the child.

Here, divorced parents with joint legal custody disagreed on whether their 11-year-old child should be vaccinated against COVID-19. The district court found that vaccination was in the child's best interest based on the child's pediatrician's recommendation and government and professional groups' guidelines and research results. Although the district court did not have the benefit

[1]The Honorable Ron Parraguirre, Justice, voluntarily recused himself and thus did not participate in the decision of this matter.

of express factors to weigh, we conclude the district court did not abuse its discretion in finding vaccination in the child's best interest because consideration of the other factors would not change the result in this case. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

When appellant Brooke Westlake Kelley and respondent Scott G. Kelley divorced, they stipulated to joint legal custody of their two minor children, G.W.-K. and A.W.-K. Specifically, Brooke and Scott agreed to "confer on all matters regarding the medical care of the children, including medical, dental, orthodontic, [or] surgical [decisions]." However, the parties disagreed on whether to have the children vaccinated against COVID-19. Scott wanted to vaccinate the children in preparation for international trips, but Brooke disagreed, citing the vaccine's novelty and unknown long-term effects. Scott then moved the district court for an order compelling Brooke to allow the children to be vaccinated, arguing that vaccination was in the children's best interests. Brooke opposed the motion but did not object to the best-interest-of-the-child standard.

At the time of the district court's evidentiary hearing on the matter, G.W.-K. was 11 years old (almost 12), and A.W.-K. was 3 years old. The parties submitted a recommendation from the children's pediatrician indicating that G.W.-K. should be vaccinated, but not A.W.-K., who was too young to be eligible for the vaccines available at the time. Additionally, Scott and Brooke testified. Scott testified that he believed it was in the children's best interests to be vaccinated based on the pediatrician's recommendation and the risk of illness he saw the COVID-19 pandemic pose. Brooke testified that she did not want the children vaccinated for several reasons: (1) the children were young and healthy, (2) the COVID-19 vaccine was new and there were no studies on its effectiveness, (3) she got the vaccine but nonetheless still got sick with COVID-19, (4) she worried the vaccine could affect the fertility of her children, and (5) the vaccine may impact G.W.-K.'s behavior in a negative way. She also testified that she believed that the COVID-19 pandemic was no longer a medical emergency, given that, by the time this issue arose, mask and vaccine mandates had been lifted. In closing, Brooke's counsel for the first time raised the prospect of a "medically necessary" standard. She argued that "[t]ypically, [t]he Court uses medically necessary as the terminology when we are talking about recommendations." She continued that "[w]hat we are not seeing is this doctor say is that the COVID vaccine for these children or particularly, [vaccination for G.W.-K.] is medically necessary."

The court took judicial notice of the Centers for Disease Control and Prevention (CDC) and American Academy of Pediatrics (AAP) guidelines and research from those organizations regarding the safety of the COVID-19 vaccine, accepted the pediatrician's rec-

ommendations, and orally ruled that it was in G.W.-K.'s best interest for the vaccination to go forward.[2] After the oral ruling, Brooke's counsel inquired for a point of clarification as to whether "medically necessary" was the applicable standard. The court answered that the best interest of the child controlled. A written order followed, awarding Scott "sole legal custody to act singularly to obtain the COVID vaccine" for G.W.-K. Brooke appeals, arguing that the district court erred in failing to apply a "medically necessary" standard and alternatively that the court did not properly analyze G.W.-K.'s best interest.

DISCUSSION

The best-interest-of-the-child standard applies

Brooke argues that the district court infringed her fundamental right to the care, custody, and control over her child by applying the best-interest-of-the-child standard. Rather than the best-interest standard, Brooke contends that the district court should have applied a medically necessary standard derived from NRS 695G.055.

Although Brooke failed to preserve a challenge to applying the best-interest-of-the-child standard by neglecting to raise it until after the district court's oral ruling, we exercise our discretion to consider and clarify this constitutional issue. *See Barrett v. Baird*, 111 Nev. 1496, 1500, 908 P.2d 689, 693 (1995) (electing to consider a constitutional issue for the first time on appeal notwithstanding the failure to object below), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008). Whether the district court applied the correct legal standard and whether such standard infringes on a fundamental right are questions of law we review de novo. *Lawrence v. Clark County*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011) (constitutional interpretation); *Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 505-06 (2007) (correct legal standard).

Parents have a fundamental right to manage the "care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). When divorced parents have joint legal custody, they are both responsible for making decisions regarding the children's health, education, and religious upbringing. *Rivero v. Rivero*, 125 Nev. 410, 420, 216 P.3d 213, 221 (2009), *overruled on other grounds by Romano v. Romano*, 138 Nev. 1, 4, 501 P.3d 980, 983 (2022). Generally, when parents agree on how to raise their children, courts

[2]On appeal, Brooke briefly argues that the district court should not have taken judicial notice of the CDC and AAP guidelines. She did not object below, so this argument is waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). We note that courts in other jurisdictions have taken judicial notice of CDC and AAP guidelines regarding vaccinations. *See, e.g.*, *Brown v. Smith*, 235 Cal. Rptr. 3d 218, 223 (Ct. App. 2018).

may not interfere. *Arcella v. Arcella*, 133 Nev. 868, 870, 407 P.3d 341, 344 (2017). But when parents with court-ordered joint legal custody disagree on a parenting decision, "then the parties may appear before the court on an equal footing to have the court decide what is in the best interest of the child." *Rivero*, 125 Nev. at 421, 216 P.3d at 221-22 (internal quotation marks omitted). And in a custody dispute, the district court may enter "an order for the custody, care, education, maintenance and support of the minor child as appears in his or her best interest." NRS 125C.0045(1)(a).

We hold that a parent's constitutional interest in the care, custody, and control of their child is not infringed when the district court settles a dispute between parents with joint legal custody under the best-interest-of-the-child standard. It is presumed that parents make health-related decisions for their children with the children's best interests in mind. *See* NRS 125C.002(1) (stating presumption that joint legal custody is in a child's best interest); *Rivero*, 125 Nev. at 420, 216 P.3d at 221 (recognizing that legal custody involves making healthcare decisions for a child and that joint custody requires that parents act in the child's best interest). When the parents, who have equal constitutional rights concerning the care of their children, disagree on what is in the children's best interests, the court decides. *Rivero*, 125 Nev. at 421, 216 P.3d at 221-22. Basing a decision on what is "medically necessary" alone goes beyond breaking a tie, then, and could infringe a parent's rights to control by requiring a higher showing—that something is or is not "medically necessary." *See Mack v. Ashlock*, 112 Nev. 1062, 1065-66, 921 P.2d 1258, 1260-61 (1996) (stating that the court's sole consideration in custody disputes is the child's best interest and rejecting a standard other than best interest by a preponderance of the evidence).

Our decision in *Arcella* is analogous. There, divorced parents with joint legal custody disagreed on whether to send their child to a religious private school or a local public school. 133 Nev. at 869, 407 P.3d at 344. The mother objected to her child receiving a religious education. *Id.* In light of the mother's objection, the district court ordered the child to attend the public school. *Id.* This court held that "a district court does not violate the First or Fourteenth Amendments by ordering a child to attend a school over a parent's religious objection." *Id.* at 871, 407 P.3d at 345. To the contrary, a district court must order a child to attend a religious school over a parent's objection if attending the religious school is in the child's best interest. *Id.* Although *Arcella* addressed the First Amendment rather than substantive due process (from which the fundamental interest in the care, custody, and control of a child arises), if a court can override a parent's religious objection if attending a religious school is in the child's best interest, similarly, a district court may override a parent's objection to vaccination if vaccination is in the child's best interest.

Other jurisdictions similarly hold that where parents with joint legal custody disagree on an issue related to the child's upbringing, the court's resolution based on the best interest of the child does not contravene the complaining parent's fundamental rights regarding the care, custody, and control of the child. For example, the Arizona Court of Appeals in *Jordan v. Rea* observed that although each parent has a constitutional right to control the upbringing of their child, where the parents seek to exercise those rights in a conflicting manner, "there is no usurpation by the court of either parent's constitutional rights" when "the court is called upon to resolve that conflict." 212 P.3d 919, 927 (Ariz. Ct. App. 2009) (applying a best-interest standard when parents are unable to agree on choice of school). The Alabama Court of Appeals likewise recognized that "a court may apply the best-interests standard in a custody dispute between such parents [sharing joint legal custody] without implicating the Fourteenth Amendment due-process rights of either parent," *Morgan v. Morgan*, 964 So. 2d 24, 31 (Ala. Civ. App. 2007), and the New Hampshire Supreme Court applied this logic in rejecting an argument that strict scrutiny applies when a district court adjudicates a child's best interest even though it involves a parent's fundamental right to make decisions about the child's upbringing, *In re Kurowski*, 20 A.3d 306, 317 (N.H. 2011). Relevantly, various courts across the country have applied the best-interest-of-the-child standard where parents with joint legal custody disagree over vaccinating a minor child.[3] Accordingly, we conclude that the district court did not err in considering the vaccination issue under the best-interest-of-the-child standard.

Insofar as Brooke relies on NRS 695G.055, a provision in the chapter on managed care, that statute defines "medically necessary" for insurance purposes. *See, e.g.*, NRS 422.27179(1)(a)(2) & (3)(a) (mandating Medicaid coverage when "medically necessary" and referring to NRS 695G.055 for the meaning of that term); NRS 687B.740 (prohibiting an insurance provider from enticing healthcare providers to deliver services less than what is "medically

[3]*See, e.g.*, *A.R. v. J.A.*, No. CK14-01551, 2022 WL 11121330, at *3 (Del. Fam. Ct. Sept. 14, 2022) (holding that the mother's position to vaccinate her child against COVID-19 aligned with the best interest of the child); *Nieber v. Nieber*, No. A20-0616, 2021 WL 1525184, at *2 (Minn. Ct. App. Apr. 19, 2021) (confirming that the best-interest standard applies where parents with joint custody disagree on vaccination); *J.F. v. D.F.*, 160 N.Y.S.3d 551, 556-57 (N.Y. Sup. Ct. 2021) (finding vaccination to be in a child's best interest); *L.L.B. v. T.R.B.*, 283 A.3d 859, 864 (Pa. Super. Ct. 2022) (holding the district court properly applied the best-interest standard in resolving an impasse between parents with joint custody who disagreed on COVID-19 vaccination); *In re A.J.E.*, 372 S.W.3d 696, 699 (Tex. App. 2012) (holding that resolving a dispute between parents with joint custody regarding immunizations under the best-interest-of-the-child standard does not infringe a fundamental right because the government is not overriding the will of parents who agree on a medical decision or a sole parent's decision).

necessary"). In the insurance context, medically necessary means "health care services or products that a prudent physician would provide to a patient to prevent, diagnose or treat an illness, injury or disease." NRS 695G.055. Brooke has not shown that this standard applies in family law contexts. Further, we see no justifiable reason to shift the inquiry away from the best interest of the child in favor of the prudent physician. As discussed below, we hold that a medical professional's recommendation is a factor in determining the best interest of the child, but it is not the sole or necessarily conclusive factor.

Factors to consider in determining the best interest of the child

Alternatively, Brooke argues that the district court abused its discretion in applying the best-interest-of-the-child standard. She points out that the district court did not analyze the best-interest factors laid out in NRS 125C.0035(4). She also contends that the district court erred in simply accepting the pediatrician's recommendation as in G.W.-K.'s best interest.

When a district court applies the best-interest-of-the-child standard, this court reviews its determination for an abuse of discretion. *Mack v. Ashlock*, 112 Nev. 1062, 1065, 921 P.2d 1258, 1261 (1996); *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). NRS 125C.0035(4) provides factors that a court must consider in determining a child's best interest in an action to decide *physical* custody. *Monahan v. Hogan*, 138 Nev. 58, 62, 507 P.3d 588, 592 (Ct. App. 2022). It does not necessarily control other types of best-interest-of-the-child analyses. *Id.* at 62-63, 507 P.3d at 592 (recognizing that additional factors may be salient in determining whether relocation serves a child's best interest). This court has provided best-interest guidance in different instances. For example, this court adopted factors tailored to education for the district court to consider in determining what school a child should attend, without reference to the NRS 125C.0035(4) factors. *Arcella*, 133 Nev. at 872-73, 407 P.3d at 346-47. And the court has adopted a different list of considerations in a dispute regarding naming a child. *Petit v. Adrianzen*, 133 Nev. 91, 94-95, 392 P.3d 630, 633 (2017).

Here, the district court did not make any decisions regarding joint physical custody, and thus the court did not need to weigh the NRS 125C.0035(4) factors. Indeed, the NRS 125C.0035(4) factors appear largely irrelevant in deciding whether vaccination is in a child's best interest. *See, e.g.*, NRS 125C.0035(4)(d) ("the level of conflict between the parents") & (4)(j) ("[a]ny history of parental abuse or neglect of the child"). In light of the foregoing, the district court was not bound to apply the NRS 125C.0035(4) factors in determining whether vaccination against COVID-19 was in G.W.-K.'s best interest.

Given that the NRS 125C.0035(4) factors do not apply, we acknowledge that district courts lack guidance on how to apply the best-interest-of-the-child standard in the context of a dispute between parents with joint legal custody regarding medical decisions concerning a minor child. Although not exactly on point, we find instructive the factors enumerated in *In re Eric B.*, 235 Cal. Rptr. 22 (Ct. App. 1987), and we adopt them as nonexhaustive factors for district courts to weigh in making best-interest-of-the-child determinations in this context. In *Eric B.*, the California Court of Appeal considered whether a juvenile court abused its discretion by ordering that a minor child retain "dependent child" status for purposes of obtaining cancer treatment over his parents' objections. 235 Cal. Rptr. at 23-24. In reviewing whether medical treatment would serve the child's best interest, the Court of Appeal noted several factors for consideration: (1) "the seriousness of the harm the child is suffering or the substantial likelihood that he will suffer serious harm," (2) "the evaluation for the treatment by the medical profession," (3) "the risks involved in medically treating the child," and (4) the "expressed preferences of the child." *Id.* at 27 (internal quotation marks omitted). Because these factors are useful in evaluating the best-interest-of-the-child standard in the context of a dispute between parents with joint legal custody concerning the medical treatment of a minor child, we adopt them with two modifications. In order to facilitate individualized determinations, we direct courts to consider the evaluation or recommendation by a medical professional—rather than the evaluation by the medical profession in general. And we clarify that a district court need only consider the child's express preferences if the district court finds that the child is of a sufficient age and capacity to form an intelligent preference. We stress that district courts have discretion as to how much weight to give each factor and that these factors are nonexhaustive, meaning district courts should consider any information that is relevant under the circumstances. *Cf. Arcella*, 133 Nev. at 873, 407 P.3d at 346-47 (emphasizing that the factors are "illustrative rather than exhaustive").

Here, the district court "accepted" the pediatrician's recommendation to vaccinate G.W.-K. against COVID-19 as in his best interest. In terms of the framework we now adopt, the court determined that the recommendation-by-a-medical-professional factor favored vaccination. The district court also took judicial notice of the CDC and AAP guidelines and the research from those organizations regarding the safety of the vaccines and thus considered both the risks involved in the medical treatment and the likelihood that G.W.-K. would suffer serious harm. While Brooke speculated that the COVID-19 vaccine could negatively affect G.W.-K.'s behavior and fertility, this contention was not supported by any evidence at the hearing, and Brooke has not otherwise shown a risk of seri-

ous harm. And the district court found that international travel, which vaccination would facilitate, was in G.W.-K.'s best interest. Although the district court did not have the benefit of express factors to weigh, the court considered similar matters in reaching its decision, and substantial evidence supports its findings. *See Rico v. Rodriguez*, 121 Nev. 695, 702, 120 P.3d 812, 817 (2005) (reviewing a child's best-interest determination for support by substantial evidence in a custody matter). The district court did not specifically address G.W.-K.'s wishes or his capacity to reach an informed decision, and we accordingly do not consider that factor to weigh in either direction.[4] Other than expressing her personal preference against vaccination, Brooke did not provide evidence that vaccination against COVID-19 was not in G.W.-K.'s best interest. Brooke's preference not to vaccinate G.W.-K. in and of itself does not outweigh Scott's preference to vaccinate G.W.-K., and vice versa, Scott's preference in and of itself does not outweigh Brooke's preference. Given that the district court's best-interest finding accords with the factors we adopt here, we affirm. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that we will affirm the district court if it reaches the correct result, even if for the wrong reason).

CONCLUSION

When parents with court-ordered joint legal custody of a minor child disagree on medical decisions regarding that child, the district court breaks the tie by determining which course of action is in the best interest of the child. In determining which medical decision is in the child's best interest, the district court should consider (1) the seriousness of the harm the child is suffering or the substantial likelihood that the child will suffer serious harm; (2) the evaluation or recommendation by a medical professional; (3) the risks involved in medically treating the child; and (4) if the child is of a sufficient age and capacity to form an intelligent preference, the expressed preference of the child. We emphasize that a medical professional's recommendation is not necessarily conclusive in every dispute, as each case turns on its particular circumstances. Because the district court's finding of best interest aligns with the factors we now adopt, we affirm its order.

Cadish, Pickering, Herndon, Lee, and Bell, JJ., concur.

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[4]We observe that Scott's testimony that G.W.-K. wanted to be vaccinated was stricken as hearsay.

ORBITZ WORLDWIDE, LLC; ORBITZ LLC; ORBITZ INC.; TRAVELSCAPE LLC; TRAVELOCITY INC.; CHEAP TICKETS INC.; EXPEDIA INC.; EXPEDIA GLOBAL LLC; HOTELS.COM LP; HOTWIRE INC.; BOOKING HOLDINGS INC.; PRICELINE.COM LLC; TRAVELWEB LLC; TRAVELNOW.COM INC.; AGODA INTERNATIONAL USA LLC; HOTEL TONIGHT INC.; AND HOTEL TONIGHT LLC, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA; MARK FIERRO; AND SIG ROGICH, REAL PARTIES IN INTEREST.

No. 85111

September 28, 2023 535 P.3d 1173

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion for summary judgment.

Petition denied.

Pisanelli Bice, PLLC, and *Todd L. Bice*, Las Vegas; *Ballard Spahr LLP* and *Joel E. Tasca* and *David E. Chavez*, Las Vegas, for Petitioners Agoda International USA LLC, Booking Holdings Inc., Cheap Tickets Inc., Expedia Global LLC, Expedia Inc., Hotel Tonight Inc., Hotel Tonight LLC, Hotels.com LP, Hotwire Inc., Orbitz Inc., Orbitz LLC, Orbitz Worldwide, LLC, Priceline.com LLC, Travelweb LLC, Travelnow.com Inc., Travelocity Inc., and Travelscape LLC.

Bradley Arant Boult Cummings, LLP, and *Anne Marie Seibel* and *Tiffany J. deGruy*, Birmingham, Alabama, for Petitioners Agoda International USA LLC, Booking Holdings Inc., Priceline.com LLC, and Travel Web LLC.

McDermott, Will & Emery LLP and *Catherine A. Battin* and *Jon Dean*, Chicago, Illinois, for Petitioners Hotel Tonight Inc. and Hotel Tonight LLC.

Morgan, Lewis & Bockius LLP and *Douglas W. Baruch* and *Elizabeth B. Herrington*, Washington, D.C., for Petitioners Cheap Tickets Inc., Expedia Global LLC, Expedia Inc., Hotels.com LP, Hotwire Inc., Orbitz Inc., Orbitz LLC, Orbitz Worldwide, LLC, Travelnow.com Inc., Travelocity Inc., and Travelscape LLC.

Aaron D. Ford, Attorney General, and *David J. Pope*, Senior Deputy Attorney General, Carson City, for Real Party in Interest the State of Nevada.

Clark Hill PLLC and *Dominic P. Gentile*, *Michael Vincent Cristalli*, and *Mark S. Dzarnoski*, Las Vegas, for Real Parties in Interest Mark Fierro and Sig Rogich.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, CADISH, J.:

In this writ proceeding, we consider an issue of first impression regarding NRS 357.080(3)(b), which prevents a private plaintiff from maintaining an action under the Nevada False Claims Act (NFCA) if the action is based on the same allegations or transactions that are the subject of a civil action to which the State or a political subdivision is already a party. Specifically, we address whether NRS 357.080(3)(b) requires dismissal of a private NFCA action brought on behalf of the State, where a county brings a subsequent suit on its own behalf against the same parties based on the same allegations or transactions as the private action to establish liability. We conclude that NRS 357.080(3)(b) does not contain a sequencing requirement, and thus when applicable this statute requires dismissal of the private NFCA action even if the civil action on behalf of the State or a political subdivision was filed after the private action. We further conclude that when a civil action has been brought by or on behalf of a state governmental entity, NRS 357.080(3)(b) presents no bar to a separate private action on behalf of a different governmental entity, even where the two suits involve the same allegations or transactions. Applying this interpretation to the instant case, we deny the request for writ relief because, even assuming the private and governmental actions here involve the same allegations or transactions, the two actions are brought on behalf of two separate governmental entities. Petitioners have thus failed to demonstrate that the law requires the district court to dismiss this private action such that writ relief is warranted here.

FACTS AND PROCEDURAL HISTORY

Real parties in interest Mark Fierro and Sig Rogich (collectively, relators) commenced a private action on behalf of real party in interest the State of Nevada against petitioners, all of whom are online travel companies (collectively, OTCs). Relators asserted a cause of action under the NFCA, alleging that OTCs knowingly

[1]The Honorable Linda Marie Bell, Justice, recused herself and did not participate in the decision of this matter.

avoided obligations to pay transient-lodging taxes[2] mandated by the Clark County Code and state law by engaging in a scheme to collect the tax from their customers based on a retail room rate but remit the tax to the county and State based on a lower, discounted room rate negotiated between OTCs and hotels.[3] In other words, relators alleged that OTCs negotiated with hotels to rent a room at a certain rate, called the wholesale rate; OTCs then marked up the price, called the retail rate, to customers. Relators allege that OTCs then calculated their transient-lodging tax obligation according to the wholesale rate, yet they collected from customers the transient-lodging tax obligation according to the retail rate and pocketed the difference. Following the procedure set forth in NRS 357.110, the Attorney General declined to intervene and permitted relators' action to proceed.

Over a year later, Clark County filed its own lawsuit against the same OTCs named in this qui-tam lawsuit, which OTCs removed to federal court. Clark County's lawsuit included several claims, all based on allegations that OTCs knowingly avoided payment of transient-lodging taxes owed to Clark County under county and state law by engaging in a scheme to collect a transient-lodging tax from its customers based on "the full retail price" charged to those customers but remit the same transient-lodging tax to Clark County based on "the discounted wholesale price" negotiated between OTCs and hotels.

Following the commencement of Clark County's lawsuit, OTCs moved for summary judgment on the NFCA claim in this private action. They argued that the government-action bar under NRS 357.080(3)(b) precluded the action from proceeding because, as relators conceded, the allegations and transactions that were the subject of the private action were now the subject of a separate civil action commenced by Clark County. Relators countered that the government-action bar did not preclude relators' action on behalf of the State, as the bar only applied to a private action that involved the same governmental entity and the same theories of liability as the separate governmental entity's action.

During a hearing on the motion, the district court raised whether NRS 357.080(3)(b)'s language creates a sequencing requirement, such that the statute precludes a private suit that involves the same

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[2]NRS 244.3352(1) mandates that counties impose transient-lodging taxes. Transient-lodging taxes are based on the gross receipts received by transient-lodging establishments, as that term is defined, from their occupants. *Id.* These taxes are collected by the counties and apportioned between the counties and the State under applicable law. NRS 244.3354.

[3]As we explain below, this type of private lawsuit, on behalf of an allegedly defrauded government entity, is sometimes referred to as a qui-tam case.

allegations or transactions as a governmental entity's suit only if the private suit was instituted after the governmental entity's suit. Ultimately, the district court denied summary judgment on this basis. It found that Clark County's action was based on the same underlying allegations or transactions that are the subject of relators' private action. However, it reasoned that the "already" language in NRS 357.080(3)(b) "contemplates first in time." Accordingly, the district court concluded that the government-action bar did not apply here because Clark County did not bring its action until after commencement of the private action; thus, it was "not 'already a party'" to its own action for purposes of the section.

Subsequently, the district court granted the relators' motion for leave to amend pursuant to a joint stipulation in which OTCs reserved the right to object to the amended complaint under NRS 357.080(3)(b). Relators' amendment sought to clarify that the original complaint encompassed recovery of transient-lodging taxes due to the State under the ordinances of each county in which they were imposed, rather than only Clark County. Thus, in the amended complaint, relators again asserted their NFCA claim on behalf of the State and included new allegations that OTCs had knowingly and improperly deprived the State of taxes owed to it pursuant to the codes of Clark, Washoe, Douglas, Lyon, and Nye counties, as well as state law, by remitting their transient-lodging taxes based on the lower negotiated room rate, rather than the higher retail room rate.

Before relators filed their amended complaint but after the joint stipulation, OTCs moved for reconsideration of the order denying summary judgment on the ground that the district court's interpretation of NRS 357.080(3)(b) conflicted with its plain language. They contended that the application of the statute depended merely on the existence of the two suits, regardless of sequence. OTCs also argued that relators' amended allegations extending the alleged tax-avoidance scheme to other Nevada counties did not sufficiently differentiate the private suit from the Clark County suit and, thus, did not overcome the government-action bar. In OTCs' view, the purported failure to pay the transient-lodging taxes, regardless of where the tax was levied, relied on the same statewide statutory sources and the same alleged statewide unlawful practices. OTCs also argued that, regardless of the amendment, the bar continued to apply with respect to the alleged violations of Clark County's ordinances because those allegations overlapped the allegations in the Clark County action and showed that the two suits rested on the same allegations or transactions.

Objecting to reconsideration, relators argued that the amended complaint, in superseding the original, precluded reconsideration as to OTCs' attacks on the original complaint. Relators also contended that the amended complaint's inclusion of new allegations regarding

transient-lodging taxes in multiple counties differentiated their suit from the Clark County suit and overcame the government-action bar. Following a hearing, the district court denied reconsideration without articulating a rationale. This writ petition followed.

DISCUSSION

We elect to entertain the petition for writ relief

A writ of mandamus is available to correct clear error or an arbitrary or capricious exercise of discretion when there is no other plain, speedy, and adequate legal remedy.[4] *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see State v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 146, 42 P.3d 233, 237 (2002) (observing that writ-of-mandamus relief "is available 'to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station,' or to control manifest abuse of discretion" (quoting NRS 34.160)). "Writ relief is an extraordinary remedy that . . . only issue[s] at the discretion of this court." *Anzalone*, 118 Nev. at 146, 42 P.3d at 237. "[B]ecause an appeal from the final judgment typically constitutes an adequate and speedy legal remedy, we generally decline to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss" or for summary judgment. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. Notwithstanding our general policy, however, we have elected to exercise our discretion and entertain a writ petition in situations where "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of [considering the petition]." *Id.* at 197-98, 179 P.3d at 559.

This petition raises purely legal questions regarding the effect of NRS 357.080(3)(b) where the government entity's suit was filed after the private action and the two at-issue lawsuits involve two distinct governmental entities. Additionally, the issues of first impression raised by this petition are of statewide importance. Because the NFCA authorizes private parties to recover fraudulently obtained government funds and return those funds to the public fisc, any interpretation of NRS 357.080(3)(b) touches on the private enforcement of a governmental entity's owed claims and a governmental entity's control over the manner in which private plaintiffs litigate false claims. Moreover, the interpretation of NRS 357.080(3)(b) at

[4]Although OTCs alternatively seek a writ of prohibition, to the extent that the government-action bar implicates a challenge to the district court's jurisdiction, we conclude that prohibition relief is not appropriate here, consistent with our analysis of mandamus relief. *See Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (holding that a writ of prohibition "will not issue if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration").

the early stages of litigation furthers judicial economy, as the statute presents a total bar to litigation in certain situations. Accordingly, we elect to exercise our discretion and entertain the writ petition to answer whether NRS 357.080(3)(b) bars a private suit on behalf of a governmental entity where a different governmental entity subsequently sues the same parties based on the same allegations or transactions as the private suit.[5]

The NFCA's government-action bar

Modeled after the 1986 amendments to its federal counterpart, the NFCA aims "to expose and combat attempted fraud against the government." *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559; *see also* NRS 357.040(1) (enumerating "acts" for which "a person" may be "liable to the State or a political subdivision"). In so doing, the NFCA allows the Attorney General or the Attorney General's designee to bring an action thereunder against any "person" who commits a prohibited "act" against the State or a political subdivision of the State and recover monetary damages, including treble damages. *See* NRS 357.040(1)(a)-(i), (2) (listing "acts" for which civil liability exists and available damages); NRS 357.070(1)-(2) (permitting Attorney General, or district or city attorney by designation, to bring cause of action under the NFCA).

At the same time, the NFCA authorizes so-called qui-tam actions by which "a private plaintiff . . . bring[s] an action . . . on his or her own account and that of the State or a political subdivision, or both the State and a political subdivision," for violations thereunder. *See* NRS 357.080(1); *see generally United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 997 n.1 (9th Cir. 2002) ("'Qui tam' is shorthand for [a] Latin phrase . . . . In practice the phrase means 'an action under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive.'" (citations and italicization omitted)). Once brought, "no person other than the Attorney General or the Attorney General's designee may intervene or bring a related action pursuant to [the NFCA] based on the facts underlying the first [private] action."[6]

[5]We are not persuaded by relators' argument that this writ petition is moot. Regardless of whether the amended complaint superseded the original complaint, the amended complaint did not substantively alter the interpretative issue concerning NRS 357.080(3)(b) presented in this petition. Thus, the amended complaint neither renders the legal issue abstract nor prevents us from granting effectual relief to the prevailing party.

[6]If the Attorney General or the Attorney General's designee elects to intervene in the qui-tam action, then the private plaintiff must effectively cede control of the litigation over to the Attorney General or the Attorney General's designee. *See* NRS 357.110(3). But if, as occurred here, the appropriate official declines to intervene, "the private plaintiff may proceed with the action."

NRS 357.080(2); *see generally Grynberg ex rel. United States v. Exxon Co., USA* (*In re Nat. Gas Royalties Qui Tam Litig.*), 566 F.3d 956, 961 (10th Cir. 2009) (describing the analogous federal provision as the "first-to-file bar," which "functions both to eliminate parasitic plaintiffs who piggyback off the claims of a prior relator, and to encourage legitimate relators to file quickly by protecting the spoils of the first to bring a claim").

NRS 357.080(3) nevertheless precludes certain qui-tam actions. The at-issue subsection, known as the government-action bar, limits private actions as follows:

> [a]n action may not be maintained by a private plaintiff pursuant to this chapter . . . [i]f the action is based upon allegations or transactions that are the subject of a civil action or an administrative proceeding for a monetary penalty to which the State or political subdivision is already a party.

NRS 357.080(3)(b); *see also United States ex. rel. Bennett v. Biotronik, Inc.*, 876 F.3d 1011, 1014 (9th Cir. 2017) (referring to "the 'government-action bar'" in the NFCA's counterpart under the federal False Claims Act). We have not yet had the occasion to interpret the scope of NRS 357.080(3)(b) in an analogous situation, and thus, we have made only general remarks regarding the provision. *See, e.g.*, *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 139, 127 P.3d 1088, 1094 (2006) (stating, without interpreting the statute, that "[g]enerally, a false claims action may not be maintained if administrative or court proceedings involving the same underlying facts and allegations were previously instigated").

OTCs argue that the district court clearly erred in interpreting the unambiguous language of NRS 357.080(3)(b) as containing a sequencing requirement. They focus on the district court's interpretation of the words "maintain" and "already," arguing the Legislature's decision to substitute "maintain" for the federal law's use of "bring" as to a private plaintiff's action supports that the two terms are not synonymous. Applying their interpretation, OTCs argue that NRS 357.080(3)(b) bars the private action here, even though the Clark County action came after the private action.

Relators counter that OTCs' interpretation of NRS 357.080(3)(b) as purportedly requiring dismissal of a private lawsuit on behalf of the State because a separate political subdivision filed a subsequent lawsuit on its own behalf premised on the same allegations or transactions conflicts with the plain language of the statute, which distinguishes between "the State" and "political subdivisions" of

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NRS 357.110(2). The State did not provide any briefing in this writ proceeding, presumably because the Attorney General previously declined to intervene in the action.

the State. They reason that because the two at-issue suits involve different state governmental entities, NRS 357.080(3)(b) does not preclude relators' private action from proceeding.

The application of NRS 357.080(3)(b) to the undisputed facts is a question of statutory interpretation, which we review de novo. *In re Resort at Summerlin Litig.*, 122 Nev. 177, 182, 127 P.3d 1076, 1079 (2006). We enforce the plain meaning of an unambiguous statute, *see City of Reno v. Yturbide*, 135 Nev. 113, 115-16, 440 P.3d 32, 35 (2019), and strive to interpret sections "in harmony with the statute as a whole," *Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015). In determining the meaning of a statute, we give undefined words in the statute their "plain and ordinary meaning." *In re Resort at Summerlin Litig.*, 122 Nev. at 182, 127 P.3d at 1079. Further, when a statute has been modeled after a federal statute, we consider interpretation of the federal statute as "helpful" insight for our interpretation of the corresponding state law. *See Int'l Game Tech.*, 122 Nev. at 150, 127 P.3d at 1101. We resort to external sources or rules of statutory construction only in the event that ambiguity, or language that gives rise to more than one "reasonable" interpretation, exists in the statute. *See Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 731, 100 P.3d 179, 193 (2004).

NRS 357.080(3)(b) may apply even where the qui-tam action precedes the State's or political subdivision's action

The statutory-interpretation dispute here concerns how the words "maintain" and "already" relate to each other. While neither word is defined within the NFCA, under the common definition, "maintain" means to "continue (something)." *Maintain*, *Black's Law Dictionary* 1142 (11th ed. 2019); *see also Maintain*, *American Heritage Dictionary* 1058 (5th ed. 2011) (defining maintain as "[t]o keep up or carry on; continue").[7] We have, in interpreting other statutes, noted a difference between the words "maintain" and "bring." *See, e.g.*, *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 258-59, 956 P.2d 117, 120-21 (1998); *Nat'l Mines Co. v. Sixth Judicial Dist. Court*, 34 Nev. 67, 77-78, 116 P. 996, 1000 (1911). In *National Mines Co.*, we discussed a statute that conferred the right to "institute and maintain" an action. 34 Nev. at 77-78, 116 P. at 1000. Interpreting this language, we reasoned as follows:

> The word "maintain," as used frequently in statutes in reference to actions, comprehends the institution as well as the support of the action, and the statutes of this state contain many

[7]The definition of "maintain" in the versions of dictionaries at the time of the statute's passage in 1999 are identical to the definitions in the current editions. *See Maintain*, *Black's Law Dictionary* 965 (7th ed. 1999); *Maintain*, *American Heritage Dictionary* 1084 (3d ed. 1996).

> instances where it is used in this broader sense. It is used in other instances to express a meaning corresponding to its more restricted and more proper definition, . . . where [the term] [is] construed not to comprehend the institution of an action, but merely the support thereof. In [the statute] the two words are used together, "institute and maintain"; and hence both are used in their restricted sense.

Id. (citations omitted). Likewise, in *Madera*, we considered a statute that used the terms "'brought' or 'maintained,'" and we acknowledged that these terms sometimes convey similar meanings. 114 Nev. at 258, 956 P.2d at 120-21. Nevertheless, we concluded that the statute's use of "maintain" extended that statute "to pending matters," not just future matters. *See id.* at 258-59, 956 P.2d at 120-21. In so concluding, we reasoned that the Legislature's use of "maintain" alongside "brought" evidenced an intent to apply different meanings to the terms, such that the word "maintain" meant to continue or uphold an action, rather than to commence or institute it. *See id.* at 259, 956 P.2d at 121.

Like the statute in *Madera*, NRS 357.080 uses the terms "maintain" and "bring" at different points, indicating the Legislature's intent to distinguish the two terms rather than collapse them. *See generally* 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes & Statutory Construction* § 46.6 (7th ed. 2007) [hereinafter *Sutherland*] ("Different words used in the same, or a similar, statute are assigned different meanings whenever possible."). Nor does the ordinary meaning of "already" preclude giving independent meaning to "maintain," as the former term may, but does not always, convey succession. *See Already*, *American Heritage Dictionary* 53 (5th ed. 2011) (defining "already," an adverb, as "[b]y this or a specified time," and noting that it functions as "an intensive" at times).[8] Moreover, it can simply apply to the time at which the motion to dismiss is made, at which point such a civil action is "already" pending.

Although the Legislature patterned the NFCA after federal legislation, it departed from the federal counterpart in substituting "maintain" for "bring." *Compare* 31 U.S.C. § 3730(e)(3) ("In no event may a person *bring* an action under [the act] . . . which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." (emphasis added)), *with* NRS 357.080(3)(b) ("An action may not be *maintained* by a private plaintiff . . . [i]f the action is based upon allegations or transactions that are the subject of a civil action . . . to which the State or polit-

[8]The 1992 edition of *American Heritage Dictionary* provides a similar definition of "already" as "[b]y this or a specified time; before," while also noting that "already" can be "[u]sed as an intensive." *See Already*, *American Heritage Dictionary* 54 (3d ed. 1996). *Black's Law Dictionary* does not define "already."

ical subdivision is already a party." (emphasis added)). Generally, "[w]hen the Legislature adopts a statute substantially similar to a federal statute, 'a presumption arises that the [L]egislature knew and intended to adopt the construction placed on the federal statute by federal courts.'" *Int'l Game Tech.*, 122 Nev. at 153, 127 P.3d at 1103. Yet here, the Legislature rejected the federal FCA's sequencing language and the caselaw's construction of that language in its use of "maintain" as opposed to "bring." *Cf.* 2B *Sutherland*, *supra*, at § 52:5 ("[W]hen a legislature models a statute after a uniform act, but does not adopt particular language, courts conclude the omission was 'deliberate,' or 'intentional,' and that the legislature rejected a particular policy of the uniform act.").

Accordingly, then, the government-action bar in NRS 357.080(3)(b) contains no sequencing requirement, and it therefore may apply even where the qui-tam action precedes the State's or political subdivision's action,[9] because it precludes not just the bringing of a private suit but also the maintaining of one, conveying the continued pursuit thereof. While the district court erred in determining that NRS 357.080(3)(b) contains such a sequencing requirement, an issue remains as to whether the statute requires dismissal where the private and government suits concern the interests of different government entities.

NRS 357.080(3)(b) does not bar a qui-tam action on behalf of one governmental entity where the separate civil action has been brought by or on behalf of a different governmental entity, even if the two suits involve the same allegations or transactions

Application of NRS 357.080(3)(b) requires comparison of two "actions": the first action is the one brought by a private plaintiff under NRS 357.080(1), and the second action, i.e., "a civil action," refers to the one to which "the State or political subdivision is already a party." Importantly, a disjunctive is used in the latter clause to describe the "civil action," signaling that the terms "the State" and "political subdivision" convey distinct meanings. *See United States v. Harris*, 838 F.3d 98, 105 (2d Cir. 2016) ("Established canons of statutory construction 'ordinarily suggest that terms connected by a disjunctive be given separate meanings.'" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979))). In authorizing the first action by a private plaintiff, the statute elsewhere maintains the disjunctive when referring to "the State" and "political subdivision." *See* NRS 357.080(1) ("[A] private plaintiff may bring an action pursuant to this chapter . . . on his or her own

[9]We note, however, that pursuant to NRS 357.080(2), only the Attorney General or their designee may assert claims pursuant to the NFCA in a government civil action when it is filed after the qui-tam action.

account and that of the State *or* a political subdivision, *or* both the State and a political subdivision." (emphases added)). Indeed, the NFCA confirms distinct meanings of "the State" and a "political subdivision," as the latter term is not defined as coextensive with the former term. *See* NRS 357.030 (defining "political subdivision" as including counties, cities, and "any other local government" entity).

Thus, when the government-action bar in subsection 3(b) refers to a "civil action" to which "*the* State or political subdivision is already a party" (emphasis added), it refers back to the specific State or political subdivision on whose account the private plaintiff has brought an action pursuant to subsection 1. *See* NRS 357.080(1) & (3); *see also The*, *American Heritage Dictionary* 1803 (5th ed. 2011) ("the," a definite article, used to "denote particular, specified persons or things"). A contrary interpretation collapses "the State" and "political subdivision" into one entity, i.e., the "government," as any governmental entity's lawsuit premised on the same allegations or transactions would foreclose a private plaintiff from pursuing recovery on behalf of a distinct entity. While the government-action bar in the federal FCA refers to "the Government" as one entity, *see* 31 U.S.C. § 3730(e)(3), the plain language of the NFCA makes clear that a claim may be brought on behalf of either the State or a political subdivision, or both. Such an interpretation makes sense in light of the distinction between state governmental entities in other contexts. *Cf. Zebe v. County of Lander*, 112 Nev. 1482, 1484-85, 929 P.2d 927, 928-29 (1996) (concluding that because "each county, acting through its district attorney, has specific jurisdiction over acts conducted within its borders," one county does not bind a second county absent "the second county's [express] consent"); *Clark County v. Lewis*, 88 Nev. 354, 356-57, 498 P.2d 363, 365 (1972) (noting that "the county as a political subdivision has the power to compromise disputed claims or causes of action brought against it").

Applying this understanding to the undisputed facts, NRS 357.080(3)(b) does not require dismissal of relators' private action. Relators allege that OTCs engaged in a fraudulent scheme throughout the state to avoid transient-lodging tax obligations. According to the amended complaint, those transient-lodging taxes were assessed in Clark, Washoe, Douglas, Lyon, and Nye counties under their respective county codes and state law. However, relators seek recovery of the portion of the transient-lodging tax to which *the State*, not the respective county authorities, was entitled, and thus bring this case only on their own account and that of the State—not that of any political subdivisions. By contrast, the State is not a party to the action brought by Clark County. Even assuming the actions involve the same allegations or transactions, the two governmental entities, and the claims pertaining to each, involved in the private action and the "civil action" remain distinct. Thus, regardless of

which suit came first, NRS 357.080(3)(b) does not preclude relators from maintaining the present qui-tam action.

We also disagree with OTCs' assertion that failure to apply the government-action bar usurps legislative intent to ensure that government officials, rather than private parties, control governmental claims and encourages private parties to make law and policy decisions that affect governmental interests. The NFCA incentivizes private citizens to recover fraudulently obtained funds from violators on behalf of and for the benefit of the State or a political subdivision, while bearing the upfront financial and material burdens of litigation. *See, e.g.*, NRS 357.210(1)-(2) (permitting a private plaintiff to receive anywhere from 15 to 30 percent of a recovery, depending on whether the Attorney General or the Attorney General's designee intervened). Further, the Legislature has conferred control over false-claims litigation exclusively on the Attorney General, not, as OTCs suggest, on all state or local government officials. *See Simonian v. Univ. & Cmty. Coll. Sys. of Nev.*, 122 Nev. 187, 190, 128 P.3d 1057, 1059 (2006) ("Nevada's FCA permits *the Attorney General, or a private 'qui tam' plaintiff* acting on his own behalf and on that of the State, to maintain an action for treble damages against 'a person' who, among other things, presents a false claim for payment or approval . . . ." (emphasis added)). For example, the Legislature permits and mandates only the Attorney General or the Attorney General's designee to investigate alleged NFCA liability. NRS 357.070(1), (2). And a private plaintiff who files a qui-tam action must first give the Attorney General the opportunity to intervene, regardless of whether the suit is brought on behalf of the State or a political subdivision, or both. *See* NRS 357.080(4)-(5); NRS 357.110(1).

If the Attorney General does intervene, the Attorney General takes over the litigation. *See, e.g.*, NRS 357.120(3) (giving the Attorney General the authority to settle the action). However, if the Attorney General declines to intervene, the private plaintiff assumes "the same rights in conducting the action as the Attorney General or the Attorney General's designee would have had." NRS 357.130(1). Even so, the private plaintiff must continue to provide the Attorney General with all pleadings associated with the matter. *Id.* Moreover, the Attorney General may nevertheless intervene even after initially declining to intervene. *See* NRS 357.130(2)-(3). While these various subsections emphasize the Attorney General's authority over false claims actions, they do not convey a general intent to ensure the government, as if it constitutes a single entity, maintains control or supervision over false claims litigated by private plaintiffs. Indeed, nowhere in NRS Chapter 357 does the NFCA authorize an independent local entity, such as Clark County, absent the Attorney General's designation, to intervene in or otherwise control a private suit to protect its interests.

Moreover, OTCs' focus on the substantial control given to the Attorney General ignores a crucial aspect of the NFCA that if the Attorney General declines to intervene in the private action, as occurred here, the Attorney General has in effect authorized the private plaintiffs to litigate as if they were the Attorney General. *See* NRS 357.130(1). Thus, a decision to decline to intervene also involves a degree of control by the Attorney General and, likewise, acknowledges that the private litigation of the State's or a political subdivision's claims may proceed. Further, here, the Attorney General did not designate a county attorney to investigate and bring an NFCA claim related to Clark County's interests. In this respect, Clark County's suit, which includes no NFCA claim, is not directly implicated in relators' matter, as there is no overlap between the private plaintiffs' NFCA claim and the political subdivision's claims.

Finally, even in vesting the Attorney General with substantial control over false-claims litigation, the Legislature has also expressed a policy that the State and its political subdivisions benefit from the private pursuit of false-claims litigation. Indeed, private enforcement not only saves the State and political subdivisions from expending resources to pursue these claims but also results in positive returns to those entities. While, undoubtedly, some private plaintiffs pursue these claims out of a degree of self-interest, the Legislature has clearly endorsed financial incentives to encourage private plaintiffs to do so. *See* NRS 357.210(1)-(2) (allowing the private plaintiff to take a percentage of the ultimate recovery). Nor do these incentives harm the State or political subdivision, as they ultimately result in recovery to those entities and come out of the wrongdoer's pocket. Thus, consideration of the NFCA as a whole, along with its purpose, supports our interpretation of NRS 357.080(3)(b) as giving independent meaning to "the State" and "political subdivision."

CONCLUSION

The government-action bar in NRS 357.080(3)(b) prevents a private plaintiff from maintaining a private NFCA action if the action is based on the same allegations or transactions that are subject to a civil action to which the State or a political subdivision is already a party. We hold that application of this provision precludes continuing an existing NFCA case by a private plaintiff even if the government entity brings its civil action after the private case is initiated. However, we further conclude that the government-action bar applies only where the two at-issue suits involve the same governmental entity as a party. Such an interpretation preserves the Legislature's intent to differentiate between the terms "the State" and "a political subdivision" and acknowledges that the reference in NRS 357.080(3)(b) to "the State or political subdivision" means the entity that is a party to the private plaintiff's suit.

Furthermore, our interpretation also comports with the purpose of the NFCA as a whole to incentivize private plaintiffs to litigate instances of fraud against the State or a political subdivision to free up the respective governmental entities' resources for other purposes. Nor does such an interpretation interfere with the Attorney General's control over private NFCA suits, as the Attorney General has the right to intervene and use other procedural mechanisms to exercise a certain amount of control.

Applied here, NRS 357.080(3)(b) does not bar relators from maintaining the instant suit because, although the two at-issue actions may involve the same allegations or transactions to establish liability, relators' action is brought on behalf of the State and not on behalf of any political subdivisions, while Clark County's action is on behalf of itself and the State is not a party thereto. Accordingly, we deny the OTCs' petition for writ relief.[10]

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

Lee, J., concurring:

While I concur in the result reached by the majority, I write separately to voice my disagreement with the majority's interpretation of NRS 357.080(3)(b).

The statute is admittedly ambiguous given its concurrent use of the words "maintain" and "already," which creates a contradiction that must be reconciled to give the statute effect. *See State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) ("[W]hen 'the statutory language lends itself to two or more reasonable interpretations,' the statute is ambiguous, and we may then look beyond the statute in determining legislative intent." (quoting *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004))). I note that the majority's interpretation is not an unreasonable one. However, their interpretation of "already" as encompassing future events is strained.

NRS 357.080(3)(b) states, in pertinent part, that "[a]n action may not be *maintained* . . . [i]f the action is based upon allegations or transactions . . . [in a] proceeding . . . to which the State or political subdivision is *already* a party." (Emphases added.) "Already," as ordinarily used, means that something occurred prior to the idea it modifies. "Already" here simply means that the State or political subdivision must have been a party to the proceeding prior to the plaintiff's action. If the State or political subdivision's proceeding "already" existed prior to the plaintiff's action, then the action may not be maintained. Thus, there is a natural sequencing requirement in NRS 357.080(3).

[10]The stay this court granted on August 18, 2022, is vacated, and the relators may proceed with their action in district court.

In holding that the government-action bar does not import a sequencing requirement, the majority consults the legislative history of the statute and compares NRS 357.080(3)(b) with 31 U.S.C. § 3730(e)(3). Because Nevada's Legislature changed the word "bring" to "maintain," the majority asserts that the Legislature intended to reject any sequencing requirement. While this is not an unreasonable interpretation, one would have to turn a blind eye to the word "already," which in and of itself conveys sequencing.

I submit that the single word change from "bring" to "maintain" is not a clear indication of legislative intent. Instead, the use of "maintain" instead of "bring" has its ordinary meaning: even if the plaintiffs somehow managed to bring this action after a related proceeding, they may not continue the action if the State or political subdivision began the related proceeding prior to the plaintiff's action.

In addition to an assessment of legislative history when dealing with an ambiguous statute, we look to reason and public policy considerations to decipher legislative intent. *Lucero*, 127 Nev. at 95, 249 P.3d at 1228. ("To interpret an ambiguous statute, we look to the legislative history and construe the statute in a manner that is consistent with reason and public policy."). As a practical matter, it does not make sense to permit qui-tam actions, only for a political subdivision to swoop in at any time. It is not clear why any private plaintiff would take the risk of funding this form of litigation given the majority's interpretation. Recognition of the inherent sequencing set forth in the government-action bar promotes the legislative policy of incentivizing, encouraging, and enabling private plaintiff qui-tam actions.

But because the government-action bar is inapplicable in this matter for the reasons set forth in the majority's opinion, I concur with the remainder of the majority's opinion.