MAGGIE ROE, NKA MAGGIE COX, APPELLANT, *v.* JASON J. ROE, RESPONDENT.

No. 84893-COA

July 27, 2023 535 P.3d 274

Appeal from a district court order modifying custody of a minor child. Eighth Judicial District Court, Family Division, Clark County; Dawn Throne, Judge.

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

Roberts Stoffel Family Law Group and *Melvin R. Grimes*, Las Vegas, for Appellant.

Page Law Firm and *Fred Page*, Las Vegas, for Respondent.

Before the Court of Appeals, GIBBONS, C.J., and BULLA and WESTBROOK, JJ.

OPINION

By the Court, GIBBONS, C.J.:

In this opinion, we address an unclear area of Nevada child custody law, provide clarification with a definition of sole physical custody, and outline what a district court must consider when entering an order for sole physical custody.[1] Further, we direct district courts to retain their substantive decision-making authority over custodial modifications and parenting time allocations, as well as reiterate that, in family law cases, being a prevailing party alone is not a sufficient basis for an award of attorney fees under NRS 18.010. This opinion also clarifies when reassignment of a case to a different judge on remand is appropriate because of the requisite fairness demanded in ongoing child custody proceedings.

The Nevada Legislature has directed that "the sole consideration" in a custodial action "is the best interest of the child." NRS 125C.0035(1). Yet, it is left to our district courts to translate a child's best interest into a quantifiable, clearly defined parenting time schedule. *See generally Bluestein v. Bluestein*, 131 Nev. 106, 112, 345 P.3d 1044, 1048 (2015). To aid district courts, our appel-

[1]We originally resolved this appeal in an unpublished order. Appellant subsequently filed a motion to reissue the order as a published opinion. We grant the motion and replace our earlier order with this opinion. *See* NRAP 36(f). Appellant also filed a petition for rehearing of our prior decision affirming the custodial modification. Having reviewed the petition, we deny rehearing. *See* NRAP 40(c).

late courts have given direction on what allocation of parenting time constitutes a physical custody characterization from joint to primary and vice versa. *See id.* at 113, 345 P.3d at 1049 (directing district courts to consider *Rivero*'s 40-percent parenting time conclusion but providing that it is not the sole consideration in characterizing custodial arrangements); *Rivero v. Rivero*, 125 Nev. 410, 417, 216 P.3d 213, 219 (2009) (defining joint physical custody generally as a parenting time arrangement where each party has physical custody at least 40 percent of the time), *overruled on other grounds by Romano v. Romano*, 138 Nev. 1, 501 P.3d 980 (2022).

By comparison, there is little direction as to what a district court must consider when entering an order for sole physical custody. Sole physical custody is a custodial arrangement where the child resides with only one parent and the noncustodial parent's parenting time is restricted to no significant in-person parenting time. Sole physical custody is different than primary or joint physical custody because sole physical custody conflicts with this state's general policy for courts to support "frequent associations and a continuing relationship" between parent and child. *See* NRS 125C.001(1). Likewise, sole physical custody orders substantially impede the fundamental parental rights of the noncustodial parent. *See Gordon v. Geiger*, 133 Nev. 542, 545-46, 402 P.3d 671, 674 (2017); *see also Troxel v. Granville*, 530 U.S. 57, 65 (2000) (concluding that parents have a fundamental interest "in the care, custody, and control of their children").

In this opinion, we provide a definition of sole physical custody to ensure custodial orders are properly characterized. We direct district courts when entering an order for sole physical custody to first find either that the noncustodial parent is unfit for the child to reside with, or to make specific findings and provide an adequate explanation as to the reason primary physical custody is not in the best interest of the child. Following either of these findings, the district court must consider the least restrictive parenting time arrangement possible to avoid constraining the parent-child relationship any more than is necessary to prevent potential harm caused by an unfit parent and meet the best interest of the child. If the court enters a more restrictive parenting time arrangement than is otherwise available, it must explain how the greater restriction is in the child's best interest. Further, we reiterate that district courts must retain substantive decision-making authority over custodial modifications and parenting time allocations and may not substitute a third party's discretion for their own.

Here, substantial evidence supports the district court's decision to modify physical custody based on its finding that there had been a substantial change in circumstances affecting H.R.'s welfare and its best interest factor findings. However, the district court abused

its discretion by improperly characterizing its custodial award as primary physical custody when it was in actuality sole physical custody, thereby overly restricting appellant Maggie Cox's parenting time without adequate findings, failing to consider any less restrictive arrangement, and delegating its substantive decision-making authority to a therapist. So, while we affirm the modification of physical custody, we reverse the parenting time allocation and vacate the award of attorney fees and costs. On remand, we also direct the chief judge to reassign this case to a different judge to ensure fairness in the ongoing child custody proceedings.

FACTS AND PROCEDURAL HISTORY

Appellant Maggie Cox and respondent Jason J. Roe had been divorced for approximately seven years when Maggie filed a motion in 2020 to modify physical custody of their child H.R., born in 2009, who was then eleven years old. At the time, the parties shared joint legal and physical custody, with the most recent custodial order being entered by stipulation in 2017. In her motion, Maggie argued that H.R.'s behavior and attitude toward her had become increasingly and alarmingly disrespectful and aggressive, which she attributed in part to Jason's conduct and influence. In addition to seeking primary physical custody, Maggie asked the district court to enter orders for therapy for H.R. and requested a brief focused assessment to determine the likely cause of H.R.'s change in demeanor and behavior. Jason opposed the motion and filed a countermotion for primary physical custody alleging Maggie was emotionally unstable and that H.R. preferred to live with him. The district court granted the motion for therapy, granted the request for a brief focused assessment, and set a hearing date on the parties' motions to modify custody.

The therapist who conducted the brief focused assessment, Maureen Zelensky, MFT, met with H.R., Maggie, and Jason multiple times to conduct her assessment. She also reviewed the entire record of the case, spoke with the parties' attorneys, and consulted with H.R.'s personal therapist. Zelensky's final report to the district court recognized the problems between Maggie and H.R. and suggested that Jason was likely engaging in parental alienation. Zelensky found that Maggie was almost certainly suffering from anxiety and possibly from post-traumatic stress disorder, which likely contributed to her highly emotional conduct. Based on her assessment, Zelensky recommended that the district court enter a behavior order for both parents and maintain the week-on/week-off parenting time schedule. The district court adopted the recommendations and entered an order for the parties to maintain joint legal and physical custody. The district court set a date for a status check.

Before the status check, the situation between Maggie and H.R. took a dramatic turn for the worse. On two separate occasions, H.R. was taken into custody by law enforcement for battery against Maggie while Maggie was exercising her parenting time. The police believed H.R. was the primary aggressor both times, so they took H.R. for a 12-hour detainment period after each incident. The record is clear that Maggie never called the police on H.R. In the first situation, the call came from her mother, and in the second situation, the call was from Jason. The record also supports Maggie's claim that once others had called the police, she had little choice but to let H.R. be taken into custody.[2]

Based on these incidents, Jason filed an emergency motion for temporary sole legal and sole physical custody of H.R. In March 2021, the district court granted the motion, finding "something wrong with the parent who cannot manage an 11-year-old," that Maggie had been the one to call the police on H.R., and that her behavior was "histrionic." The court also found that upon H.R.'s release from custody, Maggie should have let H.R. go with Jason, despite it still being Maggie's parenting time. The court supported this conclusion by finding that Maggie "is obviously not able to parent her son" and "it is not safe when you have the police call out to your home as somebody might get shot, and it is not safe." The district court ordered Maggie's contact with H.R. immediately restricted to just six hours of parenting time weekly and reunification therapy sessions conducted by Dr. Sunshine Collins. The district court characterized its parenting time order as sole physical custody. The district court also appointed a guardian ad litem for H.R. and a parenting coordinator to help the parties, with the costs of each to be split between Maggie and Jason.

A few months later, Maggie took H.R. out for a day of bowling and shopping within her restricted parenting time allocation. During the outing, H.R. ran from Maggie, hid in a bathroom at a local store, and called Jason to be picked up. Maggie believed H.R. ran after becoming upset about losing the bowling game, while Jason claimed H.R. ran because he feared that Maggie would have him arrested again.

As a result of the continued conflict between Maggie and H.R., the parenting coordinator recommended in August 2021 that all contact be "paused" between Maggie and H.R. until the district court could sort out the issues between the parents. Along with her recommendation, the parenting coordinator also informed the court that Maggie, an educator, would likely be unable to pay for

[2]With exceptions, an arrest is required when police respond to a reported battery constituting domestic violence and find probable cause supporting the commission of the offense, which results in a minimum 12-hour detainment period. *See* NRS 171.137(1); NRS 178.484(7).

Dr. Collins's services. Dr. Collins was outside of Maggie's insurance network, and the district court had also ordered Maggie to pay other obligations, including child support to Jason. The parenting coordinator recommended that Jason bear some of the cost of reunification services and that he should be included in the sessions.

Jason filed an objection, in part, to the parenting coordinator's recommendation that he attend and partially pay for reunification services. In September 2021, the district court granted Jason's objection and ordered Maggie to "have [no contact]" with H.R. "outside of the therapeutic services" with Dr. Collins. At that point, Dr. Collins was requiring Maggie to attend several individual sessions before she would be allowed to start joint sessions with H.R., which Maggie was struggling to afford. Thus, by granting Jason's objection and entering an order for no contact between H.R. and Maggie outside of therapy, the district court effectively prohibited all contact of any kind between Maggie and H.R.[3]

Maggie withdrew her motion for primary physical custody shortly thereafter and instead asked the court to maintain joint legal and physical custody pursuant to the 2017 order. The district court set the case for an evidentiary hearing in March 2022, now only on Jason's motion for modification of physical custody. The district court advised the parties that, at the hearing, they would be restricted from introducing evidence that predated the 2017 order.

During the March 2022 evidentiary hearing, Jason presented evidence that the child custody best interest factors favored his motion to modify custody, especially that H.R., who was now 12 years old, preferred to live with him. Evidence was also introduced that showed Maggie could not afford Dr. Collins's services and that both she and Dr. Collins agreed they were not a good therapeutic fit for Maggie's individual sessions. On March 11, 2022, day two of the hearing, the district court learned that its September 2021 order had prevented Maggie from contacting H.R. on the child's birthday and that the order had also prevented Maggie from sending gifts or cards to H.R. during the holidays. The court referred to this September order as "the no contact order of Dr. Collins." The district court then orally modified its no-contact order and allowed Maggie to send cards to, text, and call H.R. This oral modification was subsequently described by the district court as the "March 11, 2022, Order."

At the close of the hearing, the district court maintained joint legal custody but granted Jason what it called primary physical custody, finding a substantial change of circumstances in the severe deterioration of H.R. and Maggie's relationship and H.R.'s age and

[3]The district court's order effectively ended all contact between Maggie and H.R. for the next six months.

wishes. The district court also considered H.R.'s best interest and found that H.R. wanted to live with Jason, Jason had relatively superior mental health, and the relationship between H.R. and Jason was comparatively less fraught.[4] *See* NRS 125C.0035(4)(a), (f), (h). The court merely referred to the "March 11, 2022, [oral] Order" in setting Maggie's parenting time, ostensibly restricting Maggie's parenting time to no contact with H.R. except for cards, texts, and calls. Thus, in the district court's final order modifying custody, Maggie was awarded no in-person parenting time with her child.

The district court also ordered Maggie to attend individual therapy with Dr. Collins twice per month, with the goal of working towards joint reunification sessions with H.R. If Maggie did not attend twice a month, the court ordered the downward adjustment in the child support order was to be terminated.[5] Dr. Collins was also given authority to determine when Maggie's parenting time could be expanded to potentially include in-person contact with H.R. Finally, the district court ordered Maggie to pay $11,365 in attorney fees and costs to Jason because he was the prevailing party. This appeal followed.[6]

ANALYSIS

On appeal, Maggie raises issues with the limitations the district court placed on her parental rights and the fairness of the proceedings below. Maggie contends that the district court: (1) did not have substantial evidence to modify child custody, improperly considered child testimony when determining what was in H.R.'s best interest, and abused its discretion in finding there was a substantial change of circumstances since the 2017 order; (2) demonstrated actual bias against her; (3) violated her parental rights; and (4) abused its discretion in awarding Jason attorney fees and costs. Maggie also argues that the district court's errors are to such a degree that

[4]The district court did find that Maggie was more likely to allow H.R. to have frequent associations with Jason, *see* NRS 125C.0035(4)(c), but that "Dr. Collins will be able to address anything that Jason might say or do that is not supportive of [H.R.'s] relationship with Maggie . . . . This Court can also issue Orders to Enforce for Jason if necessary."

[5]The district court adjusted Maggie's child support obligation downward based on her extra costs to see Dr. Collins. However, based on invoices in the record, for Maggie to be treated by Dr. Collins twice a month would cost her significantly more than the downward adjustment offset.

[6]District and appellate courts are to expedite decisions affecting the custody of minor children, meaning resolutions must be reached in district court within six months of custody or parenting time being contested absent unforeseeable circumstances with specific findings justifying exceeding that time period. *See* SCR 251. The temporary custody orders in this case were in effect for more than one year and contained very few findings, and none explained the lengthy delays.

this court should reverse the district court's order and remand with instructions to conduct a new evidentiary hearing presided over by a different judge. In contrast, Jason argues that the district court's order is supported by substantial evidence, Maggie's fundamental parental rights are not properly at issue as she can reconnect with H.R. as soon as she does the work prescribed by Dr. Collins, and he is entitled to attorney fees and costs as the prevailing party.

The district court's decision to modify physical custody is supported by substantial evidence

Maggie argues that the order modifying physical custody is not supported by substantial evidence and that the district court abused its discretion by finding a substantial change in circumstances. A district court's child custody order is reviewed for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). Factual findings of the district court will not be set aside if "supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007) (footnote omitted).

We begin with the issue of child testimony. Maggie alleges that testimony given at the hearing by the guardian ad litem that recounted H.R.'s wish to live with Jason, which is a best interest factor a district court must consider under NRS 125C.0035(4)(a), was both inadmissible hearsay and unrecorded child testimony under *Gordon v. Geiger*, 133 Nev. 542, 547, 402 P.3d 671, 675 (2017).[7] Maggie's argument that the district court improperly considered child testimony fails for three reasons. First, she does not address the effect of similar testimony given by Jason, H.R.'s stepmother, and Dr. Collins, and therefore, she has not shown how the admission of the guardian ad litem's testimony affected her substantial rights. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached."). Second, while *Gordon* does direct that child interviews be recorded, the facts are distinguishable and its holding is limited to interviews intended to be used in lieu of in-court child testimony. *See Gordon*, 133 Nev. at 547-48, 402 P.3d at 675-76. Therefore, we decline to adopt an interpretation that would require a guardian ad litem to record a child's interview when the guardian ad litem's purpose is not to garner testimony but to protect the best interest of

[7]*Gordon* provides "that child interviews must be recorded" and that child testimony must abide by the Uniform Child Witness Testimony by Alternative Methods Act. 133 Nev. at 547, 402 P.3d at 675; NRS 50.500-.620; *see also* NRCP 16.215.

the child. *See* NRS 159A.0455; *see generally* NRCP 16.215(a), (f). Third, we note that a hearsay exception, such as a statement of H.R.'s then-existing mental or emotional condition, likely applies. *See* NRS 51.105(1).

Maggie also argues that Jason did not meet his burden to show a substantial change in circumstances affecting H.R.'s welfare and that the district court did not have sufficient evidence that modification was in H.R.'s best interest. *See Romano v. Romano*, 138 Nev. 1, 9, 501 P.3d 980, 986 (2022) (concluding that to modify custody a movant must show "there has been a substantial change in circumstances affecting the welfare of the child" and "the modification would serve the child's best interest").

The district court found that the severely deteriorating relationship between H.R. and Maggie and H.R.'s age and wishes constituted a substantial change in circumstances affecting H.R.'s welfare. These findings are supported by substantial evidence. Maggie acknowledged and explained her deteriorating relationship with H.R. in her motion to modify, which was the motion that initiated the matter before us. In that motion, she alleged that her relationship with H.R. had deteriorated to the point of H.R. calling her names, punching her, and locking her out of the home. By the time the matter reached the final evidentiary hearing, it was undisputed that the interactions between the two had devolved to include H.R. lashing out physically and running from Maggie. It was also undisputed that Maggie struggled to regulate her emotions during these conflicts. While the district court's findings that Maggie was primarily at fault for H.R.'s behavior are suspect based on the evidence introduced during the hearing,[8] under *Romano* the court was only required to find that a substantial change in circumstances affecting H.R.'s welfare existed. *Romano*'s holding does not require the district court to properly diagnose the cause, even if it might be important in the ultimate custody decision.

[8]As mentioned above, Zelensky's report stated Jason was likely engaged in parental alienation, and we note that the district court did not give this evidence any weight. "Parental alienation is a strategy whereby one parent intentionally displays to the child unjustified negativity aimed at the other parent." Ken Lewis, *Parental Alienation Can Be Emotional Child Abuse*, National Center for State Courts: Trends in State Courts, 46, 47 (last visited June 29, 2023), https://cdm16501.contentdm.oclc.org/digital/collection/famct/id/1644. The result is damage to the child's relationship with the other parent, turning into rejection and hostility directed at the nonalienating parent. *Id.* Parental alienation is a "form of emotional child abuse." *Id*. Zelensky testified to Jason's behavior she personally witnessed. Additionally, the guardian ad litem testified she was concerned H.R. was being coached by Jason. Dr. Collins testified that she did "not believe that alienation [was] the *primary* reason for [H.R.'s] dissatisfaction with" their relationship "today," and the district court agreed. (Emphasis added.) Further, Maggie offered testimony that H.R. would come back from spending time with Jason making unusual recriminations for a young child, such as accusing Maggie of printing a fake college degree.

Likewise, substantial evidence supported the district court's best interest findings that three factors favored Jason: (1) H.R.'s wishes; (2) Jason's mental health,[9] as compared with Maggie's "highly emotionally dysregulated" disposition; and (3) the nature of H.R.'s relationship with each parent.[10] *See* NRS 125C.0035(4)(a), (f), (h). Multiple witnesses, including therapists called to testify by both parties, attested to H.R.'s wishes and to Maggie's emotional state. It is undisputed that the nature of Maggie's and H.R.'s relationship had deteriorated to include H.R. becoming physically aggressive and running away. The record shows that by the time of the evidentiary hearing, H.R. was estranged from Maggie.

These factual findings were included in the district court's final order, and we do not reweigh evidence on appeal. *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (noting that appellate courts are "not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party"). Also, the standard of review here is deferential. *See Ellis*, 123 Nev. at 149, 161 P.3d at 242. We therefore conclude that substantial evidence supports the district court's findings that Jason demonstrated a substantial change in circumstances affecting H.R.'s welfare and supports the court's best interest factor findings. Thus, as the district court's findings allowed for a modification of the custody order, we affirm that determination. Yet we decline to give similar deference to its parenting time allocation.

The district court's allocation of parenting time is contrary to Nevada law and policy

Maggie argues that the district court's order infringed upon her parental rights and that the court's interlocutory and operative orders were so extreme that the district court effectively undermined her relationship with H.R. to the point of near termination of her parental rights. Jason argues that Maggie's fundamental parental rights are not properly at issue because she can simply follow the court's order, do the work as prescribed by Dr. Collins, and be reunited with H.R. as soon as Dr. Collins is satisfied with Maggie's progress.

[9]The district court did not address in its order how this finding was affected by either Zelensky's report that Jason had taken psychotropic medications or Jason's own testimony that he took antidepressants.

[10]A potential fourth factor, H.R.'s physical and developmental needs, cannot be viewed as supporting the custody decision because it was confusingly found to be "neutral" in part but "favor[ed] Jason" in part because "Maggie has not yet done the things she needs to do in order to" have a relationship with H.R. *See* NRS 125C.0035(4)(g).

"The district court has broad discretionary power in determining child custody," including parenting time. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (internal quotation marks omitted). We review a district court's discretionary determinations deferentially, but deference is not owed to legal error or findings that "may mask legal error." *Id*. Here, there are three significant legal errors in the district court's order. First, the order restricts Maggie's parenting time to such a degree that it has unduly infringed upon Maggie's parental rights and effectively awarded sole physical custody to Jason without a sufficient legal basis or findings for so doing. Second, the district court improperly delegated its substantive authority to a third party, Dr. Collins. Finally, the order incorporates by reference what the district court called the "March 11, 2022, Order," which was its oral modification to "the no contact order of Dr. Collins" made midway through the evidentiary hearing, as its final parenting time order. No other findings or information are included as to how the "March 11, 2022, Order" controls Maggie's parenting time, so the final order is facially unenforceable. We address each error in turn.

Sole physical custody

The parent-child relationship is a fundamental liberty interest. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Rico v. Rodriguez*, 121 Nev. 695, 704, 120 P.3d 812, 818 (2005) (quoting *Troxel*, 530 U.S. at 65, in concluding that parents have a fundamental interest in the care, custody, and control of their children). A permanent change to parenting time affects a parent's fundamental right concerning the custody of their child. *Gordon*, 133 Nev. at 546, 402 P.3d at 674. Even parents deemed highly emotionally dysregulated retain their fundamental rights. *Cf. Santosky v. Kramer*, 455 U.S. 745 (1982) (concluding that parents retain constitutional rights even if they are found to be unfit).

Nevada's district courts enter one of three parenting time arrangements in a custodial order—joint, primary, or sole physical custody. The Nevada Legislature and our supreme court have previously defined the first two parenting time arrangements and provided guidance on what a court must consider when entering an award for either joint or primary physical custody. *See, e.g.*, NRS 125C.0025; NRS 125C.003; NRS 125C.0035; *Rivero*, 125 Nev. at 424, 216 P.3d at 224. Our supreme court has defined joint physical custody as a custodial arrangement awarding "custody of the minor child or children to BOTH PARENTS and providing that physical custody shall be shared by the parents in such a way to ensure the child or children of frequent associations and a continuing relationship with both parents," which "must approximate an equal timeshare." *Rivero*, 125 Nev. at 424, 216 P.3d at 224 (quoting

Hearing on S.B. 188 Before the Assemb. Judiciary Comm., 61st Leg. (Nev., Apr. 2, 1981)) (emphasis in original). Joint physical custody is the first alternative a court should consider when deciding custody. *See* NRS 125C.003(1). If such an arrangement is not in the best interest of child, the court may then order primary physical custody. *Id*. Joint physical custody is presumed not to be in a child's best interest in certain circumstances. NRS 125C.003(1)(a)-(c); *but see* NRS 125C.0025(1)(b) (providing joint physical custody remains the "preference" and "would be in the best interest of a minor child if . . . [a] parent has demonstrated, or has attempted to demonstrate but has had his or her efforts frustrated by the other parent, an intent to establish a meaningful relationship with the minor child").

Primary physical custody "may encompass a wide array of circumstances." *Rivero*, 125 Nev. at 428, 216 P.3d at 226; *see also* NRS 125C.003(1)(a) (providing that an award of primary physical custody is appropriate when the district court determines that joint physical custody is not in the best interest of the child and specifying that joint physical custody is presumed not to be in the best interest of the child if "a parent is unable to adequately care for a minor child for at least 146 days of the year"). "The focus of primary physical custody is the child's residence." *Rivero*, 125 Nev. at 428, 216 P.3d at 226 (quoting Tenn. Code Ann. § 36-6-402(4) (2005), which defines "primary residential parent" as the parent with whom the child resides for more than 50 percent of the time). A primary physical custody arrangement is expansive enough to include parenting time arrangements where the nonprimary custodial parent has limited in-person parenting time. *Id*. (citing *Metz v. Metz*, 120 Nev. 786, 789, 101 P.3d 779, 781 (2004), wherein the court affirmed a primary custodial order where the nonprimary custodial parent had parenting time "every other weekend" and "custody of the child during the month of July").

However, neither the Nevada Legislature nor our supreme court has previously defined sole physical custody. Even so, the existence of sole physical custody as a parenting time arrangement is acknowledged in NRS 125C.0035. NRS 125C.0035(5) (explaining that clear and convincing evidence of domestic violence creates the presumption that "*sole* or joint physical custody" by the perpetrator is not in the best interest of the child (emphasis added)). Further, it is a parenting time arrangement ordered by Nevada's district courts and subject to appellate review. *See, e.g.*, *Garver v. Garver*, No. 82471-COA, 2022 WL 1772546, at *1 (Nev. Ct. App. May 27, 2022) (Order of Affirmance) (affirming an order granting sole physical custody that allowed only two virtual sessions per week with the noncustodial parent).

In a sole physical custody arrangement, the child "reside[s] with . . . one parent" yet is "subject to the power of the [district]

court to order" parenting time for the noncustodial parent. *See* Cal. Fam. Code § 3007 (West 2004) (defining sole physical custody, cited by *Rivero*, 125 Nev. at 422, 216 P.3d at 222); *see also* Mass. Gen. Laws Ann. Ch. 208 § 31 (distinguishing "sole physical custody" from "shared physical custody"). Sole physical custody is distinct from primary physical custody. In a primary physical custody arrangement, a child spends most, but not all, of their time residing with one parent. Comparatively, in a sole physical custody arrangement, the child reasonably can be said to reside with only one parent. For example, with primary physical custody, a child may reside with both parents by spending most or some weekends living with the nonprimary-custodial parent. *See Rivero*, 125 Nev. at 425-26, 216 P.3d at 224. But this is not the type of parenting time arrangement our district courts consider when entering an order for sole physical custody.[11]

We now define sole physical custody as a custodial arrangement where the child resides with only one parent and the noncustodial parent's parenting time is restricted to no significant in-person parenting time. Therefore, when a district court enters an order that limits parenting time to restrictive supervised parenting time, virtual contact, phone calls, letters, texts, a very limited block of hours on a single day of the week, or a similarly restraining parenting time arrangement, it has entered an order for sole physical custody.

Because the noncustodial parent's care, custody, and control of their child is so severely restricted, sole physical custody orders implicate a parent's fundamental rights and policies in a manner manifestly distinct from orders for joint or primary physical custody. *See Blanco v. Blanco*, 129 Nev. 723, 731, 311 P.3d 1170, 1175 (2013) ("[C]hild custody decisions implicate due process rights because parents have a fundamental liberty interest in the care, custody, and control of their children."). While a district court does not terminate a parent's rights by entering a sole physical custody order, the severe restriction on the noncustodial parent's care, custody, and control of their child requires additional findings and procedure as compared to entry of a joint or primary physical custody order. *See* NRS 128.005(2)(a) (providing that the public policy of Nevada is to preserve and strengthen family life; thus, "[s]everance of the parent-child relationship is a matter of such importance" that it requires "judicial determination"); *cf.* NRS 128.105 (outlining specific findings a district court must make before terminating parental rights); NRS 128.160-.190 (providing the procedure for seeking a restoration of parental rights).

[11]*See, e.g.*, *In re Parental Rights as to A.M.*, No. 81098-COA, 2020 WL 6955396, at *1 (Nev. Ct. App. Nov. 25, 2020) (Order Granting Petition for Writ of Mandamus) (reviewing an order granting sole physical custody that did not award any parenting time to the noncustodial parent).

To protect a noncustodial parent's rights, judicial discretion is tempered by this state's policy of supporting "frequent associations and a continuing relationship" between parent and child after the parents' relationship with each other has ended. NRS 125C.001(1). Therefore, a district court risks abusing its discretion when it orders sole physical custody without sufficient cause or otherwise unnecessarily restricts and threatens the parent-child relationship. *See, e.g.*, *Davis*, 131 Nev. at 453-54, 352 P.3d at 1144-45 (concluding that the district court abused its discretion and violated Nevada's policy of frequent association by restricting the child from traveling out of the country to visit his father); *Mosley v. Figliuzzi*, 113 Nev. 51, 64, 930 P.2d 1110, 1118 (1997) (explaining that "courts should be striving to impose as little change from the intact two-parent family as possible after parents separate"), *overruled on other grounds by Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004); *Herzog v. Herzog*, No. 73160, 2018 WL 4781619, at *2 (Nev. Oct. 2, 2018) (Order Affirming in Part, Reversing in Part, and Remanding) (concluding that the district court abused its discretion by severely limiting parenting time to a degree that "could virtually destroy [a parent's] relationship with [her] child").

To avoid unnecessary restrictions on parental rights, a district court must only enter an order for sole physical custody if it first finds either that the noncustodial parent is unfit for the child to reside with,[12] or if it makes specific findings and provides an adequate explanation as to the reasons why primary physical custody is not in the best interest of the child. *See Davis*, 131 Nev. at 452, 352 P.3d at 1143 (stating that the district court must make "specific findings and an adequate explanation of the reasons for the custody determination because they are crucial to enforce or modify a custody order and for appellate review" (quoting *Rivero*, 125 Nev. at 430, 216 P.3d at 227) (internal quotation marks omitted)); *see also Routten v. Routten*, 843 S.E.2d 154, 159 (N.C. 2020) (inter-

[12]NRS 128.018 defines, in the context of termination of parental rights proceedings, an "'unfit parent' [as] any parent of a child who, by reason of the parent's fault or habit or conduct toward the child or other persons, fails to provide such child with proper care, guidance and support." When a parent has been determined by a district court to be unfit or neglectful, *see* NRS 128.106, this can be a basis for terminating parental rights. However, when deciding sole physical custody, some of the factors of NRS 128.106 are instructive or persuasive to the district court's findings of whether a parent is unfit for a child to reside with. For example, if a parent is found to be "unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time," engaged in abuse of the child, or excessively using alcohol or drugs so that the "parent [is] consistently unable to care for the child," then that parent may be unfit for the child to reside with. *See* NRS 128.106(1)(a), (b), (d). These examples are not intended to be either controlling or exhaustive, but instructive. *See Poole v. Nev. Auto Dealership Invs., LLC*, 135 Nev. 280, 287-88, 449 P.3d 479, 485-86 (Ct. App. 2019) (using a similar statute to provide the definition of "material fact" in a statute where it was otherwise undefined).

preting the "best interest of the child" to require additional written findings when "the court determines that one parent should not be awarded reasonable visitation"). As in *Davis*, these findings must be in writing, 131 Nev. at 452, 352 P.3d at 1143, and are separate and in addition to the best interest findings required under NRS 125C.0035(4) and our primary physical custody jurisprudence.

After making either of these findings supporting sole physical custody, the district court must then order the least restrictive parenting time arrangement possible that is within the child's best interest. *Cf.* NRS 125C.0035(1) (stating that in an action for physical custody of a child, "the sole consideration of the court is the best interest of the child"). When entering its custodial order, if a less restrictive parenting time arrangement is available, or proposed but rejected, the district court must provide an explanation as to how the best interest of the child is served by the greater restriction. *Cf. In re Parental Rights as to S.L.*, 134 Nev. 490, 494-97, 422 P.3d 1253, 1257-59 (2018) (concluding that to preserve a parent's fundamental rights, a district court must consider "the services offered to and the efforts made by the parents, and whether additional services would bring about lasting change"). For example, if a party, therapist, or guardian ad litem proposes supervised parenting time in lieu of an order for no physical contact with the child, and the district court declines to enter an order for supervised parenting time, it must explain in its written findings why supervised parenting time is not in the child's best interest.[13] *Cf.* NRS 432B.530(3)(b) (stating that when a child is placed in the physical custody of a nonparent, "the court shall set forth good cause why the child was placed other than with a parent"). We now turn to the situation at hand and apply these principles.

Here, the district court properly labeled its temporary order restricting Maggie's parenting time to reunification therapy and a six-hour visit on Sunday afternoons as sole physical custody. But this is not the case in the district court's post-hearing custody modification order wherein it expressly awarded "primary physical custody" to Jason yet limited Maggie's parenting time solely to cards, texts, and calls. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) (noting that appellate courts will generally construe a district court's order in terms of what it "actually *does*, not what it is called"). By so doing, the district court mislabeled the custodial order and inequitably restricted Maggie's

[13]This level of detail is necessary to preserve the noncustodial parent's modification rights. *See Davis*, 131 Nev. at 452, 352 P.3d at 1143. A noncustodial parent, who has very limited or no care, custody, and control of their child, has a considerable evidentiary challenge to show "a substantial change in circumstances affecting the welfare of the child" and that the child's best interest will be served by the modification as compared to a joint, primary, or nonprimary custodial parent. *See Romano*, 138 Nev. at 9, 501 P.3d at 986.

parenting time so severely that she has less parenting time than other parents in cases the supreme court has addressed who were incarcerated or residing at in-person rehabilitation programs.[14] The record contains no evidence to suggest that Maggie has any criminal history, any history of substance abuse, any history of domestic violence, or unfitness. Additionally, she is gainfully employed in public service as an educator, and she has actively been in treatment with a therapist covered by her insurance plan. Yet, by order of the district court, Maggie has been prohibited from exercising any in-person parenting time with H.R. for more than one year. We also note that the indirect effect of the district court's ruling has been to effectively terminate H.R.'s relationship with his half sibling in Maggie's care. *See* NRS 125C.0035(4)(i) (providing the best interest of a child may include the ability to maintain a relationship with a sibling).

Further, the district court's order put such a strangle on Maggie's parenting time with its reunification therapy requirements and imposition of significant financial liabilities, which tied any possible relief to her now limited financial resources, that it unreasonably restricted Maggie's fundamental rights concerning the custody of her child. *See Gordon*, 133 Nev. at 546, 402 P.3d at 674. There are few findings in the final order as to why such a restriction on Maggie's rights was warranted, even though such findings are required, especially when a district court ratchets a restriction on a parent's rights this tightly. *Cf.* NRS 128.005(1) ("The Legislature declares that the preservation and strengthening of family life is a part of the public policy of this State."); NRS 432B.330 and NRS 432B.390 (describing the circumstances under which a child is or may be in need of protection, none of which are present here, thereby allowing removal from the home by child protection authorities). And this was all done without the district court considering any less restrictive and financially feasible option, such as supervised parenting time.

In sum, the district court erred by: (1) failing to consider a less restrictive parenting time arrangement; (2) failing to adequately explain why the greater restriction was necessary;[15] (3) failing to make findings how true primary physical custody was not in H.R.'s

[14] *See, e.g.*, *Herzog*, No. 73160, 2018 WL 4781619, at *2; *Bohannon v. Eighth Judicial Dist. Court*, No. 69719, 2017 WL 1080066, at *1 (Nev. Mar. 21, 2017).

[15] "Without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation." *Jitnan v. Oliver*, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011) (explaining why deferential review does not mean no review or require adherence to the district court's decision); *see also In re Guardianship of B.A.A.R.*, 136 Nev. 494, 500, 474 P.3d 838, 844 (Ct. App. 2020) ("[B]ecause it is not clear that the district court would have reached the same conclusion . . . had it applied the correct [legal] standard[,] . . . we must reverse the district court's decision and remand for further proceedings.").

best interest; and (4) implementing an almost unachievable plan with no ending, review, or even status check date, and accordingly has undermined Nevada's public policy, issued an order inconsistent with Nevada jurisprudence, and violated Maggie's parental rights. As a result, we conclude that the district court abused its discretion when it effectively awarded Jason sole physical custody of H.R. Thus, we reverse the parenting time allocation and direct the district court, on remand, to enter a parenting time order consistent with Nevada jurisprudence and this opinion.

Delegation of substantive decision-making authority

Maggie argues that it is impossible to satisfy Dr. Collins's treatment plan, as Maggie cannot afford to see her twice a month for an indefinite time and the therapeutic relationship is unrecoverable.[16] District courts may direct that an investigation be conducted for assistance in determining the appropriate custodial award. NRS 125C.0025(2). Yet district courts must have "the ultimate decision-making power regarding custody determinations, and that power cannot be delegated." *Bautista v. Picone*, 134 Nev. 334, 337, 419 P.3d 157, 159 (2018). Although some of its authority may be delegated "by appointing a third party to perform quasi-judicial duties," *Harrison v. Harrison*, 132 Nev. 564, 572, 376 P.3d 173, 178 (2016), the "decision-making authority [to be delegated] must be limited to nonsubstantive issues . . . and it cannot extend to modifying the underlying custody arrangement," including making significant changes to the timeshare for either parent, *Bautista*, 134 Nev. at 337, 419 P.3d at 159-60. This restriction applies to any delegation of a district court's decision-making power when deciding an appropriate custodial award, as well as the discretion to hear future, post-order modifications.

As outlined above, the district court ordered Dr. Collins to determine when Maggie and H.R. were ready to have any modification to the parenting time schedule. The determination of child custody is a substantive decision that rests solely within the district court's authority. *Id.* at 337, 419 P. 3d at 159; *see generally Romano*, 138 Nev. at 9, 501 P.3d at 986. Accordingly, we conclude that the district court abused its discretion by tethering any post-order increase of Maggie's parenting time to Dr. Collins's discretion.

Specificity of final order

Maggie argues that the lack of specificity in the district court's orders harmed her relationship with H.R., specifically noting the

[16]We note that Dr. Collins was called by Jason as an expert witness to testify for him and provide evidence unfavorable to Maggie, which undoubtedly further strained the therapeutic relationship beyond what has already been addressed.

district court's final order incorporating by reference only its oral modification of "the no contact order of Dr. Collins." An order awarding parenting time must "[d]efine that right with sufficient particularity to ensure that the rights of the parties can be properly enforced and that the best interest of the child is achieved," and not use terms that are "susceptible to different interpretations by the parties." NRS 125C.010(1)(a), (2). Generally, a court's oral pronouncement from the bench is ineffective. *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 208, 462 P.3d 677, 685 (2020) (quoting *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1251, 148 P.3d 694, 698 (2006)). Furthermore, a district court's written order must "specify the compliance details in unambiguous terms." *Cf. Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 454-55, 92 P.3d 1239, 1245 (2004) (concluding that an order for contempt "must spell out the details of compliance in clear, specific and unambiguous terms so that the person will readily know exactly what duties or obligations are imposed on [them]").

Here, the district court's final parenting time order incorporated, by reference only, its oral, mid-hearing direction to modify "the no contact order of Dr. Collins" by allowing Maggie to send cards to, text, or call H.R. The details of the district court's mid-hearing pronouncement were never reduced to writing, so there is little in the final order outlining the scope or facilitating enforceability of the "March 11, 2022, Order." Thus, there is no way to enforce the final order, especially as to the involvement of law enforcement, and so it follows that the district court's final order is ineffective.

Therefore, on remand, we instruct the district court to enter an interim order consistent with Nevada jurisprudence, thus returning Maggie's parenting time to at a minimum what she could exercise following the emergency motion—at least weekly contact, even if supervised, with the goal of achieving "frequent associations and a continuing relationship." *See* NRS 125C.001(1). Thereafter, we direct the district court to retain its substantive decision-making authority and enter a final enforceable order that has the requisite level of specificity to comply with NRS 125C.010(1)(a), (2), and the principles announced in this opinion.

On remand, this case must be reassigned to a different district court judge

Maggie argues that the district court displayed bias against her by: (1) ignoring the evidence in the record about who was responsible for H.R.'s arrests; (2) ignoring H.R.'s personal therapist's recommendation that H.R. would benefit from physical time with Maggie; (3) questioning her excessively and rebuking her; and (4) predetermining the outcome before the close of the evidentiary hearing. Jason responds that the district court was not

biased because it was Dr. Collins who recommended the ultimate outcome—no contact—and the parenting coordinator also recommended that contact be paused.

"[A] judge is presumed to be impartial . . . ." *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011). However, a judge must "act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary." NCJC Rule 1.2. A judge shall perform duties without bias or prejudice, not use words or conduct manifesting bias, and require lawyers to refrain from such conduct. NCJC Rule 2.3(A)-(C). A judge who "entertains actual bias or prejudice for or against one of the parties" must not preside over a proceeding. NRS 1.230(1). If a "judge's impartiality might reasonably be questioned," then that judge should be disqualified. NCJC Rule 2.11(A).

The test for judicial bias is a question of law, and the burden is on the party asserting bias to establish the factual basis. *Ybarra*, 127 Nev. at 51, 247 P.3d at 272. Ultimately, a judge should be disqualified if "a reasonable person, knowing all the facts, would harbor reasonable doubts about the [judge's] impartiality." *Id*. (alteration in original) (internal quotation marks omitted).

When evaluating if a case should be reassigned on remand, we consider the following factors:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Smith v. Mulvaney, 827 F.2d 558, 562-63 (9th Cir. 1987); *see, e.g.*, *Luong v. Eighth Judicial Dist. Court*, No. 84743-COA, 2022 WL 3755881, at *3 (Nev. Ct. App. Aug. 29, 2022) (Order Granting in Part and Denying in Part Petition for Writ of Mandamus and Denying Petition for Writ of Prohibition) (applying *Mulvaney* factors to reassign remanded family law case to a different district court judge).

From the record, it appears that the district court's impartiality can be reasonably questioned as early as the entry of the temporary order in March 2021 when it found that Maggie "obviously [cannot] parent [H.R.]" and "[t]here is something wrong . . . with the parent who cannot manage an 11-year-old." In the same order, the district court erroneously found that Maggie called the police on H.R., despite the record demonstrating that others had called. By the final prehearing conference, the district court said on the record that Maggie was "in a bad position." During the hearing, before

Maggie presented any evidence, the district court stated, "I don't think there's a whole bunch more that . . . needs to be said." This court considers these instances—despite their occurrences during the performance of the judge's judicial duties—because these statements indicate a lack of impartiality. *See Canarelli v. Eighth Judicial Dist. Court*, 138 Nev. 104, 109, 506 P.3d 334, 339 (2022) (concluding that generally what a judge learns during the performance of his or her duties "does not warrant disqualification unless the judge forms an opinion that displays a deep-seated favoritism or antagonism that would make fair judgment impossible" (internal quotation marks omitted)).

There are also extrajudicial concerns in the record that implicate the district court's impartiality in this case, such as: (1) the district court expressed repeatedly on the record its highly favorable opinion of Dr. Collins, which was based on Dr. Collins's work in other cases the court was familiar with, and then forced Maggie to see only Dr. Collins for reunification therapy, despite Dr. Collins's concession that it was not a good match; (2) the district court considered pre-2017 evidence, including asking Maggie, before she gave her direct testimony, a series of questions related to incidents that took place before the stipulated custody order, even though the court restricted pre-2017 evidence at the outset of the hearing; (3) the district court stated that being a stepmother was more challenging than being a biological mother;[17] and (4) the district court shared its opinion that H.R. was better behaved with his father because children listen better to men, in part because men have deeper voices and there is an underlying threat of "fisticuffs" should a child not listen to a man.

The above examples are nonexhaustive. Although one can reasonably argue that any statement made by a court during a lengthy proceeding can only be understood in context, here the record is replete with additional expressed views and findings that are either erroneous or based on evidence predating the 2017 order.[18] The district court's restrictive interlocutory orders almost certainly aided the devolution of H.R. and Maggie's relationship by prohibiting any form of contact between the two for months on end and by restrict-

[17]Alexandra, H.R.'s stepmother and Jason's wife, testified for Jason at the evidentiary hearing.

[18]The district court sustained several objections to the relevance of the parties offering pre-2017 evidence during the evidentiary hearing. But it did not sustain Maggie's objection to the relevance of the district court asking her several questions about pre-2017 events. *See* NRS 50.145(2) (a party may object to questions during the court's interrogation of a witness); *see also McMonigle v. McMonigle*, 110 Nev. 1407, 1408, 887 P.2d 742, 743 (1994) (providing that a party moving for a change in custody must show that circumstances have been substantially altered since the last custodial order), *overruled on other grounds by Castle*, 120 Nev. at 98, 86 P.3d at 1042.

ing physical contact for more than a year, and possibly to this day considering the requirements for reunification and improper delegation of authority as previously discussed. Further, the district court did so without considering a less restrictive alternative, such as supervised parenting time. By failing to consider a less restrictive alternative, the district court left Maggie only a single opportunity to potentially resume seeing her child—attend regular and frequent individual sessions with Dr. Collins and achieve a sufficient level of progress, as determined by Dr. Collins, before joint reunification sessions with H.R. could begin. We note again that Dr. Collins, who admittedly was not a good therapeutic fit for Maggie, was not covered by Maggie's insurance, so Maggie could not afford to regularly attend appointments.

Given the district court's strong negative opinions of Maggie, as well as its shared on-the-record extrajudicial opinions, any duplication necessary by reassignment of this case to a different judge is not out of proportion to the requisite fairness demanded in child custody proceedings. Thus, on remand, we direct the chief judge or presiding judge to reassign this case to a different department to consider the issues related to Maggie's parenting time and the financial issues previously discussed and as discussed next.[19]

The award of attorney fees and costs must be vacated

The district court awarded Jason attorney fees and costs under both NRS 18.010 and NRS 125C.250. The district court also later cited EDCR 7.60(b)(3) as a legal basis for the award in its conclusions of law, but did not cite NRS 125C.250.[20] Rather, the district court's analysis focused on NRS 18.010, which allows a prevailing party to recover attorney fees but requires the district court to first find that "the claim . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b). NRS 125C.250 allows for the recovery of reasonable attorney fees in child custody actions. EDCR 7.60(b)(3)

[19]Though we direct the assignment of this case on remand to a new district court judge, we do not agree with Maggie's argument that the proceedings were so infected by bias that an entirely new evidentiary hearing is required. Many of the difficult relationship issues between Maggie and H.R. predate the district court's first custody order in 2021, as evidenced by Maggie's own initial motion outlining her deteriorating relationship with H.R., as well as Zelensky's report on Maggie's emotional state.

[20]Following entry of the district court's order, sanctionable conduct in the family division is now addressed in EDCR 5.219, effective June 10, 2022. *See In re Amendment of Part I & V of the Rules of Practice for the Eighth Judicial Dist. Court*, ADKT 0590 (Order Amending Part I and V of the Rules of Practice for the Eighth Judicial District Court, Apr. 11, 2022). For clarity, we cite to EDCR 7.60(b)(3), which was the purported legal authority for sanctions at the time the district court entered its order.

allowed a district court in the family division to order sanctions, including an award of attorney fees, if a party, "without just cause," "multiplies the proceedings in a case as to increase costs unreasonably and vexatiously."

An award of attorney fees and costs is appropriately vacated when a portion of the underlying order is reversed. *See Halbrook v. Halbrook*, 114 Nev. 1455, 1460, 971 P.2d 1262, 1266 (1998) (reversing an award of attorney fees because the district court's order was reversed); *Iliescu v. Reg'l Transp. Comm'n of Washoe Cty.*, 138 Nev. 741, 752, 522 P.3d 453, 462 (Ct. App. 2022) (vacating an award of attorney fees because the underlying judgment was reversed in part and the prevailing party was no longer clear). As we reverse a portion of the district court's order in this case, we now also vacate the award of attorney fees and costs to Jason. However, as awards of attorney fees and costs in family law cases are frequently appealed to this court, and they will have to be addressed again upon remand, we review the bases cited by the district court for its order.

We begin with NRS 18.010. The general allowance for attorney fees to a prevailing party, provided under NRS 18.010(2)(a), is limited to civil actions where the party recovers a money judgment. *In re Execution of Search Warrants for: 12067 Oakland Hills, Las Vegas, Nev. 89141*, 134 Nev. 799, 799, 435 P.3d 672, 674 (Ct. App. 2018). Clearly there is no connection between a money judgment and a custody decision. Thus, an award for attorney fees to the prevailing party in a custodial action cannot be sustained under NRS 18.010(2)(a).

NRS 18.010(2)(b), however, permits the district court to award attorney fees to a prevailing party "when the court finds that the claim, counterclaim[,] . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." The statute allows for liberal application because "[i]t is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions . . . in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses." *Id*. Under NRS 18.010(2)(b), "a claim is frivolous or groundless if there is no credible evidence to support it," *Rodriguez v. Primadonna Co*., 125 Nev. 578, 588, 216 P.3d 793, 800 (2009), which requires the district court to consider the actual circumstances of the case, *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 688 (1995). Simply, in a custodial action, being a prevailing party alone is not enough for the district court to enter an award of attorney fees.

Here, the district court did not make findings that Maggie's claims or defenses were either unreasonable or meant to harass, as was required by the statute. Thus, the award of attorney fees was unsupportable under NRS 18.010(2)(b) based on the district court's

sole finding that the legal basis for the award of fees was that Jason was the prevailing party. To the extent NRS 18.020 influenced the court's decision, the award of costs is also unsupportable due to the lack of findings. *See* NRS 18.020(1)-(5) (stating costs must be allowed to the prevailing party in certain types of actions, none of which were found by the district court to be present in this case).

Turning to NRS 125C.250, which allows a district court to award reasonable attorney fees and costs in a custody or parenting time action, the district court did not make any findings under this statute, nor a sufficient overall determination as to the reasonableness of ordering Maggie to pay Jason over $11,000 in attorney fees and costs, considering it also ordered Maggie to pay for very expensive reunification services and individual sessions with Dr. Collins to have any parenting time with H.R. Adequate findings of reasonableness are necessary, as the evidence indicates Maggie is largely unable to afford these payments and further suggests Jason's conduct has been at least a contributing factor necessitating the reunification services. *Cf. Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (providing the framework for a district court to make findings on "the reasonable value of an attorney's services"); *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 806, 102 P.3d 41, 47 (2004) ("When considering an indigency application [in contempt proceedings], a trial judge must consider a party's complete financial picture, balancing income and assets against debts and liabilities, taking into account the cost of a party's basic needs and living expenses."); *Wright v. Osburn*, 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998) ("The disparity in [the parents'] income is also a factor to be considered in the award of attorney fees.").

Finally, the district court could not properly sanction Maggie under EDCR 7.60(b)(3) without notice and an opportunity to be heard. Nor would it be proper without the court first finding that Maggie had multiplied the cost of litigation without just cause and did so unreasonably and vexatiously, which does not appear to be the case considering Maggie withdrew her motion to modify custody early in the proceedings. Undoubtedly, there has been significant litigation in this case, but duration or volume alone does not show that a litigant is per se unjust, unreasonable, or vexatious, and the court made no findings as to the same.[21] Thus, the district

[21]Also, as to the equity and reasonableness of either NRS 125C.250, EDCR 7.60(b)(3), or EDCR 5.219 as a basis for this award, the record is replete with questionable conduct from Jason's counsel. As a limited example, in Jason's original opposition and countermotion, where the parties argue about the restrictive COVID-19 protocols, counsel for Jason opines in a footnote that "[t]he hope is that [H.R.] will contract the virus and then he will pass it on to Maggie." In the same document, he calls Maggie offensive, sexist, and demeaning names. *Cf.* NRCP 12(f) (allowing a district court to strike from

court's findings did not support an award of attorney fees and costs under NRS 18.010(2)(b), NRS 18.020(1)-(5), NRS 125C.250, or EDCR 7.60(b)(3); therefore, while we properly vacate the fees and costs here, we conclude that the award of fees and costs could also be reversed for legal error.[22]

CONCLUSION

Sole physical custody is a custodial arrangement where the child resides with only one parent and the noncustodial parent's parenting time is restricted to no significant in-person parenting time. A district court entering an order for sole physical custody creates tension with a parent's fundamental rights, Nevada's public policy, and future modification rights. Thus, a district court must first find that either the noncustodial parent is unfit for the child to reside with, or it must make specific findings and provide an adequate explanation as to the reasons why primary physical custody is not in the best interest of the child. Afterwards, the district court must enter the least restrictive parenting time arrangement possible consistent with a child's best interest. Should it enter a more restrictive order, it must explain how the greater restriction is in the child's

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a pleading "scandalous matter[s]"). Counsel also has taken liberties by inaccurately describing H.R.'s release from custody, including unjustly accusing Maggie of trying to get Jason killed via law enforcement. *See* EDCR 5.218(a), (e) (defining "[c]ivility" in the family division includes *prohibiting* "[p]ersonal attacks" and "[a]ctions and presentations" that do not "serve the interest of candor, courtesy, and cooperation by demonstrating respect for the court and all opposing litigants and attorneys").

Should the district court award attorney fees to Jason on remand, in addition to what is discussed in the body of this opinion, it should consider when deciding the amount of fees whether Jason's counsel's language and behavior multiplied the proceedings and whether he presented positions that were "obviously frivolous, unnecessary, or unwarranted," thereby unnecessarily increasing the cost of litigation. *See* EDCR 5.219(a); *see also* NRPC 3.1, 3.2(a), 3.4(e) (outlining a lawyer's ethical duty to raise "[m]eritorious [c]laims and [c]ontentions," to "make reasonable efforts to expedite litigation" and to be fair to the opposing party); *Creed of Professionalism and Civility*, State Bar of Nevada, https://nvbar.org/for-lawyers/ethics-discipline/creed-of-professionalism-and-civility/ (last visited June 30, 2023).

We also note that EDCR 5.219, which is now the basis for sanctions in the family division, provides that "[s]anctions may be imposed against a party, *counsel*, or other person" without a litigant first moving for sanctions. (Emphasis added.) Thus, after notice and an opportunity to be heard, district courts in the family division may enter sanctions sua sponte "for unexcused intentional or negligent conduct," or for any of the reasons listed under the rule, including "[f]ailing or refusing to comply with" the rule prohibiting uncivil behavior. *See* EDCR 5.219(f); EDCR 5.218 ("Civility").

[22]Insofar as the parties have raised arguments that are not specifically addressed in this opinion, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

best interest. Moreover, it must retain its decision-making authority over future custodial modifications and parenting time allocations, as well as enter orders with sufficient specificity to allow enforcement. These steps are to ensure that when a district court enters an order for sole physical custody, it does so equitably and in accordance with Nevada's statutes and jurisprudence, thereby preserving the noncustodial parent's fundamental rights to the greatest degree possible.

The district court's order in this case did not meet these requirements. Accordingly, while we conclude that substantial evidence supports the district court's findings thereby allowing a modification of custody, we reverse as to the parenting time allocation and improper delegation of the district court's authority, vacate the award of attorney fees and costs, and remand the case for reassignment to a different district court judge for proceedings consistent with this opinion.

Bulla and Westbrook, JJ., concur.

VALLEY HEALTH SYSTEM, LLC, a Nevada Limited Liability Corporation, dba CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, Appellant, *v.* DWAYNE ANTHONY MURRAY, Individually, as an Heir, as a Guardian and Natural Parent of BROOKLYN LYSANDRA MURRAY, and as Special Administrator of the ESTATE OF LAQUINTA ROSETTE WHITLEY-MURRAY, Deceased, Respondent.

No. 79658

VALLEY HEALTH SYSTEM, LLC, a Nevada Limited Liability Corporation, dba CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, Appellant, *v.* DWAYNE ANTHONY MURRAY, Individually, as an Heir, as a Guardian and Natural Parent of BROOKLYN LYSANDRA MURRAY, and as Special Administrator of the ESTATE OF LAQUINTA ROSETTE WHITLEY-MURRAY, Deceased, Respondent.

No. 80113

VALLEY HEALTH SYSTEM, LLC, a Nevada Limited Liability Corporation, dba CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, Appellant, *v.* DWAYNE ANTHONY MURRAY, Individually, as an Heir, as a Guardian and Natural Parent of BROOKLYN LYSANDRA MURRAY, and as Special Administrator of the ESTATE OF LAQUINTA ROSETTE WHITLEY-MURRAY, Deceased, Respondent.

No. 80968

August 17, 2023 533 P.3d 1040

Objection to senior justice assignments and motion to designate replacements for disqualified justices in accordance with the Nevada Constitution, article 6, section 4(2).

Objection overruled; motion denied.

Pickering, J., concurred in part and dissented in part.

Pisanelli Bice PLLC and *Jordan T. Smith*, Las Vegas; *Greenberg Traurig, LLP*, and *Kendyl Hanks*, Austin, Texas, for Appellant.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg* and *Abraham G. Smith*, Las Vegas; *The Gage Law Firm, PLLC*, and *David O. Creasy*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.[1]

OPINION[2]

By the Court, STIGLICH, C.J.:

In 1976, the people of Nevada amended our state constitution to provide for the recall to active service of any consenting retired state court justice or judge not removed or retired for cause or defeated for retention of office. Under that amendment, article 6, section 19(1)(c), the chief justice "may assign [the recalled senior justice or judge] to appropriate temporary duty within the court system," and over the 45 years since the amendment's effective date, successive chief justices have regularly assigned such senior justices to temporary duty in supreme court cases when a sitting justice is disqualified. Appellant now claims that pursuant to article 6, section 4(2) of the constitution, only the governor has authority to temporarily replace a disqualified justice on the supreme court. We are unable to read either provision so restrictively, however, and conclude that, under the Nevada Constitution, both the governor and the chief justice may designate temporary substitutes for disqualified justices on the supreme court.

BACKGROUND

In these consolidated appeals, appellant Valley Health System, LLC, doing business as Centennial Hills Hospital Medical Center, challenges a $48.6 million wrongful death judgment, as well as several post-judgment orders, resulting from a jury verdict finding that, in relation to a deceased patient, Centennial Hills had both breached the standard of care applied to medical providers and intentionally breached a fiduciary duty owed to the patient. The appeals raise important issues of first impression in Nevada and thus are assigned to the en banc court for decision. Justices Elissa F. Cadish and Patricia Lee, however, are disqualified from participating in that decision. As a result, before oral argument was heard and the appeals' merits decided, the chief justice entered orders assigning Senior Justices Michael Cherry and Abbi Silver to participate in the disqualified justices' places.

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[1]The Honorable Elissa F. Cadish and the Honorable Patricia Lee, Justices, being disqualified, did not participate in the resolution of this objection and motion. The Honorable Michael Cherry and the Honorable Abbi Silver, Senior Justices, who were assigned on March 30, 2023, to hear oral argument and participate in the determination of these consolidated appeals in the disqualified justices' places, also did not participate in the resolution of this objection and motion.

[2]We entered an order denying the motion to designate justices in this matter on April 17, 2023, indicating that this opinion would follow.

Centennial Hills objected to the senior justice assignments and moved to designate replacement justices in accordance with the Nevada Constitution, article 6, section 4(2), which authorizes the governor to designate court of appeals or district judges to sit in the place of disqualified or disabled supreme court justices.[3] According to Centennial Hills, section 4(2) bestows upon the governor sole authority to designate substitute justices in cases of disqualification, and those substitutes must be sitting lower court judges. Moreover, Centennial Hills argues, as a specific provision addressing disqualification, section 4(2) trumps the more general authority of the chief justice under section 19(1) to recall senior justices and assign them to temporary duty when sitting justices are disqualified. It thus asks that the senior justice assignments be vacated, and that the governor designate two substitute judges to participate in place of the disqualified justices.

Respondent Dwayne Anthony Murray, as heir, parent to the patient's child, and estate representative, filed a response to the objection and motion, arguing that the chief justice's authority to temporarily assign senior justices under section 19(1) is "concurrent, complementary, and compatible" with the governor's authority under section 4(2), such that we should overrule the objection and deny the motion. Specifically, Murray asserts that section 19(1) merely extends the chief justice's general and broad authority to substitute a sitting justice for a disqualified justice by including senior justices as available substitutes, while section 4(2) gives the governor a limited power over judicial assignments that the chief justice does not otherwise hold—that of elevating lower court judges to temporary assignment in the supreme court—a power that is not inherent to the executive branch under Nevada's separation-of-powers doctrine.

After reviewing the parties' arguments in light of the constitution's plain language and contemporaneous understanding of each provision, we conclude that the senior justice assignments were constitutionally permissible and thus overrule the objection and deny the motion to designate replacement justices.

DISCUSSION

Resolving Centennial Hills' objection and motion requires examination of two provisions of article 6 of the Nevada Constitution: section 4(2) and section 19(1). As noted, section 4(2) addresses the governor's designation of district and court of appeals judges to sit in the places of disqualified or disabled supreme court justices:

> In case of the disability or disqualification, for any cause, of a justice of the Supreme Court, the Governor may designate

[3]Oral argument was vacated upon the filing of Centennial Hills' emergency objection and motion.

> a judge of the court of appeals or a district judge to sit in the place of the disqualified or disabled justice. The judge designated by the Governor is entitled to receive his actual expense of travel and otherwise while sitting in the Supreme Court.

Under section 4(2), then, the governor may designate lower court judges to temporarily act in supreme court cases but has no power to recall senior justices or judges to temporary service. After the provision's ratification in 1920, the governor routinely designated district judges to replace supreme court justices who were "disqualified," who "disqualified themselves," and who "voluntarily recused" themselves.[4]

Section 19(1), on the other hand, recognizes the chief justice as the administrative head of the court system and provides for the recall and temporary assignment of senior justices, among other things:

> The chief justice is the administrative head of the court system. Subject to such rules as the supreme court may adopt, the chief justice may:
>
> (a) Apportion the work of the supreme court among justices.
>
> (b) Assign district judges to assist in other judicial districts or to specialized functions which may be established by law.
>
> (c) Recall to active service any retired justice or judge of the court system who consents to such recall and who has not been removed or retired for cause or defeated for retention in office, and may assign him to appropriate temporary duty within the court system.[5]

By permitting the assignment of senior justices to "appropriate temporary duty within the court system," section 19(1)(c) plainly authorizes the chief justice to temporarily assign senior justices to service in the supreme court. *See* Nev. Const. art. 6, § 1 ("The judicial power of this State is vested in a court system, comprising a Supreme Court, a court of appeals, district courts and justices of the peace."); *We the People Nev. ex rel. Angle v. Miller*, 124 Nev. 874,

[4]*E.g.*, *State v. Jepsen*, 46 Nev. 193, 196, 209 P. 501, 502 (1922) (replacing a "disqualified" justice); *Mirin v. State*, 93 Nev. 57, 60 n.1, 560 P.2d 145, 146 n.1 (1977) (replacing a justice who "voluntarily disqualified himself"); *State v. Fitch*, 65 Nev. 668, 693, 200 P.2d 991, 1004 (1948) (replacing a justice who "disqualified himself"), *overruled on other grounds by Graves v. State*, 82 Nev. 137, 413 P.2d 503 (1966); *Schneider v. State*, 97 Nev. 573, 575 n.3, 635 P.2d 304, 305 n.3 (1981) (replacing a justice "who voluntarily recused himself"). *See* Jeffrey T. Fiut, *Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy*, 57 Buff. L. Rev. 1597, 1598 n.3 (2009) (noting that the terms "recuse" and "disqualify," while varying slightly in meaning, are often used interchangeably).

[5]Section 19 was ratified by the people in 1976 and became effective on July 1, 1977. Const. Amend. to Be Voted Upon in State of Nev. at Gen. Elec., Nov. 2, 1976, Ballot Question 6.

881, 192 P.3d 1166, 1170 (2008) (recognizing that, as with statutory interpretation, a constitutional provision's plain language controls).

This authorization has long been understood to include the power to assign senior justices in cases of supreme court disqualification. Pursuant to section 19(1), the supreme court implemented rules governing senior justice assignments without delay. Supreme Court Rule (SCR) 243 was adopted contemporaneously with the amendment's 1977 effective date and provided that the chief justice could assign a senior justice or judge to "any state court at or below the level" served at retirement. SCR 243(1) (effective October 12, 1977). SCR 243 further acknowledged that the assigned senior justice or judge would hold "all the judicial powers and duties, while serving under the assignment, of a regularly elected and qualified justice or judge of the court to which he is assigned." SCR 243(4).[6]

Moreover, the chief justice's power to assign senior justices to temporary service was used immediately to obtain substitutes for supreme court justices in cases of disqualification and otherwise, sometimes in conjunction with the governor's power to designate district judges. *See, e.g.*, *Covington Bros. v. Valley Plastering, Inc.*, 93 Nev. 355, 363 n.4, 566 P.2d 814, 819 n.4 (July 1, 1977) (recalling a senior justice to participate in the case under section 19(1)); *Nev. State Apprenticeship Council v. Joint Apprenticeship & Training*

[6]The provisions of SCR 243 were transferred to SCR 10 in 1979. Today, SCR 10, at subsections 6 and 9, reads similarly: "A senior justice, senior court of appeals judge, or senior district judge, with his or her consent, is eligible for temporary assignment to any state court at or below the level of the court in which he or she was serving at the time of retirement or leaving office . . . . Each senior justice, senior court of appeals judge, or senior district judge assigned as provided in this rule has all the judicial powers and duties, while serving under the assignment, of a regularly elected and qualified justice or judge of the court to which he or she is assigned."

We note that other courts have interpreted analogous language governing chief justice administrative powers similarly. *See generally City of Bessemer v. McClain*, 957 So. 2d 1061, 1091-93 (Ala. 2006) (on second application for rehearing) (recognizing that a 1973 amendment to the Alabama Constitution broadly allowing the chief justice to "assign appellate justices and judges to any appellate court for temporary service" authorized the chief justice's consistent use of the constitutional provision in cases of supreme court disqualification); *Legacy Found. Action Fund v. Citizens Clean Elections Comm'n*, 524 P.3d 1141, 1143 (Ariz. 2023) (replacing a recused justice with a senior justice per Arizona Constitution, article VI, section 3, which states that "[t]he chief justice, or in his absence or incapacity, the vice chief justice, shall exercise the court's administrative supervision over all the courts of the state"); *Commonwealth v. Wetton*, 648 A.2d 524, 526 (Pa. 1994) (recognizing that Pennsylvania Constitution article V, section 16(c), which provides that "[a] former or retired justice or judge may, with his consent, be assigned by the Supreme Court on temporary judicial service as may be prescribed by rule of the Supreme Court," allowed assignment of a senior justice to the Pennsylvania Supreme Court by the chief justice pursuant to court rules generally authorizing assignment to "any court").

Comm. for Elec. Indus., 94 Nev. 763, 766 n.5, 587 P.2d 1315, 1317 n.5 (1978) (designating senior justice to sit in place of disqualified justice under section 19(1) and SCR 243); *Ressler v. Mahony*, 99 Nev. 352, 353 n.1, 661 P.2d 1294 n.1 (1983) (acting chief justice designating senior justice under section 19(1) and obtaining governor assignment of district judge under section 4(2) as substitutes for voluntarily disqualified justices); *Sacco v. State*, 105 Nev. 844, 849 nn.1 & 2, 784 P.2d 947, 950-51 nn.1 & 2 (1989) (per curiam) (same). Indeed, the chief justice assigned a senior justice to participate in supreme court cases in place of a disqualified justice at least seven times in the first two years following section 19(1)'s adoption,[7] and regularly thereafter.[8]

In examining the relationship between section 19(1) and section 4(2), we must read the constitution as a whole, giving effect to and harmonizing each provision. *We the People*, 124 Nev. at 881, 192 P.3d at 1171. If the constitution's language can be interpreted in more than one reasonable way, we look to its history and the constitutional scheme to ascertain what was intended at the time of ratification. *Id.* When exploring Nevadans' historical understanding of the constitution, contemporary construction and legislation is relevant and given great weight. *Strickland v. Waymire*, 126 Nev. 230, 234-35, 235 P.3d 605, 608-09 (2010). This is particularly so when other means of determining the voters' intent is unavailable, as "such [contemporaneous] construction is 'likely reflective of the mindset of the framers.'" *Halverson v. Sec'y of State*, 124 Nev. 484,

[7]*Nev. State Apprenticeship Council*, 94 Nev. at 766 n.5, 587 P.2d at 1317 n.5; *Hynds Plumbing & Heating Co. v. Clark Cty. Sch. Dist.*, 94 Nev. 776, 779 n.3, 587 P.2d 1331, 1333 n.3 (1978); *Dep't of Motor Vehicles v. Rebol*, 95 Nev. 64, 66 n.4, 589 P.2d 178, 179 n.4 (1979); *Douglas County v. Tahoe Reg'l Planning Agency*, 95 Nev. 101, 102 n.2, 590 P.2d 160, 160 n.2 (1979); *Cooper v. State*, 95 Nev. 114, 115 n.1, 590 P.2d 166, 167 n.1 (1979); *Bradley v. Bradley*, 95 Nev. 201, 201 n.2, 591 P.2d 663, 663 n.2 (1979); *Cranford v. State*, 95 Nev. 471, 474 n.3, 596 P.2d 489, 491 n.3 (1979).

[8]*E.g.*, *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 220 n.4, 606 P.2d 1095, 1098 n.4 (1980); *Jacobson v. Best Brands, Inc.*, 97 Nev. 390, 394 n.6, 632 P.2d 1150, 1153 n.6 (1981); *Haromy v. Sawyer*, 98 Nev. 544, 548 n.1, 654 P.2d 1022, 1024 n.1 (1982); *Tompkins v. Buttrum Constr. Co.*, 99 Nev. 142, 146 n.5, 659 P.2d 865, 868 n.5 (1983); *Foley v. City of Reno*, 100 Nev. 307, 309 n.1, 680 P.2d 975, 976 n.1 (1984); *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 691 n.2, 747 P.2d 1380, 1383 n.2 (1987); *Smith v. Clough*, 106 Nev. 568, 570 n.3, 796 P.2d 592, 594 n.3 (1990); *DeLee v. Roggen*, 111 Nev. 1453, 1459 n.2, 907 P.2d 168, 171 n.2 (1995); *LeasePartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 757 n.2, 942 P.2d 182, 188 n.2 (1997); *Staccato v. Valley Hosp.*, 123 Nev. 526, 527 n.1, 170 P.3d 503, 504 n.1 (2007); *Nev. Classified Sch. Emps. Ass'n v. Quaglia*, 124 Nev. 60, 61 n.1, 177 P.3d 509, 510 n.1 (2008); *C.R. Homes, Inc. v. Fifth Judicial Dist. Court*, No. 55151, 2011 WL 4434860, at *2 n.1 (Nev. Sept. 22, 2011) (Order Denying Petition for Writ of Prohibition or Mandamus); *Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. 503, 503 n.1, 422 P.3d 1238, 1239 n.1 (2018); *Cox v. Copperfield*, 138 Nev. 235, 235 n.1, 507 P.3d 1216, 1220 n.1 (2022).

489, 186 P.3d 893, 897 (2008) (discussing the Legislature's interpretation of a constitutional provision and quoting *Director of Office of State Lands & Investments v. Merbanco, Inc.*, 70 P.3d 241, 256 (Wyo. 2003) (examining historical aspects of both the legislative and the executive branches' interpretation of and exercise of power under a constitutional provision in discerning its meaning)).

Although Centennial Hills contends otherwise, these two sections do not necessarily conflict. *Cf. Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. 1004, 1009, 363 P.3d 1168, 1172 (2015) (explaining that when a general and specific statute conflict, the specific controls). As originally added in 1920, section 4(2) read, "In case of the disability or disqualification, for any cause, of the chief justice or either of the associate justices of the supreme court, or any two of them, the *governor is authorized and empowered to* designate any district judge or judges to sit in the place or places of such disqualified or disabled justice or justices . . . ."[9] (Emphasis added.) Thus, with respect to supreme court disqualifications, section 4(2) gives the governor limited power to designate lower court judges to participate in disqualified justices' places. But nothing in section 4(2) gives the governor the *sole* power to select substitutes for disqualified justices, and to the extent that section can be read otherwise, the provisions must be harmonized. *We the People*, 124 Nev. at 881, 192 P.3d at 1171.

Section 19(1) provides the chief justice broad power to laterally assign judges and justices but, per SCR 243, does not give the chief justice power to elevate district and court of appeals judges to act in supreme court cases. The constitution thus authorizes both the governor to designate lower court judges for temporary assignment in the supreme court in cases of disqualification and the chief justice to assign senior justices to the supreme court for temporary assignment in cases of disqualification. The powers are complementary. Centennial Hills' interpretation, on the other hand, would restrict the chief justice's power to make senior justice assignments "within the court system," by excluding from purview one of the courts in the system. *See McClain*, 957 So. 2d at 1092 (recognizing that courts cannot interpret provisions of a constitution to restrict their plain meaning or "ignore words in the constitutional scheme"). Because there is no indication from its text, history, or context that section 19(1) means anything less than what it says, and as section 19(1) has since its inception been viewed as allowing senior justice

[9]"Authorized and empowered to" was changed to "may" and court of appeals judges were added in 2014, without public comment and seemingly as a stylistic change and recognition of the new court of appeals, respectively. *See* Nevada Ballot Questions 2014, Nevada Secretary of State, Question No. 1; 2013 Nev. Stat., file no. 47, at 3969; 2011 Nev. Stat., file no. 26, at 3836. In any event, as the concurrence/dissent points out, "may" typically indicates permission, not directive. *Ewing v. Fahey*, 86 Nev. 604, 607, 472 P.2d 347, 349 (1970).

assignments in cases of disqualification, we decline to read such a restriction into the constitution.

Thus, under the constitution, Nevada has two methods for selecting substitutes for disqualified justices: the governor can designate lower court judges, or the chief justice can assign senior justices. These dual methods are expressly recognized in this court's Internal Operating Procedure 1(g)(4), which states that the chief justice can either randomly select a district judge's name to forward to the governor or recall a senior justice for temporary assignment, and as noted *supra*, on occasion both are invoked in the same proceeding. Further, this dual-method system is not completely unique: Tennessee, for instance, also allows both the governor and the chief justice to appoint substitutes. Don R. Willett, *Supreme Stalemates: Chalices, Jack-O'-Lanterns, and Other State High Court Tiebreakers*, 169 U. Pa. L. Rev. 441, 494-95 (2021) (citing *Hooker v. Sundquist*, No. 01A01-9709-CH-00533, 1999 WL 74545, at *3 (Tenn. Feb. 16, 1999) (separate statutes authorizing governor and chief justice to appoint substitute justices were consistent with constitutional directive and "the traditional practice of this Court," and thus both the governor and the chief justice hold power to designate temporary judges)). As the chief justice's senior justice assignments here were not made in violation of section 4(2), we overrule Centennial Hills' objection, rendering moot its motion for section 4(2) gubernatorial designation of substitute judges.

Having answered the question raised by Centennial Hills' objection and having reached the same conclusion as our concurring/dissenting colleague as to that question, it would seem that this matter is resolved and nothing more need be said. Nevertheless, the dissenting opinion addresses a topic neither raised by the parties nor addressed in resolving the objection and motion—selection methods and timing. As to those issues, we note only that the dissent points to no facts suggesting an untoward selection process in this case (nor, we believe, could it) and that neither IOP 1(g)(2) nor any other provision of which we are aware restricts substitutions when necessary to bring the court to full strength before hearing and determining an appeal en banc, existing quorum or not. While we do not disagree that selection methods and timing may be important to the public trust, they are not in question here and would be better addressed on the administrative docket.

CONCLUSION

When supreme court justices are disqualified from participating in a case, the Nevada Constitution authorizes both the governor's designation of lower court judges and the chief justice's temporary assignment of senior justices to take the places of the disqualified justices. Accordingly, the chief justice's assignment of senior jus-

tices to this case was constitutionally authorized, and Centennial Hills' objection is overruled and its motion to designate lower court judges is denied.

Herndon, Parraguirre, and Bell, JJ., concur.

Pickering, J., concurring in part and dissenting in part:

This case comes before the court on the emergency motion of appellant Valley Health System, LLC, dba Centennial Hills (Centennial Hills). The motion challenges the chief justice's appointment of two retired senior justices to sit in place of two current justices, who voluntarily disqualified themselves under NRS 1.225(3). Article 6, section 4(2) of the Nevada Constitution provides that "[i]n case of the disability or disqualification, for any cause, of a justice of the Supreme Court, the Governor may designate a judge of the court of appeals or a district judge to sit in the place of the disqualified or disabled justice." A separate provision of the Nevada Constitution, article 6, section 19, more generally declares that the "chief justice is the administrative head of the court system" who, as such, "may . . . [r]ecall to active service any retired justice or judge of the court system who consents to such recall . . . and may assign him to appropriate temporary duty within the court system." These provisions raise an important question in their overlap—does the chief justice's power to assign senior justices to temporary duty extend to filling a vacancy arising in a supreme court en banc case when a justice is disqualified from that case?

In its opinion, the majority finds no conflict between sections 4(2) and 19 and broadly holds that the chief justice may replace a disqualified justice with a senior justice. Public confidence in the legitimacy of the judiciary depends on the utmost transparency regarding questions of judicial assignments. For that reason, while our results are the same, I analyze the constitutional question differently and conclude that it is closer and affords a narrower permission than the majority suggests. Furthermore, and more importantly, I respectfully submit that the method of selection should be random, as provided for gubernatorial selections under Internal Operating Procedure (IOP) 1(g)(4); that the same method should be used by both the governor and the chief justice out of respect for their shared power; and that a replacement is only necessary in en banc cases to "avert a possible tie vote," IOP 1(g)(2). Because the IOPs do not adequately define a random or evenly applied method, and because two justices were disqualified, leaving both a quorum of four and an uneven number of five to hear this case without risking a tie, I respectfully dissent to the extent the majority's opinion endorses a selection process that differs from the random process used for gubernatorial selections.

I.

Beginning on ground fully shared: The senior judge program authorized by the 1976 addition of article 6, section 19(1)(c) to the Nevada Constitution has hugely benefited Nevada's trial and appellate court systems, expanding the pool of experienced judges available without the expense of more judgeships. Nor is it disputed that under article 6, section 19(1)(c), the chief justice can recall and assign a retired, senior justice to "appropriate temporary duty" in the supreme court—for example, finishing up the cases left by a justice who retires midterm while the permanent replacement process runs its course. *See, e.g.*, *Nev. Yellow Cab Corp. v. State*, No. 83014, 2022 WL 17367603 (Nev. Dec. 1, 2022) (Order of Affirmance) (Senior Justice Gibbons filling in for retired Justice Silver, who retired effective September 29, 2022). The question is whether appointing a senior justice to replace a disqualified justice is an "*appropriate* temporary duty" within the meaning of article 6, section 19(1)(c), given the specific provision article 6, section 4(2) makes for the governor to appoint a court of appeals or district judge to serve in a case of disqualification or disability.

A court must interpret constitutional provisions reasonably, 6 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 23.11 (4th ed. 2023 update), as the voters who enacted it would, *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010), and in a way that "will prevent any clause, sentence or word from being superfluous, void or insignificant," *id.* at 236, 235 P.3d at 610 (quoting *Youngs v. Hall*, 9 Nev. 212, 222 (1874)). Drawing on these principles, Centennial Hills argues that a reasonable reader could conclude that assignment to temporary duty is not "appropriate" if the person making the appointment lacks authority to do so. In its view, given the specific provision article 6, section 4 makes for the governor to replace a disqualified justice with a court of appeals or district judge, the chief justice lacks authority to replace a disqualified justice with a senior justice.

Article 6, section 4 provides that the governor "may" appoint a court of appeals or district court judge to replace a disqualified justice. The use of "may" connotes permission, not mandate, and supports the majority's conclusion that sections 4(2) and 19(1)(c) are complementary, not conflicting. *See* majority op. at 193 (citing *Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. 1004, 1009, 363 P.3d 1168, 1172 (2015)). But "may" can as easily be read to say the governor has the choice: He or she can—but has the discretion not to—appoint a replacement for a disqualified justice. Further complicating matters is NRS 1.225(5)(a),[1] which provides that

[1]NRS 1.225 provides for the disqualification of a justice for actual or implied bias and provides in subsection 3 that "[a] justice of the Supreme Court . . . ,

> [u]pon the disqualification of [a] justice of the Supreme Court under this section, a judge of the Court of Appeals or district judge *shall* be designated to sit in place of the justice [by the governor] as provided in Section 4 of Article 6 of the Constitution.

(emphasis added). Enacted in 1957, two decades before article 6, section 19(1)(c) was added to the Nevada Constitution, *see* 1957 Nev. Stat., ch. 314, at 521, NRS 1.225(5) has survived without change, except for its amendment in 2013 to make similar provision for the governor to appoint a district judge to sit in place of a disqualified court of appeals judge, *see* 2013 Nev. Stat., ch. 343, at 1711. The parties do not cite, and so the majority opinion does not address, NRS 1.225(5)(a)'s seeming mandate to use the gubernatorial appointment route in article 6, section 4 in replacing a disqualified supreme court justice.

The opinion does not dwell on the language of the two constitutional provisions. Instead, it shifts focus to history and "contemporaneous construction" and concludes that the chief justice's "authorization [under section 19(1)(c)] has long been understood to include the power to assign senior justices in cases of supreme court disqualification." Majority op., *supra*, at 191. Citing *Covington Brothers v. Valley Plastering, Inc.*, 93 Nev. 355, 363 n.4, 566 P.2d 814, 819 n.4 (1977)—which the opinion emphasizes was decided on July 1, 1977, the day article 6, section 19(1)(c) took effect, majority op., *supra*, at 191—the majority states that "the chief justice's power to assign senior justices to temporary service was used immediately to obtain substitutes for supreme court justices in cases of disqualification and otherwise, sometimes in conjunction with the governor's power to designate district judges." Majority op., *supra*, at 191. But the majority's reliance on *Covington* is misplaced. The docket sheet in *Covington Brothers*, No. 8519, shows that it was orally argued on December 16, 1976, when Justice Zenoff was an active member of the court, and resolved by opinion on July 1, 1977, with Justice Zenoff still participating despite his midterm retirement effective April 30, 1977. *See* https://nvcourts.gov/aoc/judicialhistory (last visited June 19, 2023). Justice Zenoff was not named to sit in place of a disqualified justice; he returned to complete a case he deliberated on before he retired. This qualifies as "appropriate temporary duty" under the then-newly enacted section 19(1)(c), but it does not address the more specific issue of replacement of a sitting justice who is "disabled or disqualified" under section 4.

Nor does Supreme Court Rule (SCR) 243, as adopted in 1977 and transferred to SCR 10 in 1979, resolve the tension between sec-

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upon his or her own motion, may disqualify himself or herself from acting in any matter upon the ground of actual or implied bias."

tions 4(2) and 19(1)(c). True, SCR 243 implemented the then-newly adopted section 19's permission to use senior justices and judges, but it did so in general terms—"A senior justice or judge, with his consent, is eligible for temporary assignment to any state court at or below the level of the court in which he was serving at the time of his retirement." *See* majority op., *supra*, at 191 (quoting this sentence from SCR 243(2) (1977)). And the next sentence of SCR 243(2) stated that, "[i]f designated by the governor, at the request of the chief justice, a senior judge may also hear specific cases in the supreme court upon disqualification of a justice thereof." *See also* SCR 243(3) (1977) (stating that "in the case of a senior judge assigned to hear and determine a case in the supreme court, the governor shall issue a special commission, as in the case of other judges of the district court"). SCR 243's specific reference to gubernatorial appointment of senior judges in cases of a justice's disqualification and its silence as to the chief justice's appointment of senior justices in the same instance suggests the opposite historical understanding than the majority claims for it and is, at best, ambiguous.

For historical evidence to sway constitutional interpretation, it should clearly evidence the contemporaneous understanding of the adopters themselves—here, the voters. *See Strickland*, 126 Nev. at 239, 235 P.3d at 611 (considering ballot materials as evidence of the voters' contemporaneous understanding of a constitutional amendment). Here, the ballot materials the 1976 voters received on article 6, section 19 explaining the measure said *nothing* about the interaction between article 6, section 4 and proposed section 19, even though a technical amendment to article 6, section 4 was presented to and passed by them in the same election. *See* Constitutional Amendments and Other Propositions to Be Voted Upon in State of Nevada at General Election, November 2, 1976, Question No. 6 (adding section 19(1) to article 6) and Question 7 (making a technical amendment to article 6, section 4) (available at Nevada LCB Library and https://www.leg.state.nv.us/Division/Research/VoteNV/ BallotQuestions/1976.pdf (last visited June 22, 2023)). I acknowledge that, in the near half-century that has followed section 19(1)(c)'s adoption, there have been cases in which a chief justice has appointed a senior justice to replace a disqualified justice. *See* majority op., at 192 nn.7 & 8 (collecting cases). But this seems more a matter of individual interpretation by Nevada's successive chief justices, *see* Nev. Const. art. 6, § 3 (providing for a rotating chief justice) than evidence of the contemporaneous understanding of the voters who approved section 19(1)(c)'s adoption in 1976. On this record, I submit, history and contemporaneous construction do not offer much to the analysis.

And so, I return to the text of sections 4 and 19(1)(c) and the evident purpose each serves. Before section 4(2)'s adoption in 1920,

Nevada's then-three-justice supreme court had no way to replace an absent or disqualified justice, creating the risk of deadlock in tie-vote cases. Like most states, Nevada opted to provide a means to appoint a replacement justice. *See* Don R. Willett, *Supreme Stalemates: Chalices, Jack-O'-Lanterns, and Other State High Court Tiebreakers*, 169 U. Pa. L. Rev. 441, 448 (2021) (noting that 37 states make provision to replace an absent or disqualified justice). The choice of the governor, as opposed to the court or its chief justice, to pick the temporary replacement is one other states have made and does not appear policy-driven. *See id*. at 485. When section 19 was added in 1976, it conferred administrative powers on the chief justice in terms other states have interpreted to permit appointment of senior justices to sit in place of disqualified justices. *See Legacy Found. Action Fund v. Citizens Clean Elections Comm'n*, 524 P.3d 1141, 1143 (Ariz. 2023); *Commonwealth v. Wetton*, 648 A.2d 524, 526 (Pa. 1994). Allowing the governor and the court to share replacement-justice appointment powers, while unusual, is not unique. *See* Willett, *supra*, at 494-95 (discussing the practice in Tennessee). Given the use of the permissive "may" in section 4(2)'s gubernatorial appointment powers, I therefore conclude, as does the majority, that sections 4(2) and 19(1)(c) do not conflict and can reasonably be read in harmony with one another.[2]

II.

More important than who appoints whom, however, is when and by what method the selection is made. Discretionary selection in individual cases has provoked controversy in states elsewhere because it can "seem to invite political considerations to enter and perhaps dominate the process." James C. Brent, *Stacking the Deck? An Empirical Analysis of Agreement Rates Between Pro Tempore Justices and Chief Justices of California, 1977-2003*, 27 Just. Sys. J. 14, 14 (2006) (discussing discretionary selection in California); *see* Willett, *supra*, at 489 (describing "an extraordinary crisis" that arose from certain temporary assignments in New Hampshire); *id*. at 492 (summarizing the appointment process in West Virginia); and *id*. at 501-11 (detailing the "angst" caused by the divergent tie-breaking approaches of various states). The model code of judicial conduct acknowledges as a foundational principle that even when

[2]I acknowledge that this interpretation conflicts with NRS 1.225(5), which seems to mandate gubernatorial appointment. But in cases involving conflict between constitutional and statutory text, the former prevails. *See Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 489, 327 P.3d 518, 521 (2014) ("Statutes are construed to accord with constitutions, not vice versa."). Nor does it make section 4(2) meaningless, as Centennial Hills argues, because the governor alone has the power to commission a district court judge to sit in place of a disqualified justice, a power the chief justice does not appear to have.

all is not as it seems, the appearance of judicial impropriety damages the public trust equal to any fact. *See* ABA Model Code of Judicial Conduct Preamble. In recognition of this reality, many of our sister states have enacted "apolitical and mechanical" methods that provide for rotating or random selection from an available pool of substitutes, thereby removing the threat of such damage. Brent, *supra*, at 14 (noting neutral methods such as picking names from a jar or selecting them alphabetically); *see* Willet, *supra*, at 448 (explaining that in Louisiana the clerk draws a name from a Jack-o-Lantern).

This court has not kept up with these developments. Our Internal Operating Procedures (IOPs), first adopted in 2002, *see In re: Nev. Supreme Court IOPs*, ADKT 288 (Order Adopting Nevada Supreme Court Internal Operating Procedures, July 26, 2002), have variously provided for random selection from index cards naming both the eligible district court judges and senior supreme court justices, *see id*. IOP 1(b)(3) (Order, filed July 28, 2007), to selection solely by the chief justice, *see id.* (Order filed December 24, 2008), to a mix that specifies random selection of a district judge's name to send to the governor but that gives the chief justice the power to choose the selection method for senior justices, *see id.* (Order filed May 9, 2013). *See also* Willett, *supra*, at 493-94 (describing Nevada's "random, index-card selection" based on a 2016 interview with the former clerk of the court). Even today, the IOPs remain unclear as to the process by which replacement judges and justices are chosen to replace disqualified or disabled justices in particular cases. Ideally, the selection process would be clearly laid out and as randomized as possible. But regardless of the process chosen, if the governor and the chief justice share the power to replace disqualified justices in individual cases, as both the majority and I have concluded, that power and responsibility is not truly shared or equal between branches if they do not employ the same selection method. If, for instance, the governor must select from a list of names provided by the chief justice, while the chief justice retains for himself or herself total discretion, this court loses credibility in the eyes of the citizenry and unevenly discharges its shared power.

Furthermore, while the IOPs do not currently provide a uniform, randomized process for replacing disqualified justices, they do specify under what circumstances a substitution is to be made in an en banc case. Four justices are necessary for an en banc quorum. *See* IOP 1(e). "To avert a possible tie vote in en banc matters, the court will endeavor to convene a quorum comprised of an odd number of justices before taking the matter under submission." IOP 1(g)(2). In this case, two justices disqualified themselves, leaving five justices to hear the case. This court has heard cases before under such

circumstances without seating additional justices, and the majority does not articulate why additional justices are needed in this case.

As noted, I concur with the majority in deeming the governor's and the chief justice's appointment powers complementary and in denying Centennial Hills' objection and motion on that basis. But I respectfully dissent from the majority's opinion to the extent it endorses a disparate, discretionary approach to judicial replacements in cases involving judicial disqualification.

IN THE MATTER OF SEARCH WARRANTS REGARDING SEIZURE OF DOCUMENTS, LAPTOP COMPUTERS, CELLULAR TELEPHONES, AND OTHER DIGITAL STORAGE DEVICES FROM THE PREMISES OF LAS VEGAS BISTRO, LLC, AND LITTLE DARLINGS OF LAS VEGAS, LLC.

LAS VEGAS BISTRO, LLC, DBA LARRY FLYNT'S HUSTLER CLUB; AND LITTLE DARLINGS OF LAS VEGAS, LLC, APPELLANTS, *v.* LAS VEGAS METROPOLITAN POLICE DEPARTMENT, RESPONDENT.

No. 84931-COA

August 24, 2023 535 P.3d 673

Appeal from a district court order denying a motion to unseal and quash search warrants and for the return of property. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Chief Judge.

Affirmed in part, reversed in part, and remanded.

Fox Rothschild LLP and *Deanna L. Forbush* and *Colleen E. McCarty*, Las Vegas; *Shafer & Associates, P.C.*, and *Zachary M. Youngsma*, Lansing, Michigan, for Appellants.

Marquis Aurbach and *Nick D. Crosby* and *Jackie V. Nichols*, Las Vegas, for Respondent.

Before the Court of Appeals, GIBBONS, C.J., and BULLA and WESTBROOK, JJ.

OPINION[1]

By the Court, WESTBROOK, J.:

After the Las Vegas Metropolitan Police Department (LVMPD) executed search warrants at appellants' business establishments, seizing various documents and electronic devices, appellants filed a motion for the return of that property pursuant to NRS 179.085 on the basis that the property contained privileged materials. In

[1]On April 7, 2023, we issued an unpublished order affirming in part, reversing in part, and remanding. Thereafter, appellants filed a petition for rehearing pursuant to NRAP 40. We grant that petition and withdraw our unpublished order, issuing this opinion in its place. *See Carson City v. Capital City Entm't, Inc.*, 118 Nev. 415, 417, 49 P.3d 632, 633 (2002) ("After reviewing the parties' submissions, as well as the briefs and appendix, we concluded that rehearing was warranted, and we granted the petition. We now withdraw our [prior] order and issue this opinion in its place."). We also deny the Las Vegas Review-Journal's third-party motion for extension of time to file a motion for publication and all related filings as moot.

the motion, appellants also sought to quash and unseal the warrants. Citing its ongoing investigation, LVMPD opposed appellants' motion and proposed to resolve appellants' privilege concerns by having its own Digital Forensics Lab (DFL) search for any privileged information and redact it before turning it over to LVMPD detectives. The district court determined that it was "not unreasonable" for LVMPD to retain the property under these circumstances and that the proposed search protocol was "a reasonable resolution of" the privilege issue. As a result, the district court denied appellants' return-of-property motion. The district court also denied appellants' request to quash and unseal the warrants.

Although we agree that the district court properly denied appellants' request to quash and unseal the warrants, we conclude that the district court erred when it prematurely denied appellants' return-of-property motion without giving appellants an opportunity to demonstrate privilege. We also conclude that the district court erred by adopting LVMPD's proposed search protocol, which allowed DFL to disclose potentially confidential communications to law enforcement based on its own unilateral determination of privilege without affording appellants an opportunity to challenge that determination prior to disclosure.

In reaching these conclusions, we recognize for the first time that Nevada's return-of-property statute, NRS 179.085, allows a property owner to seek the return of privileged materials that have been seized pursuant to a valid search warrant, even when the government has an ongoing investigation. When a property owner files a return-of-property motion prior to the initiation of criminal proceedings, the Nevada Rules of Civil Procedure apply. In such cases, the property owner must comply with NRCP 26(b)(5), which requires both an express claim of privilege and a description of the privileged documents in a privilege log. However, the property owner need not produce a privilege log until they have been given access to the seized materials. Accordingly, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

The LVMPD's Special Investigation Section began covertly investigating erotic dance locations for prostitution-related activities, including investigations at Las Vegas Bistro, LLC, dba Larry Flynt's Hustler Club (Hustler Club) and Little Darlings of Las Vegas, LLC (Little Darlings) (collectively, appellants). As part of its investigation, LVMPD sent undercover officers to each establishment in January and March 2022. During each of these visits, one or more entertainers reportedly solicited the undercover officers to engage in illicit prostitution activity.

In April 2022, LVMPD submitted applications and affidavits in support of search warrants for Hustler Club and Little Darlings; those applications were granted by the Las Vegas Justice Court. Both warrant applications indicated an investigation into the crimes of "advancing prostitution" and "living from earnings of prostitution" at these establishments. The warrants for both properties were issued the same day, as well as orders sealing the affidavits for both warrants.

The warrants were executed on both Hustler Club and Little Darlings on April 5. At both properties, LVMPD seized computers, tablets, thumb drives, documents, and the cell phones of managers present. Two days after the warrants were executed, LVMPD submitted additional applications and affidavits in support of search warrants requesting authority to search the digital storage devices seized from Hustler Club and Little Darlings. The justice court issued both search warrants the same day, as well as additional orders sealing the affidavits.

Five days later, appellants filed in the district court a motion to (1) unseal the search warrant applications and supporting affidavits, (2) quash the search warrants, and (3) return seized property. The motion was brought pursuant to NRS 179.105 (retention and restoration of property taken on warrant), NRS 179.045(4) (sealing and unsealing of warrant materials), and NRS 179.085(1)(b), (d), and (e) (requesting the return of property). The motion was divided into two main points: a request to quash and unseal the warrant materials based on a lack of probable cause, and a request for the return of property because the warrants were allegedly insufficient and illegally executed and the property seized contained privileged materials.

LVMPD opposed the motion. It argued the warrants were supported by probable cause for the crimes of "advancing prostitution" and "living from earnings of prostitution." LVMPD further argued that additional evidence would potentially be destroyed if the district court were to unseal the warrants and that the ongoing investigation presented a compelling reason against disclosure.

At the time of its opposition, LVMPD confirmed the seized property was in the custody of DFL. No search had yet occurred, as DFL was still in the process of creating mirror images of the electronic contents. To address appellants' privilege concerns, LVMPD proposed a search protocol whereby appellants would provide DFL with "a list of full names, email addresses, and/or phone numbers that would be considered privileged." DFL would search for the keywords and review the search results for privileged information. Privileged materials would be redacted before the documents were turned over to LVMPD detectives.

LVMPD further argued that the Nevada statute explicitly requiring the return of privileged materials among seized property, NRS

179.105, applied only to search warrants executed on practicing attorneys or law firms. Because the search warrants in this case were not executed on any attorneys or law firms, LVMPD argued that no statute required the return of privileged materials. LVMPD also asserted that the ongoing criminal investigation justified retaining the materials.

At the hearing in district court, appellants asserted there was no evidence of "prostitution" as defined by NRS 201.320 because the undercover officers may have witnessed solicitation, but not prostitution. Appellants further contended that "advancing prostitution" and "living from earnings of prostitution" could not be supported by probable cause because they lacked the material element of "prostitution." With regard to the privileged materials, appellants argued that the proper course would be to return the seized property *to them* to create a privilege log, and then the parties could engage a special master or third party to determine what was privileged.

The district court ordered LVMPD to provide the sealed warrant materials in camera so the court could determine whether there was probable cause for the warrants and whether appellants presented good cause to unseal them. After conducting its in camera review, the district court entered an order finding that the warrants were supported by probable cause and denying appellants' request to unseal. Further, the district court summarily found that LVMPD's proposed DFL search protocol was "a reasonable resolution of" the privilege claim.

ANALYSIS

On appeal, appellants argue that the district court erred in finding that the warrants were supported by probable cause and that good cause existed for the warrant materials to remain sealed. In addition, appellants argue that the district court erred in finding LVMPD's proposed DFL search protocol was a proper resolution to the privilege issue, because there must be some mechanism for the return of privileged materials seized from nonattorneys. LVMPD disagrees, arguing that the warrants *were* supported by probable cause, that good cause did not exist to unseal the warrants, and that LVMPD's retention of the property was reasonable under the circumstances. LVMPD further argues that appellants' request for the return of property is now moot because the electronic devices were returned to the property owners (though LVMPD retained a copy of the contents). We address appellants' arguments in turn.

The district court did not err in finding the warrants were properly supported by probable cause

Appellants argue probable cause for the warrants was lacking because the undercover officers could not have consummated any

sexual acts with the entertainers. While there may have been probable cause for solicitation, appellants claim that there could not have been probable cause for prostitution or any crimes that have prostitution as a material element. As a result, appellants argue they are entitled to the return of property under NRS 179.085(1)(b) and (d) because the warrants were insufficient on their face and illegally executed. LVMPD responds that the district court properly found that probable cause existed after its in camera review of the warrant materials.

"[T]he proper standard for determining probable cause for the issuance of [a] warrant is whether, under the totality of the circumstances, there is probable cause to believe that contraband or evidence is located in a particular place." *Keesee v. State*, 110 Nev. 997, 1002, 879 P.2d 63, 67 (1994). Probable cause to support a search warrant exists where the facts and circumstances within an officer's knowledge warrant a reasonable belief that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). "Further, the issuing judge's determination of probable cause should be given great deference by a reviewing court. . . . The duty of a reviewing court is simply to determine whether there is a substantial basis for concluding that probable cause existed." *Doyle v. State*, 116 Nev. 148, 158, 995 P.2d 465, 471-72 (2000) (internal citations omitted).

In this case, LVMPD's undercover investigations reportedly revealed a pattern of entertainers soliciting undercover officers for illicit sexual activity for a fee. Simply because the undercover officers did not personally engage in prostitution activities does not inherently mean that probable cause was lacking for prostitution-related offenses. A reasonable inference is that some customers could or would have engaged in illicit activities and that the entertainers were attempting to commit a crime. Having also reviewed the affidavits in camera, we agree under the totality of circumstances that there was a substantial basis for the district court to conclude that probable cause existed. Therefore, we conclude that the district court did not err in finding probable cause for the crimes of "advancing prostitution" and "living from earnings of prostitution," and it properly denied appellants' motion to return property pursuant to NRS 179.085(1)(b) and (d).[2]

[2]In their reply brief, appellants argue for the first time that the business owners and managers, as opposed to the specific female entertainers, cannot be liable for "advancing prostitution" and "living from earnings of prostitution" because the owners and managers do not permit prostitution activity to take place. We note that arguments raised for the first time in a reply brief need not be addressed and are deemed waived. *Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (explaining that arguments brought for the first time in reply briefs are waived). However, even on the merits, this argument

The district court did not abuse its discretion when it found appellants did not establish good cause to unseal the warrant applications and affidavits

Appellants argue that good cause exists to unseal the warrant materials because "[t]he gravamen of LVMPD's investigation is the alleged solicitation of prostitution at [a]ppellants' businesses in January and March of this year. . . . As such, all of the events at issue have already occurred." LVMPD counters that the warrant materials should remain sealed because they include police procedures and intelligence obtained during covert investigations. Further, LVMPD argues that unsealing the warrant materials may compromise LVMPD's ongoing investigation.

NRS 179.045(4), governing the sealing of search warrants, states that "[u]pon a showing of good cause, the magistrate may order an affidavit or a recording of an oral statement given pursuant to this section to be sealed. Upon a showing of good cause, a court may cause the affidavit or recording to be unsealed." The term "good cause" is undefined within the context of unsealing a warrant affidavit, but Nevada's appellate courts have typically held that "good cause" determinations are within the district court's discretion. *See Spar Bus. Servs., Inc. v. Olson*, 135 Nev. 296, 298, 448 P.3d 539, 541 (2019) (stating that "we review a district court's good cause determination [to extend service] for an abuse of discretion"); *Nunnery v. State*, 127 Nev. 749, 766, 263 P.3d 235, 247 (2011) ("We have indicated that a finding of good cause [to admit unnoticed evidence] is within the district court's discretion."); *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 594, 245 P.3d 1198, 1199 (2010) (holding that the district court did not abuse its discretion in finding the party failed to demonstrate good cause to enlarge time). We find this caselaw persuasive and hold that a court's determination of good cause under NRS 179.045(4) is likewise subject to an abuse of discretion standard of review.

As this court has previously recognized in other contexts, "the disclosure of an active and ongoing criminal investigation may jeopardize the integrity of the investigation itself by revealing to a suspect that he or she is being investigated, how the investigation is being conducted, and by whom." *In re Execution of Search Warrants (Anderson)*, 134 Nev. 799, 807, 435 P.3d 672, 678 (Ct. App. 2018). Here, the district court found that the warrant materials were properly sealed because disclosure of the sensitive information contained within "may compromise the ability of the Metropolitan Police Department's ability to further investigate the crimes alleged

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is premature in the context of an ongoing investigation and further does not provide a basis for invalidating warrants that are otherwise supported by probable cause.

to have been committed, and any ongoing crimes allegedly being committed, relating to this investigation." Moreover, the district court found that unsealing the warrant materials might endanger the undercover officers involved and reveal details of the ongoing investigation. After reviewing the warrant materials in camera, we agree with LVMPD that the district court had sufficient grounds to make this decision. We therefore conclude the district court did not abuse its discretion in finding the warrants should remain sealed.[3]

The district court erred by prematurely denying appellants' return-of-property motion without giving appellants an opportunity to demonstrate privilege

Appellants also moved for the return of property in district court pursuant to NRS 179.085(1)(e), which provides, in pertinent part, that

> A person aggrieved by an unlawful search and seizure or the deprivation of property may move the court having jurisdiction where the property was seized for the return of the property on the ground that:
>
> . . .
>
> (e) Retention of the property by law enforcement is not reasonable under the totality of the circumstances.

Specifically, appellants sought the return of property on the basis that it was protected by the attorney-client privilege and the accountant-client privilege. *See* NRS 49.095 (attorney-client privilege); NRS 49.185 (accountant-client privilege).

In denying appellants' request, the district court agreed that a motion under NRS 179.085 was the proper vehicle for appellants' return-of-property claims but found that it "does not appear to be unreasonable" for LVMPD to retain the materials given its ongoing investigation. The district court further determined that LVMPD's proposal to "redact information that [appellants] believe is privileged, if [appellants] provide a list of names, email addresses, and/or phone numbers, of information which would be considered privileged" was "a reasonable resolution" of appellants' privilege concerns. Appellants challenge that ruling on appeal.

At the outset, LVMPD contends that appellants' request for the return of property has been rendered moot because the property seized was subsequently returned to the property owners. Appellants respond that the issue is not moot because, even though LVMPD gave back some of the original property, LVMPD has retained copies or mirror images of the electronic devices' contents.

[3]As our review of the search warrant materials reveals investigations into ongoing criminal activity, appellants' assertion that all relevant events have already occurred is unpersuasive in this case.

Because LVMPD concedes that it has retained copies of the electronic devices' contents, which would also include any privileged communications, appellants' request for the return of any privileged property, including the copies or mirror images, is not moot.

As LVMPD points out, this court has previously recognized a similarity between Nevada's return-of-property statute and Federal Rule of Criminal Procedure (FRCrP) 41(g), the federal return-of-property rule. "NRS 179.085 largely mirrors Federal Rule of Criminal Procedure 41(g), and where Nevada statutes track their federal counterparts, federal cases interpreting the rules can be instructive." *Anderson*, 134 Nev. at 805, 435 P.3d at 677 (footnote omitted).

Other jurisdictions, in addressing the return of seized property under FRCrP 41(g), have held that property owners have an equal interest in copies of seized property as they do in the originals. For instance, the United States Court of Appeals for the Fifth Circuit recognized "that a plaintiff in a civil action for the return of property has a sufficient proprietary interest in copies of documents which have been seized to demand their return as well as the return of the originals." *Richey v. Smith*, 515 F.2d 1239, 1242 n.5 (5th Cir. 1975). The Fifth Circuit also recognized that injury to the property owner continues to occur as long as the government retains the privileged documents. *Harbor Healthcare Sys., LP v. United States*, 5 F.4th 593, 600 (5th Cir. 2021) ("The government's ongoing intrusion on Harbor's privacy constitutes an irreparable injury . . . . Harbor remains injured as long as the government retains its privileged documents.").

Likewise, the United States Court of Appeals for the Ninth Circuit has ordered copies of unlawfully seized materials to be returned, as well as the originals. *See Goodman v. United States*, 369 F.2d 166, 168 (9th Cir. 1966) ("Assuming, arguendo, that the searches or seizures were unlawful, we must consider whether the copies must be returned to the appellants in addition to the originals. We hold that they must."); *see also United States v. Burum*, 639 F. App'x 503, 504 (9th Cir. 2016) (holding that an evidentiary hearing was necessary to determine "which documents (including copies) the government still has in its possession"). Although we agree with LVMPD that the property at issue in this case was not "unlawfully seized," we find this authority relevant to the question of mootness because it demonstrates that a party has an equal right to seek the return of *copies* of seized property under the analogous federal rule governing return of property. Because LVMPD has retained copies or the mirror images of the electronic devices containing certain documents that appellants assert to be privileged, the issue was not rendered moot by the return of the physical devices.

Citing *Anderson*, LVMPD asks this court to rely on a line of federal cases indicating that motions for the return of property under

FRCrP 41(g) are properly denied where the government has an ongoing need for the property in question. *See, e.g.*, *United States v. Mills*, 991 F.2d 609, 612 (9th Cir. 1993) ("*Generally*, a Rule 41(e) motion is properly denied if . . . the government's need for the property as evidence continues." (emphasis added) (internal quotation marks omitted)); *United States v. Martinson*, 809 F.2d 1364, 1370 (9th Cir. 1987) ("A district court has both the jurisdiction and the duty to return the contested property once the government's need for it has ended." (internal quotation marks omitted)); *United States v. Totaro*, 468 F. Supp. 1045, 1048 (D. Md. 1979) (holding "that federal district courts have both the jurisdiction and the duty to order the return of seized evidence to its rightful owner, whether or not the seizure was illegal, once the need for the evidence has terminated"). Based on these federal cases, LVMPD contends that the district court correctly determined that it was not "unreasonable" for it to retain even those privileged materials belonging to appellants.

However, the federal cases relied on by LVMPD do not support a blanket rule that privileged materials are not required to be returned as long as the government has a need for them. To the contrary, these and other federal jurisdictions recognize that attorney-client privilege is a valid basis to seek the return of property under FRCrP 41(g). The Third, Eleventh, Fifth, Ninth, and D.C. Circuits have all addressed requests to return privileged materials within the scope of FRCrP 41(g) motions for the return of property. *United States v. Scarfo*, 41 F.4th 136, 171 (3d Cir. 2022) (addressing an appeal from a ruling on a motion for the return of property under FRCrP 41(g) that challenged a filter team's disclosure of communications to the prosecution without "giving him an opportunity to challenge any of the communications as privileged, prior to their potential use at trial"), *cert. denied by Pelullo v. United States*, ___ U.S. ___, 143 S. Ct. 1044 (2023); *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th 1235, 1245-46 (11th Cir. 2021) (evaluating a district court ruling on an FRCrP 41(g) motion where businesses and their owners, managers, and controllers moved to intervene under FRCrP 41(g) to assert attorney-client and work-product privileges over some documents that were seized), *cert. denied by Korf v. United States*, ___ U.S. ___, 143 S. Ct. 88 (2022); *Harbor*, 5 F.4th at 600; *Burum*, 639 F. App'x at 504 (addressing an appeal from an FRCrP 41(g) motion seeking the return or destruction of all privileged property retained by the government); *United States v. Rayburn House Office Bldg., Room 2113, Washington, D.C. 20515*, 497 F.3d 654, 665 (D.C. Cir. 2007) (addressing an FRCrP 41(g) motion for the return of all privileged materials seized upon executing a search warrant for nonlegislative materials in the congressional office of a sitting member of Congress).

Federal courts recognize that privacy interests in privileged materials "weigh[ ] heavily in favor of granting Rule 41(g) relief" for the return of property and that the government's retention of privileged materials may "constitute[ ] an irreparable injury that can be cured only by Rule 41(g) relief." *Harbor*, 5 F.4th at 600. "Once the government improperly reviews privileged materials, the damage to the [property owners'] interests is 'definitive and complete.'" *In re Sealed Search Warrant*, 11 F.4th at 1247 (quoting *DiBella v. United States*, 369 U.S. 121, 124 (1962)). We find these cases persuasive. Because FRCrP 41(g) provides a basis in federal court to seek the return of privileged materials among seized property, we read Nevada's analogous return-of-property statute to also include privilege as a basis to seek the return of seized property under NRS 179.085(1)(e), regardless of whether the government has an ongoing investigation. *See Anderson*, 134 Nev. at 805, 435 P.3d at 677.

Notably, the language in FRCrP 41(g) mirrors that of NRS 179.085(3), which directly addresses the return of property under NRS 179.085(1)(e). FRCrP 41(g) states, in pertinent part, "If [the court] grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings." Likewise, NRS 179.085(3) states, "If the motion is granted on the ground set forth in paragraph (e) of subsection 1, the property must be restored, but the court may impose reasonable conditions to protect access to the property and its use in later proceedings." Thus, both rules allow the district court to grant a party relief from the seizure of privileged materials in a manner that would protect the government's interest in "access to the property" for "use in later proceedings."

In this case, the district court initially denied appellants' return-of-property motion under NRS 179.085(1)(e) without determining whether any of the subject materials were, in fact, covered by a privilege and continued to permit LVMPD to retain the copies or mirror images of the electronic devices that may contain certain privileged documents without making such a determination.[4] In addition, the district court assumed, without deciding, that the subject materials *did* contain privileged documents and directed DFL to conduct its own search through the materials to "redact information that [appellants] believe is privileged." This was error.

Preliminarily, when a motion for the return of property is filed prior to the initiation of criminal proceedings, which was the case here, the Nevada Rules of Civil Procedure apply. *See* NRS 179.085(5) ("If a motion pursuant to this section is filed when no criminal proceeding is pending, the motion must be treated as a civil complaint seeking equitable relief."). Therefore, assertions

[4]In its petition for rehearing, appellants point out that other seized property remains in LVMPD's possession, and LVMPD does not dispute this assertion.

of privilege are governed by NRCP 26(b)(5). Pursuant to NRCP 26(b)(5)(A)(i)-(ii), when a property owner seeks to withhold information on the basis of privilege, the property owner is required to do two things: (1) "expressly make the claim," and (2) "describe the nature of" the privileged documents through a privilege log.

As to the first requirement that appellants "expressly make the claim," appellants asserted in their motion for the return of property that the seized property included materials privileged under NRS 49.095 and NRS 49.185. To support their claims of privilege, appellants provided declarations from several employees that attested to the presence of privileged materials among the seized property, including communications between those employees and appellants' attorneys and accountants. In response, LVMPD did not dispute the presence of potentially privileged materials but instead proposed a search protocol for DFL to find and redact this privileged information. The district court agreed.[5]

To comply with the second requirement to assert privilege, a party must ordinarily submit a privilege log identifying any potentially privileged materials. *See* NRCP 26(b)(5)(A)(ii). However, appellants were unable to do so without first having access to the seized property. At least until a party has access to the seized property in question, federal courts are hesitant to hold the absence of a privilege log against a party seeking relief under FRCrP 41(g). *In re Grand Jury Subpoenas*, 454 F.3d 511, 515 (6th Cir. 2006) (stating that the movant could not be criticized for failing to provide a privilege log before he had an opportunity to review the records); *see also Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for the Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005) (stating that the timeliness of a privilege log is determined by the relevant circumstances, including the ability of the party to review the documents

[5]On rehearing, LVMPD argues that appellants waived any privilege claim for the materials that have not yet been returned, including DVR and point-of-sale systems, because appellants failed to specifically assert that those items contained privileged information. However, LVMPD failed to raise this argument in the district court, and therefore the argument is waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal"). Nonetheless, LVMPD's argument can also be rejected on the merits. In appellants' motion for the return of property, they asserted that "[t]he Property seized by LVMPD, inclusive of paper documents and digital storage devices, contains emails, documents and other correspondence with [appellants'] attorneys and accountants that are privileged . . . ." Similarly, the accompanying declaration to the motion stated "that materials protected by the attorney-client and accountant-client privileges and the work product doctrine are stored on digital storage devices which were seized by [LVMPD]." When LVMPD offered its DFL search protocol, it did not propose to limit the search to any particular documents but rather would have DFL search all items recovered under the warrants. Therefore, we reject LVMPD's argument that appellants waived their right to assert privilege in certain items seized.

and identify privileged materials); *United States v. SDI Future Health, Inc*., 464 F. Supp. 2d 1027, 1046 (D. Nev. 2006) (holding that the property owner "had not waived its privileges because it had, as yet, no opportunity to inspect its files and identify additional privileged records").

Prior to a formal determination of privilege under the Nevada Rules of Civil Procedure, it is unknown what, if any, privileged materials actually exist among the seized property that appellants have asked the court to return. Therefore, it was premature for the district court to find that it was "not unreasonable" for LVMPD to retain the seized property, which continues to include the copies and mirror images of the electronic devices, because such a determination could not properly have been made until appellants had a full opportunity to demonstrate privilege.

To that end, the district court also erred by adopting LVMPD's proposed DFL search protocol. Appellants objected to the proposed DFL protocol before the district court. Appellants argued that the protocol "provides no guarantee that privileged information will be properly searched and, if that does not occur, [a]ppellants will have no recourse." Appellants' concerns in this regard are persuasive. NRS 49.095 guarantees a client the right "to prevent any other person from disclosing" confidential privileged communications, and the statutory reference to "any other person," by its plain language, would necessarily include the individuals within DFL.

LVMPD's proposed DFL search protocol violated NRS 49.095 by allowing DFL to disclose potentially confidential communications to law enforcement's investigatory arm based on its own unilateral determination of privilege. *See In re Grand Jury Subpoenas*, 454 F.3d at 523 (stating that the risk of accidental disclosure of privileged materials to prosecutors is a paramount concern when dealing with privileged materials among the property seized). The proposed protocol was also inadequate because it did not provide appellants with any opportunity to review DFL's privilege determinations *before* the seized property was forwarded to the investigating detectives. *In re Sealed Search Warrant*, 11 F.4th at 1247 ("[I]f a district court incorrectly denies Rule 41(g) relief when it is required, immediate review is necessary to preserve that same remedy of return of the documents before the government reviews them. Review later would be incapable of vindicating the [property owners'] privacy interests."); *see also SDI Future Health*, 464 F. Supp. 2d at 1039 ("Because the Government did not provide or implement any procedure for notifying SDI of the taint attorney's privilege decisions or afford SDI an opportunity to challenge those determinations in court before the documents were provided to the prosecution team, it is doubtful that the court would have approved the Government's taint procedures if SDI had challenged them."); *Richey*, 515 F.2d at

1242 n.5 ("It follows that one entitled to the return of original documents is entitled to their return prior to and not after examination or reproduction by government agents.").

Further, at the time appellants filed their motion for the return of property, LVMPD had not yet returned their physical devices, and the protocol implemented by the district court failed to provide appellants with a meaningful opportunity to assert privilege because it did not grant them any access to the seized property. Without access to the property, appellants had no ability to create a privilege log in conformance with NRCP 26(b)(5)(A)(ii). For these reasons, we conclude that LVMPD's proposed DFL search protocol was inadequate, and the district court erred in adopting it.

CONCLUSION

In summary, we affirm the portions of the district court's order that denied appellants' motion to quash and unseal the warrants. However, we conclude that the district court erred when it prematurely denied appellants' request to return the seized property without affording them an opportunity to demonstrate privilege under NRCP 26(b)(5). After asserting that the seized items contained privileged information, appellants were required to create a privilege log but were unable to do so without having access to the seized property. We therefore reverse the district court's order denying appellants' motion for the return of the entirety of appellants' property without determining whether privileged communications existed within the property seized in accordance with NRCP 26(b)(5)(A)(ii) and the relevant statutory privileges.

On remand, appellants must create a privilege log for all materials that have been returned by LVMPD, as they now have those seized materials in their possession. *SDI Future Health*, 464 F. Supp. 2d at 1044 n.4 (holding that once the defendants are granted access to the seized property, they should "supplement[ ] their privilege claims by more specifically describing the documents that they allege were protected by the attorney-client privilege"). To the extent that LVMPD has not yet returned any items seized or copies thereof, the district court should address appellants' ability to access this property in the first instance.[6] Appellants must be given an opportunity to demonstrate privilege as to the property not yet returned, "but the court may impose reasonable conditions to protect access to the property and its use in later proceedings." NRS 179.085(3).

[6]Insofar as LVMPD argues on rehearing that there are ownership disputes as to items that have not yet been returned to appellants, LVMPD should likewise direct any such ownership disputes to the district court in the first instance. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.").

The district court should then follow the protocol for asserting privilege pursuant to the applicable statutory privileges and NRCP 26(c) and set a schedule for appellants to submit a privilege log within a reasonable period of time. Finally, in the interim, due to LVMPD's retention of the copies and mirror images of the electronic devices, the district court should put in place a protective order pursuant to NRCP 26(c) that prevents LVMPD from accessing the copies and mirror images until such time as the privilege issues have been resolved and the privileged documents have been redacted. We leave the timing to the discretion of the district court with the understanding that there is an ongoing investigation.

Gibbons, C.J., and Bulla, J., concur.

WILLIAM RENE ALFARO, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 83316

August 24, 2023 534 P.3d 138

Appeal from a judgment of conviction, pursuant to jury verdict, on seven counts of sexual assault against a child under 14 and three counts of lewdness with a child under 14. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Affirmed in part, reversed in part, and remanded.

Las Vegas Defense Group, LLC, and *Michael V. Castillo* and *Michael L. Becker*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Jennifer P. Noble*, Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, Cadish and Pickering, JJ., and Gibbons, Sr. J.[1]

OPINION

By the Court, Pickering, J.:

A jury convicted appellant William Alfaro of seven counts of sexual assault against a child under 14 and three counts of lewdness with a child under 14 for acts committed against ED, the daughter of a family friend, between June and December 2015. Alfaro denies the charges and raises insufficiency of the evidence as a principal issue on appeal. He also argues that the district court erred in not dismissing the lewdness counts as redundant to the sexual assault counts; in admitting evidence that he committed other uncharged bad acts against ED; in giving and refusing certain jury instructions; and in imposing the maximum sentence allowed by law, for an aggregate total of 275 years to life. We reverse one of the lewdness convictions as redundant to a sexual assault involving the same episode. And, while we agree with Alfaro that the district court erred in admitting two of the uncharged bad acts and in issuing a jury instruction unnecessarily defining "lewdness" separate from the statutory definition provided by NRS 201.230, we find those errors harmless. Finding no reversible error except the redundant lewdness count, we otherwise affirm.

[1]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

I.

A.

Alfaro was a family friend of ED's mother, Sara, and ED grew up calling him "Uncle Bill." ED's parents struggled with homelessness and addiction. When Sara, ED, and ED's younger brother found themselves with no place to live, Sara turned to Alfaro, who drove to California, picked them up, and brought them to Fernley, Nevada. In Fernley, Sara and the children lived with Alfaro, first at a house he had been sharing with a friend and, later, at the Lazy Inn motel.

ED's father, Naylan, followed Sara and the children to the Lazy Inn. A heavy drinker, Naylan often fought with Sara and occasionally hit the children. When money for the motel ran out, Sara returned to California, and Naylan and the children moved from Fernley to a rehabilitation shelter in Reno. The shelter evicted them after Naylan violated its ban on drugs and alcohol. Again without a place to live, Naylan and the children rejoined Alfaro, who had by then rented a room at the Gateway Inn in Reno.

The family stayed with Alfaro at the Gateway Inn from June 1 through December 31, 2015. During this time, ED turned ten and entered the fourth grade. The room had one bed, which ED shared with Alfaro, while her brother slept on the floor with Naylan (or Sara, when she visited). Alfaro's charged acts of sexual assault and lewdness against ED all occurred at the Gateway Inn during this seven-month span, either at night while ED's father and brother were sleeping or when she and Alfaro were alone in the room together. The State would later charge Alfaro with, among other acts, forcing ED to fellate him and penetrating her vaginally with his penis and fingers and anally with his penis, his fingers, and a Sharpie pen.

ED said nothing about the abuse until Naylan moved the children from the Gateway Inn to the home of his girlfriend, Rochelle. Months later, the couple left the children with a friend of Rochelle's, to whom ED disclosed Alfaro's abuse. The friend called Child Protective Services, which interviewed ED and referred the case to law enforcement. Detective Ashley Harms interviewed ED and had her examined by Dr. Kristen MacLeod, a pediatrician board-certified in child abuse and neglect. The examination revealed no genital trauma, which Dr. MacLeod described as normal in child sex abuse cases, especially those involving delayed reporting.

Alfaro voluntarily submitted to an interview with Detective Harms, which lasted more than three hours. In the interview, Alfaro adamantly denied abusing ED but corroborated basic details of ED's account, including date range, location, that the two shared a bed, that they occasionally engaged in what he characterized as horseplay, and that he had a prescription for Soma, a muscle relaxant that ED told Harms Alfaro would give her to facilitate his assaults. Alfaro also consented to a search of his personal storage unit and

his room at the Gateway Inn. The searches turned up Sharpie pens, which ED had said Alfaro used to assault her, but did not uncover any nude pictures of ED, which ED also referenced in speaking to Detective Harms.

B.

The State charged Alfaro with eight counts of sexual assault against a child under 14 and three counts of lewdness with a child under 14 for his acts at the Gateway Inn in Reno between June and December 2015. He was not charged for any acts in Fernley, located about 30 miles outside of Reno in Lyon County. Before trial, the district court granted the State's motion to admit evidence at trial of four uncharged acts: that Alfaro took nude photographs of ED, gave her Soma, showed her pornography, and had her dress in fishnet stockings. The former two acts were admitted as prior uncharged sexual offenses under NRS 48.045(3), and the latter two as *res gestae* under NRS 48.035(3).

Although the charged acts dated back to 2015, trial did not occur until 2021. At trial, the State presented testimony from ED, who was by then 15 years old. It also called the woman to whom ED confided the abuse, Detective Harms, and Dr. MacLeod. The State did not call Rochelle or any members of ED's family, and the defense called no witnesses. On stipulation of the parties, the State played a videotape of Alfaro's interview with Detective Harms during its case-in-chief.

The jury convicted Alfaro on all counts, except one the State abandoned during closing. Alfaro filed a motion for acquittal under NRS 175.381(2) and for a new trial under NRS 176.515(4) on the bases of insufficient evidence and conflicting evidence, respectively. Alfaro also challenged his lewdness convictions as redundant to his convictions for sexual assault. The motions were denied. Rejecting both Alfaro's and the State's recommendations, the district judge imposed the maximum sentence allowed by law, 10 consecutive terms of incarceration totaling 275 years, in the aggregate, to life. This appeal timely followed.

II.

Alfaro argues that we must reverse his convictions because they are not supported by sufficient evidence. The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). In deciding a challenge to the sufficiency of the evidence, the reviewing court does not "ask itself whether *it* believes that the evidence at the trial established

guilt beyond a reasonable doubt." *Id*. at 318-19 (internal quotation omitted). Instead, it asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. at 319. *See Franks v. State*, 135 Nev. 1, 7, 432 P.3d 752, 757 (2019) (stating that the "test for sufficiency upon appellate review is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had a right to accept") (quoting *Edwards v. State*, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974)).

A.

Alfaro makes two distinct sufficiency-of-the-evidence arguments. First, he argues, as he did in district court, that the State did not prove he subjected ED to the "sexual penetration" required by NRS 200.366(1) to convict him of the sexual assaults charged in count I (alleging that Alfaro "put his penis into ED's anus on multiple occasions"), counts III and IV (alleging that he "put his penis into ED's vagina" two different times), and count VII (alleging that he "put his finger(s) into ED's anus"). *See Kassa v. State*, 137 Nev. 150, 152, 485 P.3d 750, 755 (2021) (noting that appellate review of an order denying a motion for a judgment of acquittal is essentially the same as a review for the sufficiency of the evidence). Second, citing *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992), and the lack of independent, corroborating evidence, Alfaro argues that ED's testimony lacked the specificity needed to support the convictions, requiring reversal on all counts.

The State sufficiently proved penetration for a rational juror to convict Alfaro on the contested sexual assault counts. As written at the relevant time, NRS 200.366(1) (2007) defined sexual assault as "subject[ing] another person to sexual penetration," while NRS 200.364(5) (2013) defined "[s]exual penetration" to mean "cunnilingus, fellatio, *or any intrusion, however slight, of any part of a person's body* or any object manipulated or inserted by a person *into the genital or anal openings of the body of another*, including sexual intercourse in its ordinary meaning." (emphases added). Alfaro points to instances during ED's testimony where she answered, "I can't remember" to a question about Alfaro putting "his front private part, his penis, into your body," or denied that he was able to "get any of his penis into your front private," as establishing a failure to prove penetration. But ED continued, explaining that when Alfaro tried to "push his penis into me . . . it wouldn't work because I had started crying and said that it hurt . . . and was begging him stop," that Alfaro got the tip of his penis in her anus, and that he would use lubricants to facilitate his assaults when he had difficulty

inserting his penis or fingers into her vaginal or anal openings. A rational juror could reasonably interpret this testimony to say that, while Alfaro could not fully insert his penis, penetration, "however slight" occurred, NRS 200.364(5), since ED would not have cried out in pain unless it did. *See State v. Toohey*, 816 N.W.2d 120, 129-31 (S.D. 2012) (finding sufficient proof of penetration under a similar statute where the child testified that the assault caused her pain) (collecting cases).

Alfaro's close parsing of ED's trial testimony also disregards the other evidence the jury properly could consider. That evidence included the handwritten note ED gave Detective Harms during their initial interview in 2016, in which ED wrote that Alfaro "would stick his front private part in my back private part, and push it in"; testimony from Detective Harms that, during the same interview, ED disclosed that Alfaro put his "front private part" in her "front and back private parts" and his fingers in her anus; and testimony from Dr. MacLeod about similar statements ED made when she examined ED, also in 2016. Although Alfaro omitted ED's handwritten note from the record on appeal, he stipulated to its admission as a trial exhibit and Detective Harms read from it during her testimony. *See Snipes v. State*, No. 82384, 2022 WL 500678, at *1 & n.2 (Nev. Feb. 17, 2022) (relying on testimony a witness read from an exhibit omitted from the record on appeal and noting that, since the appellant has the burden to provide a complete record on appeal, missing portions are presumed to support the judgment below). The jury also was entitled to consider ED's prior statements to Detective Harms and Dr. MacLeod in making its decision. *See Crowley v. State*, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004) (holding that "when a trial witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement" that makes the prior statement admissible as substantive proof).

Alfaro builds his case for complete acquittal on the same flawed foundation. He concentrates on the generality of and occasional inconsistencies in ED's testimony and emphasizes the lack of independent corroborating evidence. But "the testimony of a sexual assault victim alone [can be] sufficient to uphold a conviction." *LaPierre*, 108 Nev. at 531, 836 P.2d at 58; *see Franks*, 135 Nev. at 7, 432 P.3d at 757 ("a lewdness victim's testimony need not be corroborated"). Our case law recognizes "that it is difficult for a child victim to recall exact instances when the abuse occurs repeatedly over a period of time." *LaPierre*, 108 Nev. at 531, 836 P.2d at 58. While the child must "testify with *some* particularity" about the charged incidents and do so in a way that supplies "reliable indicia that the . . . acts charged actually occurred," the child's testimony alone, if it meets these standards, can be sufficient to convict. *Id*.;

see Rose v. State, 123 Nev. 194, 163 P.3d 408 (2007). ED's testimony distinguished between Fernley, where Alfaro's uncharged grooming of her allegedly began, and the Gateway Inn in Reno, where the charged acts occurred. She adequately described the time frame, place, and manner of the activity underlying each count at trial, and her consistent, repeated disclosures to third parties, some of whom testified to those disclosures at trial, bolstered her testimony.

Almost six years passed between the charged acts of abuse and the trial. To the extent ED's testimony contained internal inconsistencies or conflicted with Alfaro's account, resolving competing narratives is the province of the jury, not to be disturbed if their verdict is supported by substantial evidence. *See Guitron v. State*, 131 Nev. 215, 221, 350 P.3d 93, 97 (Ct. App. 2015).[2] Because a rational trier of fact could have found in ED's testimony and the other evidence at trial the elements necessary to convict Alfaro, we reject Alfaro's argument for reversal on all counts.

B.

Alfaro was convicted on three counts of lewdness with a child under 14, pursuant to NRS 201.230, for touching or fondling ED's breasts (count IX) and buttocks (count X) and kissing her on the mouth (count XI). On appeal, he challenges these convictions as redundant because the State failed to provide sufficient evidence that the lewd acts were separate and distinct from the acts for which he was convicted of sexual assault. On one count, we agree with Alfaro.

NRS 201.230(1) defines lewdness with a child as "any lewd or lascivious act, *other than acts constituting the crime of sexual assault* . . . ." (emphasis added). This provision makes sexual assault and lewdness with a child alternative or mutually exclusive offenses, "meaning as a matter of statutory interpretation that the same act can yield a conviction for sexual assault or lewdness [with a child] but not both." *Jackson v. State*, 128 Nev. 598, 612, 291 P.3d 1274, 1283 (2012) (discussing *Braunstein v. State*, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002), and *Crowley*, 120 Nev. at 33-34, 83 P.3d at 285); *see State v. Koseck*, 113 Nev. 477, 479, 936 P.2d 836, 838 (1997). Because "[t]he State has the burden to show that the defendant committed a crime," and because a lewd act must not also constitute sexual assault, NRS 201.230(1), "the State has the burden, at trial, to

[2]Alfaro also challenges the order denying his motion for a new trial under NRS 176.515(4), based on conflicts in the evidence as to his guilt. *See State v. Purcell*, 110 Nev. 1389, 1394, 887 P.2d 276, 278-79 (1994). But NRS 176.515(4) is permissive, *see Washington v. State*, 98 Nev. 601, 603, 655 P.2d 531, 532 (1982), and reposes discretion in the district judge, whose exercise of discretion is not reversible except for "palpable" abuse, *Domingues v. State*, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996). The district court did not abuse its considerable discretion in denying Alfaro's motion for new trial based on conflicts in the evidence.

show that the lewdness was not incidental to the sexual assault"—that is, that the lewd and assaultive acts were adequately "separate and distinct" to support convictions for both, *Gaxiola v. State*, 121 Nev. 638, 651-53, 119 P.3d 1225, 1234-35 (2005). To meet that burden, the State must provide sufficient evidence of separateness such that a rational juror could reasonably find two separate crimes. *See Jackson v. Virginia*, 443 U.S. at 316. If the State fails in that burden, the lewdness conviction must be reversed as redundant to the sexual assault. *Braunstein*, 118 Nev. at 78-79, 40 P.3d at 420-21.

Separately charged acts of lewdness with a child and sexual assault can occur "as part of a single criminal encounter," *see Townsend v. State*, 103 Nev. 113, 120-21, 734 P.2d 705, 710 (1987) (analogizing to multiple acts of sexual assault), if the defendant "stopped [the lewd] activity before proceeding" to the assault, *id.* at 121, 734 P.2d at 710. The lewd act cannot, however, be a mere "prelude" intended to "arouse" the victim or "predispose" them to the assault. *Crowley*, 120 Nev. at 34, 83 P.3d at 285. If the State charges both sexual assault and lewdness with a child and fails to provide "any evidence regarding the sequence of events and under what circumstances the lewdness occurred," we must assume, lacking any evidence to the contrary, that the charges are redundant. *See Gaxiola*, 121 Nev. at 653, 119 P.3d at 1235-36 (noting also that the victim did not indicate whether the lewd act "occurred on a separate day or time frame" from the charged sexual assault).

ED testified that Alfaro touched her breasts and buttocks at the Gateway Inn, but her testimony does not establish that these acts occurred at a time separate and distinct from his assaults, nor did the State ever ask any clarifying questions to that effect. However, in his interview with law enforcement, while Alfaro denied that he sexually assaulted ED, he stated that he pinched ED's breasts and buttocks as a form of horseplay. Dr. MacLeod later testified that grooming behavior can include "close physical contact" and that it is inappropriate for an adult man to pinch a nine-year-old girl's chest or buttocks. Because Alfaro's own statements describe acts separate from a sexual assault that involved touching or fondling ED's breasts and buttocks and Dr. MacLeod's testimony supports a finding that Alfaro had the requisite "lewd and lascivious" sexual intent, NRS 201.230, and ED's testimony places such acts in Reno, we conclude that a rational juror could have found the same beyond a reasonable doubt and reject his redundancy challenges to counts IX and X.

However, Alfaro did not admit to kissing ED on the mouth, and her only relevant testimony at trial was that she awakened "one time" at the Gateway Inn to find Alfaro digitally penetrating her and that he then "French kissed" her. The State did not prove any other mouth kissing separate and distinct from a charged sexual assault

and, in fact, ED's trial testimony was that this only occurred once. The State therefore failed its burden to provide sufficient evidence "regarding the sequence of events" involving both lewd and assaultive acts, *see Gaxiola*, 121 Nev. at 653, 119 P.3d at 1235-36, and we reverse Alfaro's conviction under count XI (lewdness with a child under 14) for kissing ED on the mouth.

III.

In the alternative, Alfaro seeks a new trial based on evidentiary and instructional error. While we agree that the district court erred in admitting two pieces of prior misconduct evidence and in giving an unnecessary jury instruction, the errors were harmless and do not provide a basis for a new trial.

A.

NRS 48.045(2) states the general rule against using prior misconduct to prove criminal propensity: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Despite this rule, the prosecution often seeks to introduce evidence of a defendant's uncharged misconduct in sexual assault cases. Nevada's evidence code offers three possible paths to the admission of such evidence. First, as with any other prior misconduct evidence, evidence of uncharged sexual misconduct may be admitted under NRS 48.045(2) for a non-propensity purpose "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Second, the Legislature adopted NRS 48.045(3) in 2015 to permit evidence of an uncharged sexual offense to support a normally forbidden inference of criminal propensity in a sexual offense prosecution. *See Franks*, 135 Nev. at 4, 432 P.3d at 755. And third, NRS 48.035(3) permits the admission of evidence "so closely related" to the charged act that the act cannot otherwise be described, commonly known as *res gestae* evidence.

Before trial, the State filed a motion to permit it to introduce evidence at trial of four instances of uncharged misconduct by Alfaro. The State did not argue, either in district court or on appeal, that the evidence qualified for admission under NRS 48.045(2)—a steep path that would have required the State to prove each act by clear and convincing evidence and to identify a legitimate non-propensity purpose for its admission. *See Petrocelli v. State*, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004). Instead, the State moved for the prior acts' admission as evidence of uncharged sexual offenses under NRS 48.045(3), and as *res gestae* evidence under NRS 48.035(3). The district court admitted two acts, taking nude photographs of ED and giving her Soma, as evidence

of uncharged sexual offenses under NRS 48.045(3), and two acts, making ED wear fishnet stockings and showing her pornography, as *res gestae* evidence.

The district court abused its discretion in admitting evidence of the nude photographs and the fishnet stockings on the bases it did. *See Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013) (reviewing the admission of prior misconduct evidence for an abuse of discretion). This evidence did not meet the requirements for the admission of prior sexual offense and *res gestae* evidence. Although we ultimately determine its admission was harmless, the evidence was unnecessary and the errors avoidable, so we address them fully. Regardless of the path taken to admission, compliance with the procedural requirements for admitting uncharged misconduct evidence is essential to balance the unique challenges of prosecuting sexual offenses involving children with the defendant's right to a trial free from undue prejudice.

i.

NRS 48.045(3) creates an exception to NRS 48.045(2)'s ban on propensity evidence. It permits "the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense." The requirements for admission under NRS 48.045(3) are set out in *Franks v. State*: (1) the uncharged act must constitute a sexual offense under NRS 179D.097; (2) it must be relevant to the charged offense; (3) the district court must make a preliminary finding that "a jury could reasonably find by a preponderance of the evidence that the act had occurred"; and (4) using the factors enumerated in *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001), the district court must determine that the probative value of the act is not substantially outweighed by the danger of unfair prejudice. 135 Nev. at 4-6, 432 P.3d at 755-57. The State must obtain advance permission to introduce such evidence by motion to the district court, outside the presence of the jury. *Id*. at 5, 432 P.3d at 756.

Both acts admitted under NRS 48.045(3) easily satisfy the first two *Franks* requirements. Taking nude photographs of a minor is a crime under NRS 179D.097(1)(h) and NRS 200.710 (criminalizing the production of child pornography), and giving Soma to ED prior to sexual contact is a crime under NRS 179D.097(1)(e) (providing that a "sexual offense" includes administering a drug with the intent to enable or assist the commission of another sexual offense). Furthermore, both acts are relevant to the charged offenses because they demonstrate that Alfaro had a propensity to engage in sexual behavior with a child. *See Franks*, 135 Nev. at 6, 432 P.3d at 757.

The State stumbles on the quantum of proof regarding the nude photographs. The district court decided the State's motion based

on the preliminary hearing transcript and did not reserve or revisit its pretrial admissibility determination to take into account the evidence adduced at trial. While ED testified at the preliminary hearing and at trial that Alfaro gave her Soma to facilitate his assaults, *see Keeney v. State*, 109 Nev. 220, 229, 850 P.2d 311, 317 (1993) (concluding that victim testimony alone met the higher standard of clear and convincing evidence required by NRS 48.045(2)), *overruled in part on other grounds by Koerschner v. State*, 116 Nev. 1111, 13 P.3d 451 (2000), only Detective Harms testified regarding the nude photographs based on her original interview with ED, and even that testimony was minimal and lacked specificity. Searches of Alfaro's electronic devices, motel room, and storage unit failed to turn up any physical evidence of the photographs, nor did Alfaro admit to their existence.

This dearth of relevant supporting facts is also relevant to the last step of *Franks*. There, the district court weighs the probative value of the evidence with the threat of undue prejudice, which must include an evaluation based on a nonexhaustive list of factors from *LeMay*:

> (1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.

Franks, 135 Nev. at 6, 432 P.3d at 756 (quoting *LeMay*, 260 F.3d at 1028).

While these factors are useful, their isolated presentation in *Franks* implies that consideration of the list is both necessary and sufficient. *See State v. Eighth Judicial Dist. Court (Doane)*, 138 Nev. 896, 902, 521 P.3d 1215, 1222 (2022) (emphasizing that district courts must consider each *LeMay* factor). But revisiting *LeMay* reveals a more thoughtful, holistic analysis, including considerations of whether the prior acts were based on "proven facts," whether the acts corroborated or bolstered the victim's testimony and credibility, and whether their probative value was clear and not "capable of multiple characterizations." *LeMay*, 260 F.3d at 1028-29. *LeMay* emphasized that neither these factors nor the ones adopted in *Franks* were exhaustive, citing to yet more factors from the Tenth Circuit. *Id.* at 1032 n.1. And while we do not prescribe the same approach to the district courts, *LeMay* also stressed the appropriateness of the district court's decision to prevent the government from using such evidence in opening statement "until after the prosecution had introduced . . . its other evidence, in order to get a feel for the evidence as it developed at trial before ruling on whether LeMay's prior acts of child molestation could come in." *Id.* at 1028.

A careful reading of *LeMay* does not support rote processing of factors to arrive at a pretrial decision that is then cast in stone. Rather, the district court's task is to evaluate the probative value of the uncharged misconduct in relation to the charged crime and the state of the evidence, weighed against the threat of undue prejudice arising from any unnecessarily inflammatory, factually unsupported, or unduly duplicative aspects of the evidence. The five listed *LeMay* factors, adopted in *Franks*, can and should be used in service of that goal, but the reviewing district court should not feel constrained to use only those factors to the exclusion of other meaningful and helpful guidance provided in *LeMay* and elsewhere. *See Chaparro v. State*, 137 Nev. 665, 670, 497 P.3d 1187, 1193 (2021) ("[T]he [*LeMay*] factors . . . are not elements to be met before evidence is admissible but considerations for the district court to weigh.").

Returning to the evidence at issue here, admitting the nude photograph evidence cannot be justified under *LeMay*. Scant proof exists in the record that Alfaro took nude photographs of ED. But even accepting arguendo that the proof was enough to meet the *Franks* threshold preponderance-of-the-evidence test, the creation of child pornography is also a grave and separate offense that added little to the narrative underlying the charged offenses in this case. To justify the risk of prejudice and distraction this evidence carried, more in the way of certainty of the photographs' existence was needed. *See* 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:86 (4th ed. 2022 Update) (discussing FRE 414, the federal analog to NRS 48.045(3), and noting that "uncertainty over prior [sexual] bad acts lessens their probative value and raises the risk of prejudice"). Evidence concerning the Soma pills, by contrast, met the *LeMay* standards: ED testified that Alfaro had her take Soma; this evidence was corroborated by Alfaro's prescription for Soma; and the evidence had high probative value since it strengthened ED's testimony by explaining how Alfaro used Soma to facilitate his assaults.

ii.

The other two acts, making ED watch pornography and wear fishnet stockings, were admitted under NRS 48.035(3) as *res gestae* evidence. Both the State and the district court refer to *res gestae* evidence as evidence that "explains," provides "background" for, "completes the picture" of, or is "relevant" to the charged crime, and evince an understanding that virtually any act committed during the entire course of the charged conduct can be admitted as *res gestae*. These characterizations are not accurate.

NRS 48.035(3), codifying *res gestae*, is an "extremely narrow" basis for admissibility. *Weber v. State*, 121 Nev. 554, 574, 119 P.3d

107, 121 (2005), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 698, 405 P.3d 114, 120 (2017); *see Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005); *Sutton v. State*, 114 Nev. 1327, 1331, 972 P.2d 334, 336 (1998). It is insufficient that the uncharged acts "explain," "make sense of," or "provide a context for" the charged crimes, *Weber*, 121 Nev. at 574, 119 P.3d at 121, or that the acts occurred at some ambiguous point in time during the charged course of conduct. An uncharged act may only be admitted as *res gestae* if it is part of the same "transaction"—the same temporal and physical circumstances—as the charged act. *See Dutton v. State*, 94 Nev. 461, 464, 581 P.2d 856, 858 (1978) (admitting evidence of a defendant's possession of a stolen item exchanged at the same time as the stolen item for which he was charged), *overruled on other grounds by Gray v. State*, 100 Nev. 556, 558 n.1, 688 P.2d 313, 314 n.1 (1984); *Allan v. State*, 92 Nev. 318, 320, 549 P.2d 1402, 1403 (1976) (admitting testimony from two boys the defendant assaulted immediately prior to the charged crime in the same room). The uncharged act and the crime "must be so interconnected" that it is *nearly impossible* for the witness to describe the crime without referring to the uncharged act. *Bellon*, 121 Nev. at 444, 117 P.3d at 181; *see Cirillo v. State*, 96 Nev. 489, 493, 611 P.2d 1093, 1096 (1980) (noting that the uncharged act must be a "necessary incident" or "immediate concomitant" of the charged crime, or part of the same "continuous transaction").[3]

The State also relies on *Perez v. State* to argue that prior acts are admissible if they constitute evidence of "grooming behavior," facially innocuous acts such as "gifts, praises, and rewards" used to "develop a bond between the victim and offender and, ultimately, make the victim more receptive to sexual activity." 129 Nev. 850, 853, 855, 313 P.3d 862, 864, 866 (2013). But *Perez* speaks to the admissibility of certain expert testimony on grooming. *Id.* at 859, 313 P.3d at 868. That issue is not raised here, and this court has never held, nor does any statute provide, that evidence of grooming is categorically admissible, as *res gestae* evidence or otherwise.

Because ED testified that Alfaro made her watch pornography while committing the charged acts, and that Alfaro mimicked the

[3]The strict requirements of *res gestae* evidence reflect its derogation of the general rule that the use of prior bad acts is "heavily disfavored," *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001), and that it does not balance prejudicial effect against probative value, *State v. Shade*, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995). Of note, and for these reasons, *res gestae* is falling out of favor nationwide. *See, e.g.*, *Rojas v. People*, 504 P.3d 296, 307 (Colo. 2022) (abolishing *res gestae*, following the "many jurisdictions [that] have determined that *res gestae* is incompatible with the modern Rules [of evidence]"); *State v. Gunby*, 144 P.3d 647, 663 (Kan. 2006) (same); *see generally* Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 Colum. L. Rev. 769, 798-802 (2018).

acts in the pornography as she was watching it, the act qualifies as *res gestae* because it occurred at the same time and in the same place as the charged acts. The evidence that Alfaro had ED dress up in fishnet stockings, however, does not qualify. The fishnet stocking incident(s) occurred in Fernley, months prior to the charged acts, such that ED could, and in fact did, describe the charged acts without referring to the fishnet stockings incident(s). Therefore, the district court erred in admitting evidence that Alfaro made ED wear fishnet stockings.

B.

Having concluded that the district court erroneously admitted two prior bad acts, we consider the gravity of the error. We will affirm the otherwise erroneous admission of evidence if it could have been admitted another way, *Ledbetter v. State*, 122 Nev. 252, 260, 129 P.3d 671, 677 (2006), or if the error was harmless such that it did not have "a substantial and injurious effect or influence in determining the jury's verdict," *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

Evidence of the nude photographs, erroneously admitted under NRS 48.045(3) (prior sexual offenses), could not have been admitted as *res gestae* because the State provided no evidence as to when or under what circumstances the photographs were taken. Conversely, evidence regarding the fishnet stockings incident(s), erroneously admitted under NRS 48.035(3), could not have been admitted under NRS 48.045(3) because the record does not support a determination that the act constitutes a sexual offense under NRS 179D.097. *See Franks*, 135 Nev. at 4-5, 432 P.3d at 756. And, while perhaps the erroneously admitted evidence could have been admitted under NRS 48.045(2), the State did not make that argument in district court or on appeal, thereby failing to identify the permissible nonpropensity purpose for admitting the evidence and, as to the nude photographs, failing to prove the uncharged act by the clear and convincing evidence required. *See Petrocelli*, 101 Nev. at 52, 692 P.2d at 508.

The question, then, is whether the error in admitting evidence concerning the nude photographs and fishnet stockings was harmless. The record in this case demonstrates that the erroneously admitted uncharged acts had marginal relevance, and their potential for prejudice paled in comparison to the acts with which Alfaro was charged, which the State adequately proved. We therefore deem the erroneous admission of the two prior acts harmless under the "substantial and injurious effect" standard applicable to evidentiary error.[4]

[4]Neither Alfaro nor the State discuss harmless error as to the specific evidentiary errors that occurred, instead deferring the discussion to the larger

C.

As for the jury instructions, Alfaro first contends that the court erred by rejecting his proposed instruction that a defense attorney may argue negative inferences arising from the State's failure to call important witnesses, citing *Rimer v. State*, 131 Nev. 307, 329, 351 P.3d 697, 713 (2015). But license to make an argument does not entitle Alfaro to a jury instruction to that effect, so we reject this claim out of hand.

Second, he argues that jury instruction no. 23, defining "lewdness" as it appears in *Black's Law Dictionary* and *Berry v. State*, 125 Nev. 265, 280, 212 P.3d 1085, 1095 (2009), *overruled on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010), conflicts with the definition of "lewdness" in the statute criminalizing lewdness with a child, NRS 201.230, under which Alfaro was charged. On de novo review, we agree that instruction no. 23 is not an accurate statement of the law, and the district court erred in giving it. *Berry*, 125 Nev. at 273, 212 P.3d at 1091. Instruction no. 23 stated, "[l]ewdness is defined as sexual conduct that is obscene or indecent; tending to moral impurity or wantonness," but "lewdness with a child" already has a statutory definition with four distinct elements, was laid out in instruction no. 20, and does not require further commentary, *Summers v. Sheriff*, 90 Nev. 180, 182, 521 P.2d 1228, 1228-29 (1974). Furthermore, since instruction no. 23 does not mention physical contact and "lewdness with a child" requires it, instruction no. 23 permitted the jurors to convict Alfaro for merely "obscene or indecent" behavior, even if they found he never touched ED. This is not reversible error here, however, since it was plain from the evidence, the other jury instructions, and the charges themselves that the lewd acts for which Alfaro was charged required a touching. *See Carver v. El-Sabawi*, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005) (noting that an instructional error is only reversible if it "resulted in a miscarriage of justice").

IV.

Alfaro argues two errors at sentencing. First, he posits that the district court impermissibly relied on "prior uncharged crimes" in determining the appropriate sentence, in violation of *Denson v. State*, 112 Nev. 489, 493-94, 915 P.2d 284, 287 (1996) (permitting the use of past "life, health, habits, conduct, and mental and moral propensities," but not prior crimes), as evidenced by Judge Breslow's statement, "Crimes like this are against all little girls.

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context of Alfaro's cumulative error claim. Alfaro does not argue that the State's failure in this regard triggers a waiver analysis under *Belcher v. State*, 136 Nev. 261, 464 P.3d 1013 (2020). Assuming without deciding that *Belcher* applies, it is appropriate to address harmlessness because the record is short, and the issue is not close applying the *Kotteakos* standard.

They're against society. . . . [S]ome crimes just transcend the actual people involved. This is one of them." While we do not condone the court's statements, they show that Judge Breslow was "offended by the facts of the crime committed," *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) (internal citations omitted), rather than prejudiced by "information or accusations founded on facts supported only by impalpable and highly suspect evidence," *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Second, Alfaro argues that the length of his sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment because it is unreasonably disproportionate to the crime. *See Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (holding that a sentence within statutory limits is not cruel and unusual unless the statute is unconstitutional, or the sentence is "so unreasonably disproportionate to the offense as to shock the conscience") (internal quotation omitted). But his aggregate sentence of 275 years to life is within the statutory limits. *See* NRS 200.366(3)(c) (establishing range of 35 years to life for each sexual assault against a child); NRS 201.230(2) (establishing range of 10 years to life for lewdness with a child). Alfaro argued for a sentence of 35 years to life, while the State recommended 45 years to life. The sentence the district court imposed differed from the recommended sentences because it ran the sentences on each count consecutively. This court has upheld consecutive life sentences on similar charges. *See Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009); *but see Sims v. State*, 107 Nev. 438, 442, 814 P.2d 63, 65 (1991) (Rose, J., dissenting) (noting that, of the many bases for reversal of a criminal conviction, the sentence "has the greatest ultimate effect on the defendant"). While the sentence's length, the district court's refusal to follow sentencing recommendations of either party, and the court's remarks at sentencing are troubling, precedent does not support reversal for resentencing where, as here, the sentence imposed is within statutory limits and not unconstitutionally disproportionate.

V.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though the errors are harmless individually." *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). As discussed, the district court erred in admitting evidence of two acts of uncharged misconduct and in giving instruction no. 23. We must decide whether these errors, though harmless individually, support reversal for cumulative error. In evaluating cumulative error, we consider (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the

gravity of the crime charged. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008).

This case rests, as many cases of sexual assault do, on the competing testimony of the victim and the defendant. There is no physical evidence of Alfaro's crimes, no members of ED's family testified, and Alfaro denied the charges against him in an interview played for the jury. However, we have repeatedly held that a child victim's testimony is sufficient for conviction, even if uncorroborated, if the victim testifies with "*some* particularity" and bears "some reliable indicia." *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). ED's testimony met those requirements, and the district court, which observed the witnesses, found ED credible and her testimony convincing. Nor did the errors play an important role at trial—the State did not dwell on the erroneously admitted evidence, and the instructional error as to lewdness was not material to the facts and charges in the case. So, while Alfaro's crime and sentence are undoubtedly grave, the quantity and character of the errors was not such as to affect the verdict and we reject the cumulative error claim.

For these reasons, we reverse Alfaro's conviction on count XI and remand for entry of an amended judgment of conviction but otherwise affirm.

Cadish, J., and Gibbons, Sr. J., concur.

LV DEBT COLLECT, LLC, Appellant, *v.* THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, as Trustee for the Certificateholders of CWMBS, INC., CHL MORTGAGE PASS-THROUGH TRUST 2005-02, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-02, Respondent.

No. 84174

August 24, 2023 534 P.3d 693

Appeal from a district court order granting a motion for summary judgment in an action to quiet title. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Affirmed.

[Rehearing denied September 22, 2023]

VC2 Law and *Garrett R. Chase*, Las Vegas, for Appellant.

Akerman LLP and *Ariel E. Stern*, *Natalie L. Winslow*, and *Nicholas E. Belay*, Las Vegas, for Respondent.

Before the Supreme Court, Cadish, Pickering, and Bell, JJ.

OPINION

By the Court, Cadish, J.:

NRS 106.240 provides that certain liens on real property are automatically cleared from the public records after a specified period of time. In particular, NRS 106.240 provides that a lien that is created by a mortgage or deed of trust on real property is conclusively presumed to be discharged "10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due."

At issue in this appeal is whether a loan secured by real property becomes "wholly due" for purposes of NRS 106.240 when a Notice of Default is recorded as to the secured loan. We conclude it does not. Accordingly, we affirm the district court's judgment, which determined that the deed of trust continues to encumber the real property at issue in this case.[1]

FACTS AND PROCEDURAL HISTORY

In 2004, nonparty Nanci Quinnear purchased the subject property. Quinnear financed the purchase with a loan from a bank and

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

executed a promissory note and a deed of trust that secured the note. *See generally Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 286 P.3d 249 (2012) (explaining the interrelation between a promissory note and a deed of trust, as well as what it means to be the beneficiary of a deed of trust). The current beneficiary of the deed of trust is respondent Bank of New York Mellon (BNYM).[2] The deed of trust contains a provision cross-referencing Quinnear's promissory note wherein she promised to pay off the full loan balance by 2034. The deed of trust also contains a provision stating that in the event Quinnear defaults on her loan obligation, BNYM has the right to provide her notice of such default. As relevant here, that provision further explains that if BNYM provides such a notice, Quinnear has at least 30 days to cure the default, and if she does not do so, BNYM "at its option, and without further demand, may invoke the power of sale, including the right to accelerate full payment of the Note."

Quinnear defaulted on the loan, and in 2008, BNYM recorded a Notice of Default. The 2008 Notice of Default provided that BNYM "has declared and does hereby declare all sums secured [by the deed of trust] immediately due and payable." Around the same time, Quinnear also defaulted on her homeowners' association (HOA) dues. BNYM did not pursue foreclosure proceedings after recording the 2008 Notice of Default, and in 2011, Quinnear's HOA foreclosed on its "superpriority lien" and acquired the property via credit bid. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014) (explaining that "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust"), s*uperseded by statute on other grounds as stated in Saticoy Bay LLC 9050 W Warm Springs 2079 v. Nev. Ass'n Servs.*, 135 Nev. 180, 180, 444 P.3d 428, 429 (2019). At the time of the HOA's foreclosure, however, Quinnear had filed for bankruptcy. It is unclear from the record how the bankruptcy case was resolved, but it appears that Quinnear retained ownership of the subject property following the bankruptcy case's closure.

In 2013, appellant LV Debt Collect acquired title to the subject property in two different ways: (1) by a deed from the HOA and (2) by a deed from Quinnear.[3] LV Debt Collect then filed this quiet title action in 2016, seeking a declaration that the HOA's foreclosure sale extinguished BNYM's deed of trust and that LV Debt Collect held an unencumbered ownership interest in the property.

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[2]It is undisputed that the deed of trust was validly assigned to BNYM and that BNYM is the current deed of trust beneficiary. For the sake of clarity, we refer to the bank and any deed of trust beneficiaries that preceded BNYM collectively as "BNYM."

[3]The circumstances surrounding the deed from Quinnear to LV Debt Collect are unclear. However, BNYM does not appear to dispute that this deed was effective to transfer whatever interest Quinnear had in the subject property to LV Debt Collect.

In 2020, LV Debt Collect and BNYM filed competing motions for summary judgment, with the overarching issue being the legal effect of the HOA's foreclosure sale, given that it was conducted in violation of the automatic bankruptcy stay. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 135 Nev. 346, 349, 449 P.3d 461, 464 (2019) (recognizing that foreclosure sales conducted in violation of the automatic bankruptcy stay are void unless the stay is retroactively annulled).[4] Before those motions were resolved, however, the district court granted LV Debt Collect leave to file an amended complaint asserting a declaratory relief claim based on NRS 106.240—that the 2008 Notice of Default made the loan secured by BNYM's deed of trust "wholly due," such that by 2018, the deed of trust was extinguished as a matter of law.

The district court heard and ruled on the parties' competing summary judgment motions pertaining to LV Debt Collect's original complaint. In doing so, the district court concluded that "[a]ll persons or entities who were purportedly granted title or an interest in the property through the HOA sale or subsequently obtained title from the HOA, including [LV Debt Collect] have no valid interest in the property." Thereafter, LV Debt Collect filed a motion for reconsideration arguing, among other things, that the district court overlooked the legal significance of the deed from Quinnear and that, despite the HOA's foreclosure being void, LV Debt Collect still had standing to assert its declaratory relief claim in its amended complaint. Notwithstanding its determination that LV Debt Collect had no valid interest in the property, the district court granted LV Debt Collect's motion in part and allowed LV Debt Collect's NRS 106.240 claim to proceed.

A second round of summary judgment motion practice ensued, wherein the parties raised competing arguments as to the applicability of NRS 106.240. Thereafter, the district court entered an order granting summary judgment for BNYM, reasoning that the 2008 Notice of Default did not make the loan "wholly due" for purposes of NRS 106.240, such that BNYM's deed of trust continued to encumber the subject property. This appeal followed.

DISCUSSION

We review de novo a district court's decision to grant summary judgment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). In this case, no genuine issues of material facts exist, and the primary issue presented is the interpretation of NRS 106.240, which is a legal issue that we also review de novo. *Williams v. United Parcel Servs.*, 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013).

[4]LV Debt Collect attempted repeatedly to obtain a retroactive annulment of the bankruptcy stay, but the bankruptcy court rejected those attempts.

Before addressing NRS 106.240, we must first address the district court's determination in its first summary judgment order that LV Debt Collect has no interest in the subject property. We agree with LV Debt Collect that the district court erred in this respect. LV Debt Collect has an interest in the property by virtue of the deed it received from Quinnear. But to the extent that LV Debt Collect contends there are questions of material fact as to whether it holds unencumbered title to the subject property by virtue of the deed it received from the HOA, those arguments are meritless. Namely, it is undisputed that the HOA conducted its foreclosure sale (and obtained the property via credit bid at that sale) in violation of the automatic bankruptcy stay, which rendered the sale void. *SFR Invs.*, 135 Nev. at 349, 449 P.3d at 464; *see also Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018) ("A party's status as a [bona fide purchaser] is irrelevant when a defect in the foreclosure proceeding renders the sale void."). Accordingly, LV Debt Collect has standing to raise its NRS 106.240 argument solely by virtue of the deed it received from Quinnear. *See Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (observing that this court considers appeals only when a "justiciable controversy" between the parties exists and that a lack of standing precludes the existence of a justiciable controversy).

Turning to NRS 106.240, that statute provides that certain liens on real property are discharged by operation of law ten years after the related debt becomes "wholly due." The statute reads in its entirety as follows:

> The lien heretofore or hereafter created of any mortgage or deed of trust upon any real property, appearing of record, and not otherwise satisfied and discharged of record, *shall at the expiration of 10 years after the debt secured by the mortgage or deed of trust according to the terms thereof or any recorded written extension thereof become wholly due*, terminate, and it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged.

(Emphasis added.)

LV Debt Collect contends that language in the 2008 Notice of Default made the debt secured by BNYM's deed of trust wholly due for purposes of NRS 106.240. The relevant language states that BNYM "has declared and does hereby declare all sums secured [by the deed of trust] immediately due and payable." Thus, according to LV Debt Collect, it is now "conclusively presumed that the debt [secured by BNYM's deed of trust] has been regularly satisfied and the lien discharged."

We disagree and are instead persuaded that BNYM's proffered reading of NRS 106.240 is more consistent with the statute's plain

language. *See Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) ("[W]hen a statute's language is plain and its meaning clear, the court will apply that plain language."). In particular, as BNYM observes, NRS 106.240 plainly states that a debt "become[s] wholly due" only "according to" either of two things: (1) the "terms thereof," referring to the mortgage or deed of trust, or (2) "any recorded written extension thereof." Thus, when there is no recorded extension of the due date, the terms of the mortgage or deed of trust dictate when the debt becomes wholly due. As mentioned previously, the deed of trust's terms include a discretionary acceleration clause.[5] That clause provides that BNYM could exercise its option to "accelerate full payment of the Note" only if Quinnear failed to cure a default after being given notice of the default and at least 30 days to cure the default. Thus, the deed of trust's terms permit BNYM to accelerate the loan only if Quinnear failed to cure the default after being given notice of that default and at least 30 days to cure it.[6] The Notice of Default satisfied the notice-and-cure preconditions in the acceleration clause, but the Notice of Default could not itself accelerate the loan under the terms of the acceleration clause because BNYM could not exercise that option until Quinnear failed to cure the default by the date specified in the Notice of Default. Moreover, even if a deed of trust has an acceleration clause that authorizes the lender to accelerate a loan via a Notice of Default, such language would be invalid because NRS 107.080(2)-(3) requires a Notice of Default to give a borrower 35 days to cure the default, which is

[5]The at-issue provision in the deed of trust provides as follows:

> 22: Acceleration, Remedies. Lender shall give notice to [Quinnear] prior to acceleration following [Quinnear's] breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to [Quinnear], by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform [Quinnear] of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of [Quinnear] to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option, and without further demand, may invoke the power of sale, including the right to accelerate full payment of the Note, and any other remedies permitted by Applicable Law.

[6]Citing *SFR Investments Pool 1, LLC v. U.S. Bank N.A.*, 138 Nev. 174, 507 P.3d 194 (2022), LV Debt Collect suggests that this court already held that recording a Notice of Default renders a loan wholly due. We disagree. *See Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151, 321 P.3d 875, 877 (2014) (observing that this court reviews de novo the interpretation of its previous opinions). Although we observed in dicta that recording a Notice of Default might be sufficient to accelerate a loan, we also expressly "decline[d] to definitively resolve" the issue. *SFR Invs.*, 138 Nev. at 175 n.2, 507 P.3d at 195 n.2.

antithetical to the concept of "accelerating" a loan.[7] *See SFR Invs. Pool 1, LLC v. U.S. Bank N.A.*, 138 Nev. 174, 179 & n.6, 507 P.3d 194, 198 & n.6 (2022) (observing that publicly recorded documents must be interpreted in a manner that harmonizes them with statutory provisions). Consequently, despite BNYM's 2008 Notice of Default arguably containing language purporting to accelerate the loan (i.e., BNYM "has declared and does hereby declare all sums secured [by the deed of trust] immediately due and payable"), the deed of trust's terms did not permit BNYM to do so. Therefore, under NRS 106.240's plain language, the 2008 Notice of Default did not trigger the statute's 10-year time frame.

In addition to being consistent with NRS 106.240's plain language, that conclusion also furthers the statute's purpose. *Cf. City of Reno v. Yturbide*, 135 Nev. 113, 115-16, 440 P.3d 32, 35 (2019) ("Where the language of the statute is plain and unambiguous, a court should not add to or alter the language to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports."). Namely, NRS 106.240 is Nevada's ancient-mortgage statute, the purpose of which "is to permit . . . purchasers and encumbrancers, in appraising the title [to property], to ignore mortgages whose maturity exceeds the statutory period." Nancy Saint-Paul, *Clearing Land Titles* § 6:5 (3d ed. 2022); *see also id.* §§ 6:6-6:50 (compiling other states' ancient-mortgage statutes and cases interpreting them). In other words, the purpose of NRS 106.240 is to "clear[ ] titles of old and obsolete mortgages" without the need for a prospective purchaser or encumbrancer to file a quiet title action. *Town of Pembroke v. Gummerus*, No. 311622GHP, 2008 WL 2726524, at *9 (Mass. Land Ct. July 15, 2008). It should go without saying that a deed of trust that is the subject of pending litigation "is neither obsolete nor inactive," *LBM Fin. LLC v. Shamus Holdings, Inc.*, No. CIV. 09-11668-FDS, 2010 WL 4181137, at *4 (D. Mass. Sept. 28, 2010), and LV Debt Collect's proffered interpretation of NRS 106.240 would lead to litigation incongruous with the statute's purpose. *See Gallagher v. City of Las Vegas*, 114 Nev. 595, 599-600, 959 P.2d 519, 521 (1998) (observing that statutory interpretation should avoid absurd results).

Indeed, as BNYM observes, under LV Debt Collect's proffered interpretation of NRS 106.240, property owners would be incentivized to "engage in run-out-the-clock gamesmanship" by instituting litigation over a Notice of Default and prolonging the litigation until NRS 106.240's 10-year period expires. Relatedly, the Legislature

[7]We note that the acceleration clause in Quinnear's deed of trust provides for at least a 30-day cure period, whereas NRS 107.080(2)-(3) requires a Notice of Default to provide a 35-day cure period. We are not called on to address this difference here.

repeatedly amended NRS 107.080—Nevada's statute regarding Notices of Default—in the wake of the late-2000s financial crisis and the ensuing onslaught of foreclosures throughout Nevada.[8] It stands to reason that if the Legislature intended for a Notice of Default to trigger NRS 106.240's 10-year time frame, it would have amended NRS 107.080 to eliminate the 35-day cure period and, more importantly, add Notices of Default to NRS 106.240's list of documents that can render a loan "wholly due." *Cf. Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014) (recognizing the canon of statutory construction that a legislature's inclusion of certain things in a statute implies a conscious decision on the legislature's part to exclude other things). Instead, a deed of trust can only be presumed satisfied under NRS 106.240 when ten years have passed after the last possible date the deed of trust is in effect, as shown by the maturity date on the face of the deed of trust or any recorded extension thereof, rather than a document like a Notice of Default that can sometimes have multiple iterations, recordings, rescissions, and other circumstances that would not give the clarity to property records this statute was designed to bring. *Cf. LDG Golf, Inc. v. Bank of Am. N.A.*, No. 83056, 2022 WL 6838390, at *1 (Nev. Oct. 11, 2022) (Order of Affirmance) (addressing a circumstance where multiple Notices of Default were filed and only one was rescinded, thereby creating, rather than alleviating, confusion in the property records).

Finally, even if recording a Notice of Default could render a loan wholly due, the 2008 Notice of Default in this case was not sufficient to do so. Namely, this court has held that acceleration of a debt must "be exercised in a manner so clear and unequivocal that it leaves no doubt as to the lender's intention." *Clayton v. Gardner*, 107 Nev. 468, 470, 813 P.2d 997, 999 (1991) (quoting *United States v. Feterl*, 849 F.2d 354, 357 (8th Cir. 1988)). Here, although the 2008 Notice of Default stated that BNYM "does hereby declare all sums secured [by the deed of trust] immediately due and payable," the Notice also provided that Quinnear could cure the default "upon the payment of the amounts required by [NRS 107.080] without requiring payment of that portion of the principal and interest which would not be due had no default occurred." Given this conflicting language, we conclude that the 2008 Notice of Default was not "so clear and

[8]*See* 2009 Nev. Stat., ch. 247, § 1, at 1005; 2009 Nev. Stat., ch. 364, § 2, at 1755-56; 2009 Nev. Stat., ch. 443, § 5, at 2482; 2009 Nev. Stat., ch. 484, § 7, at 2790-91; 2010 Nev. Stat., ch. 10, at 79; 2011 Nev. Stat., ch. 81, § 9, at 332-36; 2011 Nev. Stat., ch. 511, § 1, at 3511; 2011 Nev. Stat., ch. 513, § 6, at 3536-58; 2011 Nev. Stat., ch. 525, § 2, at 3656; 2013 Nev. Stat., ch. 302, § 1, at 1419-20; 2013 Nev. Stat., ch. 330, § 5, at 1549-50; 2013 Nev. Stat., ch. 403, § 17, at 2197; 2015 Nev. Stat., ch. 316, § 4, at 1617-19; 2015 Nev. Stat., ch. 517, § 1.5, at 3317, 3320-22; 2017 Nev. Stat., ch. 571, § 1.5, at 4085-91; 2019 Nev. Stat., ch. 238, § 9, at 1352-56.

unequivocal" as to "leave[ ] no doubt as to [BNYM's] intention." *Clayton*, 107 Nev. at 470, 813 P.2d at 999. Accordingly, and for that additional reason, the 2008 Notice of Default did not trigger NRS 106.240's 10-year time frame.

In sum, the secured debt here did not become wholly due when the Notice of Default was recorded in 2008 for any and all of the following reasons: (1) a Notice of Default is not identified in NRS 106.240 as a document that can render a secured loan "wholly due" for purposes of triggering the statute's 10-year time frame, (2) Nevada law requires a cure period following a Notice of Default before acceleration of the entire outstanding debt, and (3) acceleration can only occur if its exercise is clear and unequivocal, and the Notice of Default's purported acceleration language was not sufficiently clear and unequivocal here. The district court therefore correctly determined that BNYM's lien has not been discharged by operation of law and that the deed of trust continues to encumber the subject property. Accordingly, we affirm the district court's judgment.

Pickering and Bell, JJ., concur.