LUCKY LUCY D LLC, DBA LUCKY CLUB CASINO & HOTEL, APPELLANT, *v.* LGS CASINO LLC; LUCKY CLUB, LLC; AND 3227 CIVIC CENTER, LLC, RESPONDENTS.

No. 83833

LUCKY LUCY D LLC, DBA LUCKY CLUB CASINO & HOTEL, APPELLANT, *v.* LGS CASINO LLC; LUCKY CLUB, LLC; AND 3227 CIVIC CENTER, LLC, RESPONDENTS.

No. 84257

August 24, 2023 534 P.3d 689

Consolidated appeals from district court orders on motions for summary judgment and a post-judgment award of attorney fees and costs in a contract action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Affirmed in part and reversed in part.

[Rehearing denied September 22, 2023]

[En banc reconsideration denied October 24, 2023]

McNutt Law Firm, P.C., and *Daniel R. McNutt* and *Matthew C. Wolf*, Las Vegas, for Appellant.

The Wright Law Group, P.C., and *John Henry Wright*, Las Vegas, for Respondents.

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

OPINION

By the Court, BELL, J.:

In these consolidated appeals, we consider whether business actions taken in response to the COVID-19 pandemic violated an ordinary course covenant in an asset purchase agreement. Generally, an ordinary course covenant requires the seller to operate its business in the usual manner between the time the agreement is signed and closing. Such a covenant was included in the purchase agreement for the sale of a casino and hotel at issue here, and when the seller closed the casino and laid off employees due to the pandemic and the Governor's resulting emergency directive, the buyer asserted breach of the covenant.

In granting a motion for summary judgment in favor of the buyer, the district court agreed that the seller had breached the ordinary course covenant by closing the casino and hotel in response to the COVID-19 pandemic. We hold the district court erred in granting summary judgment for the buyer. In closing the casino and hotel

pursuant to the emergency directive, the seller was merely following the law so as to maintain its gaming licenses and thus did not materially breach the agreement. Accordingly, we reverse that portion of the district court's order.

The district court also denied the seller's motion for summary judgment based on the buyer's failure to obtain the necessary gaming licenses. Because the record reflects that the buyer's applications for gaming licenses were delayed—not refused—we affirm that portion of the district court's order.

Finally, the district court granted the buyer's motion for attorney fees and costs as the prevailing party under the agreement. Because we reverse the portion of the district court's order granting summary judgment to the buyer, we also reverse the order granting attorney fees and costs.

BACKGROUND

The relevant facts in this case are undisputed. The Lucky Club Casino & Hotel, located in North Las Vegas, is owned by Appellant Lucky Lucy D LLC. In April 2019, Lucky Lucy entered into an agreement to sell the property to Respondent LGS Casino LLC. The agreement required LGS to make an earnest money deposit of $350,000. The agreement also provided for a forty-five-day due diligence period. After the expiration of a forty-five-day due diligence period, the earnest money deposit became refundable only in the event of a "material default" by Lucky Lucy, per section 1.4(b) of the agreement. LGS provided the earnest money deposit in May 2019.

The agreement also contained an ordinary course covenant: under section 2.2(i), Lucky Lucy warranted that it would, before closing, maintain the property and conduct related business "in a manner generally consistent with the manner in which [Lucky Lucy] has operated and maintained the [p]roperty and [a]ssets prior to the date hereof." Further, while the sale was pending, section 1.5(c) required Lucky Lucy to remain "in material compliance with all applicable licensing and gaming regulations." Closing was contemplated to occur within a year after the due diligence period ended.

In March 2020, in response to the COVID-19 pandemic, the Governor issued Declaration of Emergency Directive 002, mandating closure of all nonessential businesses. With limited exceptions, the closures included casinos, restaurants, hotels, and nonessential governmental agencies. Lucky Lucy complied with the directive and temporarily closed the Lucky Club.

In an email to LGS, as required by section 2.4(c) of the agreement, Lucky Lucy provided notice that the Governor's emergency directive materially affected the business. LGS then sent Lucky Lucy a notice of breach and demanded Lucky Lucy cure the breach as provided in sections 2.2(i) and 2.2(q) (warrantying that "[s]ince

the most recent financial statements delivered to [respondents], there have not been any material adverse changes in the business, financial condition, operations, results of operations, or future prospects of [Lucky Lucy]"). Given the continuing closure directives from the Governor, Lucky Lucy was unable to reopen the Lucky Club within the agreement's fifteen-day cure period.

The pandemic affected LGS's duties under the agreement as well. The agreement required LGS to take "all steps necessary including obtaining necessary approvals from the Nevada Gaming Commission and other governmental authorities (the 'Gaming Approvals') to ensure" closing within one year following the due diligence period. Due to the directive, however, the Nevada Gaming Commission vacated a required class for one of LGS's members and continued a previously scheduled May 2020 hearing where LGS had planned to obtain gaming license approval. The actions of the Gaming Commission prevented the sale from moving forward at that time.

After these obstacles arose, LGS terminated the agreement on April 14, 2020. LGS's termination letter did not reference any uncured breach by Lucky Lucy. The letter focused on the impossibility of completing the transaction. After termination of the agreement, the parties were unable to agree on who was entitled to the earnest money deposit. LGS sued Lucky Lucy for return of the deposit, alleging various contract claims. Lucky Lucy answered and counterclaimed, alleging breach of contract and seeking declaratory relief. The district court ultimately granted summary judgment for LGS and denied Lucky Lucy's competing summary judgment motion. The district court later granted LGS's motion for attorney fees and costs pursuant to the parties' purchase agreement. Lucky Lucy now appeals.

DISCUSSION

Lucky Lucy did not materially breach the agreement

Lucky Lucy argues the district court erroneously determined Lucky Lucy breached section 2.2(i) of the agreement. Reviewing de novo, *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing summary judgments de novo), we agree.

As noted, section 2.2(i) of the agreement contained an ordinary course covenant requiring Lucky Lucy to maintain the property and conduct the business "in a manner generally consistent with the manner in which [Lucky Lucy] has operated and maintained" the property and business before the agreement. The relevant question here is whether temporarily closing the property pursuant to the Governor's directive constituted a material breach of the agreement that permitted LGS to seek a return of its earnest money deposit. To

answer that question, we look to the plain language of the ordinary course covenant. *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012) (holding that in interpreting contracts, "the initial focus is on whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written").

First, as the party asserting a breach of the agreement, and of the ordinary course covenant specifically, LGS carried the burden to demonstrate Lucky Lucy's actions deviated from how it had generally conducted its business in the past. *See Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 899 (9th Cir. 2013) ("Under Nevada law, 'the plaintiff in a breach of contract action [must] show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach.'" (alteration in original) (quoting *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006))); *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*, C.A. No. 2020-0310-JTL, 2020 WL 7024929, at *50 (Del. Ch. Nov. 30, 2020), *aff'd*, 268 A.3d 198 (Del. 2021) (holding that where a buyer claims that a seller has breached an ordinary course covenant, the buyer carries the burden of demonstrating a breach).

Next, because the ordinary course covenant is limited to the manner in which Lucky Lucy operated before the parties signed the agreement, the court may look only to how Lucky Lucy has operated in the past. *See Level 4 Yoga, LLC v. CorePower Yoga, LLC*, C.A. No. 2020-0249-JRS, 2022 WL 601862, at *24 (Del. Ch. Mar. 1, 2022) (holding that where "an ordinary course provision includes the phrase 'consistent with past practice' or a similar phrase," the court looks only to how the specific company has operated in the past (quoting *Snow Phipps Grp., LLC v. KCAKE Acq., Inc.*, C.A. No. 2020-0282-KSJM, 2021 WL 1714202, at *38 (Del. Ch. Apr. 30, 2021))). The ordinary course covenant at issue here, however, also broadly provides that Lucky Lucy need only conduct its business in a manner that is "*generally* consistent" with the manner in which it had done so in the past. "Generally," is defined as "in a general manner," or "in disregard of specific instances and with regard to an overall picture." *Generally*, *Merriam Webster's Collegiate Dictionary* 521 (11th ed. 2007).

In reviewing Lucky Lucy's actions in response to the COVID-19 pandemic, we conclude Lucky Lucy conducted the business in a manner that was generally consistent with the manner in which it had done so in the past. Under NRS 463.615(1)-(2), if any gaming company "does not comply with the laws of this state and the regulations of the [Gaming] Commission, the Commission may, in its discretion . . . [r]evoke, limit, condition or suspend the license" of the company or fine the company "in accordance with the laws of this state and the regulations of the [Gaming] Commission." And under Section 3.14 of the agreement, "[t]he parties further agree that

if anything in this [a]greement is in violation or contravention of any gaming laws that such provision shall be null and void."

Further, the Governor's Emergency Directives ordering the temporary closure of casinos carried with them the force of law for the duration of the state of emergency. *See* Nevada's COVID-19 Declaration of Emergency Directive 002; *see also generally* NRS 414.060-414.070 (listing the governor's powers during a state of emergency, including the power to enforce all laws and regulations relating to the emergency). Because Lucky Lucy previously complied with Nevada laws and maintained its gaming licensing, we conclude LGS failed to meet its burden in establishing Lucky Lucy's actions in response to the COVID-19 pandemic were not generally consistent with Lucky Lucy's prior actions. Lucky Lucy maintained the property and was able to reopen on June 4, 2020, once certain COVID restrictions were lifted—in fact, Lucky Lucy reported increased revenue after reopening. Accordingly, Lucky Lucy did not materially default under section 1.4(b) of the agreement.[1]

Additionally, Lucky Lucy held the property off the market for nearly a year after the conclusion of the due diligence period. During that time, LGS had the exclusive right to purchase the Lucky Club. The terms of the contract support the conclusion that the earnest money deposit was intended to be compensation for keeping the property off the market, refundable only if Lucky Lucy materially breached the agreement. As LGS failed to establish a material breach of the agreement attributable to Lucky Lucy, the earnest money deposit was not refundable to LGS under section 1.4(b) and Lucky Lucy, not LGS, was entitled to receive the earnest money deposit from the title company. We conclude the district court erred in granting LGS's motion for summary judgment and denying Lucky Lucy's motion for summary judgment as to the earnest money deposit and reverse to that extent.

LGS did not breach the agreement by failing to obtain the necessary gaming licenses

Lucky Lucy asserts that LGS failed to obtain the necessary gaming licenses and bore the risk of default for failing to obtain the licenses. Reviewing de novo, *see Wood*, 121 Nev. at 729, 121 P.3d at 1029, we disagree.

While a buyer typically bears the risk of default where it cannot obtain governmental licensing, *see Nebaco, Inc. v. Riverview Realty Co.*, 87 Nev. 55, 58, 482 P.2d 305, 307 (1971), the record does not reflect that LGS's gaming license applications were denied. The

[1]LGS also does not come to terms with section 1.5(e), which would cast Lucky Lucy in material breach due to a post-due-diligence period financial change only if that change was "within Seller's control," which the pandemic was not.

Nevada Gaming Control Board delayed the compliance classes and informed LGS that its application did not qualify to be placed on the May 2020 agenda. Thus, the record reflects the pandemic and the Governor's directives caused a delay in obtaining approval—not a refusal to approve.

Moreover, the parties used a traditional qualifier, "commercially reasonable efforts," in section 1.11 of their agreement, with regard to the effort level LGS was required to exert to obtain the necessary gaming approvals. *See Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, 2018 WL 4719347, at *86-87 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018) (outlining the five common standards, including "best efforts," "reasonable best efforts," "reasonable efforts," "commercially reasonable efforts," and "good faith efforts"). Thus, in obtaining these approvals, LGS was not required "to take any action that would be commercially detrimental, including the expenditure of material unanticipated amounts or management time." *Id.* at *87 (defining "commercially reasonable efforts"). Accordingly, we conclude LGS did not need to go beyond the efforts made here in seeking license approval.

Because the record demonstrates LGS's gaming licenses were delayed—not refused—we conclude the district court did not err by denying Lucky Lucy's summary judgment motion as to the breach asserted with respect to the gaming licenses. It is not clear from the record whether Lucky Lucy's counterclaims sought relief beyond the award to it of the earnest money deposit but, to the extent Lucky Lucy asserted and sought summary judgment on such claims, we affirm the denial of summary judgment as to them.

Attorney fees and costs

Lastly, because we reverse the district court's order granting summary judgment in favor of LGS, we necessarily reverse the attorney fees and costs award to LGS as the prevailing party. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 494-95, 215 P.3d 709, 726 (2009) ("[I]f we reverse the underlying decision of the district court that made the recipient of the costs the prevailing party, we will also reverse the costs award.").

CONCLUSION

Lucky Lucy did not violate the agreement's ordinary course covenant when it closed the Lucky Club as mandated by the Governor's emergency directive. Because the district court erred in granting LGS's motion for summary judgment and refunding the earnest money deposit to LGS, we reverse that portion of the district court's order and conclude that Lucky Lucy is entitled to retain the earnest money deposit. We further conclude the record reflects

LGS's gaming licenses were delayed, not refused. Accordingly, we affirm the portion of the district court's order denying Lucky Lucy's motion for summary judgment to the extent it sought relief beyond the award to it of the earnest money deposit. Finally, because we reverse the district court's grant of summary judgment in favor of LGS, we also reverse the award of attorney fees and costs to LGS.

CADISH and PICKERING, JJ., concur.

NOUNE DAVITIAN-KOSTANIAN, Appellant, *v.* VAROUJAN KOSTANIAN, Respondent.

No. 84086

August 31, 2023 534 P.3d 700

Appeal from a district court order denying a motion to modify alimony and to reinstate child support. Eighth Judicial District Court, Family Division, Clark County; Vincent Ochoa, Judge.

Affirmed in part, reversed in part, and remanded.

Pecos Law Group and *Jack W. Fleeman* and *Bruce I. Shapiro*, Henderson, for Appellant.

Smith Jain Stutzman and *Radford J. Smith* and *Kimberly A. Stutzman*, Henderson, for Respondent.

Before the Supreme Court, Herndon, Lee, and Parraguirre, JJ.

OPINION

By the Court, Herndon, J.:

In this opinion, we address the district court's jurisdiction to determine and award child support to a handicapped child beyond the age of majority. Relying on NRS 125C.0045(1)(a), the district court in the proceedings below found that it lacked jurisdiction to award support for the parties' adult handicapped child because he had reached the age of majority and support payments for him had previously ceased. We conclude that, while NRS 125C.0045(1)(a) generally requires that modifications to child support be made while the child is still a minor, NRS 125B.110 creates a statutory exception for adult handicapped children in certain circumstances. Thus, we conclude that the district court erred in finding that it did not have jurisdiction to reinstate support as to the child.

We conclude, however, that the district court did not abuse its discretion in denying a request to modify alimony. In this, we clarify that while a 20-percent change in monthly income may constitute a change in circumstances under NRS 125.150(8), it does not compel the district court to make a modification. Rather, it merely permits the court to determine, in its discretion, whether modifying alimony is appropriate. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Underlying divorce and relevant portions of the divorce decree

After more than 25 years of marriage, appellant Noune Davitian-Kostanian and respondent Varoujan Kostanian entered into a stipulated divorce decree in February 2012. Pursuant to the decree, Varoujan paid Noune alimony from November 1, 2011, through October 1, 2021.

At the time of divorce, the parties' youngest child, Alex Kostanian, was still a minor. The decree provided that the parties would share legal custody and required them to consult with an autism specialist for "recommendations as related to autism treatment which may be necessary." The decree also stated that the district court would retain jurisdiction over whether treatment should be implemented and on what was recommended for Alex until he "reaches the age of majority." As for child support, Varoujan was ordered to pay Noune $1,010 per month for Alex until he turned 18 or, if he was still attending high school at that time, until he graduated high school or turned 19.

Alex turned 18 in 2015, and child support payments ceased. Pursuant to the divorce decree, Varoujan's obligation to pay alimony ended on October 1, 2021.

Noune's motion to modify and the district court's order

One day before Varoujan's alimony payment obligation expired, Noune filed the underlying motion requesting, among other things, to modify the alimony payment schedule and reinstate child support payments. After a hearing, the court issued an order denying Noune's motion. The court determined that it lacked jurisdiction over Noune's request for child support because Alex had already reached the age of majority. The court further found that it lacked jurisdiction to consider Noune's request because she did not bring her motion while Alex was still receiving child support payments. The court also denied Noune's request for continued alimony because it determined that there was not a change in circumstances warranting modification under NRS 125.150(8). This appeal followed.

DISCUSSION

The district court has jurisdiction to award adult child support after the age of majority under NRS 125B.110

Noune argues that the district court erred in determining that it lacked jurisdiction to order child support beyond the age of majority. Noune contends that the district court had jurisdiction under NRS 125B.110, as the statute authorizes continuing support for handicapped adult children in some circumstances.

The district court's interpretation and construction of a statute presents a question of law that this court reviews de novo. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) (citing *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003)). "When interpreting a statute, we look first to its plain language." *Id.* at 370, 252 P.3d at 209. "If a statute's language is plain and unambiguous, we enforce the statute as written, without resorting to the rules of construction." *Smith v. Zilverberg*, 137 Nev. 65, 72, 481 P.3d 1222, 1230 (2021) (citing *Local Gov't Emp.-Mgmt. Relations Bd. v. Educ. Support Emps. Ass'n*, 134 Nev. 716, 718, 429 P.3d 658, 661 (2018)).

Generally, a parent's court-ordered child support obligation ends when the child reaches the age of majority. *Edgington v. Edgington*, 119 Nev. 577, 582, 80 P.3d 1282, 1286 (2003); *see also* NRS 125C.0045(9)(b). However, the Nevada Legislature created an exception with NRS 125B.110(1):

> A parent shall support beyond the age of majority his or her child with a handicap until the child is no longer handicapped or until the child becomes self-supporting. The handicap of the child must have occurred before the age of majority for this duty to apply.

We conclude that the district court erred when it found it lacked jurisdiction to make a post-majority child support order. In rejecting Noune's motion, the district court incorrectly determined that it could not consider her request for support pursuant to NRS 125B.110(1) because NRS 125C.0045(1)(a) requires that any modifications to a child support order be made while the child is still a minor. The district court also incorrectly found that "once a child reaches the age of majority and support payments cease, a parent cannot then request support payments for a disabled adult child." The plain language of NRS 125B.110 explicitly provides for child support "beyond the age of majority" in certain circumstances. *See Edgington*, 119 Nev. at 582, 80 P.3d at 1286 (acknowledging that NRS 125B.110 is a statutory exception to the general rule that child support obligations cease when the child reaches the age of majority). And while the statute explains that the child's handicap "must have occurred before the age of majority," NRS 125B.110(1) does not place any limits on when the district court may order a parent to provide such support. By enacting NRS 125B.110, the Legislature furthered Nevada's policies "[t]o encourage parents to share the rights and responsibilities of child rearing," NRS 125C.001(2), and "improve the circumstances of disabled citizens" so that an individual's worth is not tied to their physical or mental handicap. *Edgington*, 119 Nev. at 586, 80 P.3d at 1289 (quoting *McKay v. Bergstedt*, 106 Nev. 808, 825, 801 P.2d 617, 628 (1990)).

When the district court read NRS 125B.110 as constrained by NRS 125C.0045(1)(a), it ignored the plain language of the statute and undermined the legislative intent and the policies underlying NRS 125B.110.

The district court also found that because over five years had passed since Alex last received child support payments, the court could no longer award child support. However, the time gap itself does not serve as a bar; rather, it is simply a factor for the district court to consider, as impairments can change over time. *See* NRS 125B.110(1) (acknowledging that a child can become self-supporting despite being diagnosed with a handicap). The plain language of NRS 125B.110 does not require the movant to immediately seek continuing child support when the child reaches the age of the majority, nor does it impose a time limit for a parent or dependent adult child to seek a support order. Indeed, courts in jurisdictions with analogous laws have made similar observations. *See, e.g.*, *Hastings v. Hastings*, 841 So. 2d 484, 486 (Fla. Dist. Ct. App. 2003) (providing that a dependent adult child has standing to seek support from his parents "at any time [because] the parents remain responsible for support throughout the dependency, and throughout their lives"); *Stern v. Stern*, 473 A.2d 56, 62-63 (Md. Ct. Spec. App. 1984) (rejecting the contention that an emancipated child could not become dependent again due to a mental or physical infirmity). Thus, we conclude that the district court erred in finding that it lacked jurisdiction to order adult child support for Alex.[1]

The district court failed to make the necessary findings under NRS 125B.110

"This court reviews the district court's decisions regarding child support for an abuse of discretion." *Rivero v. Rivero*, 125 Nev. 410, 438, 216 P.3d 213, 232 (2009), *overruled on other grounds by Romano v. Romano*, 138 Nev. 1, 501 P.3d 980 (2022). "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014).

[1]This result is also consistent with cases from other jurisdictions. *See, e.g.*, *Miller v. Ark. Office of Child Support Enf't*, 458 S.W.3d 733, 738-39 (Ark. Ct. App. 2015) (holding that child support did not automatically terminate for a disabled adult child even though three years had passed since he reached the age of majority); *Koltay v. Koltay*, 667 P.2d 1374, 1377 (Colo. 1983) (compiling cases and holding that the district court has "continuing jurisdiction to order post-minority support for a disabled child" even after the original support obligation ended); *cf. Fernandez v. Fernandez*, 306 So. 3d 1013, 1016-17 (Fla. Dist. Ct. App. 2020) (concluding that the court has jurisdiction to consider an adult child's request for support made after the parent's support obligation pursuant to the divorce decree concluded).

When evaluating a request for adult child support, NRS 125B.110 requires the district court to make several findings. First, the district court must find whether the adult child is handicapped from an impairment that occurred as a child. *See* NRS 125B.110(1) ("The handicap of the child must have occurred before the age of majority."); *Edgington*, 119 Nev. at 586, 80 P.3d at 1289 (defining an "impairment" as "any physical or mental . . . limitation that can be determined by medically accepted diagnostic techniques"). Then, the district court must find whether the child is unable to be financially self-supporting.[2] *Edgington*, 119 Nev. at 585-86, 80 P.3d at 1288-89. Finally, the district court must find whether there is a causal relationship between the child's impairment and the child being incapable of engaging in substantial gainful activity. *Id.* at 585-87, 80 P.3d at 1288-89 (defining "substantial gainful activity" as "work activity that results in the child being financially self-supporting"); *see also* NRS 125B.110(4) (explaining that a "handicap" for purposes of the statute requires that the adult child be unable "to engage in any substantial gainful activity *by reason of* " their impairment (emphasis added)).

Since the district court here determined that it lacked jurisdiction to consider any request for adult child support, it did not make the requisite findings as to whether Alex is entitled to continuing support pursuant to NRS 125B.110. Without such factual findings, this court's ability to conduct "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); *see also 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."). Accordingly, on remand the district court must consider Noune's motion and make appropriate factual findings.

Noune did not demonstrate that there was a change in circumstances to warrant modifying the parties' alimony agreement

Noune argues that, when considering her alimony request pursuant to NRS 125.150, the district court improperly considered only whether Varoujan's income had changed by 20 percent or more and did not consider whether her obligation to care for Alex, coupled with the realities of her losing alimony payments, constituted a change in circumstances warranting modification. Varoujan argues that Noune did not address any factors set forth in NRS 125.150 to warrant extending alimony and that her request was deficient on its face.

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[2]Other sources of income, such as public assistance, may make the child self-supporting. NRS 125B.110(2).

"This court reviews district court decisions concerning divorce proceedings," such as spousal support, "for an abuse of discretion." *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004); *Gilman v. Gilman*, 114 Nev. 416, 422, 956 P.2d 761, 764 (1998) (reviewing a district court ruling on a motion to modify alimony for an abuse of discretion). Furthermore, this court will not disturb the district court's rulings if they are supported by substantial evidence, which is "that which a sensible person may accept as adequate to sustain a judgment." *Williams*, 120 Nev. at 566, 97 P.3d at 1129.

NRS 125.150(8) provides that unaccrued alimony payments "*may* be modified upon a showing of changed circumstances." (Emphasis added.) The statute further directs the court to analyze any factors "the court considers relevant," including changes to "the income of the spouse who is ordered to pay alimony," specifying that "a change of 20 percent or more in the gross monthly income of [the paying spouse] shall be deemed to constitute changed circumstances requiring a *review* for modification of the payments of alimony." NRS 125.150(8), (12) (emphasis added); *see also Siragusa v. Siragusa*, 108 Nev. 987, 994-96, 843 P.2d 807, 812-13 (1992) (concluding that a paying spouse's discharged property settlement obligation, which affected the finances of both spouses, was a "changed circumstance" for purposes of modifying alimony).

We conclude that the district court did not abuse its discretion in denying Noune's motion to modify alimony. Noune's only arguments for a change of circumstances are that Varoujan's income has increased significantly and that she now needs to care for Alex as a disabled adult child without receiving child support from Varoujan. Yet, the record shows that Noune failed to provide adequate evidentiary support for her claims.[3] Even assuming that Noune demonstrated a change in circumstances, the plain language of the statute only requires the district court to "review" an existing alimony payment schedule upon such a showing. *See* NRS 125.150(12); *Zilverberg*, 137 Nev. at 72, 481 P.3d at 1230 (providing that this court will generally enforce a statute's plain language). Indeed, the statute ultimately commits the matter to the district court's discretion, providing that the court "may" modify spousal support upon a showing of changed circumstances. NRS 125.150(8).

The record supports the court's finding that Noune failed to show a change in circumstances warranting modification. Moreover, the record otherwise demonstrates that the court properly considered

[3]The record also shows that Noune did not demonstrate that there was "mistake, fraud, collusion, accident, or some other ground of like nature," to warrant changing the parties' stipulated alimony award. *See Citicorp Servs., Inc. v. Lee*, 99 Nev. 511, 513, 665 P.2d 265, 266 (1983) ("A stipulation may be set aside upon a showing that it was entered into through mistake, fraud, collusion, accident or some ground of like nature.").

multiple factors in making its decision. Thus, we conclude that the court did not abuse its discretion in denying Noune's request to modify spousal support.

CONCLUSION

Nevada's handicapped child support statute, NRS 125B.110, creates a statutory exception to the general rule under NRS 125C.0045(1)(a)'s requirement that modification to child support orders may be made only while the child is still a minor. Thus, we conclude that the district court erred in determining that it lacked jurisdiction to consider Noune's request for adult child support. Moreover, while a change in monthly income may constitute a change in circumstances under NRS 125.150(8) that authorizes the district court to review a request to modify alimony, it does not require modification. Here, we conclude that the district court acted within its discretion in denying the request to modify alimony.

Accordingly, we reverse and remand the district court's order denying adult child support and affirm its denial of the request to modify alimony.

Lee and Parraguirre, JJ., concur.

THE STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC AND BEHAVIORAL HEALTH, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE CHRISTY L. CRAIG, District Judge, Respondents, and ANDREW ALIANO; DESHAWN BENJAMIN; DANE GEE; CARLOS GUZMAN; ANTHONY JOHNSON; CHAVELE JOHNSON; YASIEL OJEDA; ROBERTO OTERO; DOUGLAS TALLEY; YOLANNE TOH; and TIMOTHY WALLACE, Real Parties in Interest.

No. 85554

August 31, 2023 534 P.3d 706

Original petition for writ of certiorari or mandamus challenging eleven district court orders imposing contempt sanctions of $500 for each day Petitioner fails to accept real parties in interest for restorative treatment.

Petition denied.

Aaron D. Ford, Attorney General, and *Julie A. Slabaugh*, Chief Deputy Attorney General, *Susanne M. Sliwa*, Deputy Attorney General, and *Jeffrey M. Conner*, Deputy Solicitor General, Carson City, for Petitioner.

Darin F. Imlay, Public Defender, and *Arlene Heshmati*, Chief Deputy Public Defender, Clark County, for Real Parties in Interest.

Before the Supreme Court, En Banc.

OPINION

By the Court, Bell, J.:

In this opinion, we clarify that a district court may properly hold a party in civil contempt for failure to fulfill a statutory and constitutional obligation to accept incompetent criminal defendants for restorative treatment.

This matter arises from district court orders holding Petitioner Nevada Division of Public and Behavioral Health (DPBH) in contempt for violating competency court orders. The competency orders were issued in relation to real parties in interest, who are eleven criminal defendants in Nevada (defendants). Defendants were all deemed incompetent to assist in their own defense and ordered to psychiatric treatment under NRS 178.425. After significant delays in accepting defendants for treatment, defendants filed

motions to dismiss their cases or, alternatively, for DPBH to show cause as to why it should not be held in contempt.

The district court denied the motions to dismiss but found DPBH in contempt for failing to comply with the court orders and issued sanctions. DPBH filed a petition for certiorari or mandamus in this court, arguing that the district court lacked jurisdiction to find DPBH in contempt and that the district court manifestly abused its discretion because DPBH could not comply with the orders.

DISCUSSION

We elect to hear the petition for writ of certiorari or mandamus

A writ of certiorari is available when an inferior tribunal exceeds its jurisdiction and there is no plain, speedy, or adequate remedy at law. NRS 34.020(2); *Warren v. Eighth Judicial Dist. Court*, 134 Nev. 649, 650, 427 P.3d 1033, 1035 (2018). "[T]he inquiry upon a petition for a writ of certiorari is limited to whether the inferior tribunal acted in excess of its jurisdiction." *Dangberg Holdings Nev., LLC v. Douglas County*, 115 Nev. 129, 138, 978 P.2d 311, 316 (1999) (internal quotation marks omitted).

A writ of mandamus is available "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." NRS 34.160; *Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 679-80, 476 P.3d 1194, 1196 (2020). This court only issues writs of mandamus when (1) the petitioner establishes a legal right to have the act that their petition requests done; (2) the respondent has a duty to perform the requested action; and (3) the petitioner "has no other plain, speedy, and adequate remedy." *Walker*, 136 Nev. at 680, 476 P.3d at 1196 (internal quotation marks omitted). The standard of review is highly deferential:

> Where a district court is entrusted with discretion on an issue, the petitioner's burden to demonstrate a clear legal right to a particular course of action by that court is substantial; [this court] can issue traditional mandamus only where the lower court has manifestly abused that discretion or acted arbitrarily or capriciously.

Id. (emphases omitted). Under this standard, a lower court must go further than commit "a mere error in judgment." *Id*. at 680, 476 P.3d at 1197 (internal quotation marks omitted). Rather, the lower court must have overridden or misapplied the law, or acted out of prejudice, bias, or ill will. *Id*. at 680-81, 476 P.3d at 1197.

"[T]he decision to entertain a petition for a writ of certiorari" or a writ of mandamus is within this court's discretion. *Warren*, 134 Nev. at 650, 427 P.3d at 1035 (internal quotation marks omitted); *Walker*, 136 Nev. at 679, 476 P.3d at 1196. Because DPBH has no remedy at law to challenge a contempt order, we exercise discretion

to entertain DPBH's petition. *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000) (explaining that compared to direct appeal, writ petitions are "more suitable vehicles for review of contempt orders").

The district court had jurisdiction to hold DPBH in contempt

The contempt process largely depends on whether the contempt is classified as civil or criminal and whether the contempt is direct or indirect. Here the contempt order is undisputedly civil in nature—the intent of the contempt was to compel DPBH to comply with the court's order, and the contempt order provided a purge clause. *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804, 102 P.3d 41, 45 (2004) ("Whether a contempt proceeding is classified as criminal or civil in nature depends on whether it is directed to punish the contemnor or, instead, coerce his compliance with a court directive.").

While the parties agree the contempt order is civil, they disagree on whether the contempt is direct or indirect. Direct contempt "may be punished summarily" and may take the form of a person disrupting a court proceeding. NRS 22.030(1). In direct contempt, the events occurred "in the immediate view and presence of the court," so the court requires no additional information in order to enter a sanction. *Id*.; *Paley v. Second Judicial Dist. Court*, 129 Nev. 701, 705, 310 P.3d 590, 593 (2013).

Indirect contempt, on the other hand, is contempt where the court must receive additional information to determine whether a sanction is appropriate and what that sanction should be. NRS 22.030(2) provides that "[i]f a contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit must be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the masters or arbitrators."

In this case, while certain aspects of the contempt were within the knowledge and presence of the judge, additional information was necessary to determine the reason DPBH was not following the court orders. Consequently, the contempt in question here—the failure of DPBH to timely accept inmates for restorative treatment—is a question of indirect contempt.

Given that the question is one of indirect contempt, DPBH argues the district court lacked jurisdiction to hold DPBH in contempt because defendants failed to provide the district court with affidavits identifying the material facts of the contempt. An affidavit is required for indirect contempt pursuant to NRS 22.030(2). "The law is clear in Nevada that before a court can assume jurisdiction to hold a person in contempt, an affidavit must be filed." *Awad v. Wright*, 106 Nev. 407, 409, 794 P.2d 713, 714 (1990), *abrogated on other grounds by Pengilly*, 116 Nev. at 649, 5 P.3d at 571.

Contrary to DPBH's assertions, defendants met the requirements of NRS 22.030(2). Each motion in the record included the same declaration from counsel under the penalty of perjury. The declaration states, "I am familiar with the procedural history of the case and the substantive allegations made by The State of Nevada. I also have personal knowledge of the facts stated herein or I have been informed of these facts and believe them to be true." The motions lay out in detail the history of the issues regarding DPBH failing to provide prompt restorative treatment to each of the defendants.

An unsworn declaration signed under penalty of perjury may be used in lieu of an affidavit. NRS 53.045. This court has previously found that a declaration can satisfy a statutory requirement for an affidavit. *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 202, 234 P.3d 920, 921 (2010).

While certainly a preferred practice would be for counsel to set forth all factual matters within the declaration itself, the declaration here was included within and refers to the facts contained within the motion. Because the facts underlying the contempt were sworn to and presented to the district court, the district court had jurisdiction to find DPBH in contempt under NRS 22.030(2).

The district court did not manifestly abuse its discretion by holding DPBH in contempt

DPBH argues the district court manifestly abused its discretion by violating DPBH's due process right to an evidentiary hearing, basing its order on clear legal error and inconsistent findings, ignoring DPBH's defense of impossibility, and issuing counterproductive fines.

DPBH's arguments do not warrant extraordinary relief. When reviewing these arguments, "the standard of review in a writ petition is appropriate to the review of a contempt order." *Pengilly*, 116 Nev. at 650, 5 P.3d at 571. Further, "[w]hether a person is guilty of contempt is generally within the particular knowledge of the district court, and the district court's order should not lightly be overturned." *Id.*

DPBH failed to show how the court violated DPBH's due process rights to a hearing with proper notice. This court has held a party accused of indirect contempt has a due process right to confront witnesses and offer testimony on their behalf. *Awad*, 106 Nev. at 411, 794 P.2d at 716. While DPBH correctly asserts it had the right to present evidence on facts in dispute, it does not assert any disputed facts. DPBH asserts the same facts to this court regarding its failure to provide prompt treatment as DPBH provided to the district court. DPBH also did not ask for an evidentiary hearing. The district court based its order on undisputed facts, many of which were provided by DPBH itself through affidavits. This court there-

fore rejects DPBH's argument that it was deprived of an evidentiary hearing in violation of due process.

DPBH also argues it lacked notice because defendants' motion only asked for an order to show cause rather than a contempt order. While typically a court would issue an order to show cause and set a hearing, here, DPBH had clear advance notice that contempt was a possible outcome. DPBH had the opportunity to respond and did so. Further, DPBH does not provide any legal authority distinguishing a hearing on an order to show cause as to why a party should not be held in contempt, from a contempt hearing, for the purposes of proper notice. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Therefore, DPBH failed to show how the district court violated DPBH's due process rights due to lack of notice.

Additionally, DPBH argues the district court erred by imposing an arbitrary deadline for compliance. The district court did not impose an arbitrary rule when it gave DPBH seven days to comply with the competency orders. Rather, the district court interpreted NRS 178.425(1) and the competency orders' use of the term "forthwith" as requiring transport within seven days based on past consent decrees in effect for many years. DPBH's argument therefore lacks merit.

DPBH argues further that compliance was impossible because of bed and staffing shortages. The district court considered this argument at the hearing and properly rejected it, reasoning that based on its history with DPBH, prior contempt orders worked to ensure compliance. The record on review shows that DPBH struggles to honor its constitutional obligation to promptly treat incompetent inmates when the agency is not under the supervision of a court order or settlement agreement. *See Burnside v. Whitley*, Case No. 2:13-cv-01102-MMD-GWF (D. Nev., Modified Consent Decree, Order, and Judgment, Dec. 22, 2015); *Nev. Disability Advocacy & Law Ctr., Inc v. Brandenburg*, Case No. CV-S-05-0782-RCJ(RJJ) (D. Nev., Stipulated Order of Dismissal Without Prejudice, Apr. 18, 2008); *see also Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003) (explaining that restorative treatment is a due process requirement).

In fact, DPBH's inability to accept defendants for treatment has been the subject of two civil suits in federal court. *Burnside*, Case No. 2:13-cv-01102-MMD-GWF; *Brandenburg*, Case No. CV-S-05-0782-RCJ(RJJ). DPBH's argument that compliance is impossible strains credulity after nearly 20 years of notice. And while DPBH argues it suffers from budget constraints, "[l]ack of funds, staff or facilities cannot justify the State's failure to provide

[such persons] with [the] treatment necessary for rehabilitation." *Or. Advocacy Ctr.*, 322 F.3d at 1121 (alterations in original) (internal quotation marks omitted).

The district court found DPBH has a long history of allowing inmates to languish for long periods in jail, only to move them within days of contempt findings. Incapacitated criminal defendants suffer from various harms when they languish in facilities that are not equipped to treat them while awaiting transport. *Id.* at 1122. These harms include the worsening of their mental illness, bodily harm, and even death. *Id.* DPBH does not dispute this. The record shows that DPBH can and does comply with competency orders once a civil contempt order with sanctions is issued. Therefore, DPBH's arguments that compliance is impossible and that sanctions undermine its ability to comply with the competency orders lack merit.

CONCLUSION

We conclude that DPBH failed to meet its burden of demonstrating the need for extraordinary relief. The district court had jurisdiction to hold DPBH in contempt and did not manifestly or capriciously abuse its discretion in doing so. We therefore deny DPBH's petition for writ of certiorari or mandamus and the stay granted by this court on November 2, 2022, is lifted.

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

HELEN JORRIN, Appellant, *v.* THE STATE OF NEVADA EMPLOYMENT SECURITY DIVISION; LYNDA PARVEN, in Her Capacity as Administrator of the Employment Security Division; J. THOMAS SUSICH, in His Capacity as the Chairperson of the Employment Security Board of Review; and CLARK COUNTY SCHOOL DISTRICT, Respondents.

No. 85155

September 7, 2023 534 P.3d 978

Appeal from a district court order dismissing a petition for judicial review in an administrative law case. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Affirmed.

Nevada Legal Services and *Kristopher S. Pre*, Las Vegas, for Appellant.

Clark County School District, Office of the General Counsel and *Patrick J. Murch*, Las Vegas, for Respondent Clark County School District.

State of Nevada/DETR and *Carolyn M. Broussard* and *David Kalo Neidert*, Carson City, for Respondents Lynda Parven, J. Thomas Susich, and the State of Nevada Employment Security Division.

Before the Supreme Court, Herndon, Lee, and Parraguirre, JJ.

OPINION

Per Curiam:

We have previously noted that the former version of NRCP 6(d), which adds three days to certain time periods when service is made by mail, applied to the time period for filing a petition for judicial review challenging a decision by the Nevada Employment Security Division's (NESD) Board of Review under NRS 612.530(1). *Kame v. Emp't Sec. Dep't*, 105 Nev. 22, 23 n.1, 769 P.2d 66, 67 n.1 (1989) (citing former NRCP 6). In revisiting this issue, we now conclude that, based on its plain language, NRCP 6(d)'s three-day mailing rule does not apply to extend the time period for filing a petition for judicial review under NRS 612.530(1) and overrule *Kame* to the extent it holds otherwise. In this case, because the petition was filed beyond the statutory time period, the district court properly dismissed the petition, and we therefore affirm.

FACTS

Appellant Helen Jorrin sought and was denied unemployment benefits. After an appeals referee confirmed the denial of benefits, she sought relief from NESD's Board of Review. The letter denying the request was mailed on August 27, 2021, stating that the Board of Review's decision became final as of September 7, 2021. It further stated that Jorrin had until September 20, 2021, to appeal that decision. Jorrin filed her appeal, a petition for judicial review to the district court, on September 21, 2021. NESD moved for dismissal, arguing that the untimeliness of Jorrin's petition stripped the district court of jurisdiction over the case. The district court granted NESD's motion, finding that it lacked jurisdiction over the petition because Jorrin had filed it a day late. The district court also denied Jorrin's motion to alter or amend the judgment, and Jorrin now appeals.

DISCUSSION

Jorrin asserts that her petition was timely because NESD served its decision by mail and thus NRCP 6(d) provided three additional days to file the petition. She therefore argues that she had until September 23 to file her petition and the district court erred in dismissing her petition as untimely. NESD argues that NRCP 6(d) does not apply and the district court correctly granted dismissal because it lacked jurisdiction over Jorrin's untimely petition. Because this case presents an issue of statutory construction, our review is de novo. *See Hardin v. Jones*, 102 Nev. 469, 470, 727 P.2d 551, 552 (1986) (reviewing the proper construction of a statutory appeal period de novo because it presents "a legal, rather than a factual, question").

NRCP 6(d) provides that "[w]hen a party may or must act within a specified time after being served and service is made [by mail], 3 days are added after the period would otherwise expire under Rule 6(a)." The rule thus applies only when *service* triggers the time for a party to act. *See id.* The former version of the rule, NRCP 6(e) (1953), *amended by* ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018), similarly based its application on service, stating that "[w]henever a party has the right or is required to do some act within a proscribed period after service of a notice . . . upon him and the notice . . . is served upon him by mail, 3 days shall be added to the prescribed period." We have therefore applied the former version of NRCP 6(d) to extend deadlines in administrative cases where a statute specifies that a party has to act within a certain time after being served. For example, we applied the former NRCP 6(d) to extend the time

to administratively appeal the initial denial of unemployment benefits to an appeal referee under NRS 612.495(1) (1981), *amended by* A.B. 502, 73d Leg. (Nev. 2005), which provided "[t]he appeal must be filed within 10 days after the date of mailing, electronic transmission or personal service of the notice of determination or redetermination." *See Hardin*, 102 Nev. at 470 n.2, 471, 727 P.2d at 551 n.2, 552.[1] We also applied the former version of NRCP 6(d) to the 30-day time period to file a petition for judicial review of an agency decision under NRS 233B.130(2)(c) (2005), *amended by* A.B. 94, 74th Leg. (Nev. 2007), where the 30-day period begins "after service of the final agency decision." *See Mikohn Gaming v. Espinosa*, 122 Nev. 593, 598, 137 P.3d 1150, 1154 (2006).[2]

In this case, the statute setting the time to file a petition for judicial review from the NESD Board of Review's determination is NRS 612.530(1). We have held that NRS 612.530(1)'s requirements "are jurisdictional and mandatory." *Bd. of Review, Nev. Dep't of Emp't, Training & Rehab. v. Second Judicial Dist. Court*, 133 Nev. 253, 255, 396 P.3d 795, 797 (2017). Under that statute, a party has "11 days after the decision of the [NESD] Board of Review has become final" to file a petition for judicial review. NRS 612.530(1). Because the statute uses the date the decision becomes final, rather than the decision's service date, to trigger the time to file a petition, NRCP 6(d) does not apply by its 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 courts will apply that plain language."). Jorrin's reliance on *Hardin* and *Mikohn* is unavailing because the triggering statutes in those cases were based on the service of the agency's decision, as noted above. Indeed, the differences in the statutory language between those statutes and NRS 612.530(1) lend further support to our conclusion. *See State, Dep't of Bus. & Indus. v. Titlemax of Nev., Inc.*, 137 Nev. 540, 545, 495 P.3d 506, 510 (2021) (stating that, when discussing statutory interpretation, "this court presume[s] that the variation in language [between statutes] indicates a variation in meaning" (internal quotation marks omitted) (first alteration in original)). And we note that the time between the mailing of the decision letter, August 27, and the date the decision became final, triggering the 11-day timeline to file a petition for judicial review, September 7, allowed more time for mailing than the 3 days provided by NRCP 6(d).

We recognize that we previously applied the former version of NRCP 6(d) to extend the time to file a petition for judicial review

[1]The amendment to NRS 612.495 changed the time to administratively appeal from 10 days to 11, but the relevant language remains the same. NRS 612.495(1).

[2]The amendment to NRS 233B.130 changed the numbering of the subsections, but the relevant language remains the same. NRS 233B.130(2)(d).

of an NESD Board of Review decision. *See Kame*, 105 Nev. at 23 n.1, 769 P.2d at 67 n.1. The main issue in that case, however, was whether filing the petition in an incorrect format tolled the time for filing, and the opinion did not address former NRCP 6(d)'s service language or that the time to file a petition under NRS 612.530(1) is based on the date the decision becomes final rather than when it is served. *See generally id.* As the issue of whether the three-day mailing rule applied to NRS 612.530(1) was not squarely presented to or decided by the court in *Kame*, that decision does not "hold [a] position[ ] of permanence in this court's jurisprudence" such that the stare decisis doctrine would compel against revisiting it. *See Miller v. Burk*, 124 Nev. 579, 597 & n.65, 188 P.3d 1112, 1124 & n.65 (2008) (discussing when the stare decisis doctrine applies such that the previous decision should not be overruled without "weighty and conclusive reasons" for doing so (internal quotation marks omitted)). Even if we concluded *Kame*'s application of the three-day mailing rule constituted stare decisis, overruling the decision is appropriate, as it was "badly reasoned" for the reasons stated above. *Egan v. Chambers*, 129 Nev. 239, 243, 299 P.3d 364, 367 (2013) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Therefore, to the extent *Kame* can be read to hold that the three-day mailing rule under NRCP 6(d) can apply to extend the time to file a petition for judicial review under NRS 612.530(1), we explicitly overrule it.

Here, as stated in NESD's decision letter, its decision became final on September 7, such that any petition for judicial review had to be filed by September 20.[3] NRCP 6(d) does not apply to extend that deadline. Thus, Jorrin's petition was untimely, and the district court properly dismissed it for lack of jurisdiction. *See Bd. of Review*, 133 Nev. at 255, 396 P.3d at 797. As the district court correctly dismissed the petition, it also did not abuse its discretion in denying Jorrin's motion to alter or amend the dismissal order. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (reviewing an order denying such relief for an abuse of discretion).

CONCLUSION

We overrule *Kame v. Employment Security Department*, 105 Nev. 22, 769 P.2d 66 (1989), to the extent it holds that NRCP 6(d)'s three-day mailing period can extend the deadline to file a petition for judicial review under NRS 612.530(1). The district court did not

[3]The 11-day time period ended on September 18, a Saturday, and was therefore extended to the following Monday. *See* NRCP 6(a)(1)(C) (providing that, when a statute does not provide how to compute time, if the last day of the period "is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday").

apply NRCP 6(d) in this case and correctly determined that it lacked jurisdiction over Jorrin's untimely petition for judicial review. We therefore affirm the district court's orders.[4]

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[4]This opinion has been circulated among all justices of this court, any two of whom under IOP 13(b) may request en banc review of a case. The two votes needed to require en banc review in the first instance of the question of overruling *Kame* were not cast.

RICHARD L. CANDELARIA, Appellant, *v.* MICHAEL EDWARD KELLY, Respondent.

No. 83859

September 14, 2023 535 P.3d 234

Appeal from a divorce decree. Eighth Judicial District Court, Family Division, Clark County; Gerald W. Hardcastle, Sr. Judge, and Mary D. Perry, Judge.

Affirmed.

Greenberg Traurig, LLP, and *Tami D. Cowden* and *Elliot Anderson*, Las Vegas, for Appellant.

The Dickerson Karacsonyi Law Group and *Robert P. Dickerson* and *Sabrina M. Dolson*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, C.J.:

In this appeal, we determine the date of a same-sex marriage for the purposes of property division in divorce. Appellant Richard Candelaria and respondent Michael Kelly formally married in California in 2008. At that time, Nevada did not permit same-sex marriage or recognize out-of-state same-sex marriages. In 2015, the United States Supreme Court held in *Obergefell v. Hodges* that same-sex couples have the fundamental right to marry on the same terms and conditions as opposite-sex couples and that states must recognize same-sex marriages lawfully performed in states that already permitted such marriages. 576 U.S. 644, 675-76, 681 (2015). In their 2021 divorce, Richard argued that the district court should backdate the start of the parties' marriage to either 1991 or 1992—when his relationship with Michael became serious—because they would have married then but for Nevada's unconstitutional ban on same-sex marriage. The district court declined to backdate the marriage, finding no law to support such an action, and relied on 2008 as the date of the marriage. Richard now urges this court to adopt a factor-based test to make such a determination.

As an issue of first impression, we examine *Obergefell*'s retroactive effect. We hold that *Obergefell* requires Nevada courts to recognize same-sex marriages performed in other states even if, at the time of the out-of-state marriage, Nevada did not permit or recognize such marriages. Accordingly, here, we recognize 2008 as the

date of the marriage. *Obergefell*, however, does not require Nevada courts to backdate a marriage. Without a mandate from *Obergefell*, we consider whether to craft a judicial remedy. Nevada enacted a statutory prohibition on common-law marriage in 1943. To adopt a "but for" factor-based test is akin to recognizing a common-law marriage formed in Nevada, and we decline to craft a judicial exception to this long-standing and express ban. Because the district court order accords with our holdings, we affirm.

FACTS AND PROCEDURAL HISTORY

Appellant Richard Candelaria and respondent Michael Kelly met in July 1991 and began dating. They moved in together in November 1991 and, over the following years, relocated to various states for lucrative work opportunities for Michael. In July 1992, the couple exchanged rings. When California legalized same-sex marriage in 2008, the couple purchased new rings, traveled to California, and married.

In 2020, Michael filed for divorce. Richard counterclaimed for quantum meruit and breach of an implied contract, arguing that they had an agreement to hold property acquired since November 1991 or July 1992 as community property. Eventually, Michael and Richard agreed to divide most assets evenly. But they did not resolve the character of two assets: (1) Michael's 401(k) account, which he opened in 1984 and did not contribute to after 2008; and (2) Michael's shares of stock acquired as part of his employment between 1996 and 2004.

At a bench trial, Michael argued that because he acquired these assets before the 2008 marriage and did not contribute to the 401(k) account afterward, they are his separate property and not subject to division in the divorce. According to Richard, however, the marriage actually began in either November 1991 or July 1992, and thus the 401(k) account and shares of stock were acquired or funded during marriage and are community property subject to division in divorce. Richard testified that he and Michael would have officially married in November 1991 or July 1992 but for Nevada's unconstitutional prohibition on same-sex marriage. Michael, on the other hand, testified that he did not consider himself married until 2008.[1]

The district court entered a divorce decree rejecting Richard's claims and characterizing the 401(k) account and shares of stock as Michael's separate property. Specifically, the court found that Richard and Michael married in 2008 and that no law supported backdating the start of the marriage to the beginning of the rela-

[1]Sr. Judge Gerald W. Hardcastle presided over the bench trial and entered findings of fact and conclusions of law. Judge Mary D. Perry signed the formal divorce decree incorporating Sr. Judge Hardcastle's decision.

tionship to remedy the unconstitutional ban on same-sex marriage. Richard appeals.[2]

DISCUSSION

We review the disposition of community property for an abuse of discretion. *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 75, 439 P.3d 397, 406 (2019). However, we review the interpretation of caselaw and statutes de novo. *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151, 321 P.3d 875, 877 (2014) (caselaw); *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014) (statutes).

When Richard and Michael began dating, Nevada did not recognize same-sex marriages as a matter of statutory law. NRS 122.020(1) (1991). In 2002, Nevada voters amended the state constitution to provide "[o]nly a marriage between a male and a female person shall be recognized and given effect in this state." Nev. Const. art. 1, § 21 (repealed 2020). In 2014, the Ninth Circuit Court of Appeals held that Nevada's ban on same-sex marriage was unconstitutional and that Nevada must recognize same-sex marriages. *Latta v. Otter*, 771 F.3d 456, 476-77 (9th Cir. 2014). In 2015, the United States Supreme Court in *Obergefell* held that "the right to marry is a fundamental right," in part because of the "constellation of benefits" that attach to marriage. *Obergefell*, 576 U.S. at 670, 675. The court then held that "same-sex couples may exercise the right to marry" on the same terms and conditions as opposite-sex couples (right-to-marry holding) and that states must "recognize a lawful same-sex marriage performed in another State" (recognition holding). *Id.* at 665, 681. In 2020, Nevada voters amended the state constitution to provide "[t]he State of Nevada . . . shall recognize marriages and issue marriage licenses to couples regardless of gender." Nev. Const. art. 1, § 21.

Obergefell*'s recognition holding applies retroactively to require Nevada courts to recognize out-of-state same-sex marriages licensed and performed before 2014*

The Supreme Court has "recognized a general rule of retrospective effect for the constitutional decisions of th[e Supreme] Court." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (internal quotation marks omitted). When a new constitutional rule is applied, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule." *Id.* at 97. We join many jurisdictions in concluding that *Obergefell* applies retro-

[2]On appeal, Richard does not challenge the district court's denials of his implied contract and quantum meruit claims.

actively. *See, e.g.*, *LaFleur v. Pyfer*, 479 P.3d 869, 874 (Colo. 2021) ("[W]e conclude that [*Obergefell*] applies retroactively to marriages (including common law marriages) predating that decision."); *In re J.K.N.A.*, 454 P.3d 642, 649 (Mont. 2019) ("*Obergefell*'s holding that state prohibitions against same-sex marriage violate the United States Constitution operates retroactively in relation to [a party's] claim that a common law marriage existed with [her same-sex partner] . . . ."). Here, *Obergefell*'s holding that states must recognize same-sex marriages lawfully licensed and performed in another state applies retroactively so that we must recognize the 2008 California marriage despite Nevada's prohibition at that time. *See LaFrance v. Cline*, No. 76161, 2020 WL 7663476, at *2 (Nev. Dec. 23, 2020) (Order Affirming in Part, Reversing in Part, and Remanding) (holding that *Obergefell*'s recognition holding applies retroactively so that Nevada courts must recognize a 2003 marriage between a same-sex couple).

Obergefell*'s right-to-marry holding cannot be given pre-marriage retroactive effect in this case*

While recognition may apply retroactively, *Obergefell* does not say that same-sex couples in committed relationships will be deemed married before they meet the legal requirements of marriage—which Richard and Michael did when they married in 2008 in California. Rather, *Obergefell* demands that same-sex couples be afforded the opportunity to marry and the benefits attached to marriage on the same terms and conditions as opposite-sex couples. *Obergefell*, 576 U.S. at 675-76. Accordingly, in states recognizing common-law marriages, *Obergefell*'s right-to-marry holding has retroactive effect because in those states opposite-sex couples may prove a common-law marriage formed before the *Obergefell* decision, so same-sex couples must be afforded the same opportunity. *See, e.g.*, *LaFleur*, 479 P.3d at 882 ("Because a different-sex couple may prove a common law marriage in Colorado predating 2014, a same-sex couple must also have that opportunity."); *In re J.K.N.A.*, 454 P.3d at 649 (holding that *Obergefell* applies retroactively for a claim that a common-law marriage existed).

In contrast, the right-to-marry holding has no retroactive effect here because Nevada does not recognize common-law marriages. In Nevada, "[c]onsent alone will not constitute marriage; it must be followed by solemnization as authorized and provided by [NRS Chapter 122]." NRS 122.010(1). Solemnization requires the parties to declare, in the presence of an authorized official and at least one witness, that "they take each other as spouses." NRS 122.110(1), (2). Nevada does not recognize common-law marriages formed after March 29, 1943, NRS 122.010(2), and this court has consistently

reaffirmed that Nevada does not recognize such marriages, *Gilman v. Gilman*, 114 Nev. 416, 421 n.1, 956 P.2d 761, 764 n.1 (1998); *Watson v. Watson*, 95 Nev. 495, 496, 596 P.2d 507, 507 (1979). The solemnization requirement and ban on common-law marriage apply to all couples regardless of gender or sexual orientation. Here, it is undisputed that there was no solemnization prior to 2008.[3] Just as an opposite-sex couple could not have married in 1991 or 1992 absent solemnization, Richard and Michael were not and could not have been married under Nevada law in 1991 or 1992.

Other jurisdictions agree that *Obergefell* does not require courts to retroactively construct a marriage when the jurisdiction does not recognize common-law marriage. In *Phillip Morris USA, Inc. v. Rintoul*, the Florida District Court of Appeal considered whether *Obergefell* required the court to retroactively find that a same-sex couple were married if one partner could prove that but for Florida's unconstitutional ban, the couple would have married earlier. 342 So. 3d 656, 665 (Fla. Dist. Ct. App. 2022). In rejecting that argument, the court reasoned that Florida does not recognize common-law marriages and that *Obergefell* "did not compel states to convert all same-sex relationships predating that decision into formally recognized marriages." *Id.* at 666. Similarly, a New York appellate court observed that *Obergefell* did not require the court to retroactively recognize a commitment ceremony between a same-sex couple as a legally valid marriage. *In re Estate of Leyton*, 22 N.Y.S.3d 422, 423 (App. Div. 2016). The Supreme Court of South Dakota also concluded that even assuming *Obergefell* applies retroactively, there is no marriage to retroactively recognize when there has been "no marriage, act of solemnization, or common-law marriage to refer back to." *Anderson v. S.D. Ret. Sys.*, 924 N.W.2d 146, 150 (S.D. 2019); *cf. Charron v. Amaral*, 889 N.E.2d 946, 950-51 (Mass. 2008) (rejecting an argument that the court must construct a marriage if a same-sex couple would have married earlier but for the unconstitutional ban on same-sex marriage based on a 2004 Massachusetts Supreme Court case decided on similar grounds to *Obergefell*).

[3]Accordingly, Richard's reliance on *Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155 (N.D. Cal. 2016), is misplaced. There, a federal district court discussed a state court decision to cure a defect in a same-sex couple's marriage in a case seeking to recover employment benefits. *Id.* at 1160-62. The same-sex couple's marriage was solemnized, but they could not obtain a marriage license because of the same-sex marriage ban. *Id.* at 1158. The state court declared that the couple married on the date of the solemnization. *Id.* The federal district court noted that it lacked authority to set aside the state court order declaring the date of the marriage. *Id.* at 1161. It is unclear on what basis the state court declared that the couple married on the date of the solemnization. Assuming, however, the state relied on retroactivity, the court could refer back to solemnization. Here, there was no solemnization in 1991 or 1992 to refer back to.

We cannot recognize a common-law marriage in Nevada in the face of NRS 122.010

Richard argues that this court should backdate the start of his marriage to either November 1991 or July 1992 because he would have married Michael then but for Nevada's unconstitutional ban on same-sex marriage. He emphasizes that he is not advocating for this court to adopt common-law marriage because he is asking this court to fashion a remedy to the unconstitutional ban.

Richard relies on an Oregon Court of Appeals case, *In re Madrone*, 350 P.3d 495 (Or. Ct. App. 2015). There, the statute at issue presumed the husband of a woman who carries a child conceived by artificial insemination is the legal father if the husband consented to the insemination. *Id.* at 496. In a previous case, the Oregon Court of Appeals declared the statute unconstitutional under the state constitution because it afforded the privilege of a parentage assumption on the basis of sexual orientation and in part because same-sex couples could not marry at the time. *Id.* Rather than striking the law, the court "extended the statute so that it applies when the same-sex partner of the biological mother consented to the artificial insemination." *Id.* (internal quotation marks omitted). *In re Madrone* determined how same-sex couples are entitled to legal parentage under the statute. Because the legislature's intent was to confer the benefit of the statute on married couples, not on unmarried couples, "the salient question [was] whether the same-sex partner *would have* chosen to marry before the child's birth had they been permitted to." *Id.* at 501. In other words, the inquiry was whether but for the ban on same-sex marriage, the couple would have married earlier.

Preliminarily, the Oregon Court of Appeal's interpretation of its state constitution is not binding on this court. That said, we are not persuaded by Richard's claim that he is not advocating for this court to adopt common-law marriage in Nevada because adopting the *In re Madrone* but-for test would in effect recognize a common-law marriage in violation of NRS 122.010, and he has not shown, absent a constitutional challenge, that this court has equitable power to deviate from a statute. Under the *In re Madrone*'s test, a court would consider various factors in determining whether a same-sex couple would have married at some earlier date but for the unconstitutional ban on same-sex marriage. *Id.* at 501-02. For example, courts would consider, among other factors, "whether the parties held each other out as spouses," whether the parties "commingled their assets and finances," and whether the parties "made significant financial decisions together." *Id.* Jurisdictions recognizing common-law marriage apply similar factors to determine whether a couple is common-law married. In those states, the proponent of a common-law marriage

generally must show: (1) "[present] intent and agreement . . . to be married by both parties; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife." *In re Marriage of Winegard*, 278 N.W.2d 505, 510 (Iowa 1979); *see also In re Estate of Hunsaker*, 968 P.2d 281, 285 (Mont. 1998) (listing similar elements). Because of the similarity between the tests, we conclude Richard is asking this court to craft a judicial exception to this state's ban on common-law marriage. *Cf. Charron*, 889 N.E.2d at 952-53 (Marshall, C.J., concurring) ("Granting such relief would create in effect a common-law or de facto quasi marital status that would promote litigation, permit judges to select from among marital benefits to which quasi married couples might or might not be entitled, . . . and undercut the Legislature's role in defining the qualifications and characteristics of civil marriage." (footnote omitted)). Additionally, *In re Madrone* crafted a remedy to an unconstitutional statute, whereas here, Richard does not challenge the constitutionality of NRS 122.010, which prohibits common-law marriage. Whatever discretion this court has to fashion remedies in equity, Richard has not shown that such equitable discretion authorizes this court to deviate from a statute absent a constitutional challenge.

This court is not blind to the fact of inequality today. But "[w]hen a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 578 n.4, 97 P.3d 1132, 1134 n.4 (2004). Nor can we rewrite a statute because it may have an unfair application in certain circumstances. *See Holiday Ret. Corp. v. State, Div. of Indus. Relations*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012) ("It is the prerogative of the Legislature, not this court, to change or rewrite a statute.").

The "fair" result under the circumstances of this case is unclear. On the one hand, Richard could not marry Michael when he purportedly wanted to because of Nevada's unconstitutional ban on same-sex marriage. On the other hand, because of the ban, Michael had a reasonable belief that he was in fact not married to Richard prior to the 2008 marriage. And if Michael wanted the property he acquired before 2008 to be community property, he could have given his separate property to the community as a gift. *Cf. Schmanski v. Schmanski*, 115 Nev. 247, 250, 984 P.2d 752, 755 (1999) (recognizing that separate property may be given as a gift to the community). Michael did not do so.

If this case concerned common-law or judicially created doctrines, rather than statutory law, we might have more leeway to fashion a remedy. The cases Richard cites support this prospect. For example, in *Mueller v. Tepler*, 95 A.3d 1011 (Conn. 2014), the

Supreme Court of Connecticut expanded the common-law tort for loss of consortium to same-sex couples who at the time of the injury could not legally marry. 95 A.3d at 1030. In doing so, the court emphasized it was altering a "judicially created right," which the court was free to reshape. *Id.* at 1029 (emphasis omitted). The court suggested it may have taken a different position had there been a statute on point by observing that "in determining whether we should expand a common-law action, we are not constrained by any considerations of the constitutional separation of powers or respect for the authority of a coordinate branch of government, as we would be when determining whether a plaintiff is retroactively entitled to a statutory benefit." *Id.* at 1030.

Likewise, in *Ramey v. Sutton*, 362 P.3d 217, 218-21 (Okla. 2015), the Oklahoma Supreme Court extended equitable standing to a same-sex partner seeking custody and visitation of a child who was the product of a long-term, same-sex relationship that began before same-sex couples had the right to marry. In doing so, it relied on a judicially created concept that provides "when persons assume the status and obligations of a parent without formal adoption they stand *in loco parentis* to the child and, as such, may be awarded custody even against the biological parent." *Id.* at 221. These authorities show that courts have exercised their discretion to alter judicially made or common-law doctrines.[4]

In sum, Richard's call to adopt a factor-based test to determine whether, but for Nevada's unconstitutional ban on same-sex marriage, he would have married Michael in 1991 or 1992 is a request to craft an equitable remedy that plainly contradicts NRS 122.010(2), the ban on common-law marriage. Richard fails to demonstrate that this court has equitable authority to deviate from a statute absent a constitutional challenge. Thus, the district court did not err in refusing to backdate the marriage to either 1991 or 1992.[5]

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[4]However, the Michigan Supreme Court recently held that extending its equitable parent doctrine, a judicially created doctrine similar to the one at issue in *Ramey*, to same-sex couples is mandatory, not discretionary. *Pueblo v. Haas*, 999 N.W.2d 433, 445 (Mich. 2023). The majority held that "as a matter of equity and constitutional law," they must extend the doctrine to same-sex couples who could not marry earlier because of the unconstitutional same-sex marriage ban. *Id.* at 445. The constitutional analysis is unclear, and the court noted that failing to extend the doctrine would perpetuate inequalities identified in *Obergefell*. *Id.* While that may be true, that does not explain how *Obergefell* requires a court to create a marriage if a proponent can show but for the ban they would have married. As a result, we agree with the dissent in *Pueblo* that "the majority actually *extends Obergefell* to, in turn, extend the equitable-parent doctrine, and it does so without adequately explaining why this extension is constitutionally required." *Id.* at 458 (Zahra, J., dissenting).

[5]Richard also cites to two federal district court cases certifying class action lawsuits in support of backdating. In one case, same-sex partners married when it became legal, but one partner died before the marriage lasted nine months. *Ely v. Saul*, 572 F. Supp. 3d 751, 759-60 (D. Ariz. 2020). Because the marriage

CONCLUSION

Obergefell applies retroactively so that Nevada courts must recognize same-sex marriages licensed and performed out of state before Nevada's ban on recognizing same-sex marriages was overturned. *Obergefell*, however, does not require this court to backdate a marriage before the couple solemnized their union. Although we recognize that *Obergefell* in and of itself did not remedy all of the vestiges of discrimination against same-sex couples, Nevada does not recognize common-law marriages, and we decline to craft a judicial exception to that ban. Therefore, we conclude that the effective date of a marriage will not predate the solemnized marriage itself for property division purposes in a divorce, even if a party asserts that the couple would have married earlier but for the later-held-to-be-unconstitutional ban on marriage between same-sex couples. Because the district court order accords with our holdings, we affirm.

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

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lasted less than nine months, the surviving spouses did not qualify for benefits under a Social Security Act provision. *Id.* The surviving spouses challenged the nine-month duration requirement as unconstitutional. *Id.* at 761. The other case challenged a similar provision. *Thornton v. Comm'r Soc. Sec.*, 570 F. Supp. 3d 1010, 1018 (W.D. Wash. 2020). We find these cases distinguishable. These cases waived durational requirements for benefits but did not involve backdating marriages to a specific earlier date. Determining whether parties are eligible for a benefit involves reviewing that benefit, not judicially resolving that the parties were married at an earlier date. *Ely* and *Thornton* concluded that the claimants were eligible for benefits notwithstanding the durational requirement. They did not hold that the couples actually married earlier, which is precisely in dispute here. For instance, in *Thornton*, it was "undisputed" that the couple would have married earlier but for the unconstitutional ban. *Id.* Here, Michael disagrees that he and Richard would have married in 1991 or 1992.