UBER TECHNOLOGIES, INC., a Corporation; RASIER, LLC, a Corporation; and RASIER-CA, LLC, Appellants, *v.* MEGAN ROYZ, an Individual; and ANDREA EILEEN WORK, an Individual, Respondents.

No. 82556

September 29, 2022 517 P.3d 905

Appeal from a district court order denying a motion to compel arbitration. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Reversed and remanded with instructions.

Herndon, J., with whom Stiglich, J., agreed, dissented in part.

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, and *D. Lee Roberts, Jr.*, and *Ryan T. Gormley*, Las Vegas; *Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, and *Karen L. Bashor* and *Douglas M. Rowan*, Las Vegas, for Appellants.

Glancy Prongay & Murray LLP and *Kevin Francis Ruf* and *Natalie Stephanie Pang*, Los Angeles, California; *Quirk Law Firm* and *Trevor M. Quirk*, Las Vegas, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

Where the Federal Arbitration Act (FAA), 9 U.S.C. § 1-16, governs an arbitration agreement, state courts are compelled to follow that act and any federal law construing it. Under Nevada law, district courts typically decide the threshold question of whether a dispute is subject to an arbitration agreement. *See Clark Cty. Pub. Emps. Ass'n v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990). But the FAA allows the parties to agree that the arbitrator will resolve threshold arbitrability questions, and in *Henry Schein, Inc. v. Archer & White Sales, Inc*., the United States Supreme Court unanimously held that where the parties so contract, the court must enforce that agreement and refer the case to the arbitrator to determine threshold issues of arbitrability, even if the court believes the arbitration agreement cannot apply to the dispute at hand. 586 U.S. 63, 65, 71 (2019).

We are bound by this precedent in regard to contracts governed by the FAA, and we therefore hold that where an arbitration agreement delegates the threshold question of arbitrability to the arbitrator, the district court must refer the case to arbitration even if the district

court concludes the dispute is not subject to the arbitration agreement. Because the arbitration agreement here is governed by the FAA and included a delegation clause that clearly and unmistakably delegated the threshold question of arbitrability to the arbitrator, the district court erred by denying the motion to compel arbitration on the basis that the arbitration agreement did not cover the dispute. We therefore reverse the district court's order and direct the court to refer the case to arbitration.

FACTS

Appellants Uber Technologies, Inc., and its affiliates, Rasier, LLC, and Rasier-CA, LLC (collectively Uber), are technology companies that created the "Uber app." The Uber app is a software application that allows a person to hire an independent driver to take them to their desired destination. To use the Uber app, riders must first create an account, and as part of this process, users must consent to Uber's terms and conditions.

Pertinent here, Uber's terms and conditions include an arbitration agreement that provides that all disputes with Uber will be resolved through arbitration and that the FAA governs the arbitration agreement's interpretation and enforcement. The arbitration agreement explains that arbitration will be in accordance with the American Arbitration Association's (AAA) rules and additionally includes the following delegation clause:

> The parties agree that the arbitrator ("Arbitrator"), and not any federal, state, or local court or agency, shall have exclusive authority to resolve any disputes relating to the interpretation, applicability, enforceability, or formation of this Arbitration Agreement, including that any part of this Arbitration Agreement is void or voidable. The arbitrator shall also be responsible for determining all threshold arbitrability issues, including issues relating to whether the Terms are unconscionable or illusory and any defense to arbitration, including waiver, delays, laches, or estoppel.

The arbitration agreement also includes a severability clause providing that if any portion of the agreement is found to be unenforceable, that portion shall be severed from the agreement such that it does not invalidate the remainder thereof.

Andrea Work and Megan Royz, respondents here, both downloaded the Uber app and created accounts in 2015 and 2016, respectively. On February 22, 2018, Work ordered a ride for herself and Royz through the Uber app. While Work and Royz were riding in the Uber, their driver rear-ended another Uber driver who was executing a U-turn. Work and Royz subsequently filed a personal injury lawsuit against both drivers and Uber.

Uber moved to compel arbitration, arguing that Work and Royz had agreed to arbitrate their claims and, moreover, that the arbitration agreement included a delegation clause requiring the arbitrator to resolve disputes related to the arbitration agreement's existence, interpretation, or enforceability. Work and Royz opposed Uber's motion, arguing that their claims did not fall within the scope of the arbitration agreement and that the agreement was unenforceable against Royz because she did not use the Uber app to request the ride. The district court denied the motion, concluding that the arbitration agreement focused on the terms of service, not car accidents, and thus does not plainly provide that the parties agreed to submit this particular dispute to arbitration. The district court also determined that the arbitration agreement was not enforceable against Royz because she did not use the Uber app to request the ride.

Uber moved for reconsideration, asserting that the United States Supreme Court's decision in *Schein* requires the threshold issue of arbitrability to be resolved by the arbitrator rather than the district court, where, as here, the arbitration agreement contains a delegation clause. The district court denied that motion as well, reasoning that the delegation clause, read in conjunction with Uber's terms and conditions, does not cover motor vehicle accident disputes. Uber appeals.

DISCUSSION

The question before us is whether the delegation clause in the parties' arbitration agreement required the arbitrator to determine the threshold issue of arbitrability, or whether the district court could make that determination. We review de novo the district court's decision to deny the motion to compel arbitration. *See Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009).

A district court may not decline to apply a delegation clause on the ground that the arbitration agreement does not cover the dispute

The parties contest the interpretation and reach of the arbitration agreement and its delegation clause. Although they do not dispute that the FAA governs the arbitration agreement or that federal law is authoritative, they disagree as to whether *Schein* requires the district court to refer their case to arbitration without first deciding if the dispute is arbitrable. Uber argues that *Schein* clarified that a court must enforce delegation agreements even if the party's argument in favor of arbitrability is wholly groundless, and that the district court's decision conflicts with this precedent. Work and Royz respond that the delegation clause is not operative in this situation because Section 2 of the FAA limits the scope of the Act to controversies "arising out of [the underlying] contract." Work and

Royz further contend *Schein* is distinguishable because the district court did not invoke the "wholly groundless" exception here.

Nevada has a "fundamental policy favoring the enforceability of arbitration agreements," and we will "liberally construe arbitration clauses in favor of granting arbitration." *Tallman v. Eighth Judicial Dist. Court*, 131 Nev. 713, 720, 359 P.3d 113, 118-19 (2015). Where an arbitration agreement is covered by the FAA, state courts must enforce the FAA with respect to that agreement. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 530-31 (2012). Once the Supreme Court "has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established," as such would be "incorrect and inconsistent with clear instruction in the precedents of [the United States Supreme Court]." *See id.* at 531-32. Accordingly, where the FAA governs a contract, we are bound by Supreme Court precedent interpreting the FAA.

Under the FAA, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Schein*, 586 U.S. at 67. A delegation clause is "an agreement to arbitrate threshold issues concerning the arbitration agreement . . . such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). In other words, it is "simply an additional, antecedent agreement" to arbitrate a gateway issue. *Schein*, 586 U.S. at 68. If the parties "clearly and unmistakably" agree to delegate such threshold questions to an arbitrator, then courts must enforce the delegation clause like any other arbitration provision under the FAA. *AT & T Tech., Inc. v. Comm. Workers of Am.*, 475 U.S. 643, 649 (1986); *see Rent-A-Ctr.*, 561 U.S. at 70; *see also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[T]he court's standard for reviewing the arbitrator's decision [of who has the primary power to decide arbitrability] should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate.").

In *Schein*, the parties disagreed as to whether their dispute was subject to arbitration. 586 U.S. at 66. The parties' contract provided that any dispute must be resolved by arbitration in accordance with the AAA's rules, which, in turn, provide that arbitrators hold the power to resolve arbitrability questions. *Id.* The district court concluded that because the argument in favor of arbitrability was wholly groundless, the court could decide arbitrability. *Id.* at 66-67.

The Supreme Court disagreed, rejecting the "wholly groundless" exception and explaining that

> [w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the

> arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

Id. at 68. The Supreme Court therefore held that a court may not decide arbitrability if the contract clearly and unmistakably grants that authority to the arbitrator. *Id.* at 70-71.

Schein, read in conjunction with other federal law, thus provides clear instruction regarding the application of the FAA to a delegation clause in an arbitration agreement: where the parties have clearly and unmistakably delegated the threshold question of arbitrability to the arbitrator, the district court may not decline to refer the case to arbitration on the ground that the arbitration agreement does not cover the dispute.[1] The district court may determine whether the arbitration agreement is a valid contract before referring the case to arbitration. *Id.* at 69. Or, if the delegation clause is severable from the arbitration agreement and delegates questions regarding the arbitration agreement's validity or application to the arbitrator, the district court may determine whether the delegation clause itself is a valid agreement. *See Rent-A-Ctr.*, 561 U.S. at 72 (recognizing that where a delegation clause in an arbitration agreement is severable, unless the party opposing arbitration challenges the delegation clause specifically, the court should treat that clause as valid and leave challenges to the arbitration agreement's validity for the arbitrator); *see also Kai Peng v. Uber Techs., Inc.*, 237 F. Supp. 3d 36, 55-58 (E.D.N.Y. 2017) (considering only whether a delegation clause was binding and otherwise leaving questions of the arbitration agreement's validity to the arbitrator pursuant to the delegation clause). But in either situation, the district court may not bypass contract language delegating threshold issues to the arbitrator by finding that the arbitration agreement does not apply to the dispute.[2]

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[1]We are not persuaded by Work and Royz's argument that section 2 of the FAA supports the district court's decision, as that section addresses the enforceability of arbitration agreements but does not restrict the parties' ability to delegate threshold issues to the arbitrator. *See* 9 U.S.C. § 2; *see also Rent-A-Ctr.*, 561 U.S. at 72 (concluding a delegation clause was valid under section 2 without indicating that that statutory provision required the district court to first determine arbitrability). Nor are we persuaded that the scope of the arbitration agreement controls the scope of the delegation clause here, as such would contradict the purpose of a delegation clause and, moreover, this delegation clause's broad language plainly belies that argument.

[2]Although Work and Royz argue that the district court did not utilize the wholly groundless exception rejected in *Schein*, and although the district court did not expressly reference the exception, we note the district court's reasoning closely tracked the exception, as the court declined to apply the delegation clause on the ground that Uber failed to show that the claims were subject to arbitration. *See Schein*, 586 U.S. at 68 (describing the wholly groundless exception).

Because the Supreme Court's precedent is controlling, we are not free to deviate from it here. *See Marmet Health*, 565 U.S. at 531-32. We therefore consider whether the parties clearly and unmistakably delegated the threshold question of arbitrability to the arbitrator, as if they did, we must enforce that agreement.

The parties clearly and unmistakably delegated threshold issues of arbitrability to the arbitrator

Uber argues that the delegation clause expressly and clearly delegates all threshold issues of arbitrability to the arbitrator. Work and Royz counter that because the delegation clause applies to and incorporates the arbitration agreement's terms, the arbitration agreement applies only to claims arising out of or relating to its terms. Therefore, Work and Royz contend, the delegation clause does not clearly and unambiguously delegate all threshold questions of arbitrability to the arbitrator. We review issues of contract interpretation de novo. *See Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (interpreting a contract where the underlying facts are not in dispute presents a question of law).

We are not persuaded by Work and Royz's argument because it confuses the preliminary question of whether the contract delegates arbitrability issues with the secondary question of whether the dispute is arbitrable. In determining whether a contract delegates threshold issues such as arbitrability to the arbitrator, we must consider the contract's language as written. *See Schein*, 586 U.S. at 68 (explaining that pursuant to the FAA, courts must "interpret the contract as written"). And as many courts have found, incorporating the AAA's rules, even without more, constitutes clear and unmistakable evidence of intent to submit the question of arbitrability to the arbitrator. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130-31 (9th Cir. 2015) (concluding that a contract's incorporation of the AAA rules constituted clear and unmistakable evidence of intent to submit questions of arbitrability to the arbitrator); *Airbnb, Inc. v. Doe*, 336 So. 3d 698, 703-05 (Fla. 2022) (compiling federal cases reaching the same conclusion). Not surprisingly, then, express delegation clauses often easily establish clear and unmistakable evidence of the parties' intent to have arbitrability resolved by an arbitrator. *See Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1207-09 (9th Cir. 2016) (enforcing delegation clauses that delegated issues of "enforceability, revocability or validity of the Arbitration Provision" to the arbitrator); *Lee v. Uber Techs., Inc.*, 208 F. Supp. 3d 886, 889, 891 (N.D. Ill. 2016) (finding clear and unmistakable evidence to delegate gateway questions to the arbitrator and upholding a delegation clause that required disputes "arising out of or relating to interpretation or application of this Arbitration Provision, including [its] enforceability, revocability or validity" to be decided by the arbitrator).

Both are present in the contract at issue here. The arbitration agreement incorporates the AAA's rules and includes an express delegation clause. The delegation clause provides, in broad terms, that the parties agree that the arbitrator has exclusive authority to resolve disputes relating to the arbitration agreement's interpretation, applicability, enforceability, and formation. In fact, the delegation clause specifically states that the arbitrator is responsible for deciding all threshold arbitrability issues. We conclude this language is clear and unmistakable evidence of the parties' intent to delegate the question of arbitrability to an arbitrator.

Moreover, our conclusion applies with equal force to Royz. Although Royz did not order the Uber ride or use the Uber app on the day of the accident, she previously contracted with Uber when she downloaded the Uber app and thereby assented to all of Uber's terms and conditions, including the arbitration provision and delegation clause. Thus, although it remains to be seen whether the arbitration agreement covers the underlying accident, that is a question for the arbitrator to decide under the plain language of the delegation clause.[3] Accordingly, the district court must refer the case to arbitration.

CONCLUSION

Where the United States Supreme Court interprets the FAA, state courts may not contradict or circumvent that precedent. In *Henry Schein, Inc. v. Archer & White Sales, Inc*., 586 U.S. 63, 71 (2019), the United States Supreme Court explained that the FAA allows parties to agree that an arbitrator will determine threshold arbitrability questions, and the Court unanimously concluded that if a party's arbitration agreement shows a clear and unmistakable intent to delegate the threshold issue of arbitrability to the arbitrator, a court may not deny a motion to compel arbitration on grounds that the arbitration agreement does not apply to the dispute. Here,

[3]We decline to reach the parties' arguments regarding unconscionability, as Work and Royz waived this argument by raising it for the first time in their opposition to the motion for reconsideration, *see Thomas v. Hardwick*, 126 Nev. 142, 158, 231 P.3d 1111, 1121 (2010), and, moreover, the delegation clause clearly delegates questions of unconscionability to the arbitrator. As to the remaining arguments, we have considered them and either conclude they are without merit or need not be addressed in light of our decision. Notably, we are unpersuaded by Work and Royz's argument regarding a lack of mutual assent, where Work and Royz indisputably created Uber accounts in which they agreed to Uber's terms and conditions, including the delegation clause. *See Meyer v. Uber Techs., Inc*., 868 F.3d 66, 79-80 (2d Cir. 2017) (deciding that plaintiff manifested his assent to Uber's arbitration agreement by creating an account on the Uber app, which requires every Uber user to agree to its terms, regardless of whether plaintiff clicked on the hyperlink to view Uber's terms); *Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985, 988-90 (N.D. Cal. 2017) (deciding that plaintiff was on notice of Uber's terms and conditions and assented to them by creating an Uber account).

the district court erred by denying Uber's motion to compel on the ground that the claims are not subject to the arbitration agreement, as the agreement's delegation clause expressly requires the arbitrator to determine threshold issues of arbitrability. We therefore reverse the district court's order denying the motion to compel arbitration and remand this matter with directions that the court grant the motion and refer the case to arbitration.

Parraguirre, C.J., and Hardesty, Cadish, and Pickering, JJ., concur.

Herndon, J., with whom Stiglich, J., agrees, concurring in part and dissenting in part:

As to appellants' claims regarding the district court's decision pertaining to respondent Andrea Work, I agree, based on the particular facts and circumstances presented, that the district court erred. I do not, however, completely agree with the majority's analysis of the district court's role in arbitration agreement delegation clause cases in the "post-*Henry Schein*" era. Thus, I concur regarding Work in the result only.

As to appellants' claims regarding the district court's decision pertaining to respondent Megan Royz, I respectfully dissent, as I do not believe the district court erred. I believe the majority has taken far too rigid a view of the holding in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63 (2019). In so doing, the majority has created the very "absurd results" cautioned against by numerous courts that have been called upon to opine on arbitration agreement and/or delegation clause cases. *See Metro. Life Ins. Co. v. Bucsek*, 919 F.3d 184, 192 (2d Cir. 2019); *Smith v. Steinkamp*, 318 F.3d 775, 777 (7th Cir. 2003); *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1516 (10th Cir. 1995); *Moritz v. Universal City Studios LLC*, 268 Cal. Rptr. 3d 467, 475 (Ct. App. 2020). The *Henry Schein* court focused on whether lower courts could apply the "wholly groundless" exception to cases when determining the issue of arbitrability. 586 U.S. at 68-71. However, not only does this case not present an instance where a district court applied the "wholly groundless" exception, but it is also factually distinctive from *Henry Schein*. In *Henry Schein*, a contract clearly governed the parties' relationship, but to avoid arbitration the lower court applied the "wholly groundless" exception. Here, no contract governed the interaction Royz had with appellants that led to the underlying action. And extending an arbitration clause from a contract that governed completely different interactions Royz had with appellants to the underlying action is absurd. "[*Henry*] *Schein* presupposes a dispute arising out of the contract or transaction, i.e., some minimal connection between the contract and the dispute," *Moritz*, 268 Cal. Rptr. 3d at 475, which is just not the case here for Royz.

As the majority notes, Work and Royz each downloaded Uber's rideshare app and created accounts. On February 22, 2018, while Work and Royz were riding in an Uber, they were involved in a motor vehicle accident, which is the subject of the personal injury lawsuit at issue. While respondents each had an Uber account, only Work invoked her account and requested Uber's rideshare service on February 22, 2018. Royz did not invoke her account or order any vehicle. She was merely a passenger. The terms of an agreement she entered into with Uber for when she utilized Uber's app to request and receive a ride previously cannot now govern the circumstances under which she was only a passenger in a vehicle.

In *Coors Brewing Co. v. Molson Breweries*, the court noted that an arbitration clause "does not extend to all disputes of any sort . . . but only to disputes touching specified provisions of the agreement." 51 F.3d at 1516. The *Coors* court, using an example of two business owners who execute a sales contract containing an arbitration clause and thereafter, one assaults the other, pointed out how absurd it would be if one party were to attempt to use the sales contract to force the assault case to arbitration. *Id.* In short, one party cannot unilaterally extend, in perpetuity, an arbitration agreement to cover any and every dispute the parties may ever happen to have simply because the parties previously signed an arbitration agreement covering certain, specified disputes. *See Moritz*, 268 Cal. Rptr. 3d at 476 (noting that "[a]ppellants' argument that an arbitration provision creates a perpetual obligation to arbitrate any conceivable claim that [a party] might ever have against them is plainly inconsistent" with the FAA's requirement that the dispute relate to the contract in which the arbitration provision appears); *see* 9 U.S.C. § 2 (providing that an arbitration agreement applies to a "controversy thereafter arising out of such contract"). To allow a party to do so would, without question, run afoul of common sense and public policy and create absurd results.

Regarding delegation clauses, it would be equally illogical to seek to force one of the above business owners to submit the question of arbitrability of the assault case to an arbitrator when the matter involved an arbitration clause that only covered the sales contract. Most importantly, it would seem highly unlikely that there could be evidence that the parties clearly and unmistakably intended to submit the question of the arbitrability of a subsequent assault claim to an arbitrator when they executed a general sales contract arbitration delegation clause.

Here, Uber's terms of service govern an individual's "use . . . of the applications . . . and services," and the arbitration agreement states that an individual and Uber agree to arbitrate "any dispute . . . arising out of or relating to . . . these Terms . . . ." Under these facts and circumstances, forestalling Royz's access to the

courts by forcing her to submit the question of arbitrability to an arbitrator is akin to forcing the business owner to submit the question of arbitrability of the assault case to an arbitrator. Royz did not use Uber's app or request services on the date of the accident and there is not, and could not be, any evidence that she intended to submit this type of dispute to an arbitrator to decide arbitrability. In case the absurdity of extending *Henry Schein* to Royz's situation is still unclear, I submit another example. Under the majority's analysis, if Royz were a pedestrian who had an Uber app and account and had previously utilized Uber's app and services, and who was injured when an Uber driver struck her while she was walking, she would still have to submit her personal injury claim to an arbitrator to determine arbitrability because she had at one time, in an unrelated instance, entered into an agreement with Uber. Such a requirement is absurd and unfairly delays Royz's access to justice.

As the court in *Metropolitan Life Insurance Co. v. Bucsek* explained, "[t]he right of access to courts is of such importance that courts will retain authority over the question of arbitrability of the particular dispute unless 'the parties clearly and unmistakably provide[d]' that the question should go to arbitrators." 919 F.3d at 190 (alteration in original) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). To this point, *Metropolitan Life Insurance Co.*, notably entered after the opinion in *Henry Schein* was rendered, held that "vague provisions as to whether *the dispute* is arbitrable are unlikely to provide the needed clear and unmistakable inference of intent to arbitrate its arbitrability." 919 F.3d at 191 (emphasis added). Quite simply, Royz did not invoke her account and did not request Uber's services on the date in question. Still, Uber seeks to have the question of arbitrability decided by an arbitrator even though the scenario involves a dispute occasioned by an event occurring during an account holder's *nonuse of their account*. This is the epitome of absurdity. *See Moritz*, 268 Cal. Rptr. 3d at 475 ("When an arbitration provision is read as standing free from any [underlying] agreement, absurd results ensue." (alteration in original) (internal quotation marks omitted)). There are not just "vague provisions" at play here; rather, there are actually no provisions that provide clear and unmistakable evidence that the parties intended to submit the question of arbitrability of a dispute arising from an event outside of an account holder's use of their account to an arbitrator. Accordingly, I believe that the majority has erred in reaching its disposition as to Royz, and therefore, I respectfully dissent in part.

DEREK JOHNSTON, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE MARY KAY HOLTHUS, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 83968

October 6, 2022 518 P.3d 94

Original petition for writ of mandamus challenging district court pretrial release protocols.

Petition granted in part and denied in part.

Legal Resource Group, LLC, and *T. Augustus Claus*, Henderson, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Alexander Chen*, Chief Deputy District Attorney, and *Brianna K. Lamanna*, Deputy District Attorney, Clark County, for Real Party in Interest.

Before the Supreme Court, Hardesty, Stiglich, and Herndon, JJ.

OPINION

By the Court, Stiglich, J.:

This original petition for a writ of mandamus challenges pretrial release protocols. Petitioner was arrested and charged with criminal activity, released on bail with high-level monitoring, and then taken into custody for allegedly violating his conditions of bail. While awaiting an evidentiary hearing after remand, petitioner filed this action, complaining of delay and about the procedures (or lack thereof) implemented after he was taken into custody and asking us to consider the standards for pretrial release both in general and as applied to him specifically and to direct his release. Meanwhile, however, the district court held an evidentiary hearing and re-released petitioner to house arrest.

We conclude that petitioner's claims challenging the imposition of house arrest are not moot, while his claims regarding the procedures for addressing violations of the conditions of bail are moot because he is no longer in custody but should be considered under an exception to the mootness doctrine because they are capable of repetition yet evading review. We take this opportunity to clarify that a defendant is constitutionally entitled to a prompt hearing after being taken into custody from pretrial release, at which the State bears the burden of demonstrating probable cause. Further, we rec-

ognize that a violation of a condition of house arrest may lead to statutory sanctions, and we do not recognize a distinction between so-called "technical" and "substantive" violations. And we hold that NRS 178.4851 and *Valdez-Jimenez* require the district court to make findings of fact on the record that each condition of pretrial release is the least restrictive means of ensuring public safety and the defendant's return to court. We grant mandamus relief in part to direct the district court to enter an order concerning petitioner's custodial status, consistent with our instructions in this opinion. We deny mandamus relief insofar as relief cannot be afforded on petitioner's challenges and to the extent that petitioner seeks relief beyond an order addressing his custodial status supported by findings of fact on the record consistent with NRS 178.4851.

BACKGROUND

In 2020, the State charged petitioner Derek Johnston with battery resulting in substantial bodily harm constituting domestic violence and malicious destruction of property. He was granted bail, placed on medium-level electronic monitoring, and ordered to maintain no contact with the victim as conditions of his release. After an additional domestic battery charge was filed against Johnston in a separate case, he was placed on high-level electronic monitoring (house arrest) in 2021.

Shortly thereafter, the Las Vegas Metropolitan Police Department (LVMPD) took Johnston into custody for violating his pretrial release conditions by living with the victim, failing to stay at his approved address, failing to submit to alcohol and drug testing, and failing to comply with a court order. A letter from an LVMPD officer to the district court alleged that Johnston "had not been to his approved residence a single time since beginning [house arrest] and he had not been calling as instructed for his activities." When LVMPD officers visited Johnston's workplace during the daytime, they found that the business was closed and locked. An LVMPD officer tried calling Johnston's cellphone and home phone to no avail. They were finally able to contact Johnston by calling his GPS device. When Johnston let the officers into his shop, he informed them that his girlfriend, Sarah, was upstairs. The officers found a woman lying in a bed who they claim did not produce identification. The LVMPD letter alleged that this woman was the victim with whom Johnston was ordered not to have contact. Johnston also refused to provide a urine sample to the officers for a drug test.

A hearing on the State's motion to revoke bail was held over one month after Johnston was taken into custody. Johnston alleged that the woman who interacted with the police at his shop was not the victim and had provided a driver's license number identifying her as another person. The district court temporarily granted the State's motion pending an evidentiary hearing.

The district court held an evidentiary hearing a few weeks later. Johnston contended that the claim that the woman at Johnston's shop was the victim evinced "willful ignorance" because the victim was at least 5′7″ tall, while the woman at the shop was 4′10″ tall. Sarah, the woman Johnston contended was at the shop who he identified by name to the officers, was present at the hearing. Video from an officer's body-worn camera was shown at the hearing, and Sarah testified that she was the woman shown in the video. The State then stipulated that the woman in the video was Sarah and not the victim. The district court agreed and determined Johnston's only violation of the house arrest provisions was staying at his shop—which had open bottles of alcohol—instead of his home address. Johnston argued that his sleeping in the office was merely a technical violation that was not substantive. The district court rejected the proposed distinction of technical versus substantive violations, explaining that "whether it's technical or not technical, if you can't follow the rules, then that's an issue." Nonetheless, the district court rejected the State's motion and reinstated Johnston on house arrest. Johnston argued that he should not be placed on house arrest at all and maintained that the house arrest protocol imposed "reache[d] further than what [was] least restrictive." The district court denied Johnston's request to be removed from house arrest and did not rule on his larger challenge to the imposition of house arrest.

The next month, LVMPD again arrested Johnston and took him into custody for allegedly failing to maintain contact with his supervising officer and failing to provide a urine sample for a drug test. A letter from an LVMPD officer alleged that Johnston was unresponsive to officers' phone calls on several occasions. Further, Johnston made eye contact with officers who were attempting to conduct a home visit and drove away. The officers thereafter visited him at his workplace, which they were unable to access until they called Johnston to let them in. An officer requested Johnston provide a urine sample, which Johnston refused, as he stated that he had just used the bathroom. He was thereafter taken into custody and transported to Clark County Detention Center (CCDC). While at CCDC, Johnston again refused to provide a urine sample to the officers.

Although no hearing on the pretrial detention was scheduled, Johnston sought his release at a subsequent calendar call hearing before the district court. The district court refused to address his custody status at that hearing and directed Johnston to file a motion for release, despite Johnston's objection that NRS 178.4851 required the State to move to detain a defendant. Ultimately, the court set an evidentiary hearing, after which the court ordered Johnston's release and reinstatement to house arrest. Meanwhile, Johnston filed the instant writ petition.

DISCUSSION

Johnston's petition raises two challenges to the pretrial release violation process. First, he argues that criminal defendants are entitled to a prompt hearing when taken into custody for alleged violations of the conditions of pretrial release. At that hearing, he argues, the State should provide credible evidence to show probable cause for the violation. Second, he argues that the court should recognize a distinction between "technical" and "substantive" violations of pretrial release conditions and issue intermediate sanctions accordingly. Related to these challenges, Johnston further argues that the district court erred by requiring him to post bail and submit to house arrest because the court did not determine that bail and the conditions of bail in this case were the least restrictive means of protecting the community and ensuring his return to court. Johnston requests that this court set forth new procedures governing pretrial release decisions and order his immediate discharge.

Johnston's challenges relating to the procedures for addressing violations of the pretrial release terms are moot

Johnston's writ petition challenges the procedures for addressing alleged violations of the terms of his pretrial release. Although Johnston was taken into custody, the district court rejected the State's motion to revoke bail, and Johnston was subsequently reinstated on house arrest. This court's role is to resolve live disputes by a decision that can be given effect and not to resolve moot or abstract issues. *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004). Therefore, "a controversy must be present through all stages of the proceeding, and even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (citations omitted). Courts, however, have recognized limited exceptions to the mootness doctrine. *See* 1A C.J.S. *Actions* § 80 (2022 update) (identifying several exceptions jurisdictions have applied). As Johnston is no longer in custody, we conclude that his claims challenging his detention for violating pretrial release conditions are moot.[1] Nevertheless, we must determine whether the moot claims should be addressed under an exception to the mootness doctrine.

[1]We agree with Johnston that the claims challenging the imposition of bail with house arrest as a condition are not moot, as he has not pleaded guilty or been convicted at this time. *Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 158, 460 P.3d 976, 982 (2020) (recognizing that bail and pretrial issues "become moot once the case is resolved by dismissal, guilty plea, or trial").

The moot claims should be considered as presenting issues capable of repetition, yet evading review

Johnston argues that, even if his challenges regarding pretrial detention became moot when the district court held the evidentiary hearing and reinstated him on house arrest, this court should consider them under the capable-of-repetition-yet-evading-review exception to the mootness doctrine. He argues that "most pretrial release violation detention orders are short in duration and the issues concerning bail and pretrial detention become moot once the case is resolved by dismissal, guilty plea, or trial." He further contends that these issues recur and identifies three criminal cases in which defendants have raised similar arguments before the justice court or district court regarding the revocation of bail. And Johnston argues that the issues involve "violations of due process."

While this court generally declines to consider moot issues, we may consider a moot case "if it involves a matter of widespread importance that is capable of repetition, yet evading review." *See Personhood Nev.*, 126 Nev. at 602, 245 P.3d at 574. To invoke this exception, the party seeking to overcome mootness must show "that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013). "[T]he second factor of the mootness exception requires that the question presented is likely to arise in the future with respect to the complaining party or individuals who are similarly situated to the complainant." *Valdez-Jimenez*, 136 Nev. at 160, 460 P.3d at 983.

We conclude that Johnston's pretrial release claims present issues capable of repetition yet evading review. First, the "duration of the challenged action is relatively short." *Bisch*, 129 Nev. at 334-35, 302 P.3d at 1113. The United States Supreme Court has observed that "[p]retrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted." *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). The brevity of pretrial detention meets this consideration. Second, these issues are likely to arise in the future, as Johnston has illustrated with examples in three other criminal cases in which defendants were taken into custody in a manner that allegedly violated due process. *Cf. Valdez-Jimenez*, 136 Nev. at 160, 460 P.3d at 983 (concluding that petitioners showed a likelihood of recurrence where they "provided documents from other criminal cases in which defendants have raised similar arguments"). Johnston himself has at least twice been subjected to the detention he argues is unconstitutional, and it stands to reason that he may be similarly subjected in the future.[2]

[2]Indeed, the parties represented at oral argument that Johnston has once more been taken into custody.

Third, the pretrial issues presented here are important. Pretrial detention and the parameters of house arrest affect many arrestees, and these issues touch on the constitutionality of Nevada's bail and pretrial release regime. *See id.* at 160-61, 460 P.3d at 983 (observing that petitioners showed that the issues were important where they "affect[ed] many arrestees and involve[d] the constitutionality of Nevada's bail system," such that resolving them "would provide guidance to judges who are responsible for assessing an arrestee's custody status"). Further, this case presents an opportunity for this court to clarify the court's role when taking a defendant into custody for a violation of his pretrial release conditions. Therefore, even though resolution of these issues may not benefit Johnston, we elect to consider them under the exception. *Cf. Haney v. State*, 124 Nev. 408, 410-11, 185 P.3d 350, 352 (2008) ("Although our ruling in this case will not benefit [appellant] directly because his sentence has expired, we nonetheless address the legal questions presented because they are capable of repetition, yet evading review.").

Mandamus relief is warranted in part, and this petition presents several important legal issues that merit clarification

A writ of mandamus is available to compel a district court to perform an act the law requires or to control a manifest abuse or arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Mandamus relief is available only if a petitioner lacks a plain, speedy, and adequate legal remedy. NRS 34.170; *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. A manifest abuse of discretion occurs when there is a clearly erroneous interpretation or application of the law, and "[a]n arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than reason, or contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (internal quotation marks and citations omitted); *see also Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 680-81, 476 P.3d 1194, 1196-97 (2020) (distinguishing a *manifest* abuse of discretion or arbitrary or capricious act from correcting a "mere error in judgment" and providing that such mandamus "is available only where the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will" (internal quotation marks omitted)). The court may also issue so-called "advisory" mandamus. *Walker*, 136 Nev. at 683, 476 P.3d at 1198-99. In such instances, the court may consider a writ petition to clarify an important legal issue when "considerations of sound judicial economy and administration militate in favor of granting the petition." *Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 867, 872, 335 P.3d 1234, 1238 (2014) (internal quotation marks omitted). An issue considered

through advisory mandamus must "present a serious issue of substantial public policy or involve important precedential questions of statewide interest." *Walker*, 136 Nev. at 684, 476 P.3d at 1199. And the petitioner must show why writ relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Whether a writ petition will be considered is within this court's sole discretion. *Armstrong*, 127 Nev. at 931, 267 P.3d at 779-80.

Here, we elect to entertain this writ petition because it presents questions of statewide importance relating to pretrial release that would likely escape appellate review. As discussed below, we grant mandamus relief in part to direct the district court, in regard to Johnston's pretrial custodial status, to make findings of fact on the record supported by reasoning explaining why each condition imposed is the least restrictive means necessary to assure the safety of persons in the community and to protect against the risk of flight. We also observe that these pretrial release issues present important issues of public concern, as we noted in determining that the capable-of-repetition-yet-evading-review exception applied. Accordingly, we grant advisory mandamus in part to clarify that an individual is entitled to a prompt hearing following an arrest for an alleged violation of a condition of pretrial release and that the district court must enter findings on the record supporting that the conditions of pretrial release imposed are the least restrictive necessary to satisfy the objectives set forth in NRS 178.4851(1). We deny the petition in part to the extent that Johnston seeks further relief.

Due process requires a prompt hearing for a defendant taken into custody while on house arrest for a pretrial release violation, at which the State must show probable cause

Johnston first argues that he was deprived of his right to due process by being held in custody for over a month without a hearing. He argues that the district court was required to hold a prompt hearing at which the State must demonstrate probable cause for taking him into custody based on a violation of the pretrial release conditions. The State counters that detention for violating the conditions of release is not a new arrest that requires a hearing under *Valdez-Jimenez*. The State argues that Johnston was not arrested for a new offense, but rather was taken into custody to determine whether he was still a suitable candidate for release.

We review de novo constitutional issues such as due process. *Manning v. State*, 131 Nev. 206, 209-10, 348 P.3d 1015, 1017-18 (2015). Both the United States and Nevada Constitutions provide that no person shall be deprived of liberty without due process of law. U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(2). "Pretrial release and detention decisions implicate a liberty interest—conditional pretrial liberty—that is entitled to procedural due process protections." *Holland v. Rosen*, 895 F.3d 272, 297 (3d Cir. 2018).

"Procedural due process requires that any government action depriving a person of liberty must 'be implemented in a fair manner.'" *Valdez-Jimenez*, 136 Nev. at 165, 460 P.3d at 987 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). Once the court concludes that due process applies, it must determine what process an individual is due, as the United States Supreme Court has made clear "that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The timing of a hearing, if one is required, is often of fundamental importance for due process. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) ("The hearing must be at a meaningful time and in a meaningful manner." (internal quotation marks omitted)). In the context of one accused of violating the conditions of parole, the United States Supreme Court has held that "[t]he revocation hearing must be tendered within a reasonable time after the parolee is taken into custody." *Morrissey*, 408 U.S. at 488; *In re Smith*, 138 Nev. 133, 135, 506 P.3d 325, 327 (2022) (citing *Morrissey* for this proposition); *see also United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990) (recognizing that the federal Bail Reform Act requires a prompt hearing on an alleged violation and sets forth time limits). And in the context of bail and other decisions regarding conditions of pretrial release, this court has recognized "that an accused is entitled to a prompt individualized hearing on his or her custody status after arrest." *Valdez-Jimenez*, 136 Nev. at 163, 460 P.3d at 985.

The Legislature has provided that a penalty for noncompliance with a condition of pretrial release must be preceded by reasonable notice and an opportunity for a hearing. NRS 178.4851(7). It has not provided specific time limits for conducting this hearing. Consistent with the principles of due process and in accordance with other decisions requiring individualized hearings where an individual is subject to restraint by the State, we clarify that one detained for allegedly violating a condition of pretrial release has a due process right to a prompt hearing after arrest. At the hearing, the State must show probable cause that a violation of a condition of pretrial release has occurred, *see Valdez-Jimenez*, 136 Nev. at 166, 460 P.3d at 987 (generally recognizing it is the State's burden of proof in bail proceedings); *In re Wheeler*, 81 Nev. 495, 500, 406 P.2d 713, 716 (1965) (recognizing State's burden of proof to present evidence in bail proceedings), and the defendant may contest the evidence put forward, *State v. Knight*, 380 A.2d 61, 61 (Vt. 1977). Should the district court find probable cause that a violation occurred, it may impose a sanction as set forth in NRS 178.4851(7)(a)-(c). *See Sheriff, Washoe Cty. v. Steward*, 109 Nev. 831, 835, 858 P.2d 48, 51 (1993) (establishing that probable cause requires a showing by at least slight or marginal evidence of a reasonable inference that the accused committed the

offense). And we reject the State's argument that taking a person into custody does not qualify as an arrest, as NRS 178.4851(9) provides that remanding to custody is implemented by "arrest[ing] the person." We clarify that a district court abuses its discretion when it does not hold a prompt hearing on an alleged pretrial release violation. Nevertheless, we deny mandamus relief as to Johnston's pretrial release claims because they are moot, as he is no longer in custody. *See Valdez-Jimenez*, 136 Nev. at 167, 460 P.3d at 988 (denying mandamus petitions as moot where petitioners challenging bail regimen were no longer subject to pretrial detention).

A violation of house arrest restrictions may justify taking a defendant into custody, and there is no distinction between "technical" and "substantive" violations

Johnston argues that this court should "create intermediate levels of sanctions for small violations of pretrial releases" to avoid rendering language in NRS 178.487 surplusage. He urges this court to adopt the standard from the federal Bail Reform Act of 1984, which he argues contains similar provisions, and NRS 176A.630, which "has codified the parlance of technical vs. non-technical violation for probationers."

We look first to plain language in interpreting a statute. *Bergna v. State*, 120 Nev. 869, 873, 102 P.3d 549, 551 (2004). Where legislative intent is clear, we will construe it to give effect to that intent. *Id.* We review matters of statutory interpretation de novo. *Justin v. Second Judicial Dist. Court*, 132 Nev. 462, 466, 373 P.3d 869, 872 (2016).

We conclude that the plain language of the statutes at issue repels Johnston's arguments. First, NRS 178.487, a statute relating to bail after arrest for a felony offense committed while on bail, does not apply. Instead, NRS 178.4851(7)(c), the applicable statute, provides that the court may revoke bail and remand the defendant into custody if the defendant "fails to comply with a condition of release." NRS 178.4851(7)(c) does not distinguish a "technical" violation of a condition of pretrial release from a "substantive" violation. Rather, it unambiguously allows the district court to revoke bail and remand the defendant into custody if the defendant fails to comply with a condition of release. *See* NRS 178.4851(7). The statute provides no basis to distinguish between purportedly technical and substantive violations. Johnston's reliance on NRS 176A.630 as an example of where the Legislature has made such a distinction reinforces this point.[3] There, the Legislature defined "technical violation" as "any alleged violation of the conditions of probation" that is not, for example, the commission of a new felony or gross misdemeanor. *See* NRS 176A.630(5)(b). The Legislature's silence with

[3]Notably, NRS 176A.630 applies to probation and parole and thus does not apply here.

respect to classifications of violations in NRS 178.4851(7) undercuts Johnston's argument that the Legislature intended to distinguish between technical and other violations of conditions of bail. *See S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 453, 117 P.3d 171, 175 (2005) (observing that the Legislature has provided for supermajority voting when it so intended and concluding that its silence in that regard in the statute at issue indicated that the Legislature did not intend to impose that requirement in that instance). Finally, we decline Johnston's invitation to adopt distinctions set forth in the federal Bail Reform Act: had the Legislature intended for Nevada's bail laws to mirror analogous federal laws in this regard, it would have done so. *See id.*; *Siragusa v. Brown*, 114 Nev. 1384, 1399, 971 P.2d 801, 811 (1998) (declining to apply federal RICO statutory requirements that diverged from those of Nevada's RICO statutes); *see also State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) (presuming that the Legislature enacting a statute does so aware of other statutes relating to the same subject). Accordingly, we conclude that Johnston has not shown that we should construe the bail statutes to distinguish between technical and substantive violations.

The district court manifestly abused its discretion by failing to enter findings on the record supporting the conditions of pretrial release that it imposed

Johnston contends that the district court erred in imposing restrictions, such as house arrest, that were not individualized to his circumstances. He argues that uniform conditions of house arrest violate both NRS 178.4851 and *Valdez-Jimenez* where the district court does not make an individualized determination that the restrictions imposed are the least restrictive means of ensuring his return to court and protecting the community. Johnston also argues that the district court erred by requiring him to submit to house arrest and post bail. The district court declined to make factual findings when Johnston raised this issue below.

We review district court orders regarding pretrial release for an abuse of discretion. *Valdez-Jimenez*, 136 Nev. at 161, 460 P.3d at 984. NRS 178.4851(1) provides that the district court shall only impose a condition of release "as it deems to be the least restrictive means necessary to protect the safety of the community or to ensure that the person will appear at all times and places ordered by the court."[4] Any condition imposed must be supported by reasoned findings on the record explaining how the condition is the least restrictive means to protect community safety or to ensure the individual's appearance in court. NRS 178.4851(3); *see also Valdez-*

[4]NRS 178.4851(4) creates a partial exception to this rule for persons arrested for first-degree murder, which is not at issue in this case.

Jimenez, 136 Nev. at 166, 460 P.3d at 987 (requiring the district court to "make findings of fact and state its reasons for the bail decision on the record"). House arrest and electronic monitoring do not stand apart from the conditions that may permissibly be imposed, but, as with any condition of pretrial release, the district court's imposition of any such restriction must be supported by an individualized determination that the condition is necessary to secure the statutorily defined aims of conditions of pretrial release. *See Valdez-Jimenez*, 136 Nev. at 164, 460 P.3d at 985 ("[W]here a defendant remains in custody following indictment, he or she must be brought promptly before the district court for an individualized custody status determination.").

Here, the district court did not make the required findings when it assigned Johnston to house arrest. As the district court did not support its conditions of pretrial release with findings explaining their propriety, we cannot determine whether house arrest was appropriate to protect the community and ensure Johnston's appearance in court. Nevertheless, as the district court did not comply with its statutory mandate of supporting its imposition of house arrest, we conclude that it manifestly abused its discretion. Accordingly, we direct the district court, in regard to Johnston's pretrial custodial status, to make findings of fact on the record supported by reasoning explaining why each condition imposed is the least restrictive means necessary to assure the safety of persons in the community and to protect against the risk of flight.

CONCLUSION

In this opinion, we clarify three issues of law. First, a defendant has a constitutional right to a prompt hearing after being taken into custody from pretrial release, and at that hearing, the State bears the burden of demonstrating probable cause. Second, a violation of a condition of pretrial release may lead to statutory sanctions, and we do not recognize a distinction between so-called "technical" and "substantive" violations. And third, NRS 178.4851 and *Valdez-Jimenez* require the district court to make findings of fact on the record that each condition of pretrial release is the least restrictive means of ensuring public safety and the defendant's return to court. We grant mandamus relief in part to direct the district court to enter an order consistent with our instructions in this opinion. We deny mandamus relief insofar as relief cannot be afforded on Johnston's challenges and to the extent that Johnston seeks relief beyond an order addressing his custodial status supported by findings of fact on the record consistent with NRS 178.4851.

Hardesty and Herndon, JJ., concur.

IN THE MATTER OF THE ESTATE OF MARILYN WEEKS SWEET, DECEASED.

CHRISTY KAY SWEET, APPELLANT, *v.* CHRIS HISGEN, RESPONDENT.

No. 83342-COA

October 20, 2022 520 P.3d 827

Appeal from a district court order admitting a will to probate. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Affirmed.

[Rehearing denied November 23, 2022]

Dickinson Wright PLLC and *Kerry E. Kleiman* and *Michael N. Feder*, Las Vegas, for Appellant.

Blackrock Legal, LLC, and *Thomas R. Grover* and *Michael A. Olsen*, Las Vegas, for Respondent.

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

OPINION

By the Court, GIBBONS, C.J.:

In this appeal, we consider whether the district court properly admitted a will to probate that was drafted by or for the decedent in Portugal and was written in Portuguese, where the decedent was domiciled in Maryland and the pertinent property of the estate at death was a house in Nevada. At issue is whether the will was valid under the Uniform International Wills Act—codified as NRS Chapter 133A—and in particular, whether the will was signed by an "authorized person," who acts as a supervising witness, under the Act. Alternatively, we address whether a district court may properly admit a will to probate under NRS Chapter 133 if it is not valid under NRS Chapter 133A. Finally, we are asked to interpret the scope of the devise made under the language of the will.

We conclude that the laws of relevant foreign states must be taken into consideration when evaluating the identity of an "authorized person" for the purpose of implementing the Uniform International Wills Act. Additionally, we conclude that the plain and ordinary meaning of the relevant statutes provides for a will to be probated under NRS Chapter 133 if it fails to conform with NRS Chapter 133A. We also conclude that the district court did not err in applying the will at issue here to the decedent's entire estate and that appellant was not entitled to a will contest during the proceedings

below. For the reasons articulated herein, we affirm the district court's order.

FACTS AND PROCEDURAL HISTORY

In 2006, Marilyn Weeks Sweet, then domiciled in Maryland, executed a will in Tavira, Portugal. The will was written in Portuguese. It was signed and overseen by a notary, and it bore the signatures of two additional witnesses, which were notarized. In 2020, Marilyn died in Nevada. Her estate at the time of her death was comprised of one home in Las Vegas, titled in her name and worth an estimated $530,085.

Respondent Chris Hisgen, Marilyn's surviving spouse, filed a petition for general administration of the estate and to admit the will to probate. Hisgen attached a translation of the will to his petition. The translation was done by Lori Piotrowski and reads as follows, in pertinent part:

> [Marilyn Weeks Sweet] establishes as universal heir of all her goods, rights, and actions in Portugal, Christopher William Hisgen,[1] single, adult, native Washington, DC, United States of America, of American nationality with whom she resides.
>
> Should he have already died, on the date of her death, Kathryn Kimberly Sweet, married, resident of Arlington, Virginia, United States of America and Christy Kay Sweet, single, adult, resident of Thailand, will be her heirs.

Also attached to the petition was a waiver of notice signed by Kathryn Kimberly Sweet, one of Marilyn's daughters.

Appellant Christy Kay Sweet (Sweet), Marilyn's other daughter, filed an objection to Hisgen's petition, arguing that the will could not be probated in Nevada because it was signed in a foreign country. Sweet further argued that the will applied only to property in Portugal and did not include the Nevada home. Hisgen filed a reply in support of his petition, attaching three declarations. One was from a witness, attesting that the individual had witnessed Marilyn execute the will. The other two declarations appear to be from the same person, Isabel Santos—apparently a Portuguese attorney and also a witness to Marilyn's will.[2] In one declaration, Santos attested that she had witnessed Marilyn execute the will. In the other, Santos attested that the will was valid under Portuguese law. She additionally offered a translation of the will that differed slightly from

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[1]In Portuguese, the will reads, in pertinent part, "[Marilyn Weeks Sweet] [i]nstitui herdeiro universal de todos os seus bens, direitos e acções em Portugal, Christopher William Hisgen . . . ."

[2]One of the declarations is titled "Declaration of Isabel Pires Cruz Santos." The other is titled "Declaration of Dr[a] Maria Isabel Santos." Both declarations bear the same signature, which reads Isabel Pires Cruz Santos.

Piotrowski's translation. The Santos translation reads, in pertinent part, "[Marilyn Weeks Sweet] [e]stablishes universal heir to all her assets, rights and shares in Portugal, Christopher William Hisgen . . . ."

Following a hearing, the probate commissioner issued a report and recommendation (R&R) regarding Hisgen's petition. The probate commissioner concluded that the will was a valid international will under NRS Chapter 133A. He alternatively concluded that even if the will was invalid under NRS Chapter 133A, it could nevertheless be probated under NRS 133.040.[3] Finally, the probate commissioner concluded that the will applied to the entire estate rather than only property situated in Portugal. The probate commissioner therefore recommended that the will "be admitted to probate under either NRS 133A.060 or NRS 133.040-[.]050" and "be interpreted to dispose of the entirety of the [e]state to [Hisgen]."

Sweet filed an objection to the commissioner's R&R, and the district court held a hearing where the parties largely repeated the arguments made before the probate commissioner. The only notable difference between the hearings was that there was discussion before the court as to whether the will was valid under NRS 133.080 (foreign execution of wills) and no discussion as to NRS 133.040 (wills executed in Nevada). After the hearing, the district court issued an order affirming the probate commissioner's R&R in its entirety and admitting the will to probate. Sweet timely appealed pursuant to NRS 155.190(2).

ANALYSIS

Sweet raises four primary arguments on appeal. First, she argues the will did not meet the requirements for a valid international will under NRS Chapter 133A, Nevada's codification of the Uniform International Wills Act (UIWA). Second, she argues that the will could not otherwise be probated under NRS Chapter 133—primarily focusing her arguments on NRS 133.080(1) (foreign execution of wills). Third, Sweet argues the will applied only to property located in Portugal. And fourth, she argues, for the first time, that she was entitled to a will contest under NRS Chapter 137. We address each of her arguments in turn.

The district court did not err in ruling that the will was a valid international will under NRS Chapter 133A

Sweet argues the district court erred in ruling that the will was a valid international will under NRS Chapter 133A. She argues the

[3]NRS 133.040 provides the requirements for a valid will executed in Nevada. As discussed below, because the will was undisputedly executed in Portugal rather than Nevada, the district court erred in accepting the portion of the probate commissioner's R&R concluding that the will could be admitted to probate under NRS 133.040, as the applicable provision is NRS 133.080.

will facially fails to comply with the requirements of that chapter because it lacks the signature of an "authorized person" under NRS 133A.030 (defining "authorized person" as a person admitted to practice law in Nevada or a person empowered to supervise the execution of international wills by the laws of the United States), does not include Marilyn's signature on each page, and does not include a certificate attesting compliance with the UIWA. Hisgen counters that Santos was an "authorized person" for overseeing the execution of Marilyn's will because she is licensed to practice law in Portugal. In the alternative, Hisgen argues that the Portuguese notary was an "authorized person" because "Nevada state law allows for the recognition of a foreign notarial act." He further argues that neither the absence of Marilyn's signature on each page of the will nor the absence of the certificate of compliance is fatal to the validity of the will under NRS Chapter 133A.

The validity of a will is a question of law we review de novo. *See In re Estate of Melton*, 128 Nev. 34, 42, 272 P.3d 668, 673 (2012) (reviewing the validity of a handwritten will de novo). Further, "NRS 133A.020 to 133A.100, inclusive, derive from Annex to Convention of October 26, 1973, Providing a Uniform Law on the Form of an International Will. In interpreting and applying this chapter, regard must be given to its international origin and to the need for uniformity in its interpretation." NRS 133A.110.

At the outset, we note that the UIWA is found in the Annex to the Convention of October 26, 1973, Providing a Uniform Law on the Form of an International Will. Convention Providing a Uniform Law on the Form of an International Will, Resolution, art. I, ¶ 1, October 27, 1973, S. Treaty Doc. No. 99-29 [hereinafter ULIW Convention]. Use of the exact text of the Annex is mandatory in countries using primarily English, French, Russian, or Spanish languages. *Id.* Explanatory Report, S. Treaty Doc. No. 99-29 at 11. While the text may be translated to other languages, like Portuguese, the translators are not permitted to make even "small changes in the presentation or vocabulary of the Uniform Law." *Id.* Therefore, because of this uniformity, we may properly turn to Nevada's codification of the UIWA to determine if the will complies with the UIWA while keeping in mind the international origin of the act.

Nevada has adopted and codified the UIWA in NRS Chapter 133A. Within this chapter, the various requirements for a valid international will are established. Some of these requirements are mandatory to ensure the validity of an international will. *See* NRS 133A.060(2) (stating a will *must* be signed "in the presence of two witnesses and of a person authorized to act in connection with international wills" (emphasis added)). However, failure to comply with other sections of the chapter are not fatal to the validity of the will. *See* NRS 133A.070(4) (explaining that a will executed in compliance with NRS 133A.060 "is not invalid merely because it does

not comply with" NRS 133A.070(1)'s signature requirement); NRS 133A.090 ("The absence or irregularity of a certificate does not affect the formal validity of a will under [NRS Chapter 133A]."). Thus, even though Marilyn's will did not have a signature on each page or a certificate attached, these defects are not fatal to its validity. *See* NRS 133A.070; NRS 133A.090.

We now turn to whether Marilyn's will complied with the mandatory provisions of NRS 133A.060.[4] As we noted above, to be valid under NRS 133A.060(2), a will must be signed "in the presence of two witnesses and of a person authorized to act in connection with international wills." Nevada has defined an "authorized person" as either (1) a person admitted to practice law in Nevada and who is in good standing as an active law practitioner in Nevada, NRS 133A.120, or (2) a person empowered to supervise the execution of international wills "by the laws of the United States, including members of the diplomatic and consular service of the United States designated by Foreign Service Regulations," NRS 133A.030. Thus, a valid international will executed in Nevada would need to be signed by either a Nevada attorney or someone authorized under the laws of the United States to execute international wills. This requirement must be read with the understanding that regard is given to the "international origin" of this statute and the need for international uniformity in interpreting it. *See* NRS 133A.110.

The matter of determining an authorized person to execute a uniform international will is to be decided by each nation. *See* ULIW Convention, Resolution, art. I, ¶ 1, October 27, 1973, S. Treaty Doc. No. 99-29 ("Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory."); *id.* Resolution, art. II, ¶ 1 ("Each Contracting Party shall implement the provisions of the Annex in its law . . . by designating the persons who, in its territory, shall be authorized to act in connection with international wills."); *id.* Resolution, art. III ("The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties."); *id.* Letter of Submittal, S. Treaty Doc. No. 99-29 at 8 ("Given the differing national practices and traditions with regard to the preparation of wills, the framers of the Convention left it to each individual state becoming party to the Convention to decide whom to delegate as its 'authorized person' . . . ."). Therefore, when determining if a purported

[4]The parties only challenge the mandatory provision of NRS 133A.060(2). They do not dispute the other mandatory provisions of NRS 133A.060, so we need not address them. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present.").

international will, signed in another country, should be admitted to probate, the district court must first consider if it complied with the UIWA requirements[5] before turning to the laws of the signatory country to determine if the will was signed by an "authorized person."

Since the will was executed in Portugal, not Nevada, we must turn to Portuguese law to determine who an "authorized person" is. *See* ULIW Convention, Resolution, art. II, ¶ 1. We note logic and common sense would dictate this course of action. The purpose of an international will would be frustrated if testators were required to anticipate the exact location where their will would be admitted to probate when they created the will and identified an authorized person to sign the will. *See* S. Treaty Doc. No. 99-29, 31 ("A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator.").

In the present case, Sweet's reading of the statute would have required Marilyn, who apparently had no connection to Nevada at the time the will was created, to ignore Portuguese law and Maryland law to comply with Nevada law. This is an absurd requirement to read into the Convention Providing a Uniform Law on the Form of an International Will and NRS Chapter 133A, and we decline to do so. *See Gallagher v. City of Las Vegas*, 114 Nev. 595, 599-600, 959 P.2d 519, 521 (1998) (holding that statutory interpretation "should be in line with what reason and public policy would indicate the legislature intended, and should avoid absurd results").

At the outset of our analysis of Portuguese law, we note that Portugal signed the Convention Providing a Uniform Law on the Form of an International Will and consented to be bound to the document. U.S. Dep't of State, Providing a Uniform Law on the Form of an International Will, https://www.state.gov/wp-content/uploads/2021/08/Wills-status-table-7.26.21.pdf (official list of signatory countries); Decreto no.º 252/75 de 23 de maio [Decree no. 252/75 of 23 May], https://files.dre.pt/1s/1975/05/11900/07170722.pdf [https://perma.cc/LTP6-U5XP] (Portuguese decree signing on to the Convention Providing a Uniform Law on the Form of an International Will).[6] Additionally, an "authorized person" as defined by Portugal will be recognized in Nevada, since the United States has also signed the convention and Nevada has adopted the Annex to the UIWA derived from the Convention. *See* ULIW Convention, Resolution, art. II, ¶ 1; U.S. Dep't of State, Providing a Uniform Law on the Form of an International Will, https://www.state.gov/

[5]Codified in Nevada as NRS Chapter 133A.

[6]No official English translation of the source is available. Translation assistance was provided by the Law Library of Congress Global Research Directorate.

wp-content/uploads/2021/08/Wills-status-table-7.26.21.pdf (official list of signatory countries); NRS 133A.110.

A notary is a designated "authorized person" in Portugal. *See* Decreto-Lei n.º 177/79, de 7 de junho [Decree-Law no. 177/79 of 7 June], art. 1, https://files.dre.pt/1s/1979/06/13100/12821283.pdf [https://perma.cc/6Z9U-83JZ] (Item 1 provides that each Contracting Party shall determine the persons empowered to deal with matters relating to the international will in its territory. Item 2 determines that Portuguese notaries will be authorized persons.).[7] Therefore, the signature of Joaquim August Lucas de Silva, a notary in Portugal, is the signature of an authorized person in Portugal.[8] This authorized person's signature must be recognized by Nevada.

Accordingly, we conclude that the will was signed in the presence "of a person authorized to act in connection with international wills." NRS 133A.060(2). Thus, the district court did not err in finding that the will met all the requirements for a uniform international will, although we note the district court did not utilize the proper analysis to arrive at this conclusion.[9] *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that we will affirm the district court if it reaches the correct result, even if for the wrong reason). Next, we turn to whether

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[7]No official English translation of the source is available. Translation assistance was provided by the Law Library of Congress Global Research Directorate and Google Translate. Relevant Portuguese text states,

> 1 — A Convenção Relativa à Lei Uniforme sobre a Forma de Um Testamento Internacional, aprovada para adesão pelo Decreto-Lei n.º 252/75, de 23 de Maio, prevê, no seu artigo II, a designação, por cada Parte Contratante, das pessoas habilitadas a tratar das matérias relativas ao testamento internacional no respectivo território.
>
> 2 — Considera-se no presente diploma que tal designação deverá recair sobre os notários e agentes consulares portugueses em serviço no estrangeiro, já que, nos termos do Código do Notariado, o tratamento daquelas matérias se insere perfeitamente no âmbito da sua competência.

Google Translate translation of the text states,

> 1 — The Convention on the Uniform Law on the Form of an International Will, approved for accession by Decree-Law no. 252/75, of 23 May, provides, in its article II, for the designation, by each Contracting Party, of the persons authorized to deal with matters relating to the international will in their respective territory.
>
> 2 — It is considered in the present diploma that such designation should fall on Portuguese notaries and consular agents in service abroad should be appointed, since, under the terms of the Notary Code, the treatment of those matters falls perfectly within the scope of their competence.

[8]Hisgen does not provide, and we could not find, relevant Portuguese law stating that Santos is an authorized person because she is an attorney in Portugal.

[9]The district court did not look to see who qualified as an "authorized person" in Portugal, probably because the parties did not request it to do so.

the district court erred in alternatively ruling that the will could be probated under NRS Chapter 133.

The district court did not err in alternatively ruling that the will could be admitted to probate under NRS Chapter 133

Sweet argues that the district court erred in concluding that, even if Marilyn's will was not valid under NRS Chapter 133A, it could nevertheless be probated under NRS Chapter 133. She argues that NRS 133.040, relating to wills executed in Nevada, is inapplicable to Marilyn's will because the will was undisputedly executed outside of Nevada. Turning to NRS 133.080(1), foreign execution of wills,[10] Sweet argues that statute should be interpreted to apply to "wills made in other states or wills made in countries that have not adopted the [uniform] [i]nternational [w]ill [requirements]." She argues the district court instead interpreted NRS 133.080(1) to be "a savings clause for international wills that fail to meet the requirements of NRS [Chapter] 133A." This interpretation, according to Sweet, renders NRS 133.080(1)'s "[e]xcept as otherwise provided in chapter 133A" language superfluous.

Hisgen counters that NRS 133A.050(2) indicates that the UIWA was not intended to supplant NRS Chapter 133. He argues the will could be admitted to probate under NRS 133.080(1) because it was a valid will in Portugal, where it was executed. He further argues that NRS 133.080(1) allows the will to be probated because it was a valid will in Maryland, where Marilyn was domiciled when the will was executed.

"The construction of a statute is a question of law, which we review de novo." *Orion Portfolio Servs. 2, LLC v. County of Clark*, 126 Nev. 397, 402, 245 P.3d 527, 531 (2010). Where a statute is clear and unambiguous, we give "effect to the plain and ordinary meaning of the words" without resorting to the rules of statutory construction. *Id.* NRS Chapter 133A defines "international will" as "a will executed in conformity with NRS 133A.050 to 133A.080 inclusive." NRS 133A.040. However, failure to conform with those provisions "does not affect [the will's] formal validity as a will of another kind." NRS 133A.050(2). Nevada deems as legally valid a will executed outside the state, provided it complies with the law "where executed or of the testator's domicile." NRS 133.080(1).

NRS 133A.050(2) and NRS 133.080(1) are clear and unambiguous. NRS 133A.050(2) states that the invalidity of a will as

[10]NRS 133.080(1) states,

> Except as otherwise provided in chapter 133A of NRS, if in writing and subscribed by the testator, a last will and testament executed outside this State in the manner prescribed by the law, either of the state where executed or of the testator's domicile, shall be deemed to be legally executed, and is of the same force and effect as if executed in the manner prescribed by the law of this State.

an international will—defined as a will that complies with the UIWA—does not affect its validity as a will of another kind. NRS Chapter 133 provides for different types of wills, all of which can be probated in Nevada. *See, e.g.*, NRS 133.040 (requirements for wills executed in Nevada); NRS 133.080 (requirements for foreign wills); NRS 133.085 (requirements for electronic wills); NRS 133.090 (requirements for a holographic will). Reading the two statutes together, there is nothing preventing a will that fails to comply with the UIWA from being admitted to probate under one of the provisions in NRS Chapter 133.

This reading of the statute gives effect to the plain and ordinary meaning of the words in NRS 133A.050(2) and NRS 133.080. *See Orion Portfolio Servs.*, 126 Nev. at 402, 245 P.3d at 531. A plain reading of the statutes does not support Sweet's argument that NRS 133.080 cannot apply to wills executed in countries that have adopted the uniform international will requirements because no language within the statute supports that assertion. Additionally, our reading is supported by the legislative history of NRS Chapter 133A. At an assembly hearing on Senate Bill 141—which would become NRS Chapter 133A—Senator Terry Care testified that "Nevada will recognize a will validly executed in another state and probably would recognize in most instances a will executed in another country." *Hearing on S.B. 141 Before the Assemb. Comm. on Judiciary*, 75th Leg., at 3 (Nev., Apr. 15, 2009). According to Senator Care, a primary purpose of NRS Chapter 133A was to give a Nevadan with property in a foreign country the ability to sign a uniform will as to the disposition of that property "despite any variance with local requirements." *Id.* The legislative history also addresses the "except as otherwise provided in Chapter 133A of NRS" language from NRS 133.080. That language was added to NRS 133.080 "so if a will is executed in conformity with the requirements of an international will [but] may not meet the requirements of the place where it is made, it can still be a valid international will." *Hearing on S.B. 141 Before S. Comm. on Judiciary*, 75th Leg., at 13 (Nev., Mar. 3, 2009) (statement of Natalee Binkholder, Deputy Legislative Counsel).

Here, NRS 133.080(1) provides for the will to be probated as a foreign will. Sweet does not dispute Hisgen's argument that the will was valid under Maryland law or that Marilyn was domiciled in Maryland at the time the will was executed.[11] Accordingly, the will could have been properly admitted to probate in Nevada as a will

[11]We consider this lack of response to be a concession by Sweet that Hisgen is correct. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious); *Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position").

valid in Maryland under NRS 133.080(1). Sweet also did not dispute below that Marilyn's will was legally valid in Portugal,[12] nor does she dispute that the will was executed in Portugal. This provides a second ground upon which the will could have been properly admitted to probate under NRS 133.080(1)—as a valid Portuguese will. In sum, a plain reading of NRS 133A.050(2) in conjunction with NRS 133.080(1) means that a will that fails to comply with the UIWA may nevertheless be probated in Nevada, even if it was executed internationally.

As noted above, the probate commissioner concluded in his R&R that the will could be probated under NRS 133.040 because it "facially" met that section's requirements. And the district court affirmed the R&R in its entirety. However, NRS 133.040 applies only to wills executed in Nevada. The district court therefore erred in concluding that the will could be admitted to probate under NRS 133.040. Nevertheless, we affirm the district court's order because, as explained above, the will could have been properly admitted to probate under NRS 133.080(1). *See Saavedra-Sandoval*, 126 Nev. at 599, 245 P.3d at 1202 (providing this court will affirm the district court if it reaches the correct result, even if for the wrong reason). Having concluded that the district court properly admitted Marilyn's will to probate, we now turn to whether the district court properly interpreted the will.

The district court did not err in ruling that the will applied to the entire estate

The record includes two slightly different translations of the will.[13] The Piotrowski translation, used by the district court, reads, "[Marilyn Weeks Sweet] establishes as universal heir of all her goods, rights, and actions in Portugal, Christopher William Hisgen . . . ." The Santos translation reads, "[Marilyn Weeks Sweet]

[12]On appeal, Sweet appears to challenge the validity of Marilyn's will under Portuguese law because the will left nothing for her children—something Sweet alleges is required in Portugal. However, Sweet failed to raise this argument, or any other argument challenging the validity of the will under Portuguese law, during the proceedings below and has thereby waived it on appeal. *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").

[13]The district court failed to certify a correct English translation of the will. *See* NRS 136.210 ("If the will is in a foreign language the court shall certify to a correct translation thereof into English and the certified translation shall be recorded in lieu of the original."). Neither party raises this as an issue on appeal, so we do not need to address it. *See Greenlaw*, 554 U.S. at 243 ("[W]e rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present."). We note that the Piotrowski translation was attached to the will admitted to probate and was relied upon by the district court.

[e]stablishes universal heir to all her assets, rights and shares in Portugal, Christopher William Hisgen . . . .” Sweet argues that the modifier “in Portugal” in the will applies to the entire preceding clause, not just “actions” in the Piotrowski translation or “rights and shares” in the Santos translation. She therefore argues that the will applied only to property situated in Portugal. Hisgen counters that wills must be interpreted in such a way as to avoid intestacy. He argues that Sweet’s interpretation of the will would effectively subject the entire estate to intestacy because the only known asset is situated in Nevada.

Where ambiguity exists in a will, we turn to rules of construction in construing the testatrix’s intent. *Lamphear v. Alch*, 277 P.2d 299, 302 (N.M. 1954).[14] “A will is ambiguous if the testator’s intent is unclear because words in the will can be given more than one meaning or are in conflict.” *In re Estate of Lello*, 50 N.E.3d 110, 113 (Ill. App. Ct. 2016) (quoting *Coussee v. Estate of Efston*, 633 N.E.2d 815, 818 (Ill. App. Ct. 1994)).[15] Here, the modifier “in Portugal” could be read to apply either to the entire clause preceding it or to only the words immediately preceding it. Because the words of the will can be given more than one meaning, Marilyn’s intent is unclear and the will is therefore ambiguous. *See id.* Accordingly, we turn to rules of construction to interpret Marilyn’s will to reflect her intent.

“[T]he interpretation of a will is typically subject to our plenary review.” *In re Estate of Melton*, 128 Nev. 34, 43, 272 P.3d 668, 673 (2012). “The primary presumption when interpreting or construing

[14]*See also In re Estate of Lello*, 50 N.E.3d 110, 120 (Ill. App. Ct. 2016) (“As a rule of construction . . . the presumption against intestacy only comes into play after an ambiguity is found.” (quoting *Coussee v. Estate of Efston*, 633 N.E.2d 815, 818 (Ill. App. Ct. 1994))); *Thurmond v. Thurmond*, 228 S.W. 29, 32 (Ky. 1921) (“[The presumption against partial intestacy] can be invoked only to aid the interpretation of a will where the intention of the testator is conveyed in uncertain and ambiguous terms . . . .”); *In re Estate of Holbrook*, 166 A.3d 595, 598 (Vt. 2017) (“[W]here both the will and the surrounding circumstances are ambiguous . . . the presumption against intestacy . . . requires that the court construe the will as absolute.” (internal quotation marks omitted)); *In re Estate of Hillman*, 363 N.W.2d 588, 590 (Wis. Ct. App. 1985) (“The presumption against intestacy does not apply to the construction of this will because the will is not ambiguous.”).

[15]*See also In re Estate of Zagar*, 491 N.W.2d 915, 916 (Minn. Ct. App. 1992) (“A will is ambiguous if, on its face, it suggests more than one interpretation.”); *In re Estate of Grengs*, 864 N.W.2d 424, 430 (N.D. 2015) (“A will is ambiguous if, after giving effect to each word and phrase, its language is susceptible to more than one reasonable interpretation.” (quoting *In re Estate of Eggl*, 783 N.W.2d 36, 40 (N.D. 2010))); *Knopf v. Gray*, 545 S.W.3d 542, 545 (Tex. 2018) (“A will is ambiguous when it is subject to more than one reasonable interpretation or its meaning is simply uncertain.”) (per curiam); *In re Estate of Stanton*, 114 P.3d 1246, 1249 (Wy. 2005) (“A will is ambiguous if it is obscure in its meaning, because of indefiniteness of expression, or because a double meaning is present.”).

a will is that against total or partial intestacy." *In re Foster's Estate*, 82 Nev. 97, 100, 411 P.2d 482, 483 (1966).[16] This presumption against intestacy is particularly strong where a will contains a residuary clause. *Shriner's Hosp. for Crippled Children of Tex. v. Stahl*, 610 S.W.2d 147, 151 (Tex. 1980) ("Where the will contains a residuary clause, the presumption against intestacy is especially strong.").[17] The guideline for interpreting a will is the intention of the testatrix, determined by the meaning of her words. *In re Foster's Estate*, 82 Nev. at 100, 411 P.2d at 484.

Here, the district court did not err in interpreting the will to apply to the entire estate. First, Marilyn designated Hisgen as "universal heir of all her goods, rights, and actions in Portugal." Universal succession under Roman or civil law referred to the totality of one's estate. *See Succession*, *Black's Law Dictionary* (11th ed. 2019) (defining "universal succession" as "[s]uccession to an entire estate of another at death"); George A. Pelletier Jr. & Michael Roy Sonnenreich, *A Comparative Analysis of Civil Law Succession*, 11 Vill. L. Rev. 323, 324-26 (1966) (tracing the concept of universal succession—meaning "succession by an individual to the entirety of the estate, which includes all the rights and duties of the decedent"—back to its roots in Roman law). Accordingly, Marilyn's use of the term "universal heir" indicates her intent that Hisgen inherit her entire estate. While this is contradicted by the modifier "in Portugal," the presumption against intestacy overrides the modifier and ensures that Hisgen inherits her entire estate. This means that the modifier only applies to "actions" or "rights and shares." *See Tsirikos v. Hatton*, 61 Nev. 78, 84, 116 P.2d 189, 192 (1941) (concluding where the language in a will reasonably allows a construction favorable to testacy, that construction should be used). Thus, we give effect to both "universal heir" and "in Portugal" and use the meaning of the words utilized by Sweet to determine her intent. *See In re Foster's Estate*, 82 Nev. at 100, 411 P.2d at 484.

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[16]*See also Tsirikos v. Hatton*, 61 Nev. 78, 84, 116 P.2d 189, 192 (1941) ("[W]here the language employed in a will reasonably admits of a construction favorable to testacy, such construction should obtain."); *In re Farelly's Estate*, 4 P.2d 948, 951 (Cal. 1931) ("Of two modes of interpreting a will, that is preferred which will prevent a total intestacy. The same rule has been applied to partial intestacy." (internal quotation marks omitted)).

[17]*See also Cahill v. Michael*, 45 N.E.2d 657, 662 (Ill. 1942) ("The presumption against intestacy is strong where there is a residuary clause."); *Medcalf v. Whitely's Adm'x*, 160 S.W.2d 348, 349 (Ky. 1942) ("[T]he presumption against intestacy . . . is particularly strong where the residuary is disposed of . . . ."); *In re Glavkee's Estate*, 34 N.W.2d 300, 307 (N.D. 1948) ("The presumption against an intestacy is especially strong where the testator has attempted to insert a general residuary clause in the will."); *Edwards v. Martin*, 169 A. 751, 752 (R.I. 1934) ("There is also the presumption against intestacy, here particularly strong since the residuary clause is the subject of consideration.").

Second, the modifier "in Portugal" is not included in the residuary clause, which instead simply states that Marilyn's daughters "[would] be her heirs" should Hisgen have predeceased her. As noted above, the inclusion of a general residuary clause strengthens the presumption against intestacy. Therefore, interpreting the will to apply to the entire estate gives meaning to the use of the words "universal heir" and the omission of any modifier in the residuary clause. *See In re Foster's Estate*, 82 Nev. at 100, 411 P.2d at 484. This interpretation is also consistent with the presumption against intestacy, *see id.* at 100, 411 P.2d at 483, which in this case—because the only asset in the estate is located in Nevada—would result in total intestacy. Accordingly, the district court did not err in ruling that the will devised property outside of Portugal because the language of the will indicates that Marilyn intended to devise her entire estate and there is a strong presumption against intestacy.

Sweet was not entitled to a will contest

Finally, Sweet argues the district court erred by not holding a will contest as to the validity of the will. She argues the mandatory language of NRS 137.020(2)[18] required a will contest. Hisgen counters that Sweet never requested a will contest during the proceedings below and has therefore waived this argument on appeal. He further argues that NRS 137.010(1) required Sweet to issue citations (notices) before either the probate commissioner or the district court could have ordered a will contest. Her failure to do so, according to Hisgen, deprived the district court of jurisdiction to hold a will contest.

Here, Sweet was not entitled to a will contest during the proceedings below. As a preliminary matter, Sweet did not argue below that she was entitled to a will contest despite possibly initiating the process by filing her written objection prior to the hearing on Hisgen's petition to probate the will. *See* NRS 137.010(1) (stating who may contest a will and how to initiate the process). Therefore, this argument could be considered waived on appeal. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983. Regardless, she concedes that she did not "technically compl[y]" with NRS 137.010(1), which requires, in addition to filing a written objection, personal notice of a will contest to be given by citation to a decedent's heirs and all interested persons. "[F]ailing to issue citations in a will contest deprives

[18]NRS 137.020(2) states as follows:

> An issue of fact involving the competency of the decedent to make a will, the freedom of the decedent at the time of the execution of the will from duress, menace, fraud or undue influence, the due execution and attestation of the will, or any other question substantially affecting the validity of the will, must be tried by the court unless one of the parties demands a jury.

the [district] court of personal jurisdiction over the parties denied process." *In re Estate of Black*, 132 Nev. 73, 78, 367 P.3d 416, 419 (2016).[19] Accordingly, here, Sweet's failure to issue any citation for a will contest deprived the district court of jurisdiction over such a contest, and the district court therefore did not err in not holding a will contest.

CONCLUSION

The international scope of the UIWA requires the court to look to the laws of the foreign state where the will was executed to determine the proper identity of an "authorized person." Further, NRS 133A.050(2) and NRS 133.080(1) are clear and unambiguous in allowing a will that fails to comply with the UIWA to be probated in Nevada, even if it was executed in a foreign country, so long as it complies with NRS Chapter 133. Also, the district court did not err in applying the will to the entire estate. Finally, Sweet was not entitled to a will contest during the proceedings below because she did not comply with NRS 137.010(1). Accordingly, we affirm the district court's order.

Tao and Bulla, JJ., concur.

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[19]We note that this requirement is analogous to the demand requirement found in NRS 13.050(1)(a) (providing even if venue is not proper, the proceeding may be held in the improper county unless the defendant demands in writing that the trial be held in the proper county). A motion is not a substitute for a demand. *See Nev. Transit Co. v. Harris Bros. Lumber Co.*, 80 Nev. 465, 468-69, 396 P.2d 133, 134 (1964) (explaining that a motion for a change of venue does not meet the requirement that a written demand for a change of venue be filed).

IN THE MATTER FOR CHANGE OF NAME AS TO: ANTHONY ROY SALAZAR.

ANTHONY ROY SALAZAR, APPELLANT.

No. 82667

October 20, 2022 518 P.3d 873

Appeal from a district court order dismissing a petition for adult name change. Eighth Judicial District Court, Family Division, Clark County; Denise L. Gentile, Judge.

Reversed and remanded.

McLetchie Law and *Margaret A. McLetchie, Dayvid J. Figler*, and *Leo S. Wolpert*, Las Vegas, for Appellant.

Before the Supreme Court, HARDESTY, STIGLICH, and HERNDON, JJ.

OPINION

By the Court, HARDESTY, J.:

In this opinion, we consider the district court's dismissal of a petition for an adult name change. NRS 41.270 allows "[a]ny natural person, except an unemancipated minor, desiring to have his or her name changed" to file a petition to do so with the district court. The petition must state "whether the applicant has been convicted of a felony and include a statement signed under penalty of perjury that the applicant is not changing his or her name for a fraudulent purpose." *Id*. Publication of notice of the petition is required in some circumstances, NRS 41.280, and if no written objection to the petition is filed within ten days, NRS 41.290(1) directs the court to grant the petition, so long as the court is "satisfied by the statements in the petition, or by other evidence, that good reason exists therefor." If an objection is filed, the court must hold a hearing to determine whether the applicant has satisfactory reasons for the name change. *Id*. In either case, before granting or denying the petition, "the court shall specifically take into consideration the applicant's criminal record, if any, which is stated in the petition." *Id.* Here, where appellant's name-change petition faced no objections and where it appears that the petition met all the statutory requirements, we conclude that the district court abused its discretion in summarily dismissing it without resolution on the merits.

FACTS

Appellant Monica Denise Salazar, an inmate whose current legal name is Anthony Roy Salazar,[1] filed a petition with the Eighth Judicial District Court's Family Division to change her name. Her petition stated that her reason for the name change was to conform her name to her gender identity. Along with the petition, Salazar filed an application to waive fees and a request for summary disposition. The case was assigned to Judge William S. Potter in Department M, and two months later, department staff sent an informal communication to Salazar imposing requirements without legal citation. Specifically, staff sent a notice indicating that the court was denying the petition based on an internal department policy requiring approval from the Nevada Department of Corrections for inmate name changes, which could be overcome only with a notice of nonopposition from the correctional department.[2] No notice of nonopposition was filed, and ultimately, without resolving the pending fee-waiver application and request for summary disposition, the district court summarily dismissed the petition for pending too long without any action under Eighth District Court Rule (EDCR) 5.526.[3] The district court's order provided no explanation as to what action Salazar failed to take.[4]

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[1]While no legal name change has occurred in this case, we note that under common law, a person can go by any name they choose; this right pre-dates the United States. *See United States v. McKay*, 2 F.2d 257, 259 (D. Nev. 1924); *Linton v. First Nat'l Bank of Kittanning*, 10 F. 894, 897 (C.C.W.D. Pa. 1882) (citing *The King v. Inhabitants of Billingshurst*, 105 Eng. Rep. 603; 3 M. & S. 250 (1814)). While no law requires it, we choose to follow other courts that acknowledge a party's chosen name on a voluntary basis. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1193 (9th Cir. 2000) (acknowledging plaintiff's preferred name and gender); *In re C. G.*, 976 N.W.2d 318, 323-24 (Wis. 2022) (using a transgender juvenile's chosen name and pronouns "out of respect for [her] individual dignity").

[2]In her appendix, Salazar provided a copy of staff's October 8, 2020, notice, which was on court letterhead from Department M and signed by the judicial assistant to Judge Potter. As the notice does not appear in the district court record on appeal, we take judicial notice of it. *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (recognizing that "we may take judicial notice of facts that are '[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute'" (quoting NRS 47.130(2)(b))).

[3]EDCR 5.526(a), which has since been renumbered as EDCR 5.220(a), provides that "[a] family case that has been pending for more than 6 months and in which no action has been taken for more than 3 months may be dismissed on the court's own initiative without prejudice."

[4]While the case was originally assigned to Judge Potter, it was reassigned to Judge Denise L. Gentile in January 2021, who entered the dismissal order.

Salazar appeals, asking this court to reverse and remand the case for further proceedings on her petition because the district court erroneously applied the relevant law.[5] We agree.

DISCUSSION

Other jurisdictions recognize that even though whether to approve or deny name change petitions is within the district court's discretion, the court must articulate "substantial and principled reasons" when it denies the petition. *In re Arnett*, 56 Cal. Rptr. 3d 1, 6 (Ct. App. 2007); *accord In re Cruchelow*, 926 P.2d 833, 834 (Utah 1996) (following the courts in New Hampshire and Colorado in determining that "the court must show some substantial reason before it is justified in denying a petition for a name change"). We find this approach consistent with the plain language of NRS 41.290. We therefore adopt this standard and recognize that the district court abuses its discretion when it denies a petition for a name change without providing any substantial basis for so doing.

Here, the district court ostensibly dismissed Salazar's petition for her failure to take action in the case for more than three months. But Salazar's petition met NRS 41.270's requirements: it was addressed to the district court of the district in which she resides, and it included her current and desired names, the reason for the name change, the details of her felony convictions, and a statement signed under penalty of perjury that she was not changing her name for a fraudulent purpose. It also included a set of fingerprints. *See* NRS 41.290(3). Although Salazar did not provide notice of publication, publication is not required when, as here, "the applicant states that the reason for desiring the change is to conform the applicant's name to his or her gender identity." NRS 41.280(3). Further, while Salazar apparently did not request submission of the petition after the 10-day objection period had expired, there were unresolved motions pending before the district court at that time, including one for summary disposition under former EDCR 2.207 (now EDCR 5.701).

Because Salazar's petition met the requirements of NRS 41.270, no written objection was filed, and Salazar was exempt from the publication requirement, the district court was required to proceed with determining whether there was good reason to grant the name change under NRS 41.290. It does not appear that the district court did so. And, even if the court considered the matter and found substantial, principled reasons for denying the petition, it should have articulated those reasons in a written order. *See Jitnan v. Oliver*, 127

[5]After the notice of appeal was filed, the district court granted Salazar's fee-waiver application.

Nev. 424, 433, 254 P.3d 623, 629 (2011) (explaining that, "[w]ithout 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" and citing numerous cases to the same effect). From the documents available in the record, it appears that the only inaction in Salazar's case was the district court's failure to resolve the pending petition and other requests, such that EDCR 5.526 did not apply.

Salazar alleges on appeal that the district court communicated certain concerns about her petition to her, such as her criminal history and the ability of the Nevada Department of Corrections to keep accurate records of its inmates. These concerns are not reflected in the record, so we cannot and do not consider them on review. *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981). Nevertheless, we note that NRS 41.290(3) addresses concerns related to inmate records: "If an order grants a change of name to a person who has a criminal record, the clerk shall transmit a certified copy of the order to the Central Repository for Nevada Records of Criminal History for inclusion in that person's record of criminal history." And while a court must "specifically take into consideration" a petitioner's criminal history, we reiterate that the district court must provide substantial and principled reasons for denying an adult name-change petition, preferably in writing. Without such reasons having been articulated here, and as we can discern no relevant inaction on the part of Salazar, we must conclude that the district court failed to apply the correct legal standard and thus abused its discretion in dismissing Salazar's petition.[6] For this reason, we reverse the district court's dismissal order and remand for further proceedings on Salazar's petition under the applicable law.

Stiglich and Herndon, JJ., concur.

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[6]We decline to reach Salazar's constitutional challenge to the district court's order. *Spears v. Spears*, 95 Nev. 416, 418, 596 P.2d 210, 212 (1979) ("This court will not consider constitutional issues which are not necessary to the determination of an appeal.").

LYNN YAFCHAK, Statutory Heir and Special Administrator to the ESTATE OF JOAN YAFCHAK, Deceased, Appellant, *v.* SOUTH LAS VEGAS MEDICAL INVESTORS, LLC, dba LIFE CARE CENTER OF SOUTH LAS VEGAS, Erroneously Named as LIFE CARE CENTERS OF AMERICA, a Foreign Corporation, Respondent.

No. 82746

October 27, 2022 519 P.3d 37

Appeal from a district court order granting a motion to dismiss in a negligence action involving a skilled nursing home. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.

Reversed and remanded.

Cogburn Law and *Jamie S. Cogburn* and *Joseph J. Troiano*, Henderson, for Appellant.

Lewis Roca Rothgerber Christie LLP and *Abraham G. Smith, Daniel F. Polsenberg, Joel D. Henriod*, and *Kory J. Koerperich*, Las Vegas; *Hall Prangle & Schoonveld, LLC*, and *Casey W. Tyler* and *Zachary J. Thompson*, Las Vegas, for Respondent.

Claggett & Sykes Law Firm and *Micah S. Echols* and *David P. Snyder*, Las Vegas; *Law Office of Matthew L. Sharp* and *Matthew L. Sharp*, Reno, for Amicus Curiae Nevada Justice Association.

Before the Supreme Court, En Banc.

OPINION

By the Court, Parraguirre, C.J.:

In this opinion we both clarify the relationship between Nevada's professional negligence statutes, NRS Chapter 41A, and Nevada's elder abuse statute, NRS 41.1395, and also discuss their application to claims against skilled nursing home facilities. Claims under these statutes are separate and distinct, and it is important that the claims are properly classified because only claims for professional negligence require plaintiffs to include an affidavit of merit as part of their complaint. In the underlying proceeding, the district court concluded that appellant's allegations sounded in professional negligence and dismissed her complaint for failure to attach an affidavit of merit. For the reasons stated below, we conclude that factual development as to the gravamen of the plaintiff's allegations is necessary before such a determination can be reached. Thus, we reverse the district court's dismissal order and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

Appellant Lynn Yafchak filed a complaint against respondent skilled nursing home Life Care Center of South Las Vegas (LCC) and ten unnamed defendants for injuries that her mother, decedent Joan Yafchak (Joan), suffered while a resident at LCC. In her complaint, Yafchak asserted elder abuse, negligence, and wrongful death claims. Yafchak did not attach an affidavit of merit to her complaint. Nor did Yafchak specify which negligent actions were allegedly committed by LCC's employees or which employees were responsible for the alleged improper care. Further, LCC did not proffer any evidence that clarified either of these two issues. Instead, Yafchak's complaint only generally averred that the negligent conduct of LCC's employees was the cause of Joan's death and that their negligence stemmed from LCC's own negligent hiring, training, and supervision of said employees.

LCC moved to dismiss Yafchak's complaint, arguing that although her complaint did not expressly plead claims of professional negligence, Yafchak's allegations sounded in professional negligence and thus required her to attach an affidavit of merit. The district court, relying on our decision in *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. 350, 466 P.3d 1263 (2020), agreed that Yafchak's claims arose from allegations of professional negligence, therefore requiring her complaint to be accompanied by an affidavit of merit. Because Yafchak's complaint did not include the required affidavit, the district court granted LCC's motion to dismiss.[1]

DISCUSSION

In Nevada, actions for professional negligence are governed by NRS Chapter 41A. NRS Chapter 41A applies solely to claims regarding medical negligence committed by a "provider of health care." NRS 41A.015. A "provider of health care" is statutorily defined in NRS 41A.017. Where a complaint includes allegations of professional negligence, the plaintiff must include an affidavit of merit with their complaint. NRS 41A.071. If a complaint averring professional negligence is filed without an affidavit of merit, the complaint is void ab initio and dismissed. *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1300, 148 P.3d 790, 792 (2006).

Nevada has also provided a statutory cause of action for elder abuse, NRS 41.1395, wherein an action may be brought on behalf of an elder or vulnerable person for an injury that they suffered because

[1]The district court also dismissed Yafchak's complaint as time-barred under NRS 41A.097(2). However, as we will explain, it is not clear that NRS Chapter 41A applies to Yafchak's complaint. Thus, we reverse the district court's decision to dismiss her complaint on this alternative ground.

of abuse, neglect, or exploitation. NRS 41.1395 is an important statute for protecting Nevada's elderly and vulnerable population and incentivizes attorneys to represent this type of client by permitting plaintiffs to recover enhanced damages and, where appropriate, attorney fees and costs. *See* NRS 41.1395(1)-(2).

Claims under NRS Chapter 41A and NRS 41.1395 are separate and distinct. This is crucial because only claims arising under NRS Chapter 41A require the plaintiff to attach an affidavit of merit. *Compare* NRS 41A.071, *with* NRS 41.1395. In *Curtis*, we recognized that although a complaint may not expressly include a claim for professional negligence, a plaintiff may nevertheless be required to comply with the affidavit of merit requirement if the underlying allegations sound in professional negligence. 136 Nev. at 353-54, 466 P.3d at 1266-67. For example, where a complaint asserts direct liability against an employer for negligent hiring, training, and supervision, the complaint against the employer may be subject to the affidavit requirement if the underlying tortfeasor employee's negligence constitutes professional negligence. *Id*. As we emphasized, courts must focus on the gravamen or substance of each claim rather than its form. *Id.* at 353, 466 P.3d at 1266.

While professional negligence and elder abuse claims are legally discrete, we also acknowledge that the facts supporting these two types of claims are often closely related or overlapping. This may make determining which statute the claim properly arises under difficult. It may be particularly unclear as to allegations concerning an elderly person's mistreatment at a skilled nursing facility because these facilities often provide both standard and medical care for their residents and are staffed by both persons who do and persons who do not meet NRS 41A.017's definition of a provider of health care. Thus, in determining whether the gravamen of a claim sounds in professional negligence or elder abuse, courts must give particular consideration to the underlying facts and how they are alleged in the complaint.

Here, relying on *Curtis*, the district court concluded from the totality of the allegations in the complaint that Yafchak's claims against LCC sounded in professional negligence. We review the district court's decision to dismiss Yafchak's complaint for failing to comply with NRS 41A.071 de novo. *Zohar v. Zbiegien*, 130 Nev. 733, 736, 334 P.3d 402, 404 (2014). We will affirm such a ruling only where it appears beyond a doubt that the plaintiff could prove no set of facts that would entitle her to relief. *Id.* at 736, 334 P.3d at 405. Namely, when a defendant moves to dismiss a plaintiff's complaint for failing to comply with NRS 41A.071, the burden is on the defendant to demonstrate that plaintiff's allegations arise under NRS Chapter 41A. And, when reviewing a motion to dismiss, "this court will recognize all factual allegations in [the plaintiff's] complaint

as true and draw all inferences in its favor." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

Based on the allegations in Yafchak's complaint, and drawing all inferences in her favor, it cannot be determined at this juncture that the gravamen of her allegations sound in professional negligence as opposed to elder abuse. While it appears that Yafchak's allegations primarily concern two related instances—(1) LCC's failure to properly assess Joan after she fell and (2) LCC's failure to monitor and care for Joan—there is critical information missing that is necessary to determine whether Yafchak's complaint avers professional negligence as opposed to elder abuse. For example, as noted above, NRS Chapter 41A only applies to professional negligence committed by a "provider of health care." Here, based on the allegations in the complaint, it is unclear whether the alleged tortious conduct was a medical decision undertaken by a "provider of health care." Unlike in *Curtis*, where it was specifically asserted that the underlying negligence was committed by a nurse (a person included within NRS 41A.017's definition of a provider of health care), Yafchak's complaint does not identify who on LCC's staff allegedly injured Joan. For example, a nursing home facility may be vicariously liable for the professional negligence of a nursing home employee who is a provider of health care, in which case the nursing home would be subject to NRS Chapter 41A. LCC, as the moving party, had the burden of demonstrating Yafchak's allegations arose from professional negligence committed by a provider of health care. Because Yafchak's complaint was dismissed prior to any discovery, we are confined solely to reviewing Yafchak's complaint, and looking at the face of the complaint, it cannot be said that there is no set of facts that place Yafchak's allegations beyond the realm of professional negligence and within the scope of elder abuse.[2] Thus, we conclude that LCC failed to meet its burden.

CONCLUSION

Allegations of professional negligence and elder abuse are separate and distinct, with only the former requiring the plaintiff to

[2]LCC expresses concern that permitting Yafchak's complaint to proceed only encourages plaintiffs to file obscure complaints and plead their allegations vaguely to escape summary dismissal. We disagree. First, with respect to Yafchak's complaint, she maintained at oral argument that she was unable to plead her allegations with more specificity because she lacked information from LCC regarding who provided the allegedly negligent care for her mother. Second, and more generally, for a complaint to be proper, it "need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). Where a defendant believes a complaint to be improperly obscure or otherwise vague, a defendant has alternative avenues by which to seek relief, including filing a motion for a more definite statement. *See* NRCP 12(e).

file an affidavit of merit when alleged as part of a negligent hiring, training, and supervision claim. Based on the face of Yafchak's complaint, it is unclear whether the gravamen of her claims against LCC sound in professional negligence as opposed to elder abuse. Further factual development is necessary before such a determination can be reached. Thus, the district court erred in summarily concluding that LCC met its burden in proving that Yafchak's allegations sounded in professional negligence and subsequently dismissing her complaint for failure to attach an affidavit of merit. Accordingly, we reverse the district court's order dismissing Yafchak's complaint and remand this matter for further proceedings consistent with this opinion.[3]

Hardesty, Stiglich, Cadish, Pickering, and Herndon, JJ., concur.

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[3]The Honorable Abbi Silver having retired, this matter was decided by a six-justice court.