IN THE MATTER OF THE GUARDIANSHIP OF THE PERSON AND ESTATE OF KATHLEEN JUNE JONES, AN ADULT PROTECTED PERSON.

KATHLEEN JUNE JONES, APPELLANT, *v.* ROBYN FRIEDMAN; AND DONNA SIMMONS, RESPONDENTS.

No. 81799-COA

February 24, 2022 507 P.3d 598

Appeal from a district court award of attorney fees to former temporary guardians. Eighth Judicial District Court, Family Division, Clark County; Linda Marquis, Judge.

**Affirmed.**

*Ballard Spahr LLP* and *Joel E. Tasca*, Las Vegas; *Legal Aid Center of Southern Nevada, Inc.*, and *Maria L. Parra-Sandoval*, Las Vegas, for Appellant.

*Claggett & Sykes Law Firm* and *Micah S. Echols*, Las Vegas; *Michaelson & Associates, Ltd.*, and *Patrick C. McDonnell* and *John P. Michaelson*, Henderson; *Sylvester & Polednak, Ltd.*, and *Jeffrey R. Sylvester*, Las Vegas, for Respondents.

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

## OPINION

PER CURIAM:

This case places at issue NRS 159.344, a statute the Nevada appellate courts have not previously had occasion to consider. That statute governs the award of attorney fees in guardianship cases where the guardian requests the protected person's estate to pay attorney fees. While granting attorney fees in this way is disfavored under NRS 159.344, the district court may require the protected person's estate to pay attorney fees if the guardian makes a persuasive showing under the statute's 14-factor framework.

In this appeal, we must first determine whether the award of fees itself is proper given the statute's general presumption against such an award payable from the protected person's estate. Second, we consider whether the amount of that award is excessive under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). We first conclude the award itself was proper because the district court applied the relevant NRS 159.344 factors and reasonably found that respondents Donna Simmons and Robyn Friedman's complex temporary co-guardianship warranted compensation. For similar reasons, we conclude the district court acted within its discretion in setting the amount of the award, as this case

involved numerous parties and many filings, making for complex and time-consuming litigation. Accordingly, we affirm.

*BACKGROUND*

The fees at issue in this case stem from a period in 2019 when Donna and Robyn served as temporary co-guardians for their mother, appellant Kathleen June Jones. After that period, Jones's other daughter, Kimberly Jones,[1] assumed the role of general guardian. Kimberly is not a party here.

Before Jones needed a guardian, she executed multiple power of attorney forms, each granting Kimberly power of attorney. She later executed estate planning documents in which she named Kimberly as her preferred guardian should she ever need a guardian. Years after she executed these documents, Jones began experiencing the onset of dementia and eventually required full-time care. Initially, Jones's husband, Gerald Rodney Yeoman, handled much of Jones's caretaking. Yeoman started experiencing health problems of his own, however, and he relocated to Arizona for treatment, rendering him unable to continue caring for Jones. As a result, Kimberly moved from California to Las Vegas and assumed the caretaker role. At this point, Kimberly was Jones's caretaker and had power of attorney, and no party had filed a guardianship petition.

Despite his struggling health, Yeoman wanted to maintain as much contact with Jones as possible. Yeoman's daughter and son-in-law, Richard and Candice Powell (collectively the Powells), assisted Yeoman in his efforts to remain close with Jones despite his move to Arizona. But Kimberly believed she was the more appropriate caretaker and, considering her recent move from California, she wanted Jones to remain in Las Vegas, despite the Powells' requests and efforts to relocate her to Arizona. These competing interests created tensions between Jones's daughters and Yeoman's side of the family.

Notwithstanding Kimberly's power of attorney status, concerns about Jones's estate arose, particularly with regard to ownership of Jones's home, which she had owned as separate property from before her marriage to Yeoman. After the onset of her dementia symptoms, Jones had executed a quitclaim deed conveying the property to the Powells for far under market value. When Jones was asked of this, she denied any recollection of transferring the property to the Powells. Nevertheless, as owners of the property, the Powells brought an eviction action against Kimberly, who was living with Jones in the home as her caretaker.

In addition to the issues with the home, the Powells—at the direction of Yeoman—withdrew money from Jones's bank account without Kimberly's consent and even held Jones's dogs against the

[1]We refer to all of Jones's daughters, including Donna and Robyn, by their first names for clarity between the numerous parties in this litigation.

wishes of Jones's side of the family. While the Powells and Yeoman offered pure intentions to support their actions, these interactions between the families created grave concerns for Donna and Robyn and prompted them to act. While Kimberly possessed power of attorney, her requests and demand letters were ineffectual at stopping the financial transactions with Jones's assets. Around this time, Yeoman took Jones to Arizona without Kimberly's knowledge or permission, and Kimberly went to Arizona and brought her mother back to Las Vegas, citing her power of attorney. In short, the families disagreed on Jones's property, residence, and finances. Realizing this, Donna and Robyn sought and retained legal counsel. Donna and Robyn's attorney considered the case and spent extensive time investigating, negotiating, and preparing two comprehensive guardianship petitions, one for temporary guardianship and one for general guardianship. In the end, Donna and Robyn, through counsel, filed the temporary guardianship petition in September 2019; in that petition, Donna and Robyn noted the significant time spent in fruitless negotiations before they resorted to filing the petition. Acknowledging the tensions between the family members, the district court appointed Donna and Robyn as temporary co-guardians later in September.

After their appointment, Donna and Robyn set to work filing proposed care plans for Jones. Meanwhile, Kimberly filed a competing petition to become Jones's general guardian. The district court appointed counsel for Jones and an investigator to determine whether Kimberly had misused Jones's funds. After the investigation concluded she had not misused any property, the court appointed Kimberly as Jones's general guardian, thereby ending Donna and Robyn's temporary co-guardianship in October 2019. While their guardianship ended upon Kimberly's appointment as general guardian, Donna and Robyn were required to file requisite inventories and accountings related to Jones's estate. They completed these filings, and the district court formally discharged Donna and Robyn in May 2020.

Only one issue arising from Donna and Robyn's temporary guardianship remained: attorney fees. They sought fees payable from Jones's estate and produced their attorney's billing invoices to support a claim for $62,029.66 in fees. After some argument on the rate charged for paralegal time, Donna and Robyn's counsel conceded and reduced the paralegal fees. Following the reduction, Donna and Robyn reproduced the invoices and requested $57,742.16 in attorney fees—to be exacted as a lien against Jones's estate after her death. The district court granted the full amount of this request,[2]

[2]While the district court titled its order, "Order Granting Robyn Friedman's and Donna Simmons' Petition for Attorneys Fees in Part," it granted Donna and Robyn's request in full after the adjustments to paralegal fees.

addressing almost every factor under the controlling statute, NRS 159.344, and rejecting Jones's "specific objections" "for each billing entry." Jones now appeals.[3]

*ANALYSIS*

On appeal, Jones primarily challenges the award of fees on two grounds.[4] First, she alleges that the attorney fee award was an abuse of the district court's discretion because the work that generated the fees conveyed no benefit on Jones, as appointing Donna and Robyn instead of Kimberly—Jones's clearly preferred guardian—only delayed the inevitable guardianship arrangement. Because Kimberly's guardianship was what she sought from the outset, Jones argues, any fees accrued by Donna and Robyn were actually harmful to Jones. Second, and relatedly, Jones argues the amount of the fee award was excessive. On both points, we disagree.

To begin, we review an award of attorney fees for an abuse of discretion. NRS 159.183(1) (noting that payment of attorney fees in guardianship cases is subject to discretion and approval of the court); *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005).

*Whether fees were properly awarded from the estate*

We first address whether a guardian must confer a benefit on a protected person before the protected person's estate is required to pay the guardian's attorney fees.

Other courts have read such a mandatory requirement into guardianship fee statutes. *See, e.g.*, *In re Guardianship of Sleeth*, 244 P.3d 1169, 1174 (Ariz. Ct. App. 2010) ("We cannot agree that the legislature intended that courts overlook whether an attorney's or a fiduciary's services produced any value or benefit to the protected person."); *In re Guardianship of Ansley*, 94 So. 3d 711, 713 (Fla. Dist. Ct. App. 2012) (requiring courts to consider benefits conferred despite the statute's failure to list such benefits as a factor in an enumerated list of factors to support guardianship fees). However, NRS 159.344 contemplates protected person benefits and expressly employs permissive language—"may"—to invite, but not require, courts to consider any benefit to the protected person. *See* NRS 159.344(5) (providing factors for consideration).

Here, the language of the statute does not mandate a finding that the guardian rendered a benefit; nevertheless, the district court determined Jones did benefit from Donna and Robyn's temporary guardianship. Accordingly, we review that determination for an abuse of discretion and need not reach Jones's invitation to read

[3]We initially affirmed in an unpublished order on October 20, 2021. Donna and Robyn thereafter filed a motion to reissue our order as an opinion. We grant the motion and now issue this opinion.

[4]We note that we possess jurisdiction under NRS 159.375(5).

the strict requirement into the permissive statute codified by the Nevada Legislature.

Before the court appointed a guardian in this case, the Powells received ownership of Jones's home and withdrew funds from her bank account. While it is true that Jones would have preferred Kimberly as her guardian, it is also true that Donna and Robyn's guardianship petition was the first petition filed amidst concerns surrounding Jones's pecuniary and proprietary interests. Further, there were reasonable concerns involving money Kimberly had taken from Jones. Because of these concerns, the district court appointed an investigator to evaluate Jones's financial and medical well-being. After the investigation established she did not mishandle Jones's funds, a conclusion not contested by Donna and Robyn, Kimberly was awarded the general guardianship role without further opposition; Donna and Robyn's temporary guardianship facilitated the investigation that examined Jones's finances and enabled Kimberly, Jones's preferred guardian, to be appointed.

NRS 159.344 begins with a presumption that guardians are personally liable for their own fees. NRS 159.344(1). Fees are awardable from the protected person's estate, but only if sought by petition and the court concludes the statutory requirements support a finding that fees are just, reasonable, and necessary. *See* NRS 159.344(4)-(5). NRS 159.344(5) sets forth several factors to determine when fees are just, reasonable, and necessary, all of which may be considered by the district court. Among these factors, the district court may consider (1) whether the guardian's attorney conferred a benefit on the protected person; (2) the character of the work performed, including its difficulty; (3) the result of the work; and (4) any other factor that may be considered relevant. NRS 159.344(5)(b), (d), (f), (n).

Under the factors of NRS 159.344(5), the district court did not abuse its discretion in determining, first, that Jones benefited from counsel's services to establish the temporary guardianship, because the temporary guardianship prompted a rigorous scrutiny of Jones's financial situation, as well as an examination into the issues surrounding the sale of her home. And the understanding of Jones's financial situation enabled Kimberly's appointment. Moreover, Jones benefited from other guardianship work, such as efforts to secure the return of her dogs of which Yeoman had taken possession. Based on these facts, we cannot say that the district court abused its discretion when it determined Jones benefited from Donna and Robyn's temporary guardianship and their counsel's services in connection therewith.

Second, and for many of the same reasons, the district court did not abuse its discretion in determining that the fees were payable from Jones's estate. The district court acknowledged NRS 159.344 and found its requirements had been satisfied. Expanding on this conclusion, in finding that the requested fees were just, reasonable,

and necessary, the district court made findings under almost every single NRS 159.344(5) factor. Accordingly, we affirm the district court's overall decision to award fees from Jones's estate.

*Whether the awarded fees were proper in amount*

We turn now to Jones's challenge to the amount of the award. First, she alleges that the amount of $57,742.16 is unreasonable because Donna and Robyn were active temporary co-guardians for only one month between September and October 2019. Second, Jones argues that some of the billing entries on the invoices compensated unrelated work or work that the Legislature expressly excluded under NRS 159.344. We address each argument in turn.

The duration of representation is neither an enumerated factor in NRS 159.344 nor a consideration provided by *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). "When considering the amount of attorney fees to award, the analysis turns on the factors set forth in *Brunzell*." *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 555, 429 P.3d 664, 668 (Ct. App. 2018). Instead of the duration of representation, the difficulty of the work is an enumerated factor considered in setting fee awards. NRS 159.344(5)(d); *Brunzell*, 85 Nev. at 349, 455 P.2d at 33. In addition, temporary guardians possess only the powers necessary to address the concerns that prompted the temporary guardian's appointment; thus, the awardable temporary guardianship attorney fees are likewise limited. NRS 159.0525(6).

Here, the amount of the award is not improper based on the relatively short duration of the formal temporary guardianship or the work performed during the guardianship. While, in the strictest sense, their guardianship spanned only one month, the record supports a more extensive commitment. To the extent the duration of a guardianship may shade the analysis, we disagree with Jones's strict one-month interpretation. Donna and Robyn are correct to note that the duration of representation is not a factor in the directly controlling statute or precedent.[5] Instead, the complexity of the case is a factor. With that, it is important to acknowledge the complexity of Jones's case; some motions at the district court level attracted four filings, one each from Jones, Kimberly, Donna and Robyn together, and Yeoman. In a case like this one, responding to three opposing viewpoints is difficult; it takes time. Donna and Robyn also asked their attorney to work on power of attorney matters. While

[5]We acknowledge Jones challenged the district court's fee award for compensating work Donna and Robyn's attorney performed before the district court appointed them as guardians; however, in her reply, Jones concedes that compensation could start with the drafting of the petition on September 9, 2019. The record demonstrates that the parties contested individual billing entries starting on September 10, 2019. Accordingly, we see no major disagreement on this point.

this technically could be construed as a probate issue, the district court did not err in compensating this work because the ineffectiveness of Kimberly's power of attorney was a factor that contributed to Donna and Robyn's appointment. Therefore, the power of attorney issue was within the scope of the temporary guardianship under NRS 159.0525.

Thus, considering the complexity of the litigation and the concerns involving Kimberly's power of attorney, we conclude that the district court did not abuse its discretion by awarding fees for the scope of work performed. We turn next to the amount awarded within this scope.

Jones broadly challenges the district court's fee award for improperly compensating work expressly excluded under NRS 159.344(6). Donna and Robyn do not argue the substance of each billing entry on appeal; they argue Jones's entry-by-entry challenges are not properly before this court due to Jones's violation of appellate briefing rules. We agree with Donna and Robyn and reject Jones's final challenge.

On appeal, parties have a duty to cite relevant authority. NRAP 28(a)(10)(A). "Parties shall not incorporate by reference briefs or memoranda of law submitted to the district court or refer the Supreme Court or Court of Appeals to such briefs or memoranda for the arguments on the merits of the appeal." NRAP 28(e)(2). Without citing supporting authority, a party fails to argue cogently his or her position, and thus, this court need not consider the argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks support by relevant authority).

Here, Jones refers to a copy of her spreadsheet for her legal argument, but the spreadsheet offends the standards of NRAP 28(e)(2). Nevertheless, we note that the district court considered the statute and Jones's itemized challenges. Indeed, the district court made explicit findings on pages 10 and 13 of its order and determined that Jones had not established any fee entries were unjustified, citing directly to NRS 159.344(5)-(6) and Jones's itemized challenges. In light of these findings, we cannot conclude that the district court abused its discretion in determining the amount of fees to award Donna and Robyn.

## *CONCLUSION*

The district court did not abuse its discretion when it both elected to award fees from Jones's estate and set the amount of those fees at $57,742.16. Accordingly, we affirm the district court's award of attorney fees.

ANTHONY JACOB MONAHAN, Appellant, *v.* AMANDA KAITLYN HOGAN, Respondent.

No. 82031-COA

February 24, 2022 507 P.3d 588

Appeal from a district court order granting a motion to relocate a minor child. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

**Affirmed.**

*The Law Firm of Laub & Laub* and *Joe M. Laub* and *Nicholus C. Palmer*, Reno, for Appellant.

*Carucci & Associates* and *Roderic A. Carucci*, Reno, for Respondent.

Before the Court of Appeals, Gibbons, C.J., Tao and Bulla, JJ.

## OPINION

By the Court, Gibbons, C.J.:

This opinion considers how to interpret NRS 125C.007(1)(b)—the best interests provision of Nevada's child relocation statute.[1] Relocation of children following the dissolution of the parents' relationship is one of the most difficult issues a court must resolve. On the one hand, courts strive to preserve the nonrelocating parent's rights and relationship with the child. *See Schwartz v. Schwartz*, 107 Nev. 378, 382, 812 P.2d 1268, 1270 (1991). On the other hand, we recognize "the custodial parent's interest in freedom of movement" and "the State's interest in protecting the best interests of the child." *Id.* (quoting *Holder v. Polanski*, 544 A.2d 852, 855 (N.J. 1988)). Efforts to balance these interests gave rise to a succession of relocation statutes, beginning with NRS 125A.350. *See* 1987 Nev. Stat., ch. 601, § 1, at 1444.

As a notice statute, NRS 125A.350's main purpose was to inform the nonrelocating parent that the relocating parent would be moving with the minor child. *Trent v. Trent*, 111 Nev. 309, 315, 890 P.2d 1309, 1313 (1995) ("NRS 125A.350 is primarily a notice statute intended to prevent one parent from in effect 'stealing' the children away from the other parent by moving them away to another state and attempting to sever contact."). NRS 125C.200 replaced NRS 125A.350, limiting the applicability of the relocation scheme

[1]Throughout this opinion, we use the terms "best interests" when referring to NRS 125C.007(1)(b) and "best interest" when referring to the NRS 125C.0035(4) custody factors to reflect the exact language chosen by the Legislature for each statute.

to custodial parents who sought relocation. *See* 1999 Nev. Stat., ch. 118, § 2, at 737-38. Thereafter, the Nevada Legislature added NRS 125C.006, NRS 125C.0065, and NRS 125C.007. *See* 2015 Nev. Stat., ch. 445 § 16, at 2589-90, § 13, at 2588, § 14, at 2588-89. Notice statutes NRS 125C.006 and NRS 125C.0065 expanded the scope of relocation to include both custodial parents and joint custodians. And NRS 125C.007 essentially codified factors the supreme court had already required district courts to consider when determining whether to grant relocation, particularly those established in *Schwartz*. 107 Nev. at 383, 812 P.2d at 1271 (announcing the *Schwartz* factors based in part on the *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30 (N.J. 1976), standard).

NRS 125C.007 is the statute in dispute here. NRS 125C.007 comprises NRS 125C.007(1) (the threshold test), NRS 125C.007(2) (the six relocation factors), and NRS 125C.007(3) (the burden of proof). The threshold test has three subparts, all of which the relocating parent must satisfy before the district court must proceed to the relocation factors. *See* NRS 125C.007(2) ("If a relocating parent demonstrates to the court the provisions set forth in [NRS 125C.007(1)], the court must then weigh the [relocation] factors."). Under the first provision of the threshold test, the relocating parent must demonstrate "a sensible, good-faith reason for the move" and that "the move is not intended to deprive the non-relocating parent of his or her parenting time." NRS 125C.007(1)(a). The second provision requires the relocating parent to establish that "[t]he best interests of the child are served by allowing the relocating parent to relocate with the child." NRS 125C.007(1)(b). Finally, the third provision requires the relocating parent to show that "[t]he child and the relocating parent will benefit from an actual advantage as a result of the relocation." NRS 125C.007(1)(c).

As we explain below, supreme court authority informs the legislative intent behind "sensible, good faith reason" from provision one and "actual advantage" from provision three. But "best interests of the child" from provision two has evaded clear meaning. NRS 125C.007 does not define "best interests of the child"; it does not specify the burden of proof necessary to satisfy NRS 125C.007(1)(b); and it does not explain, as the parties debate here, whether courts must apply and make specific findings as to all the custody best interest factors in NRS 125C.0035(4) when making an NRS 125C.007(1)(b) determination. Supreme court authority does not define the "best interests of the child" in this context either. Therefore, district courts are left with little guidance regarding how to apply NRS 125C.007(1)(b) of the threshold relocation test.

With this appeal, we interpret what the Legislature meant by "best interests of the child" in NRS 125C.007(1)(b), including the application of the custody best interest factors, as well as the applicable burden of proof necessary to satisfy NRS 125C.007(1). We

conclude that (1) NRS 125C.007(1)(b) requires a district court to make specific findings regarding whether relocation would be in the best interests of the child—which should include the custody best interest factors—and tie those findings to its conclusion; and (2) the applicable burden of proof for the threshold test is preponderance of the evidence. Here, the district court followed the correct procedures, so we affirm.

## *FACTS AND PROCEDURAL HISTORY*

Appellant Anthony Jacob Monahan and respondent Amanda Kaitlyn Hogan had a child, M.M., in 2012. Both parties resided, separately, in Yerington. In 2015, the parties stipulated to, and the district court ordered, joint legal and physical custody. But Monahan began working outside Yerington, and Hogan's husband, a United States Navy lieutenant, was subsequently assigned to Naval Air Station Fallon. As a result, Hogan relocated with M.M. from Yerington to Fallon and moved the court to modify custody to reflect her de facto primary custody status.[2] In March 2019, the district court issued an order granting Hogan primary physical custody, finding that such an arrangement was in M.M.'s best interest in light of the custody best interest factors. The court also noted that Hogan's husband may need to relocate for work in the future. Later, in November 2019, the district court held a hearing to determine exact parenting time. Following that hearing, the district court entered an order setting parenting time and "incorporat[ing] by reference in its entirety" its March 2019 primary custody order.

In June 2020, Hogan moved to relocate with M.M. to Virginia Beach, Virginia, because her husband had been reassigned to a naval base there and Monahan would not consent to the relocation. Monahan opposed the motion, and the district court held an evidentiary hearing in September 2020. At the hearing, Monahan argued that it was not in M.M.'s best interests to relocate under NRS 125C.007(1)(b). He based this argument on the custody best interest factors. Hogan objected to the custody factors' relevance at the outset and contended that they were inapplicable because the hearing concerned relocation rather than custody. The court permitted Monahan to use the custody factors to argue that relocation was not in M.M.'s best interests because NRS 125C.007(1)(b) uses the term "best interests of the child" and the custody factors are used in determining a child's best interest. Later, after hearing the evidence,

[2]As to that relocation, the district court found NRS 125C.007 inapplicable because Hogan's Fallon residence was 65 miles from Monahan's Yerington home, which was not "such a distance that would substantially impair the ability of the other parent to maintain a meaningful relationship with the child." *See* NRS 125C.0065(1). In the alternative, the court found that Hogan had shown Monahan implicitly consented to the relocation, thereby satisfying NRS 125C.007. That relocation is not at issue in this appeal.

the court stated, "I don't see the [custody] best interest factors [in NRS 125C.0035(4)(a)-(*l*)] changing the relocation analysis, having considered [(a)] through [(*l*)]."

In October 2020, the district court entered an order granting Hogan's motion to relocate. The court analyzed each provision under NRS 125C.007(1) and each relocation factor under NRS 125C.007(2) and made relevant findings. Regarding NRS 125C.007(1)(b), the district court incorporated by reference and reevaluated its best interest findings from its November 2019 order, stating,

> The [c]ourt finds it is in the minor child's best interest[s] to relocate with Mother to Virginia. The Court previously considered the best interest factors in its[ ] November 20, 2019 Order which granted Mother primary physical custody of the minor child, and the relocation does not modify any prior best interest factor findings. Mother's future move based upon her Husband's reassignment was contemplated at the time of the last custodial order.

This appeal followed.

## *ANALYSIS*

NRS 125C.007(1)(b) states that "[i]n every instance of a petition for permission to relocate with a child that is filed pursuant to NRS 125C.006 or [NRS] 125C.0065, the relocating parent must demonstrate to the court that . . . [t]he best interests of the child are served by allowing the relocating parent to relocate with the child." But NRS 125C.007(1)(b) does not define "best interests of the child" in this context, and it does not explain whether the district court must apply and make specific findings as to each custody best interest factor when deciding relocation.

Monahan argues the district court abused its discretion by incorporating its findings based on the custody best interest factors from its November 2019 order to satisfy NRS 125C.007(1)(b) in its October 2020 order. Because its November 2019 order had already incorporated its previous March 2019 best interest findings, Monahan contends the analysis was "stale," as the district court had made the best interest findings over a year and a half earlier.[3] Therefore, Monahan interprets "best interests of the child"

[3]Citing *Castle v. Simmons*, 120 Nev. 98, 104-05, 86 P.3d 1042, 1047 (2004), Monahan further contends the district court relied on facts that would have been "res judicata" as of the March 2019 order. Monahan does not specify which facts the district court improperly relied upon. Instead, Monahan essentially concludes that the district court must have violated *Castle* because it incorporated conclusions from a prior order by reference. But Monahan's argument lacks merit. First, the district court in this case reevaluated its best interest factors analysis at the hearing and in its October 2020 order. Thus, the court was not relying on "stale" information. Second, *Castle* is not so broad that a district court may never again rely on facts presented at a previous proceeding.

within the meaning of NRS 125C.007(1)(b) as requiring the district court to analyze the custody factors anew whenever it considers a motion to relocate. Hogan responds that the district court was not required to apply the custody best interest factors to determine the child's best interests under NRS 125C.007(1)(b) because she already had primary physical custody and she moved for relocation under NRS 125C.006, which does not require a custody determination, unlike NRS 125C.0065, which does. Hogan also emphasizes that the district court nevertheless considered the custody factors and concluded that they did not change its relocation conclusion.

The parties' contrasting interpretations of what is required to determine the "best interests of the child" under NRS 125C.007(1)(b) raises an issue of how this phrase, in this context, must be applied. We conclude that NRS 125C.007(1)(b)'s application is unclear, and we therefore interpret what the Legislature intended by "best interests of the child" thereunder. Additionally, to give full meaning to NRS 125C.007(1)(b)'s "best interests of the child," we explain the burden of proof necessary to satisfy NRS 125C.007(1).

*The indeterminate "best interests of the child" standard*

The "best interests of the child" standard is a polestar of judicial decision making in family law matters. *See Schwartz*, 107 Nev. at 382, 812 P.2d at 1270-71. Unfortunately, although it is among the most widely used family law terms, the best interests of the child standard can be imprecise, changing meaning from one context to the next. In the physical custody context, for example, the Nevada Legislature delineated a nonexhaustive list of 12 factors that the district court must consider, among other things, to determine the child's best interest. *See* NRS 125C.0035(4). As discussed more fully below, Nevada law offers guidance on how to address the best interests of the child in other family law contexts as well. Far less clear, however, is how the best interests of the child standard applies in the relocation context.

The plain language of NRS 125C.007(1)(b) requires, and the parties do not dispute, that the district court must find the *relocation itself* is in the child's best interests. However, the parties assign different meanings to the phrase "best interests of the child." Monahan contends that "best interests of the child" means the district court must apply the child custody best interest factors. Considering that

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*See Nance v. Ferraro*, 134 Nev. 152, 163, 418 P.3d 679, 688 (Ct. App. 2018) ("*Castle* do[es] not, however, bar district courts from reviewing the facts and evidence underpinning their prior rulings in deciding whether the modification of a prior custody order is in the child's best interest."); *see also Romano v. Romano*, 138 Nev. 1, 6 n.6, 501 P.3d 980, 984 n.6 (2022) (applying the *Nance* rule to the custody modification context). Thus, Monahan's argument fails because he does not show that the district court improperly referenced its findings from a previous order in its October 2020 order.

the custody best interest factors and NRS 125C.007(1)(b) use virtually the same language, they are in close proximity within Chapter 125C, and the supreme court has linked the custody and relocation contexts, Monahan's interpretation is reasonable. *See California v. Trump*, 963 F.3d 926, 947 n.15 (9th Cir. 2020) (holding that under the doctrine of *in pari materia*, "related statutes should be construed as if they were one law" (internal quotations omitted)); *Schwartz*, 107 Nev. at 382, 812 P.2d at 1270 ("[S]ome of the same factual and policy considerations may overlap [between custody and relocation].").

Hogan counters that NRS 125C.007(1)(b) simply requires that the district court find relocation is in the best interests of the child based upon the facts of the case, without requiring the court to consider any factors in particular. This interpretation also has merit. As Hogan stresses, the Nevada Legislature chose not to incorporate the custody factors by reference, unlike other state legislatures. *See, e.g.*, Ariz. Rev. Stat. Ann. § 25-408(I)(1) (incorporating custody best interests factors by reference into its best interests of the child test for purposes of relocation); Colo. Rev. Stat. § 14-10-129(2)(c) (same when the primary custodian seeks to relocate); Fla. Stat. § 61.13001(7)(k) (same when no presumption in favor or against relocation applies); Tenn. Code Ann. § 36-6-108(c)(2)(H) (same).

Nevada law applies the best interests of the child standard in other contexts without ascribing it a specific definition or factors. *See, e.g.*, NRS 62D.010(2) (limiting public access in juvenile proceedings if "in the best interests of the child"); NRS 432B.430 (providing the same in the context of abuse and neglect cases); NRS 432B.480 (basing whether a child should be placed in protective custody on "the best interests of the child"); NRS 432B.560(1) (stating that the court may issue orders for treatment and visitation in "the best interests of the child"); NRS 432B.570(2) (stating that the court shall decide motions for revocation or modification of orders in "the best interest of the child"); *Clark Cty. Dist. Att'y, Juvenile Div. v. Eighth Judicial Dist. Court*, 123 Nev. 337, 344, 167 P.3d 922, 926 (2007) (holding that the best interest of the child standard applies in the foster placement context without deciding on specific factors). However, because the supreme court has adopted best interests factors in other family law contexts,[4] it arguably would make sense to ascribe a different meaning to the term "best interests" under NRS 125C.007(1)(b)—separate and apart from what Hogan and Monahan offer—as well. As a result, "best interests of the child" under NRS 125C.007(1)(b) has at least two reasonable interpretations, probably more. *Cf. Mizrachi v. Mizrachi*, 132 Nev. 666, 674, 385 P.3d

[4]*See, e.g.*, *Arcella v. Arcella*, 133 Nev. 868, 872-73, 407 P.3d 341, 346 (2017) (providing ten factors to consider when determining educational placement in the child's best interests); *Petit v. Adrianzen*, 133 Nev. 91, 94-95, 392 P.3d 630, 633 (2017) (adopting a list of factors to determine the child's best interests in the context of naming disputes).

982, 987 (Ct. App. 2016) (concluding that a divorce decree term was ambiguous because it was susceptible to more than one reasonable interpretation). The term therefore lacks clear meaning.

*Clarifying "best interests of the child" within NRS 125C.007(1)(b)*

Because NRS 125C.007(1)(b) is unclear, we interpret what the Legislature intended it to mean. *Potter v. Potter*, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005). We first look to the legislative history to discern that intent. *Id.* The Nevada Legislature added NRS 125C.007 to the custody and parenting time statutes in 2015. The Parental Rights Protection Act, A.B. 263, 78th Leg. Sess. (Nev. 2015).

The legislative history does not provide the meaning of "best interests of the child" in this context. *See generally* Hearing on A.B. 263 Before the Assemb. Comm. on Judiciary, 78th Leg. Sess. (Nev. 2015). However, former Assemblymember Keith Pickard (now state senator), who helped draft this legislation, did imply that NRS 125C.007 was a codification of then-existing supreme court authority.[5] *See id.* at 16 (testimony of Keith Pickard, Assemb.) ("Additions were made in an effort to clarify and unify the rulings so there are no longer multiple standards in case law."). And this implication is supported by the fact that several phrases from NRS 125C.007 are mirrored in the supreme court's relocation jurisprudence. *Compare* NRS 125C.007(1)(a), *with Jones v. Jones*, 110 Nev. 1253, 1261, 885 P.2d 563, 569 (1994) (good faith reason to relocate), *superseded by statute*, NRS 125C.007(3); *and* NRS 125C.007(1)(c), *with Schwartz*, 107 Nev. at 382, 812 P.2d at 1271 (actual advantage in relocating); *and* NRS 125C.007(2), *with Schwartz*, 107 Nev. at 383, 812 P.2d at 1271 (*Schwartz* relocation factors).

Because the legislative history provides little guidance as to "best interests of the child," we next look to supreme court authority predating NRS 125C.007 to decipher the legislative intent behind NRS 125C.007(1)(b). *See McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986) ("The meaning of the words used may be determined by examining the context and the spirit of the law or the causes which induced the legislature to enact it."). Unfortunately, there once again is little to no guidance regarding the language in NRS 125C.007(1)(b). Supreme court authority regarding relocation, however, appears to give context to the meaning of other statutory language in NRS 125C.007.

For example, *Gandee* and *Trent* shed light on the "sensible, good faith reason" threshold provision. *Gandee v. Gandee*, 111 Nev. 754, 757, 895 P.2d 1285, 1287 (1995) (career advancement is a sensible,

[5]Assemblymember Pickard also circulated an exhibit during the hearing on AB 263, which generally stated, "The bill does, however, deliberately keep the discretion in the trial court to make a [relocation] determination based upon the best interest of the child." Hearing on A.B. 263 Before the Assemb. Comm. on Judiciary, 78th Leg. Sess. (Nev. 2015) (Exhibit F, at 3).

good faith reason); *Trent*, 111 Nev. at 316, 890 P.2d at 1313 (moving to marry a nonresident is a good faith reason). *Trent* also aids in the understanding of the origin of the actual advantage threshold provision, as does *Jones*. *Trent*, 111 Nev. at 316, 890 P.2d at 1313 (an improved economic situation creates an actual advantage); *Jones*, 110 Nev. at 1260, 1262, 885 P.2d at 568, 570 (a more rural lifestyle, career opportunities, and a serious relationship in the new state collectively constitute an actual advantage). *McGuinness* and *Cook* identify circumstances that would satisfy some of the six relocation factors originally articulated in *Schwartz* and now largely found in NRS 125C.007(2). *McGuinness v. McGuinness*, 114 Nev. 1431, 1436, 970 P.2d 1074, 1078 (1998) (calls, emails, letters, and frequent parenting time can be reasonable alternative means of maintaining a meaningful relationship); *Cook v. Cook*, 111 Nev. 822, 828, 898 P.2d 702, 706 (1995) (a hostile relationship between the parents did not mean the relocating parent would refuse to comply with a revised parenting time order); *Schwartz*, 107 Nev. at 383, 812 P.2d at 1271 (relocation factors).

Finally, the burden of proof announced in NRS 125C.007(3) was the Legislature's attempt to undo the burden-shifting framework that the supreme court had established. In *Jones*, the court held that once the relocating parent demonstrated the threshold provisions and relocation factors, the burden shifted to the nonrelocating parent to show that the move would not be in the child's best interests. 110 Nev. at 1266, 885 P.2d at 572. NRS 125C.007(3) eliminates that practice by clarifying that "[a] parent who desires to relocate with a child pursuant to NRS 125C.006 or [NRS] 125C.0065 has the burden of proving that relocating with the child is in the best interest of the child."

In contrast, supreme court authority does not help explain the phrase "best interests of the child" found in NRS 125C.007(1)(b). Because we are again left with little guidance, we must interpret the legislative intent behind NRS 125C.007(1)(b) in favor of what is reasonable. *See Edgington v. Edgington*, 119 Nev. 577, 583, 80 P.3d 1282, 1287 (2003).

Reasonably, every custody best interest factor need not be applied anew when the relocating parent is already a primary physical custodian. *See* NRS 125C.006 (requiring a custodial parent to petition for permission to relocate, in contrast with NRS 125C.0065, which requires a joint custodian to seek primary physical custody); *see also Schwartz*, 107 Nev. at 382, 812 P.2d at 1270 ("Removal of minor children from Nevada by the custodial parent is a separate and distinct issue from the custody of the children."). NRS 125C.0065—the notice statute for joint custodians—requires that joint custodians who seek relocation also petition the court for primary custody for the purposes of relocating. As Hogan points out, NRS 125C.006—the notice statute for primary custodians—does

not. This is because primary custodians have already demonstrated that they should have primary custody. We do not interpret NRS 125C.007(1)(b) as requiring a custody best interest analysis and findings because primary custodians would essentially be forced to re-prove that they should have primary custody when they already have it. Doing so might obfuscate the distinction between NRS 125C.0065, which requires a custody best interest analysis, and NRS 125C.006, which does not. *See In re Estate of Murray*, 131 Nev. 64, 67, 344 P.3d 419, 421 (2015) ("[T]his court must give a statute's terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous." (quoting *S. Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005))).

Moreover, the introductory language in NRS 125C.007(2)[6] demonstrates that NRS 125C.007(1)(a)-(c) are "threshold" provisions; so do remarks made by one of the principal drafters.[7] Our court has also treated these provisions in that fashion. *See, e.g.*, *Doughty v. Laquitara*, No. 81683-COA, 2021 WL 3702016, at *2 (Nev. Ct. App. Aug. 19, 2021) (Order of Affirmance); *Melinkoff v. Sanchez-Losada*, No. 71380, 2018 WL 1417836, at *2 (Nev. Ct. App. Feb. 26, 2018) (Order of Affirmance); *Corcoran v. Zamora*, No. 71111, 2017 WL 6805189, at *2 (Nev. Ct. App. Dec. 27, 2017) (Order of Affirmance).

Furthermore, as Hogan stresses, there are 12 custody best interest factors. Thus, if we were to interpret NRS 125C.007(1)(b) as requiring findings as to each of the custody best interest factors in every relocation case, a district court would have to apply three threshold provisions—one of which would include 12 possible subfactors—to determine whether the threshold relocation test has been met before proceeding to an only six-factor analysis under the relocation factors. *See Jones*, 110 Nev. at 1260, 885 P.2d at 568 (concluding that a relocating parent need not demonstrate "tangible benefit[s]" under the actual advantage threshold requirement, precursor to the threshold relocation test, because they should be considered under the *Schwartz* factors "*after* the custodial parent makes a threshold showing"). We conclude these anomalies are not what the Legislature intended when it could have required primary custodians to refile for custody in NRS 125C.006, like in NRS 125C.0065, but it chose not to do so. *See generally Steward v. Steward*, 111 Nev. 295, 302,

[6]"If a relocating parent demonstrates to the court the provisions set forth in subsection 1, the court must *then* weigh the following factors." NRS 125C.007(2) (emphasis added).

[7]Keith Pickard, *AB 263—The Parental Rights Protection Act of 2015: Legislative History*, 28 Nev. Fam. L. Rep. 6 (2015) ("[T]he Act codified the *Schwartz* [relocation] factors that the *Druckman* [*v. Ruscitti*, 130 Nev. 468, 474, 327 P.3d 511, 515 (2014),] decision attempted to apply, including a three-prong *threshold* test." (emphasis added)).

890 P.2d 777, 781 (1995) ("When interpreting a statute, any doubt as to legislative intent must be resolved in favor of what is reasonable, and against what is unreasonable, so as to avoid absurd results.").

Hogan, however, goes too far in suggesting the statutory custody factors are not relevant to NRS 125C.007(1)(b) at all if the relocating parent already has primary physical custody. Indeed, the district court should consider the best interest custody factors and any other factors the court deems relevant. *See* NRS 125C.0035(4) ("In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, *among other things*: [list of factors]." (emphasis added)); *see also Nance*, 134 Nev. at 162 n.10, 418 P.3d at 687 n.10 (suggesting in dicta that the custody factors are relevant to NRS 125C.007(1)(b)); *Seminario v. Pierzchanowski*, No. 64670, 2015 WL 9596958, at *2 (Nev. Dec. 30, 2015) (Order of Affirmance) (concluding that the district court did not abuse its discretion by finding that relocation was in the child's best interests when the district court considered both the custody and *Schwartz* factors).

The district court must then make specific findings as to any of the factors it deems applicable. *See Pelkola v. Pelkola*, 137 Nev. 271, 274, 487 P.3d 807, 810 (2021) (concluding that the district court must make specific findings as to each of the NRS 125C.007(1) subfactors). For example, if two parents have such high conflict that the parties are better off coparenting from afar, then custody best interest factors (d) and (e)—the level of conflict between the parents and their ability to cooperate—could be applicable to determining the child's best interests under NRS 125C.007(1)(b). *See, e.g.*, *Pasternak v. Pasternak*, 467 S.W.3d 264, 272 (Mo. 2015) (affirming the trial court's conclusion that relocation was in the best interests of the children where greater physical distance between two contentious parents would "reduce stress on the children"). If the child is bonded to both parents, custody factor (h)—the nature of the relationship between the child and each parent—could also be applicable to NRS 125C.007(1)(b). *See, e.g.*, *Weiland v. Ruppel*, 75 P.3d 176, 179 (Idaho 2003) (affirming the district court's conclusion that relocation was not in the child's best interests when the child bonded to both parents). Or, if one parent has physical custody of the child's sibling, factor (i)—the ability of the child to maintain a relationship with any sibling—could be applicable. *See, e.g.*, *Schmidt v. Bakke*, 691 N.W.2d 239, 244 (N.D. 2005) (concluding that "the effect of the separation of siblings" is a consideration when assessing whether relocation is in the best interests of the child).

Other nonenumerated factors—such as the parent's greater ability to provide for the child in the new location—may also be applicable. *See* NRS 125C.0035(4) (a best interest finding includes the enumerated factors "among other things"); *cf. Gazzara v. Nance*, No. 79588, 2020 WL 2529039, at *1 (Nev. May 15, 2020) (Order of Affirmance)

(affirming the district court's conclusion that relocation was in the best interests of the child where the relocating parent received a promotion in another state); *Johnston v. Dickes*, 116 N.Y.S.3d 818, 819 (App. Div. 2019) (concluding that the trial court must consider economic factors, including that the relocating parent's new location had lower housing costs, when determining whether relocation was in the best interests of the child); *In re Matter of Moredock*, 12 N.Y.S.3d 711, 712 (App. Div. 2015) (concluding that relocation was in the best interests of the child because the relocating, primary custodian "would be living in poverty without a stable home" if she did not relocate).[8]

Last, the court must take its specific findings as to the applicable factors and tie them to its conclusion regarding the child's best interests. *See Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015) (holding that the district court must issue specific findings when making a best interest custody determination and tie them to its conclusion); *see also Pelkola*, 137 Nev. at 274, 487 P.3d at 810. Such a standard strikes the appropriate balance between the noncustodial parent's interest in maintaining a close relationship with the child and the custodial parent's interest in freedom of movement.

Here, the district court incorporated a prior best interest analysis from an order following a change of custody motion, which the court made with knowledge that Hogan may relocate in the future. The district court made a summary finding in its order that relocation was in M.M.'s best interests and that nothing about the relocation changed the best interest analysis that the court completed in the prior order. Monahan asserts that this analysis was "stale," which we addressed in footnote 2, but fails to identify which factors, if considered anew, would have weighed against relocation.

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[8]We also have issued orders where certain custody factors would have been applicable to determining the best interests of the child in the relocation context. *See, e.g.*, *Doughty*, 2021 WL 3702016, at *3 (concluding that the district court properly considered that the child "would miss his dad and brother if he moved" in determining the child's best interests); *Rowberry v. Rowberry*, No. 81118-COA, 2021 WL 3701857, at *5 (Nev. Ct. App. Aug. 18, 2021) (Order of Affirmance) (concluding that the district court did not abuse its discretion where it found relocation was in the child's best interests because the relocating parent and her new husband could not afford to live separately, amongst other things); *Reed v. Reed*, No. 76540-COA, 2019 WL 851946, at *2 (Nev. Ct. App. Feb. 14, 2019) (Order of Affirmance) (affirming the district court's conclusion that relocation was in the child's best interests when the parents' high degree of conflict and inability to constructively communicate required them to limit contact); *Brokaski v. Brokaski*, No. 70865, 2017 WL 946325, at *2 (Nev. Ct. App. Mar. 6, 2017) (Order of Affirmance) (affirming the district court's conclusion that relocation was not in the children's best interests when there was conflict between the parents that hindered their ability to coordinate interstate parenting time and the children were "extremely close and bonded" to both parents).

Therefore, he has not demonstrated that the district court's best interests determination affected his substantial rights. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (explaining that "[a]n error is harmless when it does not affect a party's substantial rights" and harmless error does not warrant a reversal); *cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

Further, the district court made findings regarding the actual advantages that relocating would bring M.M. and Hogan under the third provision of the threshold relocation test. For example, the court found that M.M. would have greater access to outside tutoring and educational resources, would have a better quality of life in Virginia, and would not be separated from her half-sibling if permitted to relocate with Hogan. These actual advantages to M.M. overlap with M.M.'s best interests. *See* NRS 125C.007(1)(b), (c). And failure to restate those findings under NRS 125C.007(1)(b) is not fatal to the district court's best interests determination. *See also Schwartz*, 107 Nev. at 382, 812 P.2d at 1270-71 (concluding that relocation "involves a fact-specific inquiry and cannot be reduced to a rigid 'bright-line' test"); *cf. Rowberry*, 2021 WL 3701857, at *5 (concluding that the district court did not err by failing to make findings as to the custody best interest factors where the district court made findings as to all three threshold provisions and the relocation factors in NRS 125C.007(2), and the appellant did not demonstrate how his substantial rights were affected by the alleged error). Therefore, we conclude that the district court did not abuse its discretion by granting Hogan's relocation petition.

*The burden of proof necessary to satisfy NRS 125C.007(1)*

The applicable burden of proof necessary to satisfy the "best interests of the child" standard under NRS 125C.007(1)(b) was not directly argued by the parties,[9] but it has never been addressed by our supreme court and is integrally related to interpreting the threshold provision the parties put before us. Therefore, we choose to address it. *Cf. Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544-45 (2010) (indicating that "refinements of points" raised below are not waived on appeal). While NRS 125C.007(1)(b) is a threshold provision and possibly should, therefore, require a less rigorous analysis than the six relocation factors, preponderance of the evidence is still the default evidentiary standard in family law absent "clear legislative intent to the contrary." *Mack v. Ashlock*, 112 Nev. 1062, 1066, 921 P.2d 1258, 1261 (1996); *but cf. Rooney v. Rooney*, 109 Nev. 540, 542-43, 853

[9]On relevance grounds, Hogan did object below that a best interests finding under NRS 125C.007(1)(b) did not require an application of the custody best interest factors because she already had primary custody.

P.2d 123, 124-25 (1993) (establishing a lesser burden of proof of adequate cause for requiring a hearing on a motion to modify custody); *see also Arcella*, 133 Nev. at 871, 407 P.3d at 345 (applying the *Rooney* standard in a motion to modify case). Clear legislative intent means the statute itself prescribes a different evidentiary standard than preponderance of the evidence. *See Mack*, 112 Nev. at 1066, 921 P.2d at 1261 (offering NRS 128.090(2), which expressly requires clear and convincing evidence, as an example of "clear legislative intent to the contrary").

Here, NRS 125C.007 is incomplete in establishing evidentiary standards, and no legislative history discusses evidentiary burdens for any of the NRS 125C.007 provisions. Therefore, we cannot say that the Legislature clearly intended a lower evidentiary burden for NRS 125C.007(1)(b). *Compare* NRS 125C.0035(5) (requiring findings by clear and convincing evidence to activate the presumption that sole or joint physical custody by a domestic abuser is not in the best interest of the child), *with* NRS 125C.007(1) (omitting any discussion of evidentiary burdens), *and* NRS 125C.007(3) (placing the burden of proving best interest on the party seeking to relocate but not establishing the quantum of proof required).

Thus, we conclude that the relocating parent has the burden of proving all three threshold provisions are met. *See* NRS 125C.007(1) (stating that "the relocating parent must demonstrate to the court" the three threshold provisions). We further conclude that the applicable burden of proof necessary to satisfy the threshold provisions under NRS 125C.007(1) is preponderance of the evidence.

## *CONCLUSION*

"Best interests of the child" from NRS 125C.007(1)(b) does not have a clear meaning. We conclude that NRS 125C.007(1)(b) requires the district court to make specific findings that relocation would be in the best interests of the child and tie those findings to its conclusion. Our interpretation of best interests strikes the appropriate balance between preserving the noncustodial parent's relationship with the child and not unduly restricting the custodial parent from pursuing life outside Nevada. The district court has discretion in determining how to decide the child's best interests, but it still must make findings as to all three threshold provisions, plus the six relocation factors if the relocating parent demonstrates the threshold provisions, under a preponderance of the evidence standard. The district court's order met those requirements and thus we affirm.

Tao and Bulla, JJ., concur.

KEOLIS TRANSIT SERVICES, LLC, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE RICHARD SCOTTI, District Judge, Respondents, and SHAY TOTH, Real Party in Interest.

No. 81637-COA

February 24, 2022 506 P.3d 1076

Original petition for a writ of prohibition challenging a district court order compelling disclosure of an insurer's surveillance videos and related reports in a tort action.

**Petition granted in part and denied in part.**

*Muehlbauer Law Office, Ltd.*, and *Andrew R. Muehlbauer* and *Sean P. Connell*, Las Vegas, for Petitioner.

*Cliff W. Marcek, P.C.*, and *Cliff W. Marcek*, Las Vegas; *Moss Berg Injury Lawyers* and *Boyd B. Moss*, Las Vegas, for Real Party in Interest.

*Claggett & Sykes Law Firm* and *Micah S. Echols*, Las Vegas; *Sharp Law Center* and *A.J. Sharp*, Las Vegas, for Amicus Curiae Nevada Justice Association.

Before the Court of Appeals, Gibbons, C.J., Tao and Bulla, JJ.

## OPINION

By the Court, Tao, J.:

This interlocutory writ petition arises from a personal injury action in which the petitioner asserts that the district court improperly ordered that three surveillance videos and two related reports created by its insurance company's investigators were subject to discovery and not protected from disclosure as "work product" under NRCP 26(b)(3). Based on the record, we can only reach a decision as to the first two videos and the report related to those videos. We conclude that the first two videos and related report are not protected work product because their production was not directed by Keolis's counsel. We cannot, however, reach a conclusion as to the ultimate discoverability of the third video and accompanying report because, while they were created at the direction of Keolis's counsel after the suit was commenced and thus constitute work product, the district court did not analyze whether they may nonetheless be discoverable upon a showing of substantial need and undue hardship. Because the district court ordered the disclosure of all the videos and reports at issue without conducting the required analysis, we

take this opportunity to clarify the appropriate framework as it pertains to an insurer's surveillance materials. Accordingly, we grant the petition in part and direct further proceedings.

## *FACTUAL BACKGROUND*

While driving a vehicle on behalf of petitioner Keolis Transit Services, LLC (Keolis), employee Andre Petway rear-ended a vehicle driven by real party in interest Shay Toth, allegedly causing serious injuries to Toth, who subsequently retained counsel. A few days after the collision, in July 2017, Toth's counsel sent a letter notifying Keolis's third-party insurer of Toth's representation and that she was claiming damages for personal injuries in connection with the collision.

Days after receiving this letter, the insurer obtained an Insurance Services Office (ISO) report to ascertain whether Toth had filed other insurance claims. A little over a year later, in August 2018, the insurer initiated an investigation to assess Toth's injuries and the truthfulness of her claims. As part of this investigation, an investigator recorded video surveillance of Toth publicly engaged in daily activities. Outside of representations Keolis's counsel made to the discovery commissioner below that a claims adjuster directed this surveillance, the record does not reveal who participated in the decision to conduct this additional investigation or what specifically prompted it. The investigator generated two surveillance videos of Toth, both dated August 2018 in Keolis's privilege log. The investigator also produced a written report associated with these two videos, likewise dated August 2018.

In June 2019, Toth filed the instant suit for negligence against both Petway and Keolis. Thereafter, Keolis's counsel directed further investigation, culminating in a third surveillance video of Toth engaged in public activities and an accompanying written report.[1] During discovery, in response to requests for production of documents, Keolis disclosed the existence of these videos and reports without disclosing their contents. Toth then specifically requested copies of, or access to, the videos and reports, but Keolis refused, asserting that the surveillance videos and reports are protected work product.

Toth filed a motion to compel pursuant to NRCP 16.1(a)(1)(A)(ii), arguing that Keolis was required to disclose the videos and reports with its initial disclosures. The discovery commissioner determined that the ISO report should be disclosed, as it was prepared in the ordinary course of business. However, the discovery commissioner

[1]Because this matter reached this court in connection with an interlocutory writ petition, neither Toth nor this court has seen the contents of any of the three surveillance videos or the two accompanying reports, nor does it appear that the district court reviewed any of these materials.

concluded that the videos and related reports are protected from discovery as work product, but that Keolis would need to disclose the materials within 30 days of Toth's deposition if Keolis intended to use them at trial.

After Toth filed an objection, the district court partly modified the discovery commissioner's report and recommendation and, in a one-sentence footnote containing no analysis or findings, ordered Keolis to immediately produce all three videos and both related reports. Keolis filed this petition seeking a writ of prohibition challenging the district court's discovery order with respect to the surveillance materials, but not the ISO report.

## *ANALYSIS*

### *Standard for writ relief*

"Generally, extraordinary relief is unavailable to review discovery orders." *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000). A court may nevertheless consider a writ petition raising a discovery issue if "an important issue of law needs clarification and public policy is served by the court's invocation of its original jurisdiction." *Id.* (quoting *Bus. Comput. Rentals v. State Treasurer*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998)). A writ of prohibition is appropriate to prevent improper discovery. *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 373-74, 399 P.3d 334, 341 (2017); *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court*, 136 Nev. 221, 223 n.3, 467 P.3d 1, 4 n.3 (Ct. App. 2020).

Here, we elect to entertain the petition to clarify the legal analysis a district court must apply when determining whether an insurer's surveillance materials are protected as work product and, if surveillance videos qualify for work-product protection, whether they are nevertheless subject to discovery, which is an important issue that may arise in numerous similarly situated cases. Moreover, without our intervention, the district court's order compelling disclosure of the videos and related reports may result in the unjust compromise of potentially protected work product that an appeal could not fully rectify after a final judgment. Accordingly, we deem our intervention appropriate.

### *Standard of review*

This court will not disturb the district court's ruling on discovery matters absent a clear abuse of discretion. *Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. 247, 251, 464 P.3d 114, 119 (2020). To receive this deference, however, "the district court must apply the correct legal standard in reaching its decision, and we owe no deference to legal error." *See In re Guardianship of B.A.A.R.*, 136 Nev. 494, 496, 474 P.3d 838, 841 (Ct. App. 2020).

*Surveillance videos and the work-product doctrine*

The work-product doctrine originated at common law but currently stands codified in NRCP 26(b)(3), which states the following:

> (A) **Documents and Tangible Things.** Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Thus, the preliminary inquiry when considering a work-product question is whether the material was created in anticipation of litigation or for trial.

As the Nevada Supreme Court explained in *Wynn Resorts, Ltd. v. Eighth Judicial District Court*, a party prepares a document in anticipation of litigation when, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 133 Nev. at 384, 399 P.3d at 348 (quoting Restatement (Third) of the Law Governing Lawyers § 87 cmt. i (Am. Law Inst. 2000)). This test, commonly referred to as the "because of" test, asks whether a party prepared or obtained a document because of the prospect of litigation and whether the anticipation of litigation was essential for the creation of the document.[2] *Id.* "The anticipation of litigation must be the *sine qua non* for the creation of the document—'but for the prospect of that litigation,' the document would not exist." *Id.* (quoting *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004)). Thus, the "because of" test does not protect "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Id.* (quoting *United States v. Adlman*, 134 F.3d 1194,

[2]We take this opportunity to note that the narrow issue here is Toth's ability to access the contents of the videos and reports. The mere existence of videos and reports like those at issue here generally must be disclosed in discovery. *See* NRCP 16.1(a)(1)(A)(ii) (providing that a party must disclose "a description by category and location" of materials that it "may use to support its claims or defenses, including for impeachment or rebuttal"); NRCP 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case . . . ."); *Ex parte Doster Constr. Co.*, 772 So. 2d 447, 451 (Ala. 2000); *Cabral v. Arruda*, 556 A.2d 47, 50 (R.I. 1989).

1202 (2d Cir. 1998)). In general, to determine whether a document satisfies the "because of" test, the district court must consider the totality of the circumstances. *Id.*

Here, the third video and related report were created at the express direction of Keolis's counsel *after* Toth filed suit. However, the first two videos and related report were created earlier by the insurance carrier, before Toth's suit was filed, for reasons not fully clear from the record. Under the general work-product analysis, the question would be whether Keolis, through its insurer, created these materials in the ordinary course of business, in which case they are not protected under the work-product doctrine, or rather created the videos "because of" looming litigation, in which case they are protected work product. This case, however, is not governed by the typical work-product analysis.

As the parties note, the complexity in this case lies in the fact that insurance companies exist, in at least some sense, for the purpose of recommending and implementing policies and procedures to mitigate the possibility of conduct that may lead to future litigation that necessarily requires them to anticipate, plan for, avoid, and defend actual or threatened litigation. Indeed, insurance carriers charge their clients premiums based upon actuarial calculations that expressly consider the likelihood of future litigation and the potential damages that a jury might award. But this cuts two ways. On the one hand, Keolis argues that, because much of what insurance carriers do is anticipate and respond to possible litigation threats, every investigation they conduct in response to the receipt of a lawyer's letter of representation must be considered protected work product. On the other hand, Toth argues that, because insurance carriers are in the business of routinely conducting such investigations whenever they receive a letter of representation from an attorney, whether they ever lead to lawsuits or not, such investigations are merely part of their regular and ordinary business activities.[3]

The Nevada Supreme Court has addressed this issue. In *Ballard v. Eighth Judicial District Court*, the supreme court articulated a special rule for insurers' investigations: investigative materials generated in the context of an insurance investigation are considered to have been created in the ordinary course of business of the insurance company, rather than in anticipation of litigation, unless

[3]Toth argues that NRS 686A.310 mandates insurance investigations and therefore makes an insurance investigation an ordinary business activity. *See Wynn Resorts*, 133 Nev. at 384, 399 P.3d at 348 (noting that the "because of" rule "withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation" (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998))). That statute, however, only describes the failure to investigate a claim as an "unfair practice" and therefore cannot be read to categorically make video surveillance an ordinary business activity such that surveillance videos are automatically excluded from work-product protection.

the investigation was performed at the request or under the direction of an attorney. *See* 106 Nev. 83, 85, 787 P.2d 406, 407 (1990). In *Ballard*, within days of an automobile/pedestrian accident but after learning that the plaintiff was represented by counsel, the defendant's automobile liability insurance company began its own investigation into the facts and circumstances of the accident. *Id.* at 84, 787 P.2d at 407. When the plaintiff later sought to discover a statement that the defendant made to the insurer during that investigation, the supreme court held that "materials resulting from an insurance company's investigation are not made 'in anticipation of litigation' unless the insurer's investigation has been performed at the request of an attorney." *Id.* at 85, 787 P.2d at 407 (citing *Langdon v. Champion*, 752 P.2d 999 (Alaska 1988)). Therefore, the court concluded, because the statement "was not taken at the request of an attorney, it is not privileged under NRCP 26(b)(3)." *Id.*

After *Ballard*, the supreme court clarified this rule in *Columbia/HCA Healthcare Corp. v. Eighth Judicial District Court*, holding that the simple involvement of an attorney does not automatically insulate all materials, such as a hospital's occurrence reports, from discovery as work product. 113 Nev. 521, 526-27, 936 P.2d 844, 848 (1997) (discussing *Ballard* and rejecting the notion "that documents become [protected work product] by injecting an attorney into the investigative process . . . , especially when the investigation occurs in the ordinary course of business"). While *Columbia* is not an insurance investigation case, we read it and *Ballard* together to require, at least, an attorney's involvement before insurance investigation materials become work product, but also to acknowledge that an attorney's involvement is not itself sufficient to confer work-product protection to materials that otherwise would have been prepared in the ordinary course of business, irrespective of the attorney's involvement.

*Ballard* controls the initial inquiry of this discovery dispute regarding materials created through an insurer's investigation. With respect to the first two videos, *Ballard*'s requirement of attorney involvement proves dispositive. This illustrates the special outcome under *Ballard* as opposed to the general analysis under *Wynn Resorts*, as the record suggests that the first two videos were created in response to the letter of representation from Toth's counsel. Specifically, although not prompted by Keolis's counsel, a colorable argument can still be made that these videos were created "because of" litigation, rather than in the ordinary course of business, because the attorney letter itself might have triggered the expectation of potential future litigation. Under *Ballard*'s insurer exception, however, any such subjective anticipation of litigation, no matter how real it may have been, is immaterial so long as the insurer's attorney did not direct the surveillance.

This outcome may seem counterintuitive under the general "because of" test. However, when viewed in light of the uniquity of insurance company practices explained above, the reason for this initial and potentially dispositive inquiry becomes clear. Accordingly, we take this opportunity to clarify that the "because of" test generally applied in work-product cases gives way to *Ballard*'s counsel requirement when insurance investigation materials are at issue. Yet, while involvement of counsel is necessary, it is not sufficient. *Columbia*, 113 Nev. at 526-27, 936 P.2d at 848. Instead, we read *Ballard* and *Columbia* together to establish that insurance investigation materials are created in anticipation of litigation, and are therefore protected work product, only when they are created at the direction of counsel under circumstances demonstrating that counsel's involvement was reasonable and not for the mere strategic purpose of obtaining work-product protection for routinely created materials.

Thus, we conclude that Nevada Supreme Court precedent resolves this case with respect to the first two videos and the accompanying report because Keolis did not argue for, and the record does not support, a conclusion that the initial investigation came at the direction of Keolis's counsel. Thus, the first two videos and report should be produced. We turn next to the third video and accompanying report, drawing two crucial distinctions.

The most obvious distinction between the materials, given the preceding discussion, is that the final video and report were created at the direction of Keolis's counsel. However, the other distinction is perhaps more important. The third video was created *after* Toth filed her lawsuit. This is important because work-product protections attach to materials prepared both "in anticipation of litigation or *for trial*." NRCP 26(b)(3)(A) (emphasis added).

While the third video and related report were generated at the direction of counsel, we need not wrestle with the question of whether counsel's involvement was reasonable or merely strategic because, when the third video was made, litigation had already commenced. There was nothing left to anticipate. The third video and related report were created after Toth filed suit; therefore, the materials were prepared for trial. Accordingly, the third video and its related report are protected by the work-product doctrine under NRCP 26(b).

Nonetheless, we must stop short of reaching a conclusion as to the ultimate discoverability of the third video and related report. Keolis argues that the district court failed to perform the complete and necessary analysis, and its argument is correct, as far as it goes; the district court's order consists of only a single sentence and virtually no analysis of any facts. Because that single sentence ordered the materials disclosed, it had no reason to analyze the main exception

to the work-product doctrine. However, our foregoing analysis shows that such an analysis must be performed. When materials meet the requirements for protection under the work-product doctrine, they may still be subject to discovery upon a showing by the requesting party of substantial need and undue hardship under NRCP 26(b)(3)(A). Thus, if the record demonstrates that this exception is met, then the third video and related report are discoverable regardless of whether the work-product doctrine applies to them.

Our supreme court has defined the terms "substantial need" and "undue hardship" for purposes of this exception. *See generally Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. 247, 257-58, 464 P.3d 114, 122-23 (2020). In particular, the party seeking to overcome work-product protection must demonstrate an actual need for the evidence in the preparation of its case; "[a] mere assertion of the need will not suffice."[4] *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 358, 891 P.2d 1180, 1188 (1995). The requesting party must also demonstrate that he or she would face undue hardship to discover the same evidence "or the substantial equivalent thereof." *Id.* Generally, no undue hardship exists if the same evidence is discoverable by any other reasonable means. *See id.* at 359, 891 P.2d at 1188-89 (finding no undue hardship where the requesting party could have deposed any of 74 individuals who could possess the desired evidence). Importantly, under NRCP 26(b)(3)(B), "[i]f the court orders discovery of [work-product] materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."

In the case at bar, the district court disposed of the discoverability of all the surveillance videos in a single-sentence footnote, ordering all the materials disclosed. As a result, the district court made no findings and provided no analysis of the exception under NRCP 26(b)(3)(A), let alone the appropriate conditions of the production to protect against the disclosure of counsel's mental impressions, conclusions, opinions, or legal theories as required under NRCP 26(b)(3)(B). Based upon the record before us, we are unable to determine whether Toth demonstrated, or could have demonstrated,

[4]We note that the extent to which Keolis plans to use the materials at trial is relevant to the question of whether Toth can show substantial need under NRCP 26(b)(3)(A). *See Fletcher v. Union Pac. R.R. Co.*, 194 F.R.D. 666, 670 (S.D. Cal. 2000) ("Whether [surveillance] films will be used at trial is a significant factor in determining whether the party seeking to discover them has a 'substantial need' for the material."). Moreover, although it is not necessary to our disposition, we note that multiple courts, like the discovery commissioner here, have determined that defendants need only produce work-product surveillance materials to be used, after they have had the opportunity to depose the plaintiff, reasoning that such timing preserves a defendant's ability to use the materials for impeachment. *See, e.g.*, *Marchello v. Chase Manhattan Auto Fin. Corp.*, 219 F.R.D. 217, 219 (D. Conn. 2004); *Cabral*, 556 A.2d at 50.

substantial need and undue hardship and, if so, when the production should be made. Nor can we sit as factfinders and determine these questions in the first instance.[5] Consequently, we grant Keolis's petition in part and direct the district court to reconsider Toth's motion to compel under the standards set forth herein.

## *CONCLUSION*

For the reasons set forth herein, we conclude that the first two videos and related report, created before the suit was filed, fail *Ballard*'s explicit requirement for counsel involvement in insurance cases. As such, those materials are not protected work product. The third video and accompanying report, however, were created at the direction of counsel after Toth filed suit against Keolis. Accordingly, these materials are work product. The third video and related report may nonetheless be discoverable upon a showing of substantial need and undue hardship. Because the district court failed to apply this framework, however, we grant Keolis's petition in part and direct the clerk of this court to issue a writ of prohibition instructing the district court to vacate its order granting Toth's motion to compel insofar as it required production of the third video and related report and to conduct further proceedings consistent with this opinion.

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

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[5]As noted above, it appears that the content of the videos has not been disclosed to the district court. The nature of the video is important to a determination of whether the evidence or the substantial equivalent thereof is obtainable via other means. When a party alleges that surveillance videos or other similar materials contain potentially sensitive information, district courts may inspect the materials in camera in order to answer these inquiries. *See Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 515-16 (5th Cir. 1993) (addressing the district court's analysis of video evidence after an in camera review of the evidence); *Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. 163, 176, 359 P.3d 1096, 1104 (2015) (directing the district court to conduct an in camera review of allegedly sensitive documents to determine "the conditions appropriate to their production"); *Las Vegas Sands v. Eighth Judicial Dist. Court*, 130 Nev. 643, 656, 331 P.3d 905, 914 (2014) (directing the district court to resolve disputes regarding a privilege log by conducting an in camera review to determine if the records were in fact privileged).

MAIDE, LLC, a Nevada Limited Liability Company, dba GENTLE SPRING CARE HOME; SOKHENA K. HUCH, an Individual; and MIKI N. TON, an Individual, Appellants, *v.* CORRINE R. DILEO, as Special Administrator for the ESTATE OF THOMAS DILEO; THOMAS DILEO, JR., as Statutory Heir to THOMAS DILEO; and CINDY DILEO, as Statutory Heir to THOMAS DILEO, Respondents.

No. 81804

February 24, 2022 504 P.3d 1126

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

**Reversed and remanded.**

*Lewis Brisbois Bisgaard & Smith LLP* and *S. Brent Vogel* and *John M. Orr*, Las Vegas, for Appellants.

*Cogburn Law* and *Hunter S. Davidson* and *Jamie S. Cogburn*, Henderson, for Respondents.

*Claggett & Sykes Law Firm* and *Micah S. Echols*, Las Vegas; *Sharp Law Center* and *A.J. Sharp*, Las Vegas, for Amicus Curiae Nevada Justice Association.

Before the Supreme Court, Parraguirre, C.J., Stiglich and Silver, JJ.

## OPINION

By the Court, Silver, J.:

NRS 597.995 requires any agreement that includes an arbitration provision to also include a specific authorization for that provision—or the provision is void. But because NRS 597.995 singles out and disfavors arbitration provisions by imposing stricter requirements on them than on other contract provisions, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (2012), preempts NRS 597.995 in cases involving interstate commerce. Below, the district court concluded that an arbitration provision was void under NRS 597.995 for failure to include a specific authorization. Because we conclude the FAA applies here and preempts NRS 597.995, the district court's decision was erroneous, and we reverse.

### *FACTS AND PROCEDURAL HISTORY*

Maide, LLC, owns and operates Gentle Spring Care Home and Bella Estate Care Home, residential group homes in Las Vegas.

Thomas DiLeo moved to Gentle Spring after he developed dementia so that he could receive 24-hour care and supervision. His ex-wife and personal representative, Corinne DiLeo, signed the paperwork to admit Thomas to Gentle Spring. The admission paperwork included a separate one-page addendum that contained one paragraph addressing "Grievances" and a second paragraph addressing "Arbitration" (the addendum).[1] The paragraphs were set in a large font, and the addendum contained its own signature block.

After his admission to Gentle Spring, Thomas injured his leg. The DiLeo family alleged that Gentle Spring staff improperly bandaged Thomas's leg, which developed gangrene. Thomas's leg was later amputated, and he passed away shortly thereafter.

Corinne, as special administrator for the estate, and Cindy DiLeo and Thomas DiLeo, Jr., as statutory heirs, filed a complaint asserting causes of action for abuse/neglect of an older person, negligence, and wrongful death, and a survival action under NRS 41.100 against Maide and individuals connected to Gentle Spring (collectively Maide). Maide moved to compel arbitration based on the addendum, but the DiLeos countered that the arbitration paragraph in the addendum was void and unenforceable under NRS 597.995 for failure to include a separate signature or initial line pertaining solely to that paragraph.

The district court initially agreed with Maide, determining the arbitration provision was binding under NRS 597.995. The district court concluded, however, that the statutory heirs were not bound by the arbitration provision and stayed their claims pending arbitration. The DiLeos moved for rehearing, and the district court granted the motion after finding the arbitration addendum lacked specific authorization, such as a separate signature block or initial section, as required by NRS 597.995. The district court vacated the earlier order and denied Maide's motion to compel arbitration.[2] This appeal followed.[3]

## *DISCUSSION*

Where an agreement contains an arbitration provision, NRS 597.995(1) requires that agreement to "include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision." Failure to include some form of specific authorization for the arbitration provision voids the arbitration provision. NRS 597.995(2).

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[1]Gentle Spring used a form addendum with a heading for another care home Maide owned, but that fact does not affect this appeal.

[2]Senior Judge J. Charles Thompson granted Maide's motion to compel arbitration. Judge Adriana Escobar granted the DiLeos' motion for rehearing.

[3]*See* NRS 38.247(1)(a) (providing that an order denying a motion to compel arbitration may be appealed).

Below and on appeal, the parties focused on whether the arbitration provision in the addendum complies with NRS 597.995. While this case proceeded in district court, however, we determined that the FAA, 9 U.S.C. §§ 1-16 (2012), where it applies, preempts NRS 597.995. *MMAWC, LLC v. Zion Wood Obi Wan Tr.*, 135 Nev. 275, 277, 448 P.3d 568, 570 (2019). Specifically, if a state law "single[s] out and disfavor[s] arbitration," such as NRS 597.995 does by imposing stricter requirements on arbitration provisions than on other contract provisions, the FAA will preempt that law. *Id.* (internal quotation marks omitted).

A threshold issue in this appeal is whether the FAA applies because, if it does, it will preempt NRS 597.995's specific authorization requirement, invalidate the district court's grounds for denying Maide's motion to compel arbitration, and moot the parties' arguments as to whether the arbitration provision complies with NRS 597.995. Maide failed to address the FAA until its reply brief on appeal, thereby waiving the issue. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). However, because failing to consider FAA preemption would require us to deliberately ignore obvious and controlling Nevada law, we nevertheless elect to address this point.[4] *Cf. Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (explaining we may consider an issue raised for the first time in the reply brief where doing so "is in the interests of justice").

In *U.S. Home Corp. v. Michael Ballesteros Trust*, we explained the FAA applies where the contract evidences a transaction that involves interstate commerce. 134 Nev. 180, 186, 415 P.3d 32, 38 (2018); *see also* 9 U.S.C. § 2 (2012). In the context of the FAA, the word "involves" "is broad and functionally equivalent to the word 'affecting,'" and a contract "affects or involves interstate commerce if Congress could regulate the transaction through the Commerce Clause." *Ballesteros*, 134 Nev. at 186, 415 P.3d at 38. In considering whether a contract comes within the purview of the FAA, we recognize that the FAA was intended to "signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003); *Ballesteros*, 134 Nev. at 186, 415 P.3d at 38. Thus, we have determined that "[s]o long as 'commerce' is involved, the FAA applies." *Tallman v. Eighth Judicial Dist. Court*, 131 Nev. 713, 724, 359 P.3d 113, 121 (2015). As to arbitration provisions specifically, the FAA will apply so long as there is evidence that interstate commerce was involved in the transaction underlying the arbitration agreement. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 281 (1995) (adopting the "commerce in fact" test); *see also Ballesteros*, 134 Nev. at 186-87, 415 P.3d at 38. Moreover, we have explained that "it is perfectly clear that the FAA encompasses a wider range of transactions than those actually

[4]We do not address the other arguments raised for the first time on appeal.

'in commerce'" and the FAA will even govern contracts evidencing intrastate economic activities so long as those contracts, "when viewed in the aggregate, substantially affect interstate commerce." *Ballesteros*, 134 Nev. at 186-87, 415 P.3d at 38-39 (internal quotation marks omitted).

For example, in *Ballesteros*, we considered whether the FAA governed an arbitration agreement contained in Covenants, Conditions, and Restrictions (CC&Rs). *Id.* at 180, 415 P.3d at 34. There, homeowners sued for construction defects in homes in a common interest community. *Id.* at 181, 415 P.3d at 34-35. A central issue was whether the FAA applied, as the homeowners argued that the CC&Rs addressed real estate and land that was a local concern. *Id.* at 181, 187, 415 P.3d at 34, 39. We rejected that argument, noting that the CC&Rs allowed the property to be developed, constructed, and sold and that "out-of-state businesses provided supplies and services in constructing the homes." *Id.* at 187, 415 P.3d at 39. We accordingly concluded that the transaction underlying the CC&Rs' arbitration agreement affected interstate commerce and the FAA controlled. *Id. Ballesteros* is not alone in concluding the definition of "interstate commerce" casts a wide net. Other cases instructive here include *Katzenbach v. McClung*, where the United States Supreme Court concluded a Birmingham restaurant engaged in interstate commerce by serving interstate travelers and by using food that moves through interstate commerce. 379 U.S. 294, 302-05 (1964). In *Allied-Bruce*, a contract to treat and repair termite damage involved interstate commerce where the material used to treat and repair termite damage came from outside the state. 513 U.S. at 282. And in *MMAWC*, the FAA applied where a licensing agreement provided a party the right to use appellant's licensed marks internationally. 135 Nev. at 276, 448 P.3d at 569.

We have never addressed the FAA's application in the context of care- or nursing-home contracts. But the South Carolina Supreme Court noted that following *Allied-Bruce*, most, if not all, courts have concluded that nursing home residency contracts implicate interstate commerce, as such "contracts usually entail providing residents with meals and medical supplies that are inevitably shipped across state lines from out-of-state vendors." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 759 S.E.2d 727, 732 (S.C. 2014). Similarly, the Kentucky Supreme Court noted that many courts have applied the FAA to arbitration provisions in nursing-home contracts and that health care is an activity that, in the aggregate, represents a general practice subject to federal control. *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581, 589-90 (Ky. 2012).

These and other cases across the country show that residency home contracts implicate the FAA where they regard supplies that are shipped across state lines or involve the use of federal funding. In *McGuffey Health & Rehabilitation Center v. Gibson*, for example,

the Alabama Supreme Court concluded a nursing home engaged in interstate commerce by accepting Medicare for the patient's care and treatment and by purchasing goods used for the patient's care from other states. 864 So. 2d 1061, 1062-63 (Ala. 2003). The Georgia Court of Appeals concluded a nursing home engaged in interstate commerce by purchasing supplies from vendors in other states, treating patients from other states, and having patients insured through Medicare and private insurances located in other states. *Triad Health Mgmt. of Ga., III, LLC v. Johnson*, 679 S.E.2d 785, 787-88 (Ga. Ct. App. 2009). An Illinois court determined a contract involved interstate commerce where Medicare paid for the patient's care and the facility received food, oxygen tanks, beds, and other supplies from vendors in other states, as well as provided services from companies situated in other states and used an out-of-state company to process its payroll. *Carter v. SSC Odin Operating Co.*, 955 N.E.2d 1233, 1239 (Ill. App. Ct. 2011), *reversed in part on other grounds by Carter v. SSC Odin Operating Co.*, 976 N.E.2d 344 (Ill. 2012). Similarly, a New Jersey court concluded that several nursing facilities that purchased supplies from out-of-state suppliers engaged in interstate commerce. *Estate of Ruszala v. Brookdale Living Cmtys., Inc.*, 1 A.3d 806, 817 (N.J. Super. Ct. App. Div. 2010); *see also THI of N.M. at Hobbs Ctr., LLC v. Spradlin*, 893 F. Supp. 2d 1172, 1184 (D.N.M. 2012) (concluding a care facility engaged in interstate commerce by accepting Medicare patients and purchasing medical and office supplies and furniture across state lines), *aff'd* 532 F. App'x 813 (10th Cir. 2013); *Pickering v. Urbantus, LLC*, 827 F. Supp. 2d 1010, 1014 (S.D. Iowa 2011) (concluding the FAA applied where the facility purchased medical equipment, laundry supplies, food, and medical supplies from other states and where the parties were located in different states). Furthermore, even where the funding comes through Medicaid or another state medical assistance program, if the program is federally funded, a contract that utilizes those funds implicates interstate commerce and falls under the FAA.[5] *In re Dec. Nine Co.*, 225 S.W.3d 693, 697-98 (Tex. App. 2006) (concluding a contract involved interstate commerce and fell within the FAA where one party received federal funds through the state-run Medicaid program).

The record here supports that the contract falls under the FAA's purview. The admission agreement promised to provide Thomas with meals and snacks, laundry service, a bed and other basic furnishings, and care for temporary illnesses. It also gave Thomas's

[5]The DiLeos urge us to adopt Oklahoma's approach in *Bruner v. Timberlane Manor Ltd. Partnership*, 155 P.3d 16, 28-31 (Okla. 2006), and conclude contracts that "involve[ ] a profoundly local transaction" and have a de minimis impact on commerce do not fall within the FAA. Given our decision in *Ballesteros*, wherein we recognized the broad reach of the FAA, we decline to adopt Oklahoma's approach.

family the option of purchasing additional services, such as cable TV and long-distance phone calls. Supplies for these services are inevitably shipped across state lines. *Cf. Ruszala*, 1 A.3d at 817 ("Clearly these nursing home facilities cannot function without the materials procured from these out-of-state suppliers."). Further, the record shows that Thomas's care was paid for in part by Medicaid,[6] further implicating the FAA.[7] *Cf. Spradlin*, 893 F. Supp. 2d at 1184 (explaining the FAA applied in part because the care center received funding from a state Medicaid program that in turn was funded in substantial part by the federal government); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983, 987-88 (Ala. 2004) (explaining that a contract involved interstate commerce where a substantial portion of the funding for the nursing home came from federally funded Medicaid or Medicare); *In re Dec.*, 225 S.W.3d at 697-98 (rejecting the argument that a contract did not involve interstate commerce because a party received payments through Medicaid instead of Medicare, where the state's Medicaid program was "a conduit for the federal funds"); *see also Visiting Nurse Ass'n of Fla., Inc. v. Jupiter Med. Ctr., Inc.*, 154 So. 3d 1115, 1124-25 (Fla. 2014) (explaining a contract involved interstate commerce where it contemplated the referral of Medicare patients, even though the record showed no other evidence of interstate commerce).

Accordingly, we conclude the FAA governs and preempts NRS 597.995.[8] The district court therefore erroneously applied NRS 597.995 here and abused its discretion by denying the motion to compel arbitration. *See Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev. 686, 699 n.10, 356 P.3d 511, 520 n.10

[6]At oral argument before this court, both parties acknowledged this funding came, at least in part, from the federal government. Thus, even if the government program utilized here is state-run, the contract still implicates interstate commerce because it ultimately makes use of federal funds.

[7]We note that *Ballesteros* clarified there must be evidence to demonstrate interstate commerce was involved before the FAA will apply. 134 Nev. at 187, 415 P.3d at 38. We are not persuaded by the DiLeos' argument that this record is devoid of evidence of interstate commerce, for the reasons stated in this opinion. Moreover, when asked at oral argument if a remand for further findings on this point would be appropriate, the DiLeos' counsel answered in the negative and urged us to settle this issue based upon the existing record.

[8]Even if the FAA had not preempted NRS 597.995 here, the district court's decision was erroneous. Nevada has a "fundamental policy favoring the enforceability of arbitration agreements," and we "liberally construe arbitration clauses in favor of granting arbitration." *Tallman*, 131 Nev. at 720, 359 P.3d at 118-19 (internal quotation marks omitted). NRS 597.995(1) requires specific authorization for an arbitration provision, and we conclude that requirement was met here, where the arbitration provision was included in a separate, one-page, two-paragraph addendum with a signature line for that particular page.

We need not address the DiLeos' arguments regarding the statutory heirs, as the district court determined the heirs were not bound by the arbitration clause and Maide does not contest this finding.

(2015) (reviewing a district court's decision to deny a motion for reconsideration for an abuse of discretion).

*CONCLUSION*

The FAA preempts NRS 597.995 in contracts involving interstate commerce. Under the FAA, state law may not impose rules that single out and disfavor arbitration. Because this contract involves interstate commerce, the FAA governs and preempts NRS 597.995. Accordingly, the district court erred by concluding NRS 597.995 voided the parties' arbitration agreement, by granting rehearing and vacating an order referring the Estate's claims to arbitration, and by denying the motion to compel arbitration. We therefore reverse that decision and remand with instructions to grant the motion to compel arbitration of the special administrator's claims.

Parraguirre, C.J., and Stiglich, J., concur.

MARIA DEL ROSARIO CERVANTES-GUEVARA, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE ERIKA D. BALLOU, District Judge, Respondents, and MARK THOMAS ANDERSON; and THOR DEVELOPMENT, LLC, a Limited Liability Corporation, Real Parties in Interest.

No. 83156

March 3, 2022 505 P.3d 393

Original petition for a writ of mandamus challenging a district court order denying a motion to enlarge time for service and serve by publication and dismissing a complaint as to the party who was not timely served.

**Petition denied.**

*Bighorn Law* and *Jacqueline R. Bretell* and *Joshua P. Berrett*, North Las Vegas, for Petitioner.

*Messner Reeves LLP* and *M. Caleb Meyer* and *Scott L. Rogers*, Las Vegas, for Real Party in Interest Mark Thomas Anderson.

*Resnick & Louis, P.C.*, and *Prescott T. Jones* and *Katlyn M. Brady*, Las Vegas, for Real Party in Interest Thor Development, LLC.

Before the Supreme Court, En Banc.

## OPINION

By the Court, Hardesty, J.:

Rule 4 of the Nevada Rules of Civil Procedure (NRCP) sets forth the requirements for summons and service of civil complaints. Specifically, NRCP 4(e) gives plaintiffs 120 days after filing a civil complaint in the district court to serve the defendants with a summons and a copy of the complaint. NRCP 4 further permits a plaintiff to request an extension of time to serve process on a defendant if the plaintiff is unable to serve the defendant within the 120-day period. If a motion demonstrating good cause is timely filed before the expiration of the service period, or any extension thereof, the court is required to extend the service period and set a reasonable date by which service should be made. NRCP 4(e)(3). However, if the plaintiff fails to timely move to extend the time for service, the court must determine whether good cause exists for the plaintiff's delay in filing the motion before considering whether good cause exists for granting an extension of the service period. NRCP 4(e)(4).

On March 12, 2020, Nevada Governor Steve Sisolak issued an Emergency Declaration declaring a state of emergency related to the COVID-19 pandemic. Subsequently, the Governor issued a series of Emergency Directives that impacted the daily lives of individuals, businesses, and government. Specifically, on April 1, 2020, the Governor issued Emergency Directive 009 (Revised), which, among other things, tolled any specific time limits set by statute or regulation pertaining to the commencement of any legal action until 30 days from the date the state of emergency was terminated. The Governor thereafter terminated Emergency Directive 009 (Revised) by issuing Emergency Directive 026 on June 29, 2020. Pursuant to Emergency Directive 026, the tolling period for commencing legal action ended on July 31, 2020, at 11:59 p.m.

In this original petition for a writ of mandamus, we determine whether the district court was within its discretion in denying, as untimely, petitioner Maria Del Rosario Cervantes-Guevara's second motion to enlarge time for service of process. In analyzing this question, we conclude that Emergency Directive 009 (Revised) did not apply to court rules and, thus, the deadline for service under NRCP 4(e) was not tolled by the Emergency Directive. Therefore, Cervantes-Guevara's motion was untimely under NRCP 4(e)(1), and she did not demonstrate good cause for her delay in filing the motion under NRCP 4(e)(3). Because the district court did not manifestly abuse its discretion by denying Cervantes-Guevara's motion and dismissing her complaint as to the party whom she failed to timely serve, we deny the original petition for a writ of mandamus.

## *FACTS AND PROCEDURAL HISTORY*

In early 2018, Cervantes-Guevara and real party in interest Mark Thomas Anderson were involved in a motor vehicle incident in Las Vegas. On January 7, 2020, Cervantes-Guevara filed a complaint against Anderson and his employer, real party in interest Thor Development, LLC, alleging various tort claims. Under NRCP 4(e)(1), the 120-day deadline to effect service of process expired on May 6, 2020. Cervantes-Guevara unsuccessfully attempted to effectuate personal service on Anderson three times between February 18, 2020, and March 8, 2020. On March 12, 2020, Governor Steve Sisolak declared a state of emergency due to the COVID-19 pandemic.

On April 1, 2020, the Governor issued Emergency Directive 009 (Revised), section 2 of which mandated that "[a]ny specific time limit set by state statute or regulation for the commencement of any legal action is hereby tolled from the date of this Directive until 30 days from the date the state of emergency declared on March 12, 2020 is terminated." The Governor terminated the tolling section of the Emergency Directive on June 29, 2020, and recommenced

the time tolled as of August 1, 2020. *See* Emergency Directive 026 (June 29, 2020), § 5.

On May 6, 2020 (the expiration date of the NRCP 4 service period), Cervantes-Guevara filed her first ex parte application to enlarge time for service, seeking an additional 90 days and leave to serve Anderson by publication due to COVID-19 social-distancing restrictions. The district court granted the unopposed motion on June 5, 2020, extending the service period until September 3, 2020. Cervantes-Guevara did not publish the first of the four required notices until October 15, 2020, however.

Cervantes-Guevara filed her second motion to enlarge time for service on October 28, 2020, seeking to extend the service period until December 23, 2020. Anderson appeared in the action to oppose the motion, and Senior Judge Joseph T. Bonaventure issued minutes denying Cervantes-Guevara's second motion to enlarge time on December 16, 2020, finding that the Emergency Directive did not toll the time for service of process and that her motion was untimely under the district court's Administrative Order 20-17, which required motions to extend service of process deadlines filed after July 1, 2020, to be filed prior to the expiration of the time to serve.[1] The minutes also indicated that Anderson would be dismissed as a party to the action.

Cervantes-Guevara filed a motion for reconsideration, arguing that Senior Judge Bonaventure did not consider whether good cause existed for Cervantes-Guevara's delay in filing the motion. Judge Erika D. Ballou denied Cervantes-Guevara's motion for reconsideration in a written order issued on March 22, 2021, finding that Senior Judge Bonaventure likely considered all factors required to deny the motion to enlarge time for service, even if his findings were not put on the record, and that she would not substitute her judgment for the judge who originally heard and ruled on the motion. After denying the motion for reconsideration, Judge Ballou issued a written order on July 13, 2021, reflecting Senior Judge Bonaventure's December 16 ruling and denying Cervantes-Guevara's second motion to enlarge time. Cervantes-Guevara filed this original petition for a writ of mandamus, asking this court to direct the district court to vacate its order denying the enlargement of time and dismissing Anderson from the action. Anderson filed an answer, as directed,[2] and Cervantes-Guevara filed a reply.

## *DISCUSSION*

### *Whether this court should entertain this writ petition*

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious

[1]*See* Eighth Judicial District Court Administrative Order 20-17, at *15-16.

[2]Thor Development filed a joinder to Anderson's answer to the petition.

exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citing, inter alia, NRS 34.160). In general, when considering a petition for a writ of mandamus, we review for a manifest abuse of discretion. *NuVeda, LLC v. Eighth Judicial Dist. Court*, 137 Nev. 533, 535, 495 P.3d 500, 503 (2021). Whether to consider such a petition is within the appellate court's discretion. *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 363, 325 P.3d 1276, 1278 (2014). Mandamus may only issue in "cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. An appeal is generally an adequate legal remedy precluding writ relief. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558.

Here, it is appropriate to entertain Cervantes-Guevara's petition because she does not have a plain, speedy, and adequate remedy to challenge the district court's order dismissing Anderson as a defendant in the underlying action. While it is true that the district court dismissed all the claims in the complaint against Anderson, the order granting dismissal is not appealable, absent an appropriate certification of finality under NRCP 54(b), because there are remaining issues to be resolved against Thor Development. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (explaining that "a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the [district] court"). But NRCP 54(b) certification is discretionary, *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1026 n.23, 102 P.3d 600, 603 n.23 (2004), and while its availability generally precludes writ relief, *see, e.g.*, *Dattala v. Eighth Judicial Dist. Court*, No. 82022, WL 510112, at *1 (Nev. Feb. 18, 2022) (Order Denying Petition), the preclusion is not absolute, *Borger*, 120 Nev. at 1026 n.23, 102 P.3d at 603 n.23. Considering this writ petition is appropriate because whether the Emergency Directive issued by the Governor applies to rules promulgated by this court is an important issue of law requiring clarification and resolving the issue will promote judicial economy. *See Mona v. Eighth Judicial Dist. Court*, 132 Nev. 719, 724, 380 P.3d 836, 840 (2016) (noting that "even if an [otherwise] adequate legal remedy exists, this court will consider a writ petition if an important issue of law needs clarification or if review would serve a public policy or judicial economy interest").

*Whether the Governor's Emergency Directive applies to service of process*

In Nevada, the judiciary has the constitutional duty "[t]o declare what the law is or has been." *N. Lake Tahoe Fire Prot. Dist. v. Washoe Cty. Bd. of Comm'rs*, 129 Nev. 682, 687, 310 P.3d 583, 587 (2013) (internal quotation marks omitted). Generally, this court

"review[s] issues of statutory construction de novo." *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). "When interpreting a statute, we look to its plain language." *Smith v. Zilverberg*, 137 Nev. 65, 72, 481 P.3d 1222, 1230 (2021). "If a statute's language is plain and unambiguous, we enforce the statute as written, without resorting to the rules of construction." *Id*. Whenever possible, this court interprets "a rule or statute in harmony with other rules or statutes." *Slade v. Caesars Entm't Corp.*, 132 Nev. 374, 376, 373 P.3d 74, 75 (2016).

Although this court has not yet addressed the issue, many other courts have applied the principles of statutory interpretation to executive orders and directives, and we agree with their approach. *See In re Murack*, 957 N.W.2d 124, 128 (Minn. Ct. App. 2021) (holding that "it is appropriate to apply statutory-interpretation principles in interpreting [emergency executive orders]"); *see also Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005) ("As is true of interpretation of statutes, the interpretation of an Executive Order begins with its text."); *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 922 (N.D. Ill. 2006) ("The Court interprets Executive Orders in the same manner that it interprets statutes."); *City of Morgan Hill v. Bay Area Air Quality Mgmt. Dist.*, 13 Cal. Rptr. 3d 420, 431 (Ct. App. 2004) ("The construction of an executive order presents an issue akin to an issue of statutory interpretation . . . .").

Here, Cervantes-Guevara argues that the tolling provision contained in Emergency Directive 009 (Revised) applied to the service period prescribed under NRCP 4(e), such that the remaining 36 days of the original service period recommenced on August 1, with the first 90-day extension beginning on September 5 and not expiring until December 4, rendering her second motion timely filed. As noted, the Emergency Directive tolled "[a]ny specific time limit set by state statute or *regulation for the commencement of any legal action*." Emergency Directive 009 (Revised) (April 1, 2020), § 2 (emphasis added). Cervantes-Guevara asserts that NRCP 4 is a regulation that sets forth guidelines for the conduct of the courts and attorneys during legal proceedings. However, Nevada law defines a "regulation," in relevant part, as "[a]n agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." NRS 233B.038(1)(a). Further, Nevada law defines an "agency" as "an agency, bureau, board, commission, department, division, officer or employee *of the Executive Department*." NRS 233B.031 (emphasis added). Court rules are not included. Moreover, this court recently stated in an unpublished disposition that "[t]he Declaration of Emergency Directive 009 (Revised) does not apply to deadlines established by this court's rules." *Byrd v. Byrd*, No. 81198, 2020 WL 4746547 (Nev.

Aug. 14, 2020) (Order Dismissing Appeal) (noting that "the time limitation to file a notice of appeal is not established by state statute or regulation, but by court rule"). Therefore, Cervantes-Guevara's attempt to frame the NRCP as "regulations" under Emergency Directive 009 (Revised) fails because, by definition, a regulation refers to any rule or adjudication made by an executive branch entity and does not encompass the rules promulgated by this court.

Cervantes-Guevara also contends that NRCP 4(e) expands the meaning of commencing a legal action because it sets forth a specific timeline for when the legal proceeding begins for the defendant in a civil matter. But NRCP 3 specifically states that "[a] civil action is commenced by filing a complaint with the court." As used in the rules of civil procedure, a "'complaint' includes a petition or other document that *initiates* a civil action." NRCP 3, Advisory Committee Note—2019 Amendment (emphasis added). Cervantes-Guevara's attempt to expand the meaning of "commencing a civil action" to include service of process upon the defendant fails because service of process is not a part of the commonly known definition of the phrase.

*Whether the district court manifestly abused its discretion by denying Cervantes-Guevara's second motion to enlarge time for service as untimely under NRCP 4(e)*

A dismissal for failure to effect timely service of process is reviewed for an abuse of discretion, *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 595, 245 P.3d 1198, 1200 (2010), and as noted above, writ relief will not issue absent a manifest abuse of that discretion, *NuVeda*, 137 Nev. at 535, 495 P.3d at 503.

We agree with the district court that Cervantes-Guevara's second motion to enlarge time, filed on October 28, 2020, was untimely because the previously granted motion extended Cervantes-Guevara's deadline 90 days to September 3, 2020—approximately 55 days before she filed the second motion.

Further, Cervantes-Guevara did not have good cause under NRCP 4(e)(3) for filing her second motion late because her interpretation of the Emergency Directive is unreasonable. Cervantes-Guevara's assertion that she was "reasonably diligent in her attempts" to serve Anderson is belied by the record. As the record shows, her attempts to personally serve Anderson stopped altogether after March 8, 2020, and she failed to begin the service-by-publication process until October 15, 2020, after being granted leave to do so by the district court on June 5, 2020. Therefore, the district court was within its discretion when it denied Cervantes-Guevara's second motion to enlarge time for service because she did not timely file the motion and she failed to demonstrate good cause for her delay.

*CONCLUSION*

Emergency Directive 009 (Revised) did not apply to the deadlines established by court rules because court rules are neither statutes nor regulations pertaining to the commencement of a legal action. Because the Emergency Directive did not toll the 120-day service period established by NRCP 4(e), the district court did not manifestly abuse its discretion when it denied Cervantes-Guevara's second motion to enlarge time and dismissed her complaint as to Anderson. We therefore deny the original petition for a writ of mandamus.

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