SAITTA, J., dissenting:

I dissent. For the reasons expressed in my dissent in *Watson v. State*, 130 Nev. 764, 335 P.3d 157 (2014), regarding the erroneous mitigation instruction—the same instruction given here, I would reverse the judgment of conviction and remand this matter to the district court for a new penalty hearing. As I observed in *Watson*, there is a significant disconnect between the instruction and the broad definition of mitigation articulated in NRS 200.035. Here, as in *Watson*, that disconnect likely confused the jury and improperly limited its consideration of the mitigating evidence presented. In a case where the circumstances of the murder make the death penalty a close call, the jury's rejection of all 17 of Burnside's mitigating circumstances notwithstanding the compelling mitigation evidence introduced exposes the prejudicial impact of a flawed mitigation instruction. Because there is a reasonable likelihood the instruction interfered with the jury's consideration of the mitigation evidence introduced, the penalty hearing was fundamentally unfair and the death sentence cannot be upheld with any confidence. Consequently, a new penalty is necessary.

THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF TRANSPORTATION, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ALLAN R. EARL, DISTRICT JUDGE, RESPONDENTS, AND AD AMERICA, INC., A NEVADA CORPORATION, REAL PARTY IN INTEREST.

No. 63179

June 25, 2015 351 P.3d 736

Original petition for a writ of mandamus or prohibition challenging a district court partial summary judgment in an inverse condemnation proceeding.

The supreme court, DOUGLAS, J., held that: (1) the supreme court would consider Nevada Department of Transportation's (NDOT) petition for writ of mandamus, (2) city's amendment to its general master plan to allow for certain road widening did not constitute a regulatory taking of property, (3) NDOT did not take property within meaning of Fifth Amendment takings clause, and (4) NDOT did not take property within meaning of state takings clause.

Petition granted.

Adam Paul Laxalt, Attorney General, and *Dennis Gallagher*, Chief Deputy Attorney General, Carson City; *Lemons, Grundy & Eisenberg* and *Robert L. Eisenberg*, Reno; *Chapman Law Firm, P.C.*, and *Michael G. Chapman* and *Erich N. Storm*, Las Vegas, for Petitioner.

Law Offices of Brian C. Padgett and *Brian C. Padgett* and *John P. Shannon*, Las Vegas; *Leach Johnson Song & Gruchow* and *Kirby C. Gruchow, Jr.*, Las Vegas, for Real Party in Interest.

Law Offices of Kermitt L. Waters and *Kermitt L. Waters, James Jack Leavitt, Michael A. Schneider*, and *Autumn L. Waters*, Las Vegas, for Amici Curiae People's Initiative to Stop the Taking of Our Land and Carrie L. Jenkins.

1. MANDAMUS.

   A writ of mandamus is available to control an arbitrary or capricious exercise of discretion.

2. MANDAMUS.

   An appeal from a final judgment or order is usually an adequate remedy, and thus, the supreme court often declines to exercise its discretion to consider writ petitions challenging interlocutory district court orders.

3. MANDAMUS.

   The supreme court would consider Nevada Department of Transportation's petition for writ of mandamus challenging the district court's partial summary judgment for property owner in inverse condemnation action, where petition raised an important issue regarding state takings law, petition presented an important question of policy about an agency's ability to engage in efficient, long-term planning dependent on federal funding, and given highway project's magnitude as a 20- to 25-year, six-phase freeway improvement project requiring multiple acquisitions of private property and inevitability of other similar long-term projects in the future, addressing issues raised in petition would serve judicial economy.

4. MANDAMUS.

   The supreme court will only issue a writ of mandamus to compel entry of a summary judgment when evidence on file viewed in a light most favorable to nonmoving party shows there is no genuine issue as to any material fact and movant is entitled to judgment as a matter of law.

5. MANDAMUS.

   In making determination of whether there is a genuine issue as to any material fact viewed in light most favorable to nonmoving party, for purposes of determining whether the supreme court should issue a writ of mandamus to compel entry of summary judgment, the supreme court considers legal questions de novo.

6. EMINENT DOMAIN.

   Although federal and state constitutions provide significant protection of private property rights, these rights must be considered in light of realities facing state and local government entities in their efforts to serve public through long-term projects that require significant planning and extensive compliance with both state and federal law; thus, these competing interests are balanced in takings jurisprudence. Const. art. 1, § 8, cl. 6; U.S. CONST. amend. 5.

7. Eminent Domain.
   Direct government appropriation or physical invasion of private property is a taking, as is a government regulation that authorizes a permanent physical invasion of private property or completely deprives an owner of all economically beneficial use of his or her property. Const. art. 1, § 8, cl. 6; U.S. Const. amend. 5.
8. Eminent Domain.
   A taking occurs when a government entity requires an unlawful exaction in exchange for approval of a land-use permit. Const. art. 1, § 8, cl. 6; U.S. Const. amend. 5.
9. Eminent Domain.
   Courts generally only consider ripe regulatory takings claims.
10. Eminent Domain.
    A claim, that application of government regulations effects a taking of a property interest, is not ripe until government entity charged with implementing regulations has reached a final decision regarding application of regulations to property at issue.
11. Eminent Domain.
    When exhausting available remedies on a regulatory takings claim, including the filing of a land-use permit application, is futile, the matter is deemed ripe for review.
12. Eminent Domain.
    Property owner's regulatory takings claim was unripe for review for failure to file any land-use application with city.
13. Eminent Domain.
    Factors that guide ad hoc analyses of potential regulatory takings are (1) economic impact of regulation on claimant, (2) extent to which regulation has interfered with distinct investment-backed expectations, and (3) character of governmental action. Const. art. 1, § 8, cl. 6; U.S. Const. amend. 5.
14. Eminent Domain.
    City's amendment to its general master plan to allow for certain road widening did not constitute a regulatory taking of property; road-widening amendment had no demonstrated nexus to the property at issue so any impact on the property would be negligible, and given need to widen specific streets to ensure adequate access to private property and construction areas during a freeway project, character of government action was more akin to adjusting benefits and burdens of economic life to promote the common good than to a physical invasion. Const. art. 1, § 8, cl. 6; U.S. Const. amend. 5.
15. States.
    Even assuming that city's amendment to its master plan to allow for certain road widening to ensure adequate access to private property and construction areas during freeway project was a taking, Nevada Department of Transportation was not directly or vicariously liable for city's actions forming basis of hypothetical taking. Const. art. 1, § 8, cl. 6; U.S. Const. amend. 5.
16. Eminent Domain.
    Nevada Department of Transportation (NDOT) did not take property within meaning of Fifth Amendment takings clause; environmental assessment only indicated that the owner's property would likely be needed 18 years in the future, loss of tenants was theoretically influenced by owner's highlighting NDOT's anticipated need of property, and owner provided no evidence of fair market values or rental charges for similarly situated prop-

erties with which to determine any real decrease in fair market value or economic use of the property. U.S. CONST. amend. 5.

17. EMINENT DOMAIN.

Nevada Department of Transportation did not take property within meaning of state takings clause when it prepared an environmental assessment, which indicated that it might need the property 18 years in the future as part of a 20- to 25-year freeway improvement project. Const. art. 1, § 8, cl. 6.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

In this opinion, we consider whether the district court erred by determining that Nevada's Department of Transportation (NDOT) owes just compensation for taking Ad America's property in conjunction with Project Neon, a freeway improvement plan, based on NDOT's and the City of Las Vegas' precondemnation activities. Specifically, we address whether a taking occurred under either the United States or Nevada Constitutions because NDOT publicly disclosed its plan to acquire Ad America's property to comply with federal law, the City independently acquired property that was previously a part of Project Neon, and the City rendered land-use application decisions conditioned on coordination with NDOT for purposes of Project Neon. We conclude that the district court erred by conflating Nevada's precondemnation damages standard with takings law, and that, after applying the correct law, no taking of Ad America's property occurred. Accordingly, we grant the petition.

FACTUAL AND PROCEDURAL HISTORY

Project Neon

Petitioner NDOT is the lead agency for Project Neon, a six-phase, 20- to 25-year freeway improvement project for the Interstate Highway 15 (I-15) corridor between Sahara Avenue and the U.S. Route 95/I-15 interchange in Las Vegas. With an estimated cost of between $1.3 and $1.8 billion dollars, the completion of Project Neon depends primarily on funding from the Federal Highway Association (FHWA). To procure this funding, NDOT complied with the National Environmental Policy Act (NEPA) by performing an environmental assessment of Project Neon between 2003 and 2009. NEPA required NDOT to publicly release all reasonable development alternatives it was considering for public comment. Each of these alternatives included the commercial rental property owned by real party in interest, Ad America.

Based on the results of the environmental assessment, NEPA also required NDOT to complete an environmental impact statement

(EIS). In 2011, after the approval of the EIS, FHWA allocated $203 million to NDOT for Phase 1 of Project Neon. Notably, at that time, NDOT did not anticipate acquiring Ad America's property for another 17 years during Phase 5, assuming funding was available.

To reduce the impacts associated with Project Neon, NDOT coordinated efforts with the City of Las Vegas and other agencies. Anticipating the development of an arterial improvement (the MLK Connector) that is no longer a part of Project Neon, the City amended its Master Plan to allow for certain road widening and, on October 24, 2007, purchased a tract of land from a private party. Additionally, the City approved 19 land-use applications for development rights of properties in proximity to Project Neon.[1]

Ad America

Ad America acquired its property between 2004 and 2005, planning to redevelop existing business space into higher-end commercial offices with multilevel parking. To that end, Ad America hired a surveyor and architect, the latter having drafted a preliminary design. Ad America then retained a political consultant to obtain necessary development permits. After speaking with members of the City Planning Department and one City Council member, the consultant opined that there was a de facto moratorium on development in the path of Project Neon. Based on this opinion, Ad America chose not to submit development applications for its property.

In October 2007, Ad America began informing its tenants that its property would be acquired for Project Neon. Although Ad America's net rental income remained steady from 2007 to 2010, it decreased by approximately 37 percent in 2011.[2] Ad America has not had its property appraised or attempted to sell it. As of August 2012, Ad America could no longer meet its mortgage commitments.

Procedural history

Ad America filed an inverse condemnation action against NDOT in the District Court of Clark County, Nevada, seeking precondemnation damages for alleged economic harm and just compensation

[1]In several instances, the City conditioned its approval of land-use applications on coordination with NDOT. In all but one of these cases, the City removed those conditions. The City also tabled three land-use applications because of concerns for aesthetics and potential conflicts with Project Neon, among other things.

[2]Ad America's tenant occupancy remained steady from 2007 to 2009, decreasing by approximately 36 percent (four tenants) in 2010. Ad America provided affidavits from two of its former tenants indicating that they did not renew their rental leases because of Project Neon. The record provides no data for net rental income or tenant occupancy for any period before 2007, making it impossible to assess any diminution of these values occurring between 2005 and 2007.

for the alleged taking of its property.[3] Thereafter, NDOT filed a motion in the district court for a determination that the valuation date for purposes of the inverse condemnation action was May 3, 2011, the date Ad America served its summons and complaint. Ad America filed an opposition to that motion and included a countermotion to set a valuation date of October 24, 2007, the date it alleged that the acquisition of property for Project Neon began. NDOT interpreted Ad America's countermotion to include a motion for summary judgment on the takings issue and filed an opposition to Ad America's countermotion proposing the valuation date and a countermotion for summary judgment on the takings issue.

Ultimately, the district court granted Ad America's summary judgment requests and denied NDOT's summary judgment requests.[4] In its order, the district court attributed the City of Las Vegas' actions, including its purchase of property and land-use decisions, to NDOT and determined that NDOT committed a taking of Ad America's property on October 24, 2007.[5] At the time of this decision, it was undisputed that NDOT had not physically occupied Ad America's property, passed any regulation or rule affecting Ad America's property, or taken any formal steps to commence eminent domain proceedings against Ad America's property. In its writ petition, NDOT requests that we order the district court to grant summary judgment and dismissal in NDOT's favor.

DISCUSSION

Writ consideration

[Headnotes 1, 2]

A writ of mandamus is available "to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Generally, writ relief is available only when there is no "plain, speedy, and adequate remedy in the ordinary course of law." NRS 34.170; *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 356, 167 P.3d 421, 426 (2007). An appeal from a final judgment or order is usually an adequate remedy, *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558, and the court often declines to exercise its discretion to consider writ petitions challenging interlocutory dis-

[3]The City of Las Vegas was listed as a party to the action but never served.

[4]Although the district court's order was somewhat opaque about its granting summary judgment in favor of Ad America on the takings issue, our review of the hearing transcripts confirms that this was the district court's intended disposition. *See Oxbow Constr. v. Eighth Judicial Dist. Court*, 130 Nev. 867, 875, 335 P.3d 1234, 1240 (2014) ("When a district court's order is unclear, its interpretation is a question of law that we review de novo.").

[5]We decline to address Ad America's precondemnation damages claim because the district court has not decided the issue.

trict court orders. *See Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). The court has considered writ petitions, however, when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 559.

[Headnote 3]

We conclude that NDOT's writ petition merits our consideration. First, the petition raises an important issue regarding Nevada's takings law. Second, the petition presents an important question of policy about an agency's ability to engage in efficient, long-term planning dependent on federal funding. And third, given Project Neon's magnitude as a 20- to 25-year, six-phase freeway improvement project requiring multiple acquisitions of private property and the inevitability of other similar long-term projects in the future, addressing the issues raised in this petition will serve judicial economy. Accordingly, we exercise our discretion to consider this writ petition.[6]

[Headnotes 4, 5]

We will only issue a writ of mandamus "to compel entry of a summary judgment when [the evidence on file viewed in a light most favorable to the nonmoving party shows] there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Cnty. of Clark v. Bonanza No. 1*, 96 Nev. 643, 650, 615 P.2d 939, 943 (1980); *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 608 n.8, 331 P.3d 881, 889 n.8 (2014). In making this determination, we consider legal questions de novo. *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 602, 331 P.3d at 884-85.

In its petition, NDOT argues that there was no taking here because there was no physical ouster, regulatory taking, or unlawful exaction. NDOT also contends that it cannot be held liable for the City's actions. According to NDOT, concluding that there has been a taking in these circumstances is unjustifiably speculative given the contingencies of both federal funding and continued need for Ad America's property in 2028 when Phase 5 of Project Neon begins.

In response, Ad America contends that NDOT committed a taking of its property.[7] Specifically, Ad America asserts that there was a de facto moratorium on development in Project Neon's path, Project Neon had moved from the planning to acquisition stage, and Ad

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[6]We summarily deny Ad America's request for a writ of prohibition because it is not a proper vehicle to challenge the order at issue here. *Oxbow Constr.*, 130 Nev. at 871 n.4, 335 P.3d at 1238 n.4; *see also* NRS 34.320.

[7]Ad America frames its arguments in terms of a "de facto taking." However, the U.S. Supreme Court has not explicitly defined "de facto taking." Accordingly, to avoid confusion with other takings terminology, we do not use this term.

America suffered substantial impacts. According to Ad America, it has been rendered an involuntary and indentured trustee of its property due to the effects of Project Neon.

Takings

Eight hundred years ago, the Magna Carta laid a foundation for individual property rights, including the protection of private property from unlawful government takings, which was incorporated into the U.S. Constitution.[8] *See* Bridget C.E. Dooling, *Take it Past the Limit: Regulatory Takings of Personal Property*, 16 Fed. Cir. B.J. 445, 454-55 (2007); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 Am. U. L. Rev. 181, 208 (1999). Specifically, the Takings Clause in the Fifth Amendment of the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." Similarly, the Nevada Constitution provides that "[p]rivate property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made." Nev. Const. art. 1, § 8, cl. 6. Our state constitution, however, also guarantees every individual's right to acquire, possess, and protect property. Nev. Const. art. 1, § 1. As we previously explained in *McCarran International Airport v. Sisolak*, 122 Nev. 645, 670, 137 P.3d 1110, 1127 (2006), "our State enjoys a rich history of protecting private property owners against government takings," and "the Nevada Constitution contemplates expansive property rights in the context of takings claims."

[Headnote 6]

Although our federal and state constitutions provide significant protection of private property rights, these rights must be considered in light of the realities facing state and local government entities in their efforts to serve the public through long-term projects that require significant planning and extensive compliance with both state and federal law. Thus, these competing interests are balanced in takings jurisprudence. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-05 (2013) (explaining that there is a need to protect land-use permit applicants given their vulnerability in the face of government discretion granting or denying their application and a need to protect the public from the burden of additional costs from the proposed development); *see also Penn Cent. Transp. Co.*

[8]Because Article 1, Section 8, Clause 6 of the Nevada Constitution was partially derived from its counterpart in the U.S. Constitution, *see Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada* 60-63 (July 4, 1864) (Eastman 1866), that clause, too, is connected to the Magna Carta.

v. City of New York, 438 U.S. 104, 124 (1978) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in general law . . . ." (internal quotation omitted)).

Federal takings jurisprudence

[Headnotes 7, 8]

Given "the nearly infinite variety of ways in which government actions or regulations can affect property interests," no "magic formula" exists in every case for determining whether particular government interference constitutes a taking under the U.S. Constitution. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). Nevertheless, there are several invariable rules applicable to specific circumstances. *Id.* "[A] direct government appropriation or physical invasion of private property," for example, is a taking, as is a government regulation that authorizes a permanent physical invasion of private property or "completely deprive[s] an owner of all economically beneficial use of her property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537-38 (2005) (internal quotation omitted). A taking also occurs when a government entity requires an unlawful exaction in exchange for approval of a land-use permit. *See generally Koontz*, 570 U.S. 595 (2012). Nearly all other takings claims "turn on situation-specific factual inquiries." *Arkansas Game*, 568 U.S. at 32.

The parties agree that NDOT did not appropriate or physically invade Ad America's property. No unlawful exaction was possible because Ad America did not submit any land-use application. Moreover, the only government regulation identified by the parties—the City's amendment to its General Plan—did not cause Ad America to suffer a permanent physical invasion of its property and, as evidenced by Ad America's stream of rental income and the continuing presence of commercial tenants, did not completely deprive Ad America of "all economically beneficial use" of its property. Accordingly, we are left to consider both regulatory and nonregulatory factual inquiries to decide whether actions attributable to NDOT amount to a taking.

Regulatory analysis (Penn Central analysis)

[Headnotes 9-11]

Generally, courts only consider ripe regulatory takings claims, and "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Ctny. Reg'l Planning Comm'n v. Hamilton Bank*

of Johnson City, 473 U.S. 172, 186 (1985); *see also Hsu v. Cnty. of Clark*, 123 Nev. 625, 635, 173 P.3d 724, 732 (2007) (indicating that an owner need not exhaust her administrative remedies when a regulation authorizes a permanent physical invasion of her property). But when exhausting available remedies, including the filing of a land-use permit application, is futile, a matter is deemed ripe for review. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 625-26 (2001); *see also State, Dep't of Taxation v. Scotsman Mfg. Co.*, 109 Nev. 252, 255, 849 P.2d 317, 319 (1993) (acknowledging that exhaustion of a taxpayer's administrative remedies is not required when doing so would be futile).

[Headnote 12]

Applying the general exhaustion rule, Ad America's regulatory takings claim is unripe for review for a failure to file any land-use application with the City. And although Ad America contends that exhaustion was futile because there was a de facto moratorium on developing property within Project Neon's path, the record does not support this contention. The opinion of Ad America's political consultant, which was based on alleged statements from only one of seven City Council members, is insufficient to establish the existence of such a moratorium. This is especially true given the context in which that opinion was provided, where the City had approved 19 land-use applications in proximity to Project Neon juxtaposed with having tabled a single entity's 3 applications for special-use permits.

[Headnotes 13, 14]

Even if we ignored the requirement of administrative exhaustion, Ad America still could not establish that the City's amendment to its General Plan constituted a regulatory taking. Three factors guide ad hoc analyses of potential regulatory takings. *See Penn Cent.*, 438 U.S. at 124. These factors are (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Id.* Here, the record does not support the proposition that the amendment had an economic impact on Ad America. Additionally, because the road-widening amendment had no demonstrated nexus to Ad America's property, any impact on Ad America's investment-backed expectations to develop its property would be negligible. Finally, given the need to widen specific streets to ensure adequate access to private property and construction areas during Project Neon, the character of the government action is more akin to "adjusting the benefits and burdens of economic life to promote the common good" than to a physical invasion. *Id.* We therefore conclude that the regulation's impact on Ad America's property does not constitute a regulatory taking.

[Headnote 15]

Nevertheless, even assuming that these factors favored a conclusion that Ad America's property was taken by the City's amendment to its Master Plan, NDOT was not directly or vicariously liable for the City's actions forming the basis of the hypothetical taking. There is no compensable taking in such circumstances "unless the government's actions on the intermediate third party have a direct and substantial impact on the plaintiff asserting the takings claim." *Tex. State Bank v. United States*, 423 F.3d 1370, 1377 (Fed. Cir. 2005) (internal quotation omitted). And despite Ad America's efforts to portray NDOT as a grand puppet master dictating the City's actions, the record does not support such a portrayal. A City's decision to amend its Master Plan in a coordinated effort to support both its residents' needs and the needs for a construction project that will benefit its residents does not satisfy the aforementioned legal standard.[9]

Nonregulatory analysis

[Headnote 16]

As Ad America's briefing intimates and *Arkansas Game* acknowledges, *see* 568 U.S. at 31-32, an ad hoc approach outside of the regulatory takings context is possible. The U.S. Court of Appeals for the Federal Circuit, for example, has recognized that even where no government regulation is at issue, a taking occurs if the government has "taken steps that directly and substantially interfere[ ] with [an] owner's property rights to the extent of rendering the property unusable or valueless to the owner." *Stueve Bros. Farms, LLC v. United States*, 737 F.3d 750, 759 (Fed. Cir. 2013). This standard, however, only applies in extreme cases. *Id.* As an example of an extreme case, we consider the facts of *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), wherein the Ninth Circuit concluded that a nonregulatory taking had occurred.

The Richmond Elks Hall Association (Elks) owned property that it leased to commercial tenants. *Richmond Elks*, 561 F.2d at 1329. In 1959, the City of Richmond declared that a group of properties, including Elks', was blighted, created the Richmond Development Agency (Agency), and authorized Agency to exercise eminent domain. *Id.* By May 1966, the City approved Agency's plan for redevelopment of the blighted area, which anticipated that Elks' property would be acquired within two years. *Id.* By the end of 1966, Agency had begun acquiring blighted properties. *Id.*

In early 1967, Elks received a letter from Agency stating that Elks could only retain its property if it signed an agreement to re-

[9]Based on the record, the City's unilateral decision to purchase a parcel of land for the MLK Connector also cannot be attributed to NDOT.

habilitate the property at its own expense, which Elks declined to do. *Id.* By May 1967, understanding that its property would soon be acquired, Elks refused to offer tenancies in excess of month-to-month. *Id.* Moreover, as a direct result of Agency's actions, Elks' commercial tenants suffered a decrease in their gross sales, causing most of the tenants to leave the property. *Id.* The exodus of tenants reduced Elks' rental income to less than one-third of what it was before Agency adopted its plan. *Id.* at 1329-30.

Later, in July 1968, Agency entered into an agreement with a developer obligating Agency to acquire optioned property, including that belonging to Elks, and then to convey it to the developer for construction of a shopping center. *Id.* at 1330. The option, aside from being publicly known, was extended from one year to two years. *Id.* By the end of 1969, after Agency had acquired 83 percent of the blighted properties, excluding Elks' property, federal funding was halted for the project. *Id.* Nearly three years later, despite Agency's redevelopment efforts flooding Elks' property on multiple occasions between 1970 and 1972 and its previous actions, Agency informed Elks that it would not acquire its property. *Id.* Based on these facts, the Ninth Circuit affirmed the lower court's determination that Agency's actions rendered Elks' property "unsaleable in the open market" and "severely limited" the property's use for its intended purposes. *Id.* at 1330-31.

The circumstances in this case do not approach the extremity of the facts in *Richmond Elks*. Unlike *Richmond Elks*, Ad America's property is not anticipated to be needed for Project Neon until 2028, if at all. At the date that Ad America alleges that a taking occurred, October 24, 2007, NDOT had not acquired a single parcel of property for Project Neon and did not for another three years. And, even then, it acquired properties slotted for Phase 1 of the project, not Phase 5.

Also different from *Richmond Elks*, NDOT had not created a contractual obligation or option with a private party guaranteeing future rights to Ad America's property. Instead, the only meaningful action NDOT had taken as of the alleged date of taking was continuing to produce its environmental assessment as required by NEPA, which it did not complete until 2009. Furthermore, based on the results of the environmental assessment, NEPA required additional compliance in the form of an environmental impact statement, which NDOT did not complete until the middle of 2010. Only at this point was it possible to reasonably conclude that Ad America's property would likely be needed in the future—18 years later.[10]

[10]Although every development alternative publicly disclosed upon the completion of the environmental assessment required Ad America's property, federal funding—the means of making Project Neon a reality— hinged on the completion and acceptance of NDOT's environmental impact statement.

Even further, and in contrast to *Richmond Elks*, the loss of Ad America's tenants was theoretically influenced by Ad America highlighting NDOT's anticipated need of the property, as explained in Ad America's owner's affidavit, magnifying the effect of any generalized knowledge that the tenants might have had. Additionally, the reason there was public knowledge of Project Neon's anticipated need for Ad America's property was because NEPA required disclosure of the plans and the opportunity for public comment.[11] Making NDOT's compliance with federal law a basis for compensation to Ad America in these circumstances would undermine long-term public projects by requiring comprehensive funding for all acquisitions at the planning stage, which would, in turn, unreasonably expedite the need for acquired property to be put to use. *Cf.* Nev. Const. art. 1, § 22, cl. 6 ("Property taken in eminent domain shall automatically revert back to the original property owner upon repayment of the original purchase price, if the property is not used within five years for the original purpose stated by the government.").

Finally, the record's minimal empirical evidence undermines Ad America's position. The decrease in Ad America's rental income in 2011 did not approach the loss suffered by Elks, and certainly did not "render[ ] the property unusable or valueless" to Ad America. *Stueve Bros.*, 737 F.3d at 759. Additionally, Ad America provides no evidence of fair market values or rental charges for similarly situated properties with which to determine any real decrease in the fair market value or economic use of the property. Thus, based on our nonregulatory analysis, we conclude that NDOT did not take Ad America's property within the meaning of the Fifth Amendment of the U.S. Constitution.

Nevada takings jurisprudence

[Headnote 17]

Ad America insists that NDOT's actions constitute a taking under the Nevada Constitution and that our caselaw supports this conclusion. According to Ad America, in *City of Sparks v. Armstrong*, 103 Nev. 619, 748 P.2d 7 (1987), this court adopted an expanded takings approach that provides for just compensation when precondemnation activities are unreasonable or oppressive and diminish the market value of property. We now clarify that our decision in

[11]NEPA requires projects to be submitted as a whole and not improperly segmented into subparts. *See* 40 CFR § 1502.4(a) ("Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement."); *Defenders of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 394-95 (4th Cir. 2014); *see also California ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 795 (9th Cir. 2014). Accordingly, NDOT could not have engaged in a piecemeal environmental assessment or impact process to avoid publicly disclosing the anticipated need for Ad America's property in the future.

Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224, 181 P.3d 670 (2008), corrected *Armstrong* inasmuch as *Armstrong* used our precondemnation damages standard to award just compensation for a taking based on precondemnation activities.

The standard employed in *Armstrong* originated in our decision, *Sproul Homes of Nevada v. State, Department of Highways*, 96 Nev. 441, 611 P.2d 620 (1980). In *Sproul*, the plaintiff-appellant's inverse condemnation action for damages was dismissed for failure to state a claim for relief. 96 Nev. at 442, 611 P.2d at 620. We explained that to state an inverse condemnation action for damages, " 'there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury.' " *Id.* at 444, 611 P.2d at 621-22 (quoting *Selby Realty Co. v. City of San Buenaventura*, 514 P.2d 111, 114-15 (Cal. 1973)). Acknowledging that "not every decrease in market value as a result of precondemnation activities is compensable," the court also stated that when such activities are "unreasonable or oppressive and the affected property has diminished in market value as a result of the governmental misconduct, the owner of the property may be entitled to compensation." *Id.* at 444-45, 611 P.2d at 622 (citing *Klopping v. City of Whittier*, 500 P.2d 1345, 1355 (Cal. 1972)). Thus, *Sproul* discussed unreasonable or oppressive activities that diminished market value in the context of precondemnation damages only. *Id.*

Sproul clarified that the standards it announced and relied on were for claims of *damages* related to unreasonable and oppressive *precondemnation activities* (now called precondemnation damages), and not for just compensation for the fair market value of a property due to a taking. *Id.* at 442-45, 611 P.2d at 620-22. That *Sproul*, and necessarily *Armstrong*, employed our standard for precondemnation damages is confirmed not only by the California cases upon which they relied, namely *Klopping* and *Selby*, but also by our later decisions relying on this standard and citing to *Sproul*. *See Buzz Stew*, 124 Nev. at 231 n.17, 181 P.3d at 674 n.17; *State, Dep't of Transp. v. Barsy*, 113 Nev. 712, 720-21, 941 P.2d 971, 976 (1997), *overruled on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001). We therefore will not apply this standard to Ad America's takings claim and conclude that NDOT did not commit a taking under the Nevada Constitution.[12]

CONCLUSION

Based on our analysis, we conclude that the undisputed material facts, as a matter of law, do not demonstrate that NDOT committed

[12]Given our conclusion that a taking did not occur, we do not address the parties' arguments concerning the valuation date for the taking.

a taking of Ad America's property warranting just compensation. Therefore, we grant NDOT's writ petition. Summary judgment in favor of NDOT is warranted, but summary judgment in favor of Ad America is not. The clerk of this court shall issue a writ of mandamus instructing the district court to vacate its previous order and enter a new order granting summary judgment in favor of NDOT on the inverse condemnation cause of action.[13]

HARDESTY, C.J., and PARRAGUIRRE, CHERRY, SAITTA, and PICKERING, JJ., concur.

GIBBONS, J., concurring:

While I concur with the majority that NDOT was not directly or vicariously liable for the actions of the City of Las Vegas, this writ of mandamus only adjudicates the summary judgment motions of NDOT and Ad America. Any claims Ad America may have against the City of Las Vegas or any other third parties, together with any claims against NDOT which matured after December 14, 2012, remain outstanding.

THE STATE OF NEVADA DEPARTMENT OF TAXATION, APPELLANT, *v.* JOHN T. KAWAHARA AND BARBARA J. KAWAHARA, TRUSTEES OF THE JOHN T. KAWAHARA AND BARBARA J. KAWAHARA REVOCABLE TRUST, U/T/D 12/17/1992, RESPONDENTS.

No. 64064

June 25, 2015 351 P.3d 746

Certified questions under NRAP 5 concerning lien priority between a tax lien and a later-recorded deed of trust. United States Bankruptcy Court for the District of Nevada; Gregg W. Zive, Bankruptcy Judge.

The supreme court, CHERRY, J., held that: (1) certificate of tax lien was not entitled to effect and priority of mortgage lien, and (2) deed of trust had priority over tax lien.

Questions answered.

Adam Paul Laxalt, Attorney General, and *Melissa L. Flatley*, Deputy Attorney General, Carson City, for Appellant.

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[13]We limit our holding to apply through December 14, 2012, the last date at which the district court heard arguments and considered evidence from the parties.

Richard G. Hill, Ltd., and *Richard G. Hill* and *Sophie A. Karadanis*, Reno; *Shea & McIntyre, P.C.*, and *Marc L. Shea*, San Jose, California, for Respondents.

1. Mortgages; Taxation.
   Department of Taxation's certificate of tax lien was not entitled to effect and priority of a mortgage; although Department alleged that interest arose from a guarantee, not by operation of law, and therefore could not legally be a tax lien, Department chose to file a certificate of tax lien rather than a mortgage or any instrument that would have fulfilled the formalities of a mortgage lien. NRS 111.312(1), 360.473(1).
2. Federal Courts.
   The supreme court may reframe certified questions presented to it.
3. Mortgages; Taxation.
   Tax lien was considered a judgment lien and judgment creditors were not protected against prior unrecorded conveyances, and therefore, pursuant to "first in time, first in right" rule, deed of trust that attached in 2009 but was recorded in 2011 had priority over tax lien that was created and recorded in 2010. NRS 360.473.

Before the Court En Banc.[1]

OPINION

By the Court, Cherry, J.:

The United States Bankruptcy Court for the District of Nevada certified two questions to this court concerning the priority of two competing liens on the proceeds of a property sale. The first question asks whether "Certificates of Tax Lien . . . have the effect and priority of a non-consensual judgment lien or the effect and priority of a consensual mortgage lien[.]" The second asks which lien has priority over the proceeds of a 2012 property sale: "a 2009 deed of trust, first recorded in 2011, [or] a tax lien, created and recorded in 2010[.]"

We conclude that a recorded tax lien cannot be recognized as a mortgage lien. Formality is part and parcel of recording statutes. The State Department of Taxation cannot now claim to have recorded a mortgage lien when it filed a tax lien certificate. We further conclude that a deed of trust, which attached in 2009 but was recorded in 2011, has priority over a tax lien levied under NRS 360.473, which was created and recorded in 2010. The Department's tax lien is considered a judgment lien under NRS 360.473(2), and Nevada recording statutes do not protect judgment creditors against prior

[1]The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from the consideration of this matter.

unrecorded conveyances. Thus, the common-law rule of "first in time, first in right" applies.

FACTS AND PROCEDURAL HISTORY

Our review is limited to the facts provided by the certification order from the United States Bankruptcy Court for the District of Nevada "and we answer the questions of law posed to us based on those facts." *In re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev. 556, 570, 289 P.3d 1199, 1207 (2012).

The Kawaharas loaned Wayne and Gail Allison $400,000. The Allisons executed a note to the Kawaharas in that amount secured by a deed of trust on a Reno property. In July 2009, the note was delivered to the Kawaharas. Although all parties believed the deed of trust had been recorded at that time, it was not recorded until February 2011.

The Allisons owned Allison Automotive Group, Inc., a car dealership in Reno. The dealership became delinquent in taxes owed to the Nevada Department of Taxation. It submitted a signed payment agreement to the Department, which obligated the dealership to pay $438,044.68 pursuant to a payment schedule. In connection with that submission, the Allisons personally guaranteed payment to the Department. In December 2010, the Department recorded certificates of tax lien against the Allisons.

The Allisons filed for bankruptcy in November 2011. As part of the administration of the bankruptcy estate, the bankruptcy court approved the sale of the Reno property with liens attaching to the sale proceeds in the order of their priority. The bankruptcy court's certified questions concern the dispute between the Kawaharas and the Department over the priority of their respective liens on the Reno property and, more directly, which party is entitled to be repaid first from the $482,000 in remaining proceeds from the property's sale.

DISCUSSION

The nature of the Department's liens

[Headnotes 1, 2]

This court may reframe the certified questions presented to it. *See Chapman v. Deutsche Bank Nat'l Trust Co.*, 129 Nev. 314, 318, 302 P.3d 1103, 1105-06 (2013) (citing *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 72, 206 P.3d 81, 85 (2009)). We think the first certified question is better framed as, "Do the Allisons' guarantees and the Department's filings create a mortgage?" We conclude that they do not.

Generally, the purpose of recording statutes is to provide subsequent purchasers with knowledge concerning the state of title

for real property. 66 Am. Jur. 2d *Records and Recording Laws* § 40 (2011). To record a mortgage or real property lien in Nevada, the filed document must contain certain formalities, including the grantee's address and the conveyed parcel's county-assigned number. NRS 111.312(1). In contrast, to record a tax lien, the Department may simply file a certificate of delinquency setting forth (1) the amount due, (2) the name and address of the debtor, and (3) the Department's statement that it has complied with all procedures required by law. NRS 360.473(1).

Here, the Department filed a tax lien, not a mortgage. The bankruptcy court stated that the Department filed a tax lien certificate. We accept the facts provided by the certification order. *In re Fontainebleau*, 128 Nev. at 570, 289 P.3d at 1207. The bankruptcy court's finding is supported by the record, which shows that the Department's filings refer to tax statutes and do not include parcel numbers.

The Department requests that this court give the certificates of tax lien the effect and priority of a mortgage. But it would defeat the purpose of a centralized recording system if the law protected people who filed the wrong liens. *Mortg. Elec. Registration Sys., Inc. v. Church*, 423 F. App'x 564, 567 (6th Cir. 2011). "[T]here must be substantial compliance with statutes providing for the recording or registration of mortgages; the usual purpose of recording or registration is to give persons subsequently dealing with the property notice of the existence of the lien . . . ." 59 C.J.S. *Mortgages* § 248 (2009). Here, the Department filed certificates of tax lien, not a mortgage or any instrument that fulfilled the formalities of a mortgage lien. Third parties reviewing the public records would not see a mortgage on the property, but only a tax lien with the Allisons' address. The Department further argues that their interest arose from a guarantee, not by operation of law, and therefore could not legally be a tax lien. That may be true, but then the Department should not have recorded tax lien certificates. We conclude that the Department's filings have the effect and priority of exactly what they recorded: tax liens.

Priority of the liens

[Headnote 3]

At common law, lien priority depends upon the time that liens attach or become perfected: "first in time, first in right." 51 Am. Jur. 2d *Liens* § 70 (2011). Statutes may modify or abolish the "first in time, first in right" rule. *Id.* Under NRS 360.473(2), a tax "lien has the effect and priority of a judgment lien."[2] This court has acknowl-

[2]Although NRS 360.480(1) gives tax liens some special priority, the Department did not argue priority based on this statute and, indeed, did not mention the statute until the reply brief. We therefore decline to consider any

edged that "a judgment creditor is not within the class designated by the recording statute for protection against an unrecorded conveyance." *Sturgill v. Indus. Painting Corp. of Nev.*, 82 Nev. 61, 64, 410 P.2d 759, 761 (1966). Here, because the Department's tax lien is given the effect of a judgment lien, NRS 360.473(2), the Department is not protected by Nevada's recording statutes, *Sturgill*, 82 Nev. at 64, 410 P.2d at 761.

Because Nevada's recording statutes do not protect the Department against unrecorded conveyances, the rule applicable to this case is the common-law rule of "first in time, first in right." The Kawaharas' deed of trust was valid and attached in 2009, when their interest was created.[3] The Department's tax lien certificates were filed, and thereby attached, in 2010. *See* NRS 360.473(2). Therefore, the Kawaharas' deed of trust has priority over the Department's tax lien.

HARDESTY, C.J., and DOUGLAS, SAITTA, GIBBONS, and PICKERING, JJ., concur.

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argument regarding the statute. *Bongiovi v. Sullivan*, 122 Nev. 556, 570 n.5, 138 P.3d 433, 444 n.5 (2006) ("[B]ecause reply briefs are limited to answering any matter set forth in the opposing brief, NRAP 28(c), we decline to consider this argument.").

[3]Attachment includes "[t]he creation of a security interest in property." *Black's Law Dictionary* 152 (10th ed. 2014).

ELIOT A. ALPER, Trustee of the ELIOT A. ALPER REVOCABLE TRUST; SPACEFINDERS REALTY, INC.; and THE ALPER LIMITED PARTNERSHIP, Petitioners, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE CHARLES M. McGEE, Senior Judge, Respondents, and WILLIAM W. PLISE, Real Party in Interest.

No. 64260

June 25, 2015 352 P.3d 28

Original petition for a writ of prohibition or mandamus challenging a district court order imposing contempt sanctions.

Judgment creditor petitioned for a writ of prohibition or mandamus to the district court challenging order finding judgment debtor in contempt, but allowing him to avoid incarceration by participating in a debtor's examination. The supreme court, Hardesty, C.J., held that the district court order exceeded the scope of the bankruptcy court's lift-stay order.

Petition granted.

Edward J. Hanigan, Henderson, for Petitioners.

Cremen Law Offices and *Frank J. Cremen*, Las Vegas, for Real Party in Interest.

1. Contempt.
   While an appeal is typically an adequate legal remedy precluding writ relief, because no rule or statute authorizes an appeal from an order of contempt, contempt orders must be challenged by an original petition. NRS 34.320.
2. Bankruptcy.
   The state district court order finding judgment debtor in contempt, but allowing him to avoid incarceration by participating in a debtor's examination, exceeded the scope of the bankruptcy court's lift-stay order, which permitted the district court to conduct a hearing and enter an order with regard to debtor's alleged criminal contempt in state court action, where conditional provision transformed sanction from criminal to civil, and it was intended to compel debtor's obedience with order requiring him to submit to a debtor exam for the benefit of judgment creditor, not as a punishment for debtor's refusals to obey prior court orders. 11 U.S.C. § 362(b)(1).
3. Contempt.
   Whether a contempt proceeding is classified as criminal or civil in nature depends on whether it is directed to punish the contemnor or, instead, coerce the contemnor's compliance with a court directive.
4. Contempt.
   Criminal sanctions punish a party for past offensive behavior and are unconditional or determinate, intended as punishment for a party's past dis-

obedience, with the contemnor's future compliance having no effect on the duration of the sentence imposed.

5. CONTEMPT.
Civil sanctions are remedial in nature, as the sanctions are intended to benefit a party by coercing or compelling the contemnor's future compliance, not punishing them for past bad acts.

6. CONTEMPT.
A civil contempt order is indeterminate or conditional; the contemnor's compliance is all that is sought, and with that compliance comes the termination of any sanctions imposed.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

A bankruptcy court entered an order lifting the automatic stay to permit the district court to determine whether a judgment debtor's prior refusals to participate in debtor's examinations in the district court were subject to criminal contempt. The automatic stay provisions of the Bankruptcy Code do not stay "the commencement or continuation of a criminal action or proceeding against the debtor." 11 U.S.C. § 362(b)(1) (2012). In this writ proceeding, we must determine whether the subsequent district court order finding the judgment debtor in contempt but allowing him to avoid incarceration by participating in a debtor's examination exceeded the scope of the bankruptcy court's lift stay order. We conclude that it did because a contempt order that permits a judgment debtor to purge incarceration is civil in nature. We, therefore, grant the writ of prohibition.

FACTS AND PROCEDURAL HISTORY

In August 2010, the district court entered judgment in excess of $16,000,000 against real party in interest William Plise and in favor of petitioner Eliot Alper.[1] Thereafter, Alper obtained an order for examination of Plise's assets and liabilities to satisfy the judgment.

Plise did not attend the first scheduled debtor's examination, and Alper moved for an order to show cause why Plise should not be held in contempt of court. The district court ordered Plise to appear, produce documents, and fully comply with the order or he would be held in contempt of court.

Plise appeared at the next scheduled exam, but asserted a Fifth Amendment privilege in response to every question except his

[1]Petitioners in this action are Eliot A. Alper, Trustee of the Eliot A. Alper Revocable Trust; Spacefinders Realty, Inc.; and the Alper Limited Partnership. We refer to the petitioners collectively as Alper.

name. Alper filed a status report indicating Plise did not produce the documents the court previously ordered him to produce, nor did he answer questions during the exam. At a subsequent status hearing, the district court ordered Plise to answer Alper's questions. Alper scheduled a new debtor's examination, and Plise requested several continuances, but ultimately Plise did not appear. Fifteen days later, Alper sought an order to show cause why Plise should not be held in contempt of court. But, two days before the hearing on that motion, Plise filed a bankruptcy petition.

Alper participated in the bankruptcy proceeding, and as a result, obtained an order from the bankruptcy court granting relief from the automatic stay and allowing the district court to "conduct a hearing and enter an order with regard to the alleged criminal contempt" of Plise. Alper again moved in district court for an order to show cause as to why Plise should not be held in contempt for his failure to appear at the debtor's examination. Plise opposed any order for contempt, arguing that, based on its punishment, contempt is a misdemeanor and the statute of limitations had run on any of Plise's alleged contemptuous conduct.

At the hearing, the district court found Plise guilty of contempt of court and sentenced Plise to 21 days' incarceration. However, the district court also provided that Plise could purge his contempt and be released from confinement if he fully participated in a judgment debtor examination. In doing so, he could avoid serving the remainder of his sentence.

Alper filed this petition arguing that the district court exceeded the scope of the bankruptcy court's order granting relief from the automatic stay, thereby violating 11 U.S.C. § 362(a) (2012), when it conditionally allowed Plise to avoid criminal contempt punishment, thus transforming the contempt proceeding from criminal to civil. Plise responds by arguing that the statute of limitations had already run on any criminal contemptuous conduct. Plise also argues that Alper waived his argument by not objecting during the sentencing.[2]

DISCUSSION

Writ relief is appropriate

[Headnote 1]

Alper petitions this court for a writ of prohibition, arguing that the district court exceeded the scope of the order lifting the auto-

[2]Since the July 24, 2013, contempt hearing was not recorded, there is no transcript available for review. When no trial transcript exists, NRAP 9(c) provides the appropriate procedure for generating an accurate record of what took place. Absent a transcript or properly submitted statement, this court cannot determine what occurred during the hearing in this case, and we, therefore, do not consider Plise's waiver argument. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (observing that this court does not consider matters not properly appearing in the district court record on appeal).

matic stay when it allowed Plise the opportunity to purge the contempt order.[3] A writ of prohibition is appropriate when "the proceedings of any tribunal, corporation, board or person exercising judicial functions . . . are without or in excess of the jurisdiction of such tribunal, corporation, board or person." NRS 34.320. While an appeal is typically an adequate legal remedy precluding writ relief, *see Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 223-24, 88 P.3d 840, 840-41 (2004), because "[n]o rule or statute authorizes an appeal from an order of contempt[,] . . . contempt orders must be challenged by an original petition pursuant to NRS Chapter 34." *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000).

The opportunity to purge in the contempt order converted the criminal sanction to civil and thus exceeded the authority granted by the bankruptcy court's lift stay order

[Headnote 2]

Generally, an automatic stay under § 362 of the United States Bankruptcy Code stays the initiation or continuation of all state actions against the debtor that precede the filing of the bankruptcy petition. 11 U.S.C. § 362 (2012). However, § 362(b)(1) provides that the filing of a petition in bankruptcy "does not operate as a stay . . . of the commencement or continuation of a criminal action or proceeding against the debtor." The Bankruptcy Code does not define "criminal action," but several bankruptcy courts have held that criminal contempt, but not civil contempt, is included as a criminal action and these proceedings are not subject to the stay.[4] *See, e.g.*, *In re Maloney*, 204 B.R. 671, 674 (Bankr. E.D.N.Y. 1996).

Here, the bankruptcy court granted relief from the automatic stay, permitting the district court to "conduct a hearing and enter an order with regard to [Plise's] alleged criminal contempt" in the state court action. The district court did so, finding Plise's conduct contemptuous and subject to criminal punishment in the form of confinement in the detention center for 21 days. That punishment was condition-

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[3]In the alternative, Alper petitions for a writ of mandamus compelling the district court to vacate that portion of its contempt order giving Plise the opportunity to purge. However, a writ of prohibition is a more appropriate remedy because at issue is whether the district court exceeded the scope of the bankruptcy court order lifting the stay. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) ("A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." (footnote omitted)).

[4]Section 362(a) ordinarily stays a civil-contempt proceeding because, by definition, such a proceeding is not criminal in nature. *See In re Gindi*, 642 F.3d 865, 871 (10th Cir. 2011) (citing *In re Wiley*, 315 B.R. 682, 687 (Bankr. E.D. La. 2004)), *overruled on other grounds by TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011).

al, however, because the district court also allowed Plise to avoid confinement if he complied with the debtor's examination at any time during the 21-day sentence. Accordingly, we must determine whether the district court's contempt order exceeded its authority because it became civil in nature, not criminal.

The criminal/civil distinction in contempt sanctions

[Headnotes 3-6]

This court has previously explained that "[w]hether a contempt proceeding is classified as criminal or civil in nature depends on whether it is directed to punish the contemnor or, instead, coerce his compliance with a court directive." *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804, 102 P.3d 41, 45 (2004). Criminal sanctions punish a party for past offensive behavior and are "unconditional or determinate, intended as punishment for a party's past disobedience, with the contemnor's future compliance having no effect on the duration of the sentence imposed." *Id.* at 805, 102 P.3d at 46; *see also Warner v. Second Judicial Dist. Court*, 111 Nev. 1379, 1383, 906 P.2d 707, 709 (1995) (concluding that a contempt order of "a set term of eleven months imprisonment" was punitive and criminal in nature). Civil sanctions, on the other hand, are

> remedial in nature, as the sanctions are intended to benefit a party by coercing or compelling the contemnor's future compliance, not punishing them for past bad acts. Moreover, a civil contempt order is indeterminate or conditional; the contemnor's compliance is all that is sought and with that compliance comes the termination of any sanctions imposed.

Rodriguez, 120 Nev. at 805, 102 P.3d at 46 (footnote omitted); *see also Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994) (explaining that civil contempt sanctions "are considered to be coercive and avoidable through obedience"). Alper argues that the conditional provision of the contempt order allowing Plise to be released from incarceration directly to a judgment debtor examination transforms the sanction from criminal to civil. We agree.

The contempt sanction here is civil in nature because it was intended to compel Plise's obedience with the district court's order requiring him to submit to a debtor exam for the benefit of Alper, not as a punishment for Plise's refusals to obey prior court orders. The district court ordered Plise "sentenced to confinement in the Clark County Detention Center for a period of twenty-one (21) days." This language alone is a criminal sanction: it punishes Plise for past behavior with a set term of imprisonment. *See Warner*, 111 Nev. at 1383, 906 P.2d at 709. However, the order further stated that Plise "may be released directly to an Examination of Judgment

Debtor Hearing without serving the remainder of the twenty-one day sentence." When the district court included this opportunity to purge the imprisonment, it put a civil remedy in the place of the punishment—Plise would only remain imprisoned until he submitted to the judgment debtor examination. This opportunity to purge is coercive, as it provides Plise an option to avoid incarceration or obtain early release if he submits to the examination.

CONCLUSION

Because the district court's order is civil in nature, the district court exceeded the scope of its authority granted by the bankruptcy court. We therefore grant the petition and direct the clerk of this court to issue a writ instructing the district court to vacate its contempt order and conduct further proceedings consistent with this opinion.[5]

PARRAGUIRRE, DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

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[5]Because we grant the petition and the contempt order will thus be vacated, we do not address Plise's contention that any criminal order would violate the statute of limitations. Thus, we leave this issue for the district court to resolve if further proceedings are conducted in this case.

Determining the applicable statute of limitations for both criminal and civil contempt is a matter of first impression in Nevada as no statute defines the statute of limitations for contempt. A few state supreme courts have addressed the issue regarding criminal contempt and, similar to Plise's argument, likened criminal contempt to a misdemeanor based on its maximum punishment. *Or. State Bar v. Wright*, 785 P.2d 340, 342 (Or. 1990) (likening the maximum punishment for criminal contempt to a misdemeanor and analogizing that the statute of limitations for criminal contempt is the same as other misdemeanors—two years); *see also State ex rel. Robinson v. Hartenbach*, 754 S.W.2d 568, 570 (Mo. 1988) ("Because contempt is *sui generis*, it could be, and in this case is, controlled by the statute of limitations applicable to misdemeanors although it is not a 'crime' within the meaning of the criminal code."). Other states have statutorily codified criminal contempt as a misdemeanor. *See, e.g.*, Cal. Penal Code § 166 (West Supp. 2015); Haw. Rev. Stat. § 710-1077(2) (2014); Mich. Comp. Laws Ann. § 4.83 (West 2013).

On the other hand, there is little information in other jurisdictions regarding the statute of limitations for civil contempt. At least one state supreme court has concluded that no statute of limitations exists for civil contempt. *State v. Schorzman*, 924 P.2d 214, 216 (Idaho 1996). In addition, other courts have indicated that the equitable defense of laches may apply. *See, e.g.*, *Adcor Indus., Inc. v. Bevcorp, LLC*, 411 F. Supp. 2d 778, 803 (N.D. Ohio 2005).

C. NICHOLAS PEREOS, LTD., APPELLANT, *v.*
BANK OF AMERICA, N.A., RESPONDENT.

No. 61553

July 2, 2015 352 P.3d 1133

Appeal from a district court summary judgment in a tort action. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Bank customer brought action against bank to recover losses sustained due to unauthorized activity in customer's bank account. The district court granted summary judgment in favor of bank, and customer appealed. The supreme court, HARDESTY, C.J., held that: (1) genuine issues of material fact as to the manner of delivery of account statements, and whether the statements bank provided to its customer were sufficient to trigger customer's statutory duty to report unauthorized activity in customer's bank account, precluded summary judgment; (2) one-year period of repose that applied to bank customer's claims again bank related to unauthorized activity in customer's bank account began to run with each successive forgery; and (3) genuine issues of material fact regarding the parties' fault with respect to unauthorized activity in bank customer's account precluded summary judgment.

Reversed and remanded.

C. Nicholas Pereos, Ltd., and *C. Nicholas Pereos*, Reno, for Appellant.

Poli & Ball, P.L.C., and *Michael N. Poli* and *Jody L. Buzicky*, Las Vegas, for Respondent.

1. BANKS AND BANKING.
   The statute governing the relationship between banks and bank customers concerning unauthorized activity in the customer's bank account generally absolves a bank of liability for payment on an unauthorized transaction when it provides the customer with information that would allow the customer to identify any unauthorized transactions, such as an account statement, and the customer then fails to timely act in response to unauthorized transactions reflected therein. NRS 104.4406.
2. APPEAL AND ERROR.
   The supreme court reviews a district court's order granting summary judgment de novo.
3. JUDGMENT.
   Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.
4. JUDGMENT.
   When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party.

5. Judgment.
   General allegations and conclusory statements do not create genuine issues of fact.
6. Appeal and Error.
   Statutory interpretation is a question of law that the supreme court reviews de novo.
7. Statutes.
   When a statute is clear and unambiguous, the supreme court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction.
8. Statutes.
   When interpreting a statute, the supreme court considers the statute's multiple legislative provisions as a whole.
9. Statutes.
   The supreme court will not interpret a statute in a way that would render any part of the statute meaningless.
10. Judgment.
    Genuine issues of material fact as to the manner of delivery of account statements, and whether the statements bank provided to its customer were sufficient to trigger customer's statutory duty to report unauthorized activity in customer's bank account, precluded summary judgment with regard to bank customer's action against bank related to losses associated with any such unauthorized activity under the statute's 30-day safe harbor rule. NRS 104.4406(1), (4)(b).
11. Banks and Banking.
    One-year period of repose that applied to bank customer's claims against bank related to unauthorized activity in customer's bank account began to run with each successive forgery, regardless of whether the same wrongdoer was responsible for all the embezzlements and customer did not report them within 30 days of receiving the first account statement reflecting the forgeries; the one-year period of repose did not differentiate between a single forgery and multiple forgeries by the same wrongdoer. NRS 104.4406(4)(b), (6).
12. Judgment.
    Genuine issues of material fact regarding the parties' fault with respect to unauthorized activity in bank customer's account precluded summary judgment with regard to bank customer's action against bank related to losses associated with any such unauthorized activity. NRS 104.4406.

Before Hardesty, C.J., Parraguirre and Cherry, JJ.

OPINION

By the Court, Hardesty, C.J.:

NRS 104.4406 regulates the relationship between a bank and its customers concerning losses sustained due to unauthorized activity in the customer's bank account. Generally, a customer "must exercise reasonable promptness" in examining a bank statement and within 30 days notify the bank of any unauthorized transactions. NRS 104.4406(3), 4(b).

Because genuine issues of material fact exist in this case regarding the manner of delivery of bank statements, the contents of online and received-in-branch statements, and the bank's exercise of due care in paying certain unauthorized transactions, we conclude that the district court erred in granting summary judgment. We further conclude that unauthorized account transactions that occur within the one-year period before the customer gives notice to the bank are not time-barred under NRS 104.4406(6)'s one-year period of repose because the statute does not differentiate between a single forgery and multiple forgeries by the same wrongdoer. Therefore, the one-year period of repose begins to run with each successive forgery.

FACTS AND PROCEDURAL HISTORY

Mary Williams, a long-time employee of appellant, the C. Nicholas Pereos, Ltd., law firm, was a signator on the firm's operating account with respondent Bank of America. In September 2006, the firm's solo practitioner, C. Nicholas Pereos, removed Williams as a signator on the account, leaving Pereos as the sole signator. Pereos told Williams to let the Bank of America account "run itself out" to cover any outstanding checks, but he never took any action to affirmatively close the account.

In 2010, Pereos discovered that Williams had been embezzling money since 2006. Despite being removed as a signator on the account, Williams deposited checks made out to Pereos, Ltd. into the Bank of America account and would then write and sign checks for her own personal use. Pereos notified the bank of the unauthorized transactions on January 28, 2010. The next month, Pereos, Ltd. filed a complaint against Bank of America based on Williams' use of unauthorized signatures to withdraw funds from the account from 2006 to 2010. When it was discovered that Williams had enrolled the Pereos, Ltd. account in online banking and the bank statements had not been mailed, Pereos amended the complaint to include an allegation that Bank of America had failed to make Pereos, Ltd.'s statements available as required by NRS 104.4406(1).

Bank of America moved to dismiss the amended complaint, or alternatively for summary judgment, on the ground that Pereos, Ltd.'s claims for unauthorized transactions were time-barred either because they were not reported by Pereos, Ltd. within 30 days under NRS 104.4406(4)(b) or within the one-year period of repose under NRS 104.4406(6). The bank argued that, notwithstanding Pereos, Ltd.'s contention that the account statements were not mailed to it, Pereos' deposition testimony revealed that Pereos had on occasion personally picked up some of Pereos, Ltd.'s bank account statements from Bank of America in 2006, 2007, and 2008. The bank attached copies of the account's statements to its motion and argued that the "[u]nauthorized transactions . . . were contained in the bank state-

ments that were made available to [Pereos].” In opposition, Pereos, Ltd. argued that the statements he obtained were insufficient to provide it with notice of the unauthorized signatures as they “were only a single page or two-page document . . . that showed check numbers and the amount of the check, and balances. Nothing more[.]” Moreover, he contended that the statements were insufficient because they did not contain a copy of the canceled checks. Pereos also argued that his claims for unauthorized checks cashed within the year preceding his notification to the bank were not time-barred. Conversely, Bank of America argued that, because the same wrongdoer committed all of the wrongful transactions, all claims were time-barred by Pereos, Ltd.’s failure to give the bank notice within 30 days after receiving the account statements.

The district court granted summary judgment in favor of Bank of America, finding that it was irrelevant whether Pereos, Ltd. received copies of the checks because NRS 104.4406(1) does not require the inclusion of check images. Moreover, the district court found that there was “no dispute that the bank statements received by [Pereos] contained item numbers, amounts, and dates of payment,” and thus, the account statements Pereos received were sufficient to notify him of the unauthorized activity on the firm’s account. Accordingly, all claims were time-barred under NRS 104.4406(4)(b) and NRS 104.4406(6). This appeal followed.

DISCUSSION

[Headnote 1]

Nevada’s version of the Uniform Commercial Code is codified in NRS Chapters 104 and 104A. *See* NRS 104.1101. Article 4, located at NRS 104.4101-.4504, deals with bank deposits and collections, and, specific to this action, NRS 104.4406 regulates the relationship between banks and bank customers concerning unauthorized activity in a customer’s bank account. *See also* U.C.C. § 4-406 (2002). Generally, the statute absolves a bank of liability for payment on an unauthorized transaction when it provides the customer with information that would allow the customer to identify any unauthorized transactions, such as an account statement, and the customer then fails to timely act in response to unauthorized transactions reflected therein.[1] *See Prestridge v. Bank of Jena*, 924 So. 2d 1266, 1270 (La. Ct. App. 2006) (discussing analogous Louisiana statute).

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[1]NRS 104.4406, in its entirety, reads:

> 1. A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount and date of payment.

Thus, once the customer is provided with the necessary account information, the customer must "exercise reasonable promptness" in examining the information and notifying the bank of any unauthorized transactions. NRS 104.4406(3). Failure to do so may limit the bank's liability for the unauthorized transactions contained in the information and also for any others made by the "same wrongdoer" that occur before the bank receives notice, depending on whether the bank exercised ordinary care in making the payments. NRS 104.4406(4), (5). Regardless of fault, however, a customer is

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2. If the items are not returned to the customer, the person retaining the items shall either retain the items or, if the items are destroyed, maintain the capacity to furnish legible copies of the items until the expiration of 7 years after receipt of the items. A customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item.

3. If a bank sends or makes available a statement of account or items pursuant to subsection 1, the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

4. If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection 3, the customer is precluded from asserting against the bank:

(a) His or her unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and

(b) His or her unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank.

5. If subsection 4 applies and the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection 3 and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection 4 does not apply.

6. Without regard to care or lack of care of either the customer or the bank a customer who does not within 1 year after the statement or items are made available to him or her (subsection 1) discover and report his or her unauthorized signature or any alteration on the item, is precluded from asserting against the bank the unauthorized signature or the alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under NRS 104.4208 with respect to the unauthorized signature or alteration to which the preclusion applies.

barred from asserting any claims with respect to an unauthorized transaction more than one year after the bank made the information available to the customer. NRS 104.4406(6).

Here, Pereos, Ltd. argues that summary judgment was inappropriate because genuine issues of material fact remain as to (1) whether the account statements were sufficient to give notice of the unauthorized activity on its account so as to trigger its duty to examine the statements for and notify the bank of any unauthorized activity; and (2) even if its duty was triggered, whether its claims concerning payments made within the one-year period before it notified the bank of the unauthorized activity were time-barred.

[Headnotes 2-5]

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

[Headnotes 6-9]

Additionally, statutory interpretation is a question of law that this court reviews de novo. *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 460, 282 P.3d 751, 756 (2012). "When a statute is clear and unambiguous, this court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction." *Id.* When interpreting a statute, "this court considers the statute's multiple legislative provisions as a whole." *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007). We will not interpret a statute in a way that would "render any part of [the] statute meaningless." *Id.*

Summary judgment is inappropriate because a genuine issue of material fact remains as to whether the account statements Bank of America provided to Pereos were sufficient to trigger Pereos, Ltd.'s duty to act

[Headnote 10]

To trigger a customer's duty to examine its account for unauthorized account activity, a bank may either (1) return or make available copies of the canceled checks to the customer, or (2) furnish an account statement to the customer. NRS 104.4406(1). If copies of canceled checks are not returned, the account statement must provide the customer with sufficient information for "the customer reason-

ably to identify the items paid" on the account. NRS 104.4406(1). This requirement is met "if the item is described by item number, amount and date of payment." *Id.*

This "safe harbor" rule permitting banks to furnish account statements to customers that contain the item number, amount, and date of payment in lieu of providing customers with copies of canceled checks was intended to reduce the costs associated with check collection. *See* U.C.C. § 4-406 cmt. 1 (2002). The drafters reasoned that this information is generally sufficient to notify "[a] customer who keeps a record of checks written" of any unauthorized signatures, while also recognizing that this information may be insufficient for a customer who does not "utilize [a] record-keeping method." *Id.* The drafters explained that "accommodating customers who do not keep adequate records is not as desirable as accommodating customers who keep more careful records," nor does it reduce the cost of the check collection system to all customers. *Id.* Therefore, the drafters placed the burden on the bank's customers to remain reasonably aware of the activity on their accounts. *See id.* Accordingly, if the customer "should reasonably have discovered the unauthorized payment" from the information provided, the customer must promptly notify the bank. NRS 104.4406(3).

Here, there are genuine issues of material fact as to the manner of delivery and the content of the "statements" that Bank of America contends were mailed to Pereos or delivered to him during his branch visits. Pereos, Ltd. disputes the fact that Bank of America mailed bank statements to its office location during the time in question. While Bank of America supplied copies of the bank statements to the district court, it appears from the record that the bank did not actually mail those statements to Pereos, Ltd., but rather, they were made available online at the direction of Williams. It is not clear from the record the extent of Williams' authority and when she converted delivery of the bank statements to an online format. Nonetheless, Bank of America continues to maintain that, regardless of the method of delivery, Pereos received some of the statements during his visits to the bank between September 2006 and January 2008, the contents of which would have put him on notice of the unauthorized activity. And even though Pereos concedes that the statements he received contained the item number and amount for each item paid, he maintains that they did not contain the date of payment. Because genuine issues of material fact remain as to the delivery method of the bank statements and whether the statements Pereos received during his visits to Bank of America contained the statutory safe harbor information to discover the unauthorized transactions, we conclude that the district court erred in granting summary judgment under the 30-day rule in NRS 104.4406(4)(b).

The district court erred in dismissing Pereos, Ltd.'s claims for embezzlement that occurred between January 2009 and January 2010[2]

[Headnote 11]

Pereos, Ltd. next argues that, even if the statements triggered its duty to identify and promptly notify Bank of America of the unauthorized activity, its claims for checks forged within the year preceding giving notice to the bank are not time-barred by the one-year deadline. Bank of America argues that all of Pereos, Ltd.'s claims are barred pursuant to NRS 104.4406(4)(b), because payment on all of the acts of forgery, committed by the same wrongdoer, occurred after Pereos, Ltd. had 30 days to examine the first account statement containing forged transactions and before Pereos, Ltd. reported the unauthorized transactions to Bank of America. To resolve this issue, we examine the interplay between NRS 104.4406's subsections 4, 5, and 6, to determine whether Pereos, Ltd.'s claims for unauthorized payments made from its bank account during the one-year period before January 2010 are statutorily barred.

Distinguishing between a single forgery and multiple forgeries by the same wrongdoer, subsection 4 provides that a customer who fails to exercise the reasonable diligence required in subsection 3 is precluded from asserting a claim against the bank for a single forged item if the bank "proves that it suffered a loss" from that failure, NRS 104.4406(4)(a), or for multiple forged items "by the same wrongdoer . . . paid in good faith by the bank[,] if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration," but after the customer had 30 days to review the account statement. NRS 104.4406(4)(b). These preclusions are subject to exception for the bank's failure to exercise due care, however: "[i]f . . . the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss," the loss is to be divided between the bank and the customer. NRS 104.4406(5). And if the bank pays the item without good faith, subsection 4's prohibitions against the customer asserting a claim are inapplicable altogether. *Id*. But regardless of either the bank's or the customer's failure to exercise ordinary care, a customer is precluded from bringing any

[2]Pereos acknowledged obtaining a statement in a Bank of America branch in September 2006, occasional statements between late 2006 and early 2007, and a statement in January 2008. Pereos argues that he received no statements after January 2008, and we thus address this time period separately. *See* NRS 104.4406(6) (providing that any customer who does not report unauthorized activity to the bank within one year after the statement giving notice of that activity is made available to it is precluded from recovering on that activity against the bank.)

claim against the bank if it is not brought within one year of the account statement being made available. NRS 104.4406(6).

To the extent that Bank of America argues that all of Pereos' claims are barred by NRS 104.4406(4)(b) because the same wrongdoer was responsible for all of the embezzlements and Pereos did not report them within 30 days of receiving the first account statement reflecting the forgeries, we note that the one-year period of repose in NRS 104.4406(6) does not differentiate between a single forgery and multiple forgeries by the same wrongdoer. *See* NRS 104.4406(6). Because NRS 104.4406(6) does not expressly differentiate between a single forgery and multiple forgeries by the same wrongdoer, we conclude that a new limitations period under its one-year statute of repose begins to run with each successive forgery. *See Sun 'n Sand, Inc. v. United Cal. Bank*, 582 P.2d 920, 935 (Cal. 1978) ("This failure to explicitly differentiate between one-time and repetitive forgeries and alterations in [the one-year statute of repose] leads us, in light of the express distinction in [the 'same wrongdoer' subsection], to conclude that a new one-year period begins to run with each successive check."); *Associated Home & RV Sales, Inc. v. Bank of Belen*, 294 P.3d 1276, 1283 (N.M. Ct. App. 2012) (holding that the one-year statute of repose controls because there is "no natural connection between [the] 'same wrongdoer' rule and the more general wording in [the one-year statute of repose subsection]"). Thus, Pereos is permitted to bring claims consistent with the provisions in NRS 104.4406.

[Headnote 12]

Moreover, if the customer sufficiently proves that the bank failed to exercise ordinary care in making the unauthorized payment, NRS 104.4406(4)(b)'s limitation period is negated. Here, Pereos, Ltd. has alleged, and Bank of America has not denied, that it paid on checks drawn from the account signed by Williams after Williams' authority over the account was removed. Thus, Pereos may be able to prove that Bank of America failed to exercise ordinary care in continuing to honor Williams' signature on checks despite the account owner's instructions otherwise. Accordingly, genuine issues of material fact exist regarding the parties' fault with respect to these transactions. Even if Pereos, Ltd.'s claims for unauthorized transactions before January 2009 are barred by NRS 104.4406(4)(b), Pereos, Ltd. is entitled to go forward with its claims against Bank of America for those unauthorized payments made during the year before Pereos notified the bank in January 2010. *See* NRS 104.4406(5); *Associated Home*, 294 P.3d at 1283 (holding that, even though the 30-day statutory limitation period had elapsed, because the one-year statute of repose had yet not expired, the customer could bring a claim

against the bank if the customer could prove that the bank did not exercise ordinary care).

Accordingly, we reverse the district court's summary judgment and remand this matter to the district court for further proceedings consistent with this opinion.

PARRAGUIRRE and CHERRY, JJ., concur.

BEAU DAVIS, APPELLANT, *v.* ANDREA EWALEFO, RESPONDENT.

No. 63731

July 2, 2015 352 P.3d 1139

Petition for en banc reconsideration of a panel order affirming a district court's child custody decree. Eighth Judicial District Court, Family Court Division, Clark County; Kenneth E. Pollock, Judge.

In child custody case, the district court awarded parties joint legal custody of child, awarded mother primary physical custody, and awarded unsupervised visitation rights to father, who lived and worked in Africa, while specifying that visitation could not occur in Africa and that child was forbidden from traveling outside the country except on court order or with both parents' consent. Father petitioned for reconsideration following affirmance by divided three-judge panel. The supreme court, PICKERING, J., held that the district court's failure to provide factual basis for denying father's request for child's visitation in Africa, or for ban on child traveling outside United States and its territories absent parental consent or court order, warranted remand of child custody matter.

Petition for reconsideration granted; affirmed in part, reversed in part, and remanded.

PARRAGUIRRE, J., with whom SAITTA, J., agreed, dissented.

McFarling Law Group and *Emily M. McFarling*, Las Vegas, for Appellant.

Andrea Ewalefo, New Orleans, Louisiana, Pro Se.

1. CHILD CUSTODY.
   The district court has broad discretionary power in determining child custody, including visitation. NRS 125A.045.
2. CHILD CUSTODY.
   Although the supreme court reviews a district court's discretionary determinations at a child custody proceeding deferentially, deference is not owed to legal error or to findings so conclusory they may mask legal error.

3. Child Custody.
   In making a child custody determination, the sole consideration of the court is the best interest of the child. NRS 125.480(1).
4. Child Custody.
   A child custody decree or order must tie the child's best interest, as informed by specific, relevant findings with regard to factors enumerated by statute and any other relevant factors, to the custody determination made. NRS 125.480(4).
5. Child Custody.
   Specific findings and an adequate explanation of the reasons for a child custody determination are crucial to enforce or modify a custody order and for appellate review; without them, the appellate court cannot say with assurance that the custody determination was made for appropriate legal reasons.
6. Child Custody.
   A child custody determination, once made, controls the child's and the parents' lives until the child ages out or the decree is judicially modified.
7. Child Custody.
   The district court's failure to provide factual basis for denying father's request for child's visitation in Africa, where father worked and lived, or for ban on child traveling outside United States and its territories absent parental consent or court order, warranted remand of child custody matter for taking of evidence and making of findings concerning whether child could safely visit father in neighboring countries, whether doing so was in child's best interest, and, if necessary, whether abduction prevention measures were appropriate.
8. Parent and Child.
   There is a presumption that fit parents act in the best interests of their children.

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

This is an appeal from a child custody decree. As stipulated, the decree gives the parents joint legal custody of their eight-year-old son, E.D., and awards the mother, respondent Andrea Ewalefo, primary physical custody. In dispute are the visitation rights of the father, appellant Beau Davis. The decree grants Davis unsupervised visitation but specifies that visitation cannot occur in Africa, where Davis lives and works; it also includes a *ne exeat* provision that forbids E.D. from traveling outside the United States except on court order or with both parents' consent. A divided three-judge panel questioned the lack of findings by the district court but nonetheless affirmed. *Davis v. Ewalefo*, Docket No. 63731 (Order of Affirmance, July 31, 2014) (2-1). Without specific findings to connect the child's best interests to the restrictions imposed, the travel and visitation re-

strictions cannot stand. We therefore grant en banc reconsideration and affirm in part, reverse in part, and remand.

I.

Ewalefo and Davis separated several years after E.D. was born. Although the couple did not marry, Davis acknowledged, and Ewalefo concedes, his paternity. Ewalefo's and E.D.'s residency made Nevada E.D.'s "home state" as defined in NRS 125A.085 when Davis filed this action. Thus, Nevada law applies to the district court's custody determination, including NRS 125.480, *Rico v. Rodriguez*, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005), and, by extension, NRS 125.510 and NRS Chapters 125A through 125D. *See Druckman v. Ruscitti*, 130 Nev. 468, 327 P.3d 511 (2014).

Ewalefo and Davis came to court in agreement that it was in E.D.'s best interest that they share joint legal custody, with Ewalefo exercising primary physical custody. They differed on visitation. The parents also disagreed on, but ultimately worked out details relating to, notice of visitation, holidays, Skype sessions, and other matters.

Davis lives and works in Africa, making frequent face-to-face and unscheduled visitation impossible. Before initiating this action, Davis worked with Ewalefo in an effort to establish reasonable visitation and was met, the district court orally found, with "multiple instances of the Defendant [Ewalefo] finding reasons to alter or minimize contact."[1] In his complaint, Davis sought a decree awarding him up to four two-week blocks of unsupervised visitation per school year, to occur wherever E.D. is then attending school; in addition, he asked that E.D. be allowed to spend all but two weeks of his summers in Africa. Ewalefo agreed to Davis having unsupervised visitation but asked that it occur in the United States and be limited, initially, to three two-week blocks of time per year. Somewhat inconsistently, Ewalefo suggested as an appropriate condition of joint legal custody that, "If a trip is made overseas, the address(es) and telephone number(s) at which the minor child will reside must be provided within thirty (30) days prior to the minor child leaving the United States."

The facts elicited at the evidentiary hearing showed that, although a United States citizen, Davis has significant international ties, especially to Africa. Davis was born and raised in Nigeria to American missionaries, who now live in Texas. He graduated with a bachelor's

[1]The dissent mentions the parties' difficulties with Skype and telephonic visitation as significant—and Davis's fault—but the district court rejected Ewalefo's arguments on this point, attributing what it dismissed as "the hiccups in the telephone or Skype visitation" as due in part to failures of technology, not Davis, then moving into its statement respecting the "multiple instances" of Ewalefo "finding reasons to alter or minimize contact."

of science degree from Texas A&M University, then went to work for the U.S. Department of Defense in its reconstruction efforts in Iraq. This was followed by project-management work for Texas A&M in the Democratic Republic of Congo (DRC), supporting construction and road improvement projects there. After Davis and Ewalefo separated, he married Marilena Davis, a German national who had been a schoolmate of his growing up in Nigeria. Marilena now also works for Texas A&M on DRC project supervision. Davis owns a house in Texas, which he rents out.

Like Davis, Ewalefo is well-educated, with a bachelor's of science degree, and has international ties. Her father was born and raised in Nigeria, a country she visited as a child. When E.D. was three years old, he and his parents went to Kenya for vacation, where the family visited a game reserve. E.D. has also traveled to Europe with his mother. Ewalefo acknowledged that, at least before the formal custody proceedings began, she was agreeable to E.D. traveling overseas to visit Davis, so long as she was the boy's "traveling guardian," and at one point had been open to living overseas with Davis and E.D.

The DRC is and was at the time of the evidentiary hearing in the district court the subject of a U.S. State Department travel warning, cautioning against nonessential travel to that country. *See* http://travel.state.gov/content/passports/english/alertswarnings/democratic-republic-of-the-congo-travel-warning.html (last visited Mar. 26, 2015). Out of safety concerns, Davis did not propose that E.D. visit him and Marilena in the DRC but, rather, that his visitation occur in Rwanda or Uganda, countries that neighbor the DRC and have comparatively stable governments and resort cities with associated amenities and infrastructure. Neither Rwanda nor Uganda is currently or was at the time of the district court hearing the subject of a U.S. State Department warning similar to that in place for the DRC. *See* http://travel.state.gov/content/passports/english/alertswarnings.html (last visited Mar. 26, 2015); *but cf. infra* note 3. Davis's employer, Texas A&M, confirmed that, since his work for them in the DRC focused on scheduling, budgets, and logistics, not hands-on construction, it would accommodate the family and allow Davis to work remotely from Rwanda or Uganda when E.D. visited. Davis testified to his and Marilena's plans for French and swimming lessons and other scheduled activities for E.D. when he visited.

Ewalefo objected to visitation in Rwanda and Uganda on the grounds that neither country is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction,[2] a fact to

[2]"The Convention provides that a child abducted in violation of rights of custody must be returned to the child's country of habitual residence, unless certain exceptions apply." *Abbott v. Abbott*, 560 U.S. 1, 5 (2010) (internal quotation marks omitted); *see also Lozano v. Montoya Alvarez*,

which Davis stipulated and of which the district court took judicial notice. Ewalefo also cited safety concerns based on her Internet research concerning Rwanda's and Uganda's support in the late 1990s of rebel forces in the DRC, which remains unstable. She presented no expert proof on contemporary turmoil or threats, however, or citations to the historical research she undertook.[3]

At the conclusion of the hearing, the district court denied Davis permission to have E.D. visit him in Africa. It also refused to grant summer visitation, instead limiting Davis's visitation to five two-week blocks of time per year, no closer than 60 days together. And, going further than either Davis or Ewalefo asked, the court forbade either parent from traveling with E.D. outside the United States or its territories, absent court order or signed consent. These restrictions carry no expiration date, and will last, unless the order is modified, until E.D. reaches the age of majority. In the district judge's words, "the child's going to have to wait til [he's] an adult and make [his] own decisions" about travel outside the United States.

In its ruling, the district court did not explain or make particularized findings as to why the international travel and visitation restrictions imposed were in the best interest of the child. Orally, the district judge stated, "We know that the law attempts to maximize the relationship between the child and both parents," *see* NRS 125.460, then said it would "hit" the "NRS 125.480 factors," even though "a lot of them are not particularly applicable." The court found E.D., then almost seven, too young to have a creditable visitation preference; that Davis's and Ewalefo's conflicts were "minimal"; that neither Davis nor Ewalefo suffers mental or physical health problems; that E.D. is "normal, healthy [and] active"; that E.D. had traveled with his parents—to Africa, in fact—and "benefitted from . . . that travel"; that although E.D. has spent more time with his mother than his father, nothing suggests "that [E.D.'s] relationship with [his father] is anything other than a healthy, normal relationship"; that as for "Any history of parental abuse or neglect of the child, there's no evidence of any abuse or neglect"; and that there is "no evidence . . . of domestic violence," and "no evidence of a parental

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134 S. Ct. 1224, 1228-29 (2014) (discussing the purposes of the Hague Convention). Approximately 80 countries are signatories to the Convention. *See* United States Department of State, *U.S. Hague Convention Treaty Partners*, http://travel.state.gov/content/childabduction/english/country.html (follow "See list of Hague Convention Partner Countries" hyperlink) (last visited Mar. 31, 2015).

[3]Though not part of the record in this case, the State Department website suggests that events post-dating the evidentiary hearing in this case may legitimate Ewalefo's fears as to parts of Rwanda and Uganda. *See* http://travel.state.gov/content/passports/english/country/rwanda.html; http://travel.state.gov/content/passports/english/country/uganda.html (both last visited Mar. 26, 2015).

abduction" in this case. The court's only arguably negative finding as to either parent was that Ewalefo "has demonstrated a tendency towards controlling behavior," though it added "that may simply [be] because of the absence of [court] orders and being the primary parent stepping up."[4]

As for Africa, specifically Uganda and Rwanda, the district court made only these cryptic findings:

> In terms of the visitation in Africa . . . I should note that the world is a dangerous place as we've learned even in the United States terrorism can occur, that *the proposed countries [for visitation in Africa—Rwanda and Uganda] are not Hague signatories nor Hague compliant*.

(Emphasis added.) It did not offer any findings to justify its larger prohibition on international travel for E.D.

The district court's written custody decree tracks its oral ruling. It awards joint legal custody to Davis and Ewalefo, primary physical custody to Ewalefo, and up to five two-week periods of visitation a year to Davis. The decree states, without elaboration, that "[Davis's] request for visitation in Africa is denied." It also states that, "neither party shall take the minor child outside the United States or any of its territories or possessions absent a written agreement otherwise or upon further Order of the Court."

II.

[Headnotes 1, 2]

The district court has "broad discretionary power" in determining child custody, *Hayes v. Gallacher*, 115 Nev. 1, 4, 972 P.2d 1138, 1140 (1999), including visitation. *See* NRS 125A.045 (defining a "child custody determination" as an order or decree that "provides for the legal custody, physical custody or visitation with respect to a child"); *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). Although this court reviews a district court's discretionary determinations deferentially, deference is not owed to legal error, *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010); *see Sims v. Sims*, 109 Nev. 1146, 1148-49, 865 P.2d 328, 330 (1993), or to findings so conclusory they may mask legal error, *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009); *cf. Culbertson v. Culbertson*, 91 Nev. 230, 233-34, 533 P.2d 768, 770 (1975) (presuming that the district court properly exercised its discretion in determining the best interest of the child where the court made substantial factual findings). The decree in this case does not explicitly address the best interest of the child, E.D., nor does

[4]The district court also stated that it found Ewalefo credible and, to the extent there were conflicts between her testimony and Davis's, resolved them in her favor.

it include findings to support its implicit conclusion that E.D.'s best interest is served by forbidding visitation in Africa or travel outside the United States or its territories, absent a written agreement otherwise or court approval, until he becomes an adult. These deficiencies violate Nevada law, which requires express findings as to the best interest of the child in custody and visitation matters, NRS 125.480(4); NRS 125.510(5); NRS 125C.010(1), and they leave us in doubt whether "the district court's determination was made for appropriate reasons." *Rico*, 121 Nev. at 701, 120 P.3d at 816.

A.

[Headnote 3]

In making a child custody determination, "the sole consideration of the court is the best interest of the child." NRS 125.480(1). This is not achieved, as the district court seemed to believe, simply by processing the case through the factors that NRS 125.480(4) identifies as potentially relevant to a child's best interest and announcing a ruling. As the lead-in language to NRS 125.480(4) suggests, the list of factors in NRS 125.480(4) is nonexhaustive. *See* NRS 125.480(4) ("In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, *among other things* . . .") (emphasis added); *Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 243 (2007) (in determining the best interest of a child, "courts should look to the factors set forth in NRS 125.480(4) *as well as any other relevant considerations*") (emphasis added). Other factors, beyond those enumerated in NRS 125.480(4), may merit consideration.

[Headnote 4]

Crucially, the decree or order must tie the child's best interest, as informed by specific, relevant findings respecting the NRS 125.480(4) and any other relevant factors, to the custody determination made. *Bluestein v. Bluestein*, 131 Nev. 106, 113, 345 P.3d 1044, 1049 (2015) (reversing and remanding a custody modification order for further proceedings because "the district court abused its discretion by failing to set forth specific findings that modifying the parties' custodial agreement to designate [mother] as primary physical custodian was in the best interest of the child"); *see* NRS 125.510(5) ("Any order awarding a party a limited right of custody to a child must define that right with sufficient particularity *to ensure* that the rights of the parties can be properly enforced and *that the best interest of the child is achieved*.") (emphasis added); NRS 125C.010(1)(a) (identical, except it substitutes "a right of visitation of a minor child" for "a limited right of custody"); *Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986) (deeming it "essential" that a custody determination set forth "the basic facts which show *why* that ultimate conclusion is justified").

[Headnotes 5, 6]

Specific findings and an adequate explanation of the reasons for the custody determination "are crucial to enforce or modify a custody order and for appellate review." *Rivero*, 125 Nev. at 430, 216 P.3d at 227. Without them, this court cannot say with assurance that the custody determination was made for appropriate legal reasons. *See Sims*, 109 Nev. at 1148, 865 P.2d at 330; *Ivy v. Ivy*, 863 So. 2d 1010, 1013 (Miss. Ct. App. 2004) ("[M]eaningful appellate review . . . requires that the chancellor make on-the-record findings of fact as to issues relating to custody as well as some analysis of how these facts affected the ultimate custodial decision."); *Dixon v. Dixon*, 312 S.E.2d 669, 672 (N.C. Ct. App. 1984) ("[C]ustody orders are routinely vacated where the 'findings of fact' consist of mere conclusory statements. . . .") (citation omitted); *Keita v. Keita*, 823 N.W.2d 726, 730 (N.D. 2012) ("A district court's factual findings should be stated with sufficient specificity to enable this Court to understand the basis for its decision."). Yet, more is at stake than facilitating appellate review. A child custody determination, once made, controls the child's and the parents' lives until the child ages out or the decree is judicially modified. *Compare Rennels v. Rennels*, 127 Nev. 564, 566, 257 P.3d 396, 398 (2011) (holding that a stipulated order according nonparents visitation can only be modified "upon a showing of a substantial change in circumstances that affects [the] child's welfare such that it is in the child's best interest to modify the existing visitation arrangement"), *and Ellis v. Carucci*, 123 Nev. at 150, 161 P.3d at 242 (to similar effect), *with* Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) § 303, adopted in Nevada as NRS 125A.445(1) (under the UCCJEA, a child custody determination carries nationwide effect; a court "shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with the provisions of" the UCCJEA). A parent cannot reasonably be expected to show that "a substantial change in circumstances" as to the child's best interest warrants modification of an existing child custody determination unless the determination at least minimally explains the circumstances that account for its limitations and terms.

B.

[Headnote 7]

The decree in this case does not give a factual basis for denying Davis's request for visitation in Africa, much less for its ban on E.D. traveling outside the United States and its territories absent parental consent or court order. Although the best interest of the child is the controlling factor in child custody cases, *see* NRS 125.480(1), and maintaining "frequent associations and a continuing relationship with both parents after the parents have become separated or have

dissolved their marriage" is Nevada's declared public policy, NRS 125.460(1), the decree effectively ensures that Davis and E.D. will never see one another on anything approaching Davis's home turf or more than infrequently, even though, unlike many cases where divorced or separated parents live half a world apart, Davis has the wherewithal and willingness to arrange for his son to travel to visit him (with supervision until he is old enough to travel alone). It also denies E.D. exposure to the rich and varied cultural experiences both his parents had growing up and to the world beyond the borders of the United States that both Davis and Ewalefo embrace. Assuming Davis later moves to modify the decree, what explains the travel and visitation restrictions and how can he be expected to demonstrate that the circumstances that made the restrictions in E.D.'s best interest have substantially changed?

The decree does not address whether visitation in Africa would or would not be in E.D.'s best interest or explain why it is not in E.D.'s best interest for Davis to be able to exercise visitation, even one of the two-week visitation periods allotted him, outside the United States or its territories.[5] It also does not discuss parental fitness or other factors that could be informative in a custody determination. All the decree says is that "[Davis's] request for visitation in Africa is denied" and "neither party shall take the minor child outside the United States or any of its territories or possessions absent a written agreement otherwise or upon further Order of the Court."

[Headnote 8]

"[T]here is a presumption that fit parents act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68 (2000), and here, there is nothing to suggest that either parent is unfit or that "the child [is anything] other than . . . a normal, healthy [and] active" boy. And while the district court did discuss the factors listed in NRS 125.480, it did not explain *how* the factors supported the categorical prohibition it imposed. Instead, after opining that "the 125.480 factors, a lot of them really are not particularly applicable," the district court made observations that, if anything, supported Davis's request, including the fact that the child previously had traveled with his parents to Africa, the child "benefitted from some of that travel," and there were no concerns regarding parental abduction, abuse, neglect, or mental health problems. *See also* Linda D. Elrod, *Child Custody Practice & Procedure* § 6:15 (2014) (not-

[5]The dissent hypothesizes that a summer in Africa with Davis and Marilena might not be in E.D.'s best interest because three months is too long for the boy, who was a month away from his seventh birthday when the decree was originally entered, to be away from Ewalefo. This may be but it is not what the decree states. The decree prohibits all visitation by Davis with E.D. outside the United States or its territories—even the two-week visitation periods it grants Davis—until E.D. reaches adulthood and does so without findings to support the restrictions.

ing that "[j]udges, lawyers, and social scientists feel that, in most instances, children should be encouraged to have as close and as normal a parent-child relationship as possible with both parents" and from this it follows that, "[a]bsent extraordinary circumstances, a nonresidential parent should be able to determine the place and manner of visitation" and that "[a]ny restrictions should be reasonable, and not infringe on other constitutional rights").

Here, none of the district court's oral or written observations explain *why* the district court ruled as it did. Instead, the only apparent basis for the district court's denial of Davis's request for visitation in Africa was because Rwanda and Uganda are neither "Hague signatories nor Hague compliant." But unless a credible threat exists that a parent would abduct or refuse to return a child, courts have "decline[d] to adopt a bright-line rule prohibiting out-of-country visitation by a parent whose country has not adopted the Hague Convention or executed an extradition treaty with the United States." *Abouzahr v. Matera-Abouzahr*, 824 A.2d 268, 281 (N.J. Super. Ct. App. Div. 2003); *see also Long v. Ardestani*, 624 N.W.2d 405, 417 (Wis. Ct. App. 2001) (finding no cases that "even hint" at a rule that provides, "as a matter of law that a parent . . . may not take a child to a country that is not a signatory to the Hague Convention if the other parent objects"). Here, the district court expressly found that both parents are fit, the "level of conflict between the parents is minimal at best," and there is no threat of abduction, making the court's mention of Rwanda's and Uganda's Hague-signatory status a cipher, not a reason for the limitations imposed. *See In re Rix*, 20 A.3d 326, 328-29 (N.H. 2011) (affirming order allowing child to travel to India with his father over mother's objection that India is not a signatory to the Hague Convention where the trial court noted that it had heard "no evidence that father will not return with the child").

This is not to say that a district court may not, in a proper case, prohibit visitation in a non-Hague signatory country or impose limitations on international travel, or travel to dangerous parts of the world, if the best interest of the child demands. *See, e.g.*, *Katare v. Katare*, 283 P.3d 546, 552 (Wash. 2012) (upholding travel restrictions where there was evidence that the father presented a serious risk of absconding with the children to India). But before doing so, the court must make findings that support its restrictions and, if the basis for the restriction is fear of abduction or concealment, consider alternatives offered by law. Nevada has adopted the Uniform Child Abduction Prevention Act, NRS Chapter 125D, to address such alternatives. Either at the request of a party or its own motion, a district court "may order abduction prevention measures in a child custody proceeding if the court finds that the evidence establishes a credible risk of abduction of a child." NRS 125D.150(1). This Act articulates the factors a district court should consider in making such

a determination, NRS 125D.180, and offers a series of graduated restrictions, ranging from providing the other parent with detailed itineraries for the child, to the posting of a bond to ensure the child's return, to complete prohibition on travel outside the United States. NRS 125D.190. But, by law, "[t]he fact that a parent has significant commitments in a foreign country does not create a presumption that the parent poses an imminent risk of wrongfully removing or concealing the child." NRS 125.510(8)(b).

The district court's cursory finding of "no evidence of abduction" suggests, as the record does, that it found that Davis, with his strong ties to the United States government and Texas A&M, did not pose a credible abduction threat. But if risk of abduction does not justify the travel and visitation restrictions, some other basis must be established as a reason for imposing them. The fact that "the world is a dangerous place" is not enough.

We therefore reverse and remand as to the visitation and travel restrictions imposed in the decree. On remand, the district court shall reopen the proceedings and take evidence and make findings concerning whether E.D. may safely visit his father and stepmother in Rwanda or Uganda, whether doing so is in his best interest, and, if necessary, whether abduction prevention measures are appropriate. *See supra* note 3. Contrary to the dissent's suggestion, we do not mandate that such visitation occur, only that, if it is to be prohibited, findings be made to support the prohibition. As for the ban on international travel by E.D. until he reaches the age of 18, no evidence appears in the record to legitimate such a categorical ban. *See, e.g.*, *In re Marriage of Stern*, No. 13-2087, 2015 WL 568584, at *2 (Iowa Ct. App. Feb. 11, 2015) (reversing ban on international travel until a child reaches 16 years of age and noting, "Our case law . . . does not recognize any limitation on visitation rights solely because one of the parents resides outside the borders of Iowa or the United States."). Pending further proceedings on remand consistent with this order, we leave in place the temporal visitation provisions in the decree and the travel restrictions included in the temporary visitation schedule agreed to by the parties, subject to modification by the district court to comport with current circumstances. We do not disturb the panel's affirmance of the district court's resolution of the parties' dispute as to child support and all other issues in the case.

HARDESTY, C.J., and DOUGLAS, CHERRY, and GIBBONS, JJ., concur.

PARRAGUIRRE, J., with whom SAITTA, J., agrees, dissenting:

I disagree with the majority's conclusion that the district court abused its discretion by denying Davis's request for prolonged visitation in Africa. Accordingly, I believe that this court made the proper decision in affirming the district court's custody decree and I would deny en banc reconsideration.

The majority overlooks key facts considered by the district court in denying Davis's request to have E.D. for extended periods of time in Africa. At the time of the evidentiary hearing in 2013, E.D. was only six years old, and for the majority of E.D.'s life, Davis had worked overseas. As a result, Davis was provided with a few two-week visitation periods each year. But, Davis actually only spent on average a total of three weeks per year with E.D. Additionally, Davis failed to visit E.D. for an entire year between July 2011 and August 2012. Evidence was also offered that while Davis was previously allowed specific telephone and Skype visitation with E.D., Davis failed to exercise about 50 percent of that visitation. Further, Davis's own wife Marilena, with whom E.D. would reside in Africa, testified that she had only met E.D. on four occasions.

As a result, Ewalefo testified that she did not believe E.D. would be comfortable going from seeing Davis for two weeks at a time to spending three months with Davis and Marilena. In fact, Ewalefo argued that it may negatively affect E.D.'s emotional and mental development to suddenly be unable to see his mother for a three-month period of time, when she testified that she is the parent who has spent 96 percent of the time each year with him.

Ewalefo further testified about concerns she had with Davis's parental abilities. For example, she testified about an instance during Davis's visitation when E.D. was 15 months old and Davis left E.D. overnight with a neighbor, who resided with a known drug user, while Davis went out drinking; and another instance when Davis took E.D., then four years old, to one of Davis's medical appointments and left him in the waiting room hiding under a coffee table while Davis met with the doctor because, as Davis informed her, he never thought to take E.D. into the back office with him. Ewalefo also testified that she had concerns over her ability to maintain communication with E.D. while he was in Davis's custody because she had previously had trouble speaking with E.D. when he was with Davis. The district court concluded that Ewalefo's testimony was more credible than Davis's testimony.

The majority recognizes the well-established rule that this court will not overturn a custody decision absent a clear abuse of discretion, *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996), but then determines that the district court's failure to include express factual findings in the custody decree prevents adequate appellate review because without those express findings there is insufficient support for the district court's decision. While I agree that written factual findings facilitate appellate review, because the record as a whole in this case includes substantial evidence supporting the district court's decision, reversal is unwarranted. *See Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004) (recognizing that "[r]ulings supported by substantial evidence will not be

disturbed on appeal"). At the evidentiary hearing, the district court specifically considered and made findings on the record regarding each of the NRS 125.480(4) best-interest-of-the-child factors, recognizing that because of Davis's minimal contact with E.D. there was limited evidence regarding certain factors. Accordingly, the district court's consideration of those factors at the evidentiary hearing meets NRS 125.480(4)'s requirement that the court "consider and set forth its specific findings" regarding the factors listed. Further, faulting the district court for its inability to better address some of those factors because of their inapplicability to the case or a lack of evidence presented by the parties would be unreasonable.

Additionally, a lack of express factual findings in the custody decree does not enable this court to reweigh the evidence presented at the two-day evidentiary hearing and substitute its judgment for that of the district court, as the majority purports to do. *See Schwartz v. Schwartz*, 126 Nev. 87, 91, 225 P.3d 1273, 1276 (2010) (explaining that under an abuse of discretion standard, "we will not substitute our judgment for that of the district court"). We have repeatedly held that the district court is in the best position to hear and decide the facts and determine witness credibility. *In re J.D.N.*, 128 Nev. 462, 477, 283 P.3d 842, 852 (2012) (explaining that "the family division of the district court is in a better position to weigh the credibility of witnesses"); *see also Schwartz*, 126 Nev. at 91, 225 P.3d at 1276 (providing that the district court is "in the best position to hear and decide the facts of this case"). Here, the district court recognized that "the child has lived primarily almost to the point of exclusively with [Ewalefo]" and that "[Ewalefo] is more credible" than Davis. This court should not then reweigh the evidence considered or the testimony of the witnesses.

While the majority places great emphasis on the fact that the district court's custody decree may prevent E.D. from traveling internationally until he turns 18,[1] the majority overlooks the fact that the district court was tasked with the job of determining if it was in the best interest of the then-six-year-old child to spend three months a year in a foreign country with a parent with whom he has had limited contact. *See Rico v. Rodriguez*, 121 Nev. 695, 704, 120 P.3d 812, 818 (2005) (recognizing that the district court determines what is in a child's best interest when it serves as a tiebreaker in a dispute between parents). Although finality in custody decisions is important because it promotes the stability necessary to support the develop-

[1]The majority is concerned with the district court restricting the parties from traveling internationally with E.D. when neither party requested such a restriction, but it appears that the district court imposed that restriction in response to Davis's testimony whereby he was concerned that Ewalefo had traveled with E.D. outside the United States without informing him and in response to Davis's implication that any international travel and visitation restrictions should apply equally.

mental and emotional needs of a child, *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007), the district court cannot focus on potential future circumstances at the expense of the situation currently before it when making a custody decision.

Additionally, under the order the parties remain free to agree to E.D.'s international visitation and travel, which seems likely to occur as the district court concluded that the parties had a low level of conflict and Ewalefo testified that as E.D. gets older, it may become more appropriate for him to spend extended periods of time with Davis. Moreover, the order does not prevent either party from seeking a modification as the child ages and the circumstances change. *See Ellis*, 123 Nev. at 150, 161 P.3d at 242 (explaining that a modification of a primary physical custody arrangement is appropriate when there is a substantial change in the circumstances and the modification serves the child's best interest).

Because the panel's decision was correct and reversing and remanding this matter will only serve to unnecessarily delay the custody dispute, I would deny Davis's petition for en banc reconsideration. *See* NRAP 40A(a) (describing the grounds for en banc reconsideration). Thus, I respectfully dissent.