THE LEGISLATURE OF THE STATE OF NEVADA; THE STATE OF NEVADA DEPARTMENT OF TAXATION; THE STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES; THE HONORABLE NICOLE CANNIZZARO, in Her Official Capacity as Senate Majority Leader; THE HONORABLE KATE MARSHALL, in Her Official Capacity as President of the Senate; CLAIRE J. CLIFT, in Her Official Capacity as Secretary of the Senate; and THE HONORABLE STEVE SISOLAK, in His Official Capacity as Governor of the State of Nevada, Appellants/Cross-Respondents, *v.* THE HONORABLE JAMES A. SETTELMEYER, THE HONORABLE JOE HARDY, THE HONORABLE HEIDI SEEVERS GANSERT, THE HONORABLE SCOTT T. HAMMOND, THE HONORABLE PETE GOICOECHEA, THE HONORABLE BEN KIECKHEFER, THE HONORABLE IRA D. HANSEN, and THE HONORABLE KEITH F. PICKARD, in Their Official Capacities as Members of the Senate of the State of Nevada and Individually; GREAT BASIN ENGINEERING CONTRACTORS, LLC, a Nevada Limited Liability Company; GOODFELLOW CORPORATION, a Utah Corporation Qualified to Do Business in the State of Nevada; KIMMIE CANDY COMPANY, a Nevada Corporation; KEYSTONE CORP., a Nevada Nonprofit Corporation; NATIONAL FEDERATION OF INDEPENDENT BUSINESS, a California Nonprofit Corporation Qualified to Do Business in the State of Nevada; NEVADA FRANCHISED AUTO DEALERS ASSOCIATION, a Nevada Nonprofit Corporation; NEVADA TRUCKING ASSOCIATION, INC., a Nevada Nonprofit Corporation; and RETAIL ASSOCIATION OF NEVADA, a Nevada Nonprofit Corporation, Respondents/Cross-Appellants.

No. 81924

May 13, 2021 486 P.3d 1276

Appeal and cross-appeal from a district court final judgment in a case involving constitutional challenges to legislation. First Judicial District Court, Carson City; James Todd Russell, Judge.

Affirmed.

Aaron D. Ford, Attorney General, and *Craig A. Newby*, Deputy Solicitor General, Carson City, for Appellants/Cross-Respondents the State of Nevada Department of Taxation, the State of Nevada Department of Motor Vehicles, Kate Marshall, and Steve Sisolak.

Legislative Counsel Bureau, Legal Division, and *Kevin C. Powers*, General Counsel, Carson City, for Appellants/Cross-Respondents

the Legislature of the State of Nevada, Nicole Cannizzaro, and Claire J. Clift.

Allison MacKenzie, Ltd., and *Karen A. Peterson* and *Justin M. Townsend*, Carson City, for Respondents/Cross-Appellants.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, C.J.:

Article 4, Section 18(2) of the Nevada Constitution requires the agreement of at least two-thirds of the members of each house of the Nevada Legislature to pass any bill "which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates." In this case, the parties ask us to determine whether this supermajority provision applies to two bills passed in 2019 during the 80th session of the Nevada Legislature. Based on the plain language of the supermajority provision, we conclude that it applies to the subject bills because they create, generate, or increase public revenue. Because the bills did not pass by a two-thirds majority in the Senate, those portions of the bills that would require a supermajority vote are unconstitutional. We further conclude that the individual defendants are protected by legislative immunity under NRS 41.071 because the actions they performed were within the sphere of legitimate legislative activity. Because the district court correctly found the bills were unconstitutional and rejected the claims against the immune defendants, we affirm the district court's judgment in whole.

FACTS

Senate Bill 542: The Department of Motor Vehicles technology fee

In 2015, the Legislature approved a bill adding a $1 technology fee to every Department of Motor Vehicles (DMV) transaction that was already subject to a fee. *See* 2015 Nev. Stat., ch. 394, § 3 at 2211; *see also* NRS 481.064 (2015) (codification of the bill). The bill had a sunset provision, such that the additional $1 fee would expire on June 30, 2020. *See* 2015 Nev. Stat., ch. 394, § 3 at 2213. Senate Bill 542, proposed during the 2019 legislative session, extended the sunset provision to June 30, 2022. The DMV would collect an estimated additional $6.9 million for each year of the extension. The Legislature did not subject the bill to a supermajority vote, and the Senate passed it by a 13 to 8 vote—1 vote short of a supermajority. 2019 Nev. Stat., ch. 400, § 1 at 2502.

Senate Bill 551: Payroll tax computation under the modified business tax

In 2015, the Legislature also approved a bill that reduces the rate of payroll taxes under Nevada's modified business tax (MBT) if tax revenues exceed fiscal projections by a certain amount. 2015 Nev. Stat., ch. 487, § 62 at 2896-97. The bill went into effect on July 1, 2015, codified at NRS 360.203. On October 11, 2018, the Department of Taxation published a news release stating that 2018 tax revenues exceeded the stated threshold and therefore the reduced payroll tax rates would go into effect on July 1, 2019.

In 2019, Senate Bill 551 proposed to repeal NRS 360.203 in its entirety, allowing the Department of Taxation to collect an estimated $98.2 million during the following biennium. When initially considered by the Senate, certain sections of the bill—2, 3, 37, and 39—required a supermajority vote to pass. After the Senate fell one vote short of a supermajority, the bill was reconsidered without the supermajority requirement. The votes remained the same, 13 to 8, and it therefore passed with less than a supermajority. *See* 2019 Nev. Stat., ch. 537, § 39 at 3294.

Proceedings in the district court

After the Legislature declared Senate Bills 542 and 551 passed and the Governor signed them, all the senators who voted against the bills, along with businesses and other entities (collectively, the Senators), sued Senate Majority Leader Nicole Cannizzaro, Senate President Kate Marshall, Senate Secretary Claire J. Clift, and Governor Steve Sisolak (all in their official capacities); the Nevada Department of Taxation; and the DMV.[1] The Senators sought declarations that the supermajority provision applied to the bills and asked the district court to invalidate the bills because they did not receive a supermajority vote in the Senate. They also sought injunctive relief preventing the Department of Taxation and the DMV from collecting money pursuant to the bills. The complaint included requests for attorney fees and costs for each cause of action and in the prayer for relief.

The State moved to dismiss, arguing that the supermajority provision did not apply. To support its argument, it relied on a 2019 Legislative Counsel Bureau memorandum coming to the same conclusion. The Senators opposed the motion and moved for summary judgment. The parties briefed competing summary judgment motions, and Senator Cannizzaro and Senate Secretary Clift argued they were protected by legislative immunity.

[1]This opinion refers to these parties, along with the Legislature, which intervened as a party, *see* NRS 218F.720 (allowing the Legislature to protect its interests by intervening in cases), collectively as the State.

After a hearing, the district court's final order found both bills generated revenue and therefore were subject to the state constitution's supermajority provision. The district court reasoned that, "[b]ut for" the bills, the State would not have realized an additional approximate $14 million through the extended DMV fee and $98.2 million after removing the reduced computation rates under the MBT. As to the MBT bill, the district court granted the State's unopposed request for severance and invalidated only those sections subject to a supermajority vote. The DMV bill was fully invalidated. The district court denied the Senators' request for an award of attorney fees as special damages. The district court also dismissed the attorney fees and costs claim against the Legislature. It denied all of the Senators' claims as against Senator Cannizzaro, Senate President Marshall, Senate Secretary Clift, and Governor Sisolak (collectively, the individual defendants) and dismissed them from the action. The order allowed the Senators to move for a postjudgment award of attorney fees and costs against the Department of Taxation and/or the DMV, however.

The State contests the district court's conclusion that the supermajority provision applies to the subject bills and that they are therefore unconstitutional. In their cross-appeal, the Senators challenge the district court's denial of their requests for attorney fees and costs and other claims as against the individual defendants, as well as the dismissal of those defendants below. The district court stayed enforcement of its order and any proceedings on postjudgment requests for fees and costs pending the outcome of this appeal.

DISCUSSION

The supermajority provision applies based on its plain language

The State's appeal centers on the interpretation of the supermajority provision as applied to Senate Bills 542 and 551, an issue we review de novo. *See Ramsey v. City of N. Las Vegas*, 133 Nev. 96, 98, 392 P.3d 614, 616 (2017) ("This court reviews questions of constitutional interpretation de novo."). Because we presume that statutes are constitutional, the Senators, as the parties challenging the bills' constitutionality, "bear[ ] the burden of making a clear showing of invalidity." *Sheriff of Washoe Cty. v. Martin*, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983) (internal quotation marks omitted); *see also Citizens for Honest & Responsible Gov't v. Sec'y of State*, 116 Nev. 939, 946, 11 P.3d 121, 125 (2000) (citing *Martin* with approval).

Consonant with the axiomatic principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), Nevada courts are the "ultimate interpreter" of the Nevada Constitution, *see Baker v. Carr*, 369 U.S. 186, 211 (1962) (discussing the United States Supreme Court and the United States Constitution); *see also MDC Rests., LLC*

v. Eighth Judicial Dist. Court, 134 Nev. 315, 320-21, 419 P.3d 148, 152-53 (2018) (addressing this court's duty to resolve constitutional questions without deference to others). When interpreting a constitutional provision, our ultimate goal is "'to determine the public understanding of a legal text' leading up to and 'in the period after its enactment or ratification.'" *Pohlabel v. State*, 128 Nev. 1, 9, 268 P.3d 1264, 1269 (2012) (quoting *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010) (further internal quotation marks omitted)); *see also Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 490, 327 P.3d 518, 522 (2014) ("[R]ecent precedents have established that we consider first and foremost the original public understanding of constitutional provisions, not some abstract purpose underlying them."). In doing so, we look to the provision's language; if it is plain, the text controls and we will apply it as written. *Ramsey*, 133 Nev. at 98, 392 P.3d at 617; *see also Miller v. Burk*, 124 Nev. 579, 590-92, 188 P.3d 1112, 1120-21 (2008) (refusing to consider other arguments when the plain language of a constitutional provision controlled). Thus, "when a constitutional provision's language is clear on its face, we will not go beyond that language in determining the voters' intent or to create an ambiguity when none exists." *Miller*, 124 Nev. at 590, 188 P.3d at 1120.

The supermajority provision states,

> Except as otherwise provided in subsection 3, an affirmative vote of not fewer than two-thirds of the members elected to each House is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.

Nev. Const. art. 4, § 18(2).

The plain meaning of both "create" and "generate" is "to bring into existence," and the plain meaning of "increase" is "to become progressively greater (as in size, amount, number, or intensity)." *Merriam-Webster's Collegiate Dictionary* 293, 521, 631 (11th ed. 2020). These words plainly encompass a bill that results in the State receiving more public revenue than it would have realized without it, as the bill would "bring into existence" "progressively greater" public revenue. And, by using the word "any," the provision has broad application and applies to all bills that create, generate, or increase public revenue *at any time*. *See In re Estate of Ella E. Horst Revocable Tr.*, 136 Nev. 755, 759, 478 P.3d 861, 865-66 (2020) (quoting 3A Shambie Singer, *Sutherland Statutes and Statutory Construction* § 67:2 (8th ed. 2019 update), for the proposition that "any," when used in a procedural law, means "any and all"); *Any*, *Black's Law Dictionary* (6th ed. 1990) (defining "any" as "one out of many" and "indiscriminately of whatever kind"). Applying this

plain and broad language to the bills at issue, we conclude that Senate Bills 542 and 551 are subject to the supermajority requirement.[2]

The district court found, and the State agrees, that the DMV fee would raise about $7 million for each year of the sunset date's extension. By extending the sunset date on the additional $1 DMV fee, Senate Bill 542 created public revenue that otherwise would not exist. In other words, but for the bill, the State would not generate the roughly $14 million in revenue from the additional $1 DMV fee for the period of July 1, 2020, through June 30, 2022. Because the bill results in increased public revenue, it is subject to a supermajority vote despite the fact that the Legislature passed the bill before the original sunset date. Similarly, the State agrees that, by eliminating the reduced payroll tax rate set to take effect in July 2019, Senate Bill 551 generated $98.2 million in public revenue that otherwise would not exist. Like the DMV bill, but for the MBT bill, the State would not receive that increased revenue, and it is therefore subject to a supermajority vote. Again, that result does not depend on whether the reduced payroll tax rate had taken effect when the Legislature passed Senate Bill 551. Because both bills create, generate, or increase public revenue such that the plain language of the supermajority provision applies, the district court correctly determined they were unconstitutionally passed in the Senate with less than a supermajority vote.

The State's arguments about how to interpret the supermajority provision are unconvincing. The mantra of the State's appeal is that, when passed, the two bills "did not change—but maintained" current revenue levels. It argues that revenue levels remained consistent, as the bills removed the reduced tax rate under the MBT and extended the sunset on the DMV fee *before* the reduced rate or original sunset date took effect. Based on that premise, the State contends the bills did not "create[ ], generate[ ], or increase[ ]" public revenue for purposes of the supermajority provision. It further argues that the supermajority provision only applies to bills that "directly bring[ ] into existence" new state revenue "in the first instance by imposing new or increased state taxes."

As stated above, however, that current revenue levels remained unchanged does not alter the fact that the bills "create[ ], generate[ ], or increase[ ]" public revenue within the plain meaning of those words. Adopting the State's contrary interpretation would also violate the settled rule against interpreting a law in a manner that renders part of it superfluous, as it would require us to ignore the

[2]We reject any contention that we should defer to the Legislature's interpretation of the supermajority provision. We give no such deference when a law's language is plain, as it is here. *See Indep. Am. Party of Nev. v. Lau*, 110 Nev. 1151, 1154-55, 880 P.2d 1391, 1393 (1994) (giving "no deference" to a coordinate government branch's interpretation of a statute when the statute's language was plain).

constitutional provision's use of the word "any." *See Manuela H. v. Eighth Judicial Dist. Court*, 132 Nev. 1, 6-7, 365 P.3d 497, 501 (2016) (recognizing that, in applying a statute's plain language, this court will not interpret the law in a manner that renders any of its words superfluous); *S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (same); *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990) (same), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000). And accepting the State's argument that the provision only applies to bills that directly bring about new or increased taxes would require us to read language into the provision that it does not contain—a task we will not undertake. *See Berkson v. LePome*, 126 Nev. 492, 502, 245 P.3d 560, 567 (2010) (refusing to read language into a statute that the statute did not contain). Indeed, the provision contains no limiting language that supports the State's arguments in these regards.

As to the MBT bill, the district court also properly determined that severance was appropriate. *See Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 515, 217 P.3d 546, 555 (2009) ("[I]t is 'the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions.'" (quoting *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001) (further internal quotation marks omitted))); *see also* NRS 0.020 (declaring Nevada laws to be severable). The only portions of the MBT bill that are unconstitutional are sections 2, 3, 37, and 39, as the remaining sections, "standing alone, can be given legal effect," and the State's arguments below in favor of severance show the Legislature's intent for "the remainder of the [bill] to stay in effect." *Flamingo Paradise*, 125 Nev. at 515, 217 P.3d at 555 (laying out the test for severability).

Based on the foregoing, we conclude that the district court correctly found in favor of the Senators on their declaratory and injunctive relief claims. We now address the Senators' cross-appeal.

Legislative immunity protects the individual defendants

The Senators challenge the district court's denial of their request for attorney fees from the individual defendants—Senator Cannizzaro, Senate President Marshall, Senate Secretary Clift, and Governor Sisolak—as well as those parties' dismissal below. The State asserts that the individual defendants have legislative immunity from the Senators' claims and the district court therefore properly rejected the Senators' claims against them and dismissed them from the action.[3]

[3]We have considered the State's argument that this court does not have jurisdiction over the cross-appeal and conclude it lacks merit for two reasons. First, the Senators are aggrieved because the district court did not afford them all the relief they sought. *See* NRAP 3A(a) ("A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order . . . ."); *Ford v.*

We agree with the State that the individual defendants are entitled to legislative immunity. NRS 41.071(1)(h) codifies legislative immunity and protects those performing legislative functions "from having to defend themselves, from being held liable and from being questioned or sanctioned in administrative or judicial proceedings for speech, debate, deliberation and other actions performed within the sphere of legitimate legislative activity." Immunity applies to actions taken in regard to legislative measures including, but not limited to, "drafting," "revising, amending," "supporting," "approving," "or voting in any form." NRS 41.071(5)(a), (6). The immunity applies to the Legislature, individual legislators, the Legislative Counsel Bureau, and those who "take[ ] or perform[ ] any actions within the sphere of legitimate legislative activity that would be protected if taken or performed by any [legislator]." NRS 41.071(7)(c), (7)(d)(2).

The Senators contend that legislative immunity does not apply in this case. They argue that the individual defendants actively circumvented constitutional requirements to pass the subject bills such that their actions are not "within the sphere of legitimate legislative activity." Our immunity jurisprudence has not discussed NRS 41.071 and the "sphere of legitimate legislative activity." NRS 41.071(3), however, instructs that "the interpretation and application given to the constitutional doctrines of . . . legislative privilege and immunity under the Speech or Debate Clause [of the United States Constitution] must be considered to be persuasive authority."

In addressing NRS 41.071(3)'s federal counterpart, the United States Supreme Court has said that "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998). But "[l]egislative acts are not all-encompassing." *Gravel v. United States*, 408 U.S. 606, 625 (1972). To be protected, the acts "must be an integral part of the deliberative and communicative processes by which [legislators] participate in committee and House [or Senate] proceedings with respect to the consideration and passage or rejection of proposed legislation." *Id.*; *see also* 72 Am. Jur. 2d *States, Etc.* § 61 (Feb. 2021 update) (providing that courts look, in part, to whether the challenged acts were an integral part of business before the legislature to determine if a party has legislative immunity); 14A C.J.S. *Civil Rights* § 480 (Mar. 2021 update) (discussing legislative

---

Showboat Operating Co., 110 Nev. 752, 755-56, 877 P.2d 546, 548-49 (1994) (holding that a party must be aggrieved by a lower court's judgment and seek to alter the rights of the parties to that judgment for this court to have appellate jurisdiction). Second, whether the individual defendants are entitled to legislative immunity is a substantive issue to be decided by the court, not a limit on the court's jurisdiction. *See Powell v. McCormack*, 395 U.S. 486, 504-05 & n.25 (1969) (reviewing on appeal whether legislative immunity applied and holding that legislative immunity does not absolve a party "of the responsibility of filing a motion to dismiss" because the court "must still determine the applicability of [legislative immunity] to [a] plaintiff's action").

immunity from civil rights claims and stating that, to determine whether an action is within the sphere of immunity, courts look to "whether [the act] bears all the hallmarks of traditional legislation"). Thus, protected actions include "only those things 'generally done in a session of the House . . . in relation to the business before it.'" *United States v. Brewster*, 408 U.S. 501, 512-13 (1972) (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)).

Here, the individual defendants were performing basic legislative functions—proposing, amending, voting on, and passing legislation—such that their actions fell within the sphere of legitimate legislative activity.[4] *See* NRS 41.071(5); *see also Brewster*, 408 U.S. at 512-13. They are therefore protected by legislative immunity from the Senators' substantive claims as well as their requests for attorney fees and costs.[5] *See Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980) (recognizing that, if legislative immunity applies, it protects the immune parties "from suits for either prospective relief or damages"). This immunity extends to Senate President Marshall and Governor Sisolak, even though they are members of the executive branch, as the Senators only named them as defendants based on actions they took as part of the legislative process. *See* NRS 41.071(7)(d)(2); *Bogan*, 523 U.S. at 55 (recognizing "that officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions," including those considered "integral steps in the legislative process"). Indeed, the amended complaint alleged that Senate President Marshall "sign[ed]" the bills "passed by the Senate in conformity with the Nevada Constitution" and that Governor Sisolak "approv[ed] and sign[ed] bills passed by the Legislature in conformity with the

[4]These actions are also dissimilar from those other courts have found to be outside the sphere of legitimate legislative activity. *See, e.g.*, *Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979) (concluding legislative immunity did not protect a legislator from a lawsuit regarding a newsletter and press release, as those were not actions within the sphere of legitimate legislative activity, but recognizing that immunity would apply if the same information was given during a speech before the Senate); *Brewster*, 408 U.S. at 526 (holding that a legislator accepting a bribe, even when accepted in exchange "for the performance of a legislative act," is not part of the legislative process); *Olson v. Lesch*, 931 N.W.2d 832, 838 (Minn. Ct. App. 2019) (concluding that a legislator's letter to the mayor was not within the sphere of legitimate legislative activity because it did not address legislative business, the jurisdiction, or executive appointments and was instead personal or political in nature).

[5]Because intent is irrelevant, we do not consider the Senators' argument that the individual parties acted in bad faith by not subjecting the bills to a supermajority vote. *See Bogan*, 523 U.S. at 54. We also do not consider the Senators' arguments regarding *Romer v. Colorado General Assembly*, 810 P.2d 215 (Colo. 1991), as that case addresses the Colorado Constitution's legislative immunity provision rather than that of the United States' Constitution. *See* NRS 41.071(3) (providing that interpretations of the United States Constitution's counterpart to Nevada's legislative immunity statute are persuasive authority without mentioning interpretations of other states' legislative immunity provisions).

Nevada Constitution." The district court's denial of the Senators' claims against the individual defendants and its dismissal of those parties was therefore proper.[6] *See Harrison v. Roitman*, 131 Nev. 915, 917, 362 P.3d 1138, 1139 (2015) (reviewing the application of immunity de novo); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing summary judgments de novo).

CONCLUSION

Senate Bills 542 and 551 each "generate[ ], create[ ], or increase[ ]" public revenue such that Article 4, Section 18(2) of the Nevada Constitution applies to the bills. Thus, both houses of the Legislature were required to pass the bills by a two-thirds vote to satisfy the Constitution. Because the Senate did not do so, the bills are unconstitutional and the district court properly granted the Senators' requests for declaratory and injunctive relief to stop their enforcement. The district court also properly severed the nonoffending portions of Senate Bill 551. We further conclude that the district court's rejection of the Senators' claims and requests for attorney fees and costs against the individual defendants and its dismissal of those parties were proper, given that the individual defendants are protected by legislative immunity under NRS 41.071(3). We therefore affirm the judgment of the district court in whole.[7]

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

---

[6]The district court rejected the Senators' claims against the individual defendants and dismissed them because it found that NRS 218F.720(1)(b) barred any attorney fees and costs award against those parties and that the Senators failed to show those parties acted in bad faith. Although we resolve the cross-appeal based on legislative immunity, we may still affirm the district court's judgment. *See Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons." (alteration in original) (quoting *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987))).

[7]We grant the Senators' January 6, 2021, motion to amend the caption of this case to add Senator Nicole Cannizzaro, Senate President Kate Marshall, Senate Secretary Claire J. Clift, and Governor Steve Sisolak in their official capacities as appellants/cross-respondents. The clerk of the court shall therefore amend the caption on this docket to conform with the caption on this opinion.

IN THE MATTER OF THE PARENTAL RIGHTS AS TO L.L.S., A MINOR.

TAHJA L., APPELLANT, *v.* STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES; AND L.L.S., RESPONDENTS.

No. 79124

May 27, 2021 487 P.3d 791

Appeal from a district court order terminating parental rights. Eighth Judicial District Court, Family Division, Clark County; Bryce C. Duckworth, Judge.

Reversed and remanded.

PICKERING, J., with whom HARDESTY, C.J., and CADISH, J., agreed, dissented.

The Grigsby Law Group and *Abira Grigsby*, Las Vegas, for Appellant.

Steven B. Wolfson, District Attorney, and *Candice Saip*, Deputy District Attorney, Clark County, for Respondent State of Nevada Department of Family Services.

Lewis Roca Rothgerber Christie LLP and *Abraham G. Smith* and *Daniel F. Polsenberg*, Las Vegas; *Legal Aid Center of Southern Nevada, Inc.*, and *Dewey Fowler, Jr.*, Las Vegas, for Respondent L.L.S.

Before the Supreme Court, EN BANC.

OPINION

By the Court, STIGLICH, J.:

This case requires us to decide whether a hearing master may preside over a termination of parental rights (TPR) trial. The Nevada Legislature has provided that masters may preside over certain proceedings in the district court. In TPR proceedings pursuant to NRS Chapter 432B, the matter must be conducted by a "court." Under NRS 62A.180(2), a hearing master may constitute a court in this sense when the juvenile court delegates authority for the master to perform a role in accordance with the Nevada Constitution. Resolution of this appeal turns on whether having a hearing master preside over the trial in a TPR proceeding satisfies the due process requirements enshrined in the Nevada Constitution.

Balancing the fundamental importance of the rights at stake in a TPR trial and the profound consequences of an erroneous deprivation of those rights against the minimal value to the State of inserting an extra layer between the parties and the ultimate decision maker,

we hold that due process requires the TPR trial to be heard before a district judge in the first instance. Central to this holding is our conclusion that when a trial takes place before a hearing master, a district judge's subsequent review of the trial record is not sufficient to safeguard the rights of the parent and child against the uniquely grave consequence of the permanent loss of parental rights. Because a master cannot preside over a TPR trial pursuant to NRS Chapter 432B without infringing on a parent's constitutional right to procedural due process, the master is not statutorily authorized to serve the role that the Legislature requires to be conducted by a "court." Rather, the district judge must perform that function. Accordingly, because the juvenile court erred in delegating that role to a hearing master in the proceedings below, we reverse and remand for a new TPR proceeding.

FACTS AND PROCEDURAL HISTORY

Appellant Tahja L. was still a teenager when she brought her then six-month-old daughter, L.L.S., into a Department of Family Services (DFS) facility. Tahja intended to temporarily place L.L.S. with DFS, pursuant to NRS 432B.360, while she completed her high school education. Tahja lacked the family and financial resources to care for L.L.S. and was concerned about her ability to provide adequate care for L.L.S. while attending school. A DFS representative explained child care options and the difficulties Tahja could face regaining custody should she surrender L.L.S. Tahja reiterated that she believed L.L.S. would be better off in DFS custody.

Shortly after Tahja surrendered her daughter, DFS filed a petition under NRS 432B.330 alleging that the child was in need of protection due to neglect. The matter was assigned to juvenile dependency Hearing Master David Gibson. Tahja pleaded no contest, and DFS placed L.L.S. in foster care outside the home. DFS designed a case plan to reunify Tahja and L.L.S. But DFS was dissatisfied with Tahja's progress under that case plan, and so it shifted the case plan from reunification to termination of parental rights and eventual adoption.

DFS sought to terminate Tahja's parental rights as to L.L.S. by filing a motion within the ongoing NRS Chapter 432B proceedings. Hearing Master Gibson was assigned to conduct the trial and to produce findings and recommendations regarding the TPR motion. L.L.S. objected that a district judge, not a hearing master, should conduct the trial. Tahja did not join this objection.

The juvenile court thoroughly considered L.L.S.'s objection and denied it by written order. The court held that it had the power to appoint any qualified person as a master and that it could order the master to conduct proceedings in the same manner as a district judge would, including taking evidence and making findings of fact and recommendations. It concluded that the TPR petition

was brought under NRS Chapter 432B and that it had statutory authority to delegate the hearing to a master because the term "juvenile court" includes a master to whom the juvenile court delegates authority. *Cf.* NRS 62A.180(2). The court further considered Eighth Judicial District Court Rules contemplating the use of masters in juvenile dependency cases and the Eighth Judicial District Court's "one-family-one-judge" policy that required holding the TPR proceeding before the same hearing master previously assigned to the case. Lastly, the court concluded that NRCP 53, which governs the appointments of hearing masters in general, permitted the assignment, as the one-family-one-judge rule, limited judicial resources, and "best practices" constituted "exceptional conditions" justifying the appointment of a master.

Before the trial took place, however, Hearing Master Gibson was elevated to the bench, becoming District Judge Gibson. The clerk then reassigned the matter to Hearing Master Holly Roys. The master heard from several witnesses, considered the exhibits and orders filed in the NRS Chapter 432B proceedings, and recommended terminating Tahja's parental rights.

Tahja objected to Hearing Master Roys' findings and recommendations but did not specifically request a trial de novo. The juvenile court, through Judge Bryce C. Duckworth, held a hearing on the objection and offered the parties an opportunity to present additional evidence, but the parties did not offer new evidence. After the hearing, the juvenile court entered an order rejecting Tahja's challenges and terminating her parental rights. The court noted that it—not the hearing master—held the sole constitutional power of decision.

By all indications, the court took its responsibility seriously. Although it took no new evidence, it conducted a thorough review of the record before it, including viewing the video of the entire trial proceedings. Judge Duckworth explicitly stated that he "observe[d] issues pertaining to the credibility and demeanor of each witness who testified." The court ultimately found, based on the record, that clear and convincing evidence supported the conclusion that termination of Tahja's parental rights was in L.L.S.'s best interests.

Tahja appealed. She now argues that the juvenile court lacked authority to appoint a master to preside over the trial in the TPR proceeding. L.L.S. agrees, consistent with her prior position.

DISCUSSION

Both statutes and court rules may have a role to play in the inquiry into whether a master may hear a case.[1] But these statutes and court

[1]We disagree with our dissenting colleagues and conclude that the issue was properly preserved for appeal. *See In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) ("There is no bright-line rule to determine whether a matter has been properly raised. A workable standard, however, is that the argument must be

rules must be consistent with the constitution. The dispositive issue here is whether the proceedings before the hearing master, followed by the juvenile court's review, provided Tahja and L.L.S. with due process. We conclude that they did not. We do not fault the juvenile court's careful and thoughtful review of the record. But this sort of trial by video-recording is not congruent with the gravity of the rights at issue and is not justified by a sufficient state interest.

A juvenile court is statutorily authorized to appoint a master if and only if the appointment is constitutional

Tahja argues that the juvenile court lacked authority to appoint a hearing master to preside over the TPR trial. The Nevada Constitution allows the Legislature to "provide by law for . . . [r]eferees in district courts." Nev. Const. art. 6, § 6(2)(a); *cf.* NRCP 53(a)(1) (providing that referees are masters). The Legislature has repeatedly exercised this authority by enacting laws permitting masters to act as referees in district courts. *See Henry v. Nev. Comm'n on Judicial Discipline*, 135 Nev. 34, 36, 435 P.3d 659, 661 (2019) (recognizing the Legislature's constitutional authorization to provide for masters).

The Legislature, however, has provided that TPR proceedings under NRS Chapter 432B are to be conducted by the "court." *See generally* NRS 432B.5901-.5908. "Court," in NRS Chapter 432B, has the same meaning as "juvenile court" in NRS Chapter 62A. *See* NRS 432B.050. And under NRS 62A.180, a "juvenile court" includes a master only if "[t]he juvenile court delegates authority to the master to perform [a specific] act *in accordance with the Constitution of the State of Nevada*." NRS 62A.180(2)(a) (emphasis

raised sufficiently for the trial court to rule on it." (internal citations omitted)); *cf. Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 545 (2010) (finding issue waived because "neither [the opposing party] nor the district court had the opportunity to address" it). It is true that Tahja did not join L.L.S.'s objection below to the use of a hearing master, and we generally decline to consider "point[s] not urged in the trial court." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). But this point was not only "urged" below, but also decided in a thoroughly reasoned order after a hearing. And as the juvenile court had already rejected the argument that the master was not authorized to preside, our conclusion is not affected by L.L.S. declining to reassert her challenge to the master's role after the master made her report. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) ("[I]n the civil no less than the criminal area, courts indulge every reasonable presumption against waiver [of procedural due process rights]." (internal quotation marks omitted)); *Landes Constr. Co., Inc. v. Royal Bank of Can.*, 833 F.2d 1365, 1370 (9th Cir. 1987) ("As long as a party properly raises an issue of law before the case goes to the jury, it need not include the issue in a motion for a directed verdict in order to preserve the question on appeal."). The purpose of the waiver rule is to prevent issues from being raised for the first time on appeal. This ensures a proper division of trial and appellate functions, maintains judicial efficiency, and gives fair notice to other parties. *See Schuck*, 126 Nev. at 437, 245 P.3d at 544.

added).[2] Accordingly, a master may constitute a "court" in this context and preside over a TPR proceeding only if the exercise of that authority does not violate a parent's constitutional rights.

As discussed below, having a hearing master preside over Tahja's TPR trial violated her right to due process. Therefore, the master did not perform that function in accordance with the constitution, and the master did not constitute a "court" for purposes of NRS 62A.180 and NRS 432B.5901-.5908. Consequently, a district judge, not a master, must preside over the trial of a TPR proceeding conducted pursuant to NRS 432B.5901-.5908.

Due process does not permit the juvenile court to delegate TPR trials to a master

The Nevada Constitution states that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Nev. Const. art. 1, § 8(2); *see also* U.S. Const. amend. XIV(1). In analyzing the analogous provision of the federal constitution, the United States Supreme Court has recognized the "fundamental liberty interest of natural parents in the care, custody, and management of their child" and explained that "[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Accordingly, "due process requires states to provide parents with fundamentally fair procedures in parental termination proceedings." *In re Parental Rights as to M.F.*, 132 Nev. 209, 212, 371 P.3d 995, 998 (2016).

This court applies the three-part test outlined in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), when we consider whether a TPR trial complied with due process. *In re Parental Rights as to M.M.L., Jr.*, 133 Nev. 147, 149-52, 393 P.3d 1079, 1081-83 (2017); *In re M.F.*, 132 Nev. at 213-14, 371 P.3d at 998-99. The *Mathews* test requires us to carefully "consider and balance (1) the parent's interest and (2) the risk of erroneous deprivation against (3) the government's interest." *In re M.M.L.*, 133 Nev. at 150, 393 P.3d at 1081. We review constitutional issues such as a parent's right to due process in a termination proceeding de novo. *In re M.F.*, 132 Nev. at 212, 371 P.3d at 997.

[2]The dissent's reliance on NRS 62A.180 and NRS 432B.050 is misguided. Its reasoning entails that a master would only constitute a court to which authority might be delegated after it had already received and exercised that authority. This circular reasoning cannot support disregarding whether its exercise accords with the state constitution. Relatedly, NRS 62B.030's statement of acts a master may perform is irrelevant, because such considerations arise only if the master may preside over a given proceeding. And the dissent's invocation of local court rules for an authority to delegate is no more persuasive, as the local rules cannot salvage the deficiency that the master is not statutorily a "court" here, as concluded below.

First, the parent's interest is as strong as can be. We have recognized the gravity of a TPR proceeding in particular, stating that "the termination of parental rights is an exercise of awesome power that is tantamount to imposition of a civil death penalty." *In re Parental Rights as to A.L.*, 130 Nev. 914, 918, 337 P.3d 758, 761 (2014) (internal quotation marks omitted). Just as "there is no doubt that death is different" from other possible consequences imposed for criminal acts, *see Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) (internal quotation marks and alteration omitted), there is no doubt that the permanent termination of parental rights is different from any lesser consequence of family-law litigation. Consistent with these principles, the Legislature has recognized that TPR proceedings are "a matter of such importance in order to safeguard the rights of parent and child as to require judicial determination." NRS 128.005(2)(a). Therefore, we conclude—as we have before—that "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one." *In re M.F.*, 132 Nev. at 213, 371 P.3d at 998 (quoting *Santosky*, 455 U.S. at 759).

In order to properly analyze the second and third factors, we must briefly review what a hearing master is and does. A hearing master is a person appointed by a court to preside over certain matters in place of a judge. A master is usually if not always an attorney. *See, e.g.*, EDCR 1.46(a)(3) (requiring juvenile hearing masters to be members in good standing with the State Bar). A master must of course be impartial, *see* NRCP 53(b)(3)-(4), and juvenile hearing masters are required to attend a course designed for the training of new judges, *see* NRS 62B.020(3). We have no doubt that masters are typically both competent and careful.

But no matter how neutral and qualified a master may be, it remains that he or she is not a judge and "does not possess the same powers conferred to a juvenile court judge through Article 6, Section 6 of the Nevada Constitution." *In re A.B.*, 128 Nev. 764, 770-71, 291 P.3d 122, 127 (2012). Therefore, absent a stipulation of the parties, *see* NRCP 53(a)(2)(A), (b)(1), a master's findings are not binding and are subject to review by the court, *see* NRCP 53(f)(2)(A). While the judge should "give serious consideration to the master's findings of fact and recommendation"—if not, there would be no point in having a master at all—"[t]he judge may not transfer his or her judicial decision-making power to a master." *In re A.B.*, 128 Nev. at 771, 291 P.3d at 127.

Accordingly, after receiving a master's report, a juvenile court first "review[s] the evidence and testimony presented to the master." *Id.* While the judge may rely on the master's findings that are supported by credible evidence and not clearly wrong, the judge may also choose to order de novo fact-finding. *Id.*; *see* NRS 62B.030(4); NRCP 53(f)(2). "Once the court determines the applicable facts," it must then "exercise its independent judgment to determine, based

on the facts and the law, the case's proper resolution." *In re A.B.*, 128 Nev. at 771, 291 P.3d at 127.

This two-step approach runs afoul of the second and the third prongs of the *Mathews* analysis. Regarding the risk of an erroneous deprivation, we find it troubling that when the juvenile court does not order de novo fact-finding, parents must argue their case and present evidence to a hearing master who does not hold the ultimate power of decision. The district judge, who holds that power, does not see the parties face-to-face but generally makes the decision based on evidence presented to another. Without disparaging the juvenile court's efforts in making an independent judgment, we think it is clear that inserting an additional layer of insulation between the litigants and the decisionmaker tends to lessen, not improve, the quality of the decision.

This does not mean that the use of masters is always or even usually invalid. As noted above, we presume that masters are competent, careful, and impartial and that district judges conscientiously review the record before them. In the great run of cases, the risk of an erroneous deprivation is likely to be eclipsed by the other two *Mathews* factors.

But turning our attention to that third factor, it is plain that this is not among the great run of cases. We conclude that, given the uniquely serious nature of TPR proceedings, the State's interests in using masters are insufficient to justify the use of a method of adjudication that is less reliable than a trial before the district judge in the first instance.

First, we consider the government's interest in efficiency, i.e., in avoiding the "fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *See Mathews*, 424 U.S. at 335. Relatedly, the government undoubtedly has an important "interest both in obtaining a speedy resolution and, more importantly, in protecting the child's best interests, including obtaining a permanent home for the child."[3] *In re M.M.L.*, 133 Nev. at 151, 393 P.3d at 1082. Accordingly, we have held that a district court is not necessarily required to grant a continuance in a TPR trial when the parent has been previously deemed incompetent to stand for a criminal trial, as potentially indefinite continuances would prejudice those important interests. *Id.* Similarly, in *In re Parental Rights as to M.F.*, we held that a parent was not entitled to

[3]The dissent misrepresents L.L.S.'s desires in suggesting that her sole concern is for a quick resolution of this case. L.L.S.'s brief makes plain her goal of preserving the parental bond. The dissent has mischaracterized her wishes by resting its characterization on one statement in her objection to the use of a master, taken out of context, without consideration of L.L.S.'s other representations.

And insofar as the dissent elects to discuss and reject several claims for relief that are not considered in or relevant to this disposition, such discussion need not be addressed further precisely because it is not material to resolving this appeal.

a jury trial, as opposed to a bench trial. 132 Nev. at 214, 371 P.3d at 999. We noted that "conservation of judicial resources" was a "compelling interest" weighing against requiring jury trials. *Id.* at 213, 371 P.3d at 998. It goes without saying that jury trials may be "complex and expensive." *See Aftercare of Clark Cty. v. Justice Court of Las Vegas Twp.*, 120 Nev. 1, 9, 82 P.3d 931, 936 (2004).

Those cases are distinguishable. Compared to the efficiencies obtained by denying indefinite continuances, or by holding a bench trial as opposed to a jury trial, we see little to no efficiency gained by having a master preside over a TPR trial. The juvenile court is still required to thoroughly review the evidence, including the possibility of de novo fact-finding, and to exercise its independent judgment. *In re A.B.*, 128 Nev. at 771, 291 P.3d at 127. Indeed, the facts here provide a striking example of the *inefficiency* of this two-step proceeding, as the district judge watched the *entire* trial recording in order to make a decision. By requiring the trial to initially take place before a master before review by a district judge, the litigation is often prolonged.

Of course, *if* the parties accept the hearing master's findings and recommendations, then the judge's review may be streamlined. In those cases, permitting masters to preside at a TPR trial may facilitate resolutions because searching judicial review is not required. Expeditious resolutions serve an important government interest. *In re M.M.L.*, 133 Nev. at 151, 393 P.3d at 1082. As we are well familiar with the Eighth Judicial District's meteoric growth in population and docket congestion, we give this factor some weight.[4] But this does not outweigh the other *Mathews* factors.

Our confidence in this determination is strengthened by the Legislature's recent choice to increase the number of family court judges in the Eighth Judicial District from 20 to 26. 2019 Nev. Stat., ch. 483, § 4, at 2870 (amending NRS 3.0185). Certain comments made during the hearings on this statutory amendment are too salient to ignore. Specifically, the Chief Judge of the Eighth Judicial District Court told the Legislature that

> we are looking for three judges to *eliminate the use of hearing masters in the time-sensitive area of dependency.* This deals with kids who have come into the foster care system because

[4]We note that where no statute authorizes the appointment of a master, "[c]alendar congestion, complex issues of fact and law, and prospectively lengthy trials do not provide 'exceptional conditions' for a reference" under NRCP 53(a)(2)(C)(i). *Russell v. Thompson*, 96 Nev. 830, 835-36, 619 P.2d 537, 540 (1980). Where the Legislature expressly authorizes a referral to a master, relieving calendar congestion may be a valid state interest that should be considered under *Mathews*' third prong. Here, in contrast, relieving congestion is insufficient to justify a reference in a TPR trial, as the rights at stake are almost uniquely serious. We express no opinion as to whether it might suffice in a different class of cases.

> their parents are unable to take care of them. We have excellent hearing masters; however, due to the structure, *when a hearing master makes a decision, there is an objection period, and that causes delays in an area where we really cannot afford to delay things for these vulnerable children*. We are therefore looking for three judges to replace those hearing masters, for a total of six new judges.

Hearing on A.B. 43 Before the Senate Judiciary Comm., 80th Leg. (Nev., June 2, 2019) (emphases added). These statements reinforce the conclusion that, as a practical matter, hearing masters do not in fact make the system significantly more efficient.

In summary, *Mathews* requires us to balance countervailing interests to decide whether the process afforded is commensurate with the importance of the interests at stake. Weighing the foregoing factors, we conclude that having a hearing master preside over the trial in a TPR proceeding violates due process. Even assuming without deciding that the need to relieve the court's docket congestion might justify the appointment of masters in other cases, termination of parental rights is different. TPR trials must be treated with the gravity and solemnity appropriate to the seriousness of their consequences. Assigning these trials to hearing masters, even when the results are reviewed by a judge, reflects an apparent view that these trials are less important and deserve less process. Nothing could be further from the truth.[5]

Accordingly, we conclude that the juvenile court violated Tahja's right to due process when it assigned a hearing master to preside over the TPR trial. As a result, the master did not qualify as a "court," *see* NRS 62A.180, and the trial was not held in compliance with the provisions in NRS Chapter 432B. *See* NRS 432B.5901-.5908.

CONCLUSION

TPR trials involve determining whether to deprive a person of one of his or her most fundamental rights. While the Legislature has authorized juvenile courts to appoint hearing masters in many cases, it has expressly conditioned this authority on the constitutionality of the appointment. Therefore, we conclude that masters may

[5]The dissent relies too heavily on the juvenile court's thorough efforts to review the record in this instance and pays insufficient heed to the sufficiency of the process in general for such proceedings. *Cf. Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985) ("[T]he very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.'" (quoting *Mathews*, 424 U.S. at 344)); *Santosky*, 455 U.S. at 757 ("Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.").

not be appointed to preside in TPR trials. Accordingly, here, the district judge was required to hear the TPR trial in the first instance. While we commend the juvenile court for its efforts to analyze the record as thoroughly as possible, those efforts ultimately cannot cure this error. We reverse and remand for proceedings consistent with this disposition.

Parraguirre, Silver, and Herndon, JJ., concur.

Pickering, J., with whom Hardesty, C.J., and Cadish, J., agree, dissenting:

This court should affirm the district court's decision to terminate appellant Tahja L.'s parental rights as to respondent L.L.S. The district court referred the hearing on the termination of Tahja's parental rights to a master, and Tahja did not object. The evidence at that termination of parental rights (TPR) hearing showed that L.L.S., then not even three years old, had been in foster care for the preceding two years. Under NRS 128.109, this evidence triggered mandatory presumptions, both of parental fault and that termination was in L.L.S.'s best interests.

Tahja had counsel at the TPR hearing, yet despite this evidence and the statutory presumptions it raised, she called no witnesses and did not herself testify. Thereafter, the hearing master entered written findings and recommendations, which included a recommendation that the district judge terminate Tahja's parental rights. At that point, under NRS 62B.030(3) & (4)(c) and EDCR 1.46(g)(7), Tahja had the right to request a hearing de novo before the district judge. She did not do so, thereby waiving the right. She also declined the district judge's invitation to supplement the evidence.

On this record, no basis exists to reverse and remand for another TPR hearing in this long-running NRS Chapter 432B case. Not only did Tahja not object when the district court referred her case to the master, she subsequently voluntarily waived the very process that the majority now says she was due—the opportunity to present live witness testimony to a district judge. And, although the majority suggests otherwise, L.L.S.'s prehearing objection to the master presiding does not salvage Tahja's case. L.L.S.'s objection did not concern due process or Tahja's interests; it spoke to L.L.S.'s interest in achieving permanency without risk of undue appellate delay. Nearly two years later, the majority's reversal and remand to repeat the TPR hearing all over again makes the child's feared risk a reality. Respectfully, I dissent.

I.

A brief review of the procedural facts provides helpful context. As the majority notes, respondent Clark County Department of Family Services (DFS) filed the motion seeking to terminate Tahja's

parental rights as to L.L.S. under NRS 432B.5901, in Tahja's and L.L.S.'s ongoing NRS Chapter 432B abuse and neglect proceeding. Because the same juvenile dependency hearing master, David Gibson, had presided over the matter to that point, the supervising district judge also assigned Master Gibson to conduct the evidentiary hearing and make a report and recommendations to the district court on the TPR motion.[1] The order assigning Master Gibson advised that "each party is entitled . . . to request the termination of parental rights issue [be] heard before a District Judge . . . no later than 30 days from the entry of th[e] Order" and that failure to do so "constitutes a waiver of any claim that the assigned Hearing Master lacks the ability to hear your Termination of Parental Rights action." Notably, Tahja did not object to this assignment.

As discussed *infra* Part III, L.L.S. did file a timely prehearing objection to the notice of the master's assignment. After briefing, the district judge overruled L.L.S.'s objection, citing the Eighth Judicial District Court's one family/one judge policy and Master Gibson's deep familiarity with the parties, having presided over 14 of the parties' 15 NRS Chapter 432B hearings over the preceding two years. But before the evidentiary hearing occurred, then-Master Gibson was elevated to district judge, and the clerk assigned the matter to a new hearing master. Still Tahja did not object, L.L.S. did not renew her objection, and the hearing proceeded under the stewardship of the newly appointed master.

The master took testimony from multiple DFS witnesses and considered the exhibits and prior orders filed in the NRS Chapter 432B proceeding. Tahja called no witnesses and declined to testify, though the master advised her she had the right to do so if she wished. Following the hearing, the master entered written findings and recommended that the district court terminate Tahja's parental rights. Tahja objected to the findings and recommendations as "clearly erroneous," but *still* did not assign error in a master having presided over the evidentiary hearing; nor did she request a hearing de novo before the district judge, as NRS 62B.030(3) & (4)(c) and EDCR 1.46(g)(7) entitled her to do.

The district judge then set Tahja's objections for hearing. At the hearing, the district judge confirmed that the child, L.L.S., had not objected to the master's findings and recommendations and asked Tahja's counsel (and L.L.S.'s separate counsel) if either wanted to present supplemental evidence. *Both declined*, and the district judge took the matter under submission. A lengthy written order followed, in which the district judge recited that he had reviewed the entirety of the TPR hearing record—including the videorecorded testimony

[1]The district judge charged with supervising the Eighth Judicial District Court juvenile dependency and delinquency hearing masters in this case was at all relevant times Judge Bryce C. Duckworth, who entered the interim orders and final TPR judgment at issue here.

of six key witnesses. The order summarized the testimonial and written evidence, made the requisite findings of fact and conclusions of law, rejected Tahja's objections to the master's findings and recommendations, and vested custody and control of L.L.S. in DFS with authority to place her for adoption.

Tahja timely appealed, *but still did not raise any due process challenge to the appointment of a master*. Instead, Tahja reasserts her challenge to the sufficiency of the evidence to support termination and raises, for the first time, a statute- and equal-protection-based challenge to the master having presided over the TPR hearing. Consistent with her oft-stated desire to avoid litigation delay, L.L.S. did not file a notice of appeal. As respondent, L.L.S. filed an answering brief purporting to support Tahja's request for reversal, to which DFS, as L.L.S.'s co-respondent, did not and had no right of reply.

II.

Setting aside, for the moment, the unprompted due process analysis undertaken by the majority under *Mathews v. Eldridge*, 424 U.S. 319 (1976), there simply is no merit to the challenges Tahja raises on appeal—substantial evidence supports the district judge's TPR order, and the district court had statutory and rule-based authority to employ the master in the manner that it did.[2] For these reasons, this court should affirm.

A.

"A party petitioning to terminate parental rights must establish by clear and convincing evidence that (1) termination is in the child's best interest, and (2) parental fault exists." *In re Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 762 (2006). Tahja argues that the district judge erred by finding that termination was in L.L.S.'s best interest and that parental fault exists. Because the termination of parental rights is "an exercise of awesome power," *In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000) (internal quotation omitted), this court "closely scrutinize[s] whether the district court properly preserved or terminated the parental rights at issue." *A.J.G.*, 122 Nev. at 1423, 148 P.3d at 763 (internal quotation omitted). But, when reviewing the district court's factual findings for substantial evidence, this court "will not substitute [its] own judgment for that of the district court." *Id.*

[2]Tahja makes a third argument on appeal: She tried to voluntarily surrender L.L.S. to DFS under NRS 432B.360, so DFS should not have initiated a petition under NRS 432B.330. This argument fails because Tahja pleaded "no contest" to DFS's NRS Chapter 432B petition and did not tender the voluntary surrender issue to the district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that a point not raised in the district court is generally "deemed to have been waived and will not be considered on appeal").

Here, the presumptions established by the uncontroverted evidence and the lack of rebuttal evidence afford little, if any, appellate leeway. As to the child's best interest, there is a presumption that termination is in her best interest when she has resided outside the home for 14 of 20 consecutive months. NRS 128.109(2). As to parental fault, under NRS 128.109(1)(a), there is a presumption that a parent is making only "token efforts" if a child is outside the home for 14 of 20 consecutive months. And under Section (1)(b) of the same statute, there is a presumption of failure of parental adjustment if that parent does not comply with the terms of the case plan within six months.

By the time the TPR hearing took place, L.L.S. had been continuously out of her mother's custody for 24 months, with only the briefest of exceptions, and caseworkers testified that Tahja made limited progress on her case plan (more than 18 months after its adoption). Thus, the presumptions established by NRS 128.109 applied, including the presumption that termination is in L.L.S.'s best interest. "Once the presumption applies, the parent has the burden to offer evidence to overcome the presumption that termination of his or her rights is in the child's best interest." *A.J.G.*, 122 Nev. at 1426, 148 P.3d at 764. But Tahja did not testify at the hearing or present evidence or witnesses of her own. She relied instead on the witnesses DFS called, whose testimony established and largely supported the statutory presumptions as to L.L.S.'s best interest and parental fault (token efforts and failure of parental adjustment). Then, after the master submitted her findings and termination recommendation—citing NRS 128.109, the presumptions that DFS established under it, and Tahja's failure to rebut them—Tahja neither requested a hearing de novo nor accepted the district judge's invitation to supplement the evidence. With no request for a hearing before the district judge and no proffer of unadmitted evidence, Tahja is not entitled to a "do over."

B.

In their briefs on appeal, both Tahja and L.L.S. challenge the district court's statutory and rule-based authority to use a hearing master to take evidence and make findings of fact and recommendations in a contested TPR hearing. It is questionable whether this issue is even properly before us. Only Tahja filed a notice of appeal, and she did not question the master's assignment in any way, shape, or form in the court below. As for L.L.S., she did not file a notice of appeal. And, although L.L.S. objected to the initial order assigning the TPR hearing to then-Master Gibson, she did not object to the findings and recommendations, request a de novo hearing, or file a notice of appeal. Nor did she return to the supervising district judge, Judge Duckworth, to ask that he reconsider his denial of her objection after Master Gibson became a district judge. This omission is

significant because Judge Duckworth based his order upholding the assignment in significant part on the district court's one family/one judge policy and Master Gibson's having presided over the parties' NRS Chapter 432B proceeding from the start.

But, even apart from these waiver and preserved-error problems, the challenge still fails: Nevada statutes and court rules expressly authorize the family court division of the Eighth Judicial District Court to use hearing masters in juvenile dependency and delinquency matters, including contested TPR proceedings. DFS filed its motion to terminate Tahja's parental rights under NRS 432B.5901. Proceedings to terminate parental rights under NRS 432B.5901 through NRS 432B.5908 are conducted by the "court." The word "court," as used in NRS Chapter 432B, "has the meaning ascribed to it in NRS 62A.180." NRS 432B.050; *see* NRS 432B.010. And, by its terms, NRS 62A.180 defines "court" to include masters:

> 1. "Juvenile court" means each district judge who is assigned to serve as a judge of the juvenile court pursuant to NRS 62B.010 or court rule.
>
> 2. *The term includes a master who is performing an act on behalf of the juvenile court if:*
>
> *(a) The juvenile court delegates authority to the master to perform the act* in accordance with the Constitution of the State of Nevada; *and*
>
> *(b) The master performs the act within the limits of the authority delegated to the master.*

(emphases added).[3]

NRS 62B.020 specifies the training that a master of the juvenile court must complete. Addressing the scope of the delegation permitted, NRS 62B.030(1) permits the district court to order a juvenile court master to:

> (a) Swear witnesses.
>
> (b) Take evidence.
>
> (c) Make findings of fact and recommendations.
>
> (d) Conduct all proceedings before the master of the juvenile court in the same manner as a district judge conducts proceedings in a district court.

NRS 62B.030(3) and (4) lay out the processes whereby the parties can object and the district court must review the master's findings and recommendations, including the right of the parties "to request

[3]The majority parses NRS 62A.180 to support its argument that unconstitutional assignments are not legislatively authorized. But this goes without saying. A more reasonable reading of NRS 62A.180 is that the *delegation* must not amount to an unconstitutional abdication of adjudicative function to a nonconstitutional officer—an issue NRS 62B.030 and EDCR 1.45 and 1.46 obviate by the objection and review process they prescribe. *See In re A.B.*, 128 Nev. 764, 291 P.3d 122 (2012); *see also* discussion *infra* Part III.

a hearing de novo before the [district] court" and the authority of the reviewing district judge to approve or reject the findings and recommendations, in whole or in part, to order such relief as may be appropriate, and "to direct a hearing de novo" upon timely request therefor.

In addition to the statutes just cited, the district court relied on EDCR 1.45 and 1.46 to support its referral of the TPR hearing to a master. These local rules authorize the Eighth Judicial District Court to appoint hearing masters in Clark County juvenile dependency cases, including proceedings to terminate parental rights, whether conducted under NRS Chapter 128 or NRS Chapter 432B. Thus, by its express terms, EDCR 1.45(a)(1) states: "The juvenile dependency division judge must . . . [s]upervise the activities of the juvenile dependency division hearing masters . . . *in the performance of their duties pursuant to NRS Chapters 432B and 128*." (emphasis added). While NRS Chapter 432B addresses a range of juvenile dependency proceedings, NRS Chapter 128 solely addresses the termination of parental rights. EDCR 1.46(b) "derive[s] from NRS Chapter 432B" and authorizes dependency masters "to hear protective custody matters, pleas, *adjudicatory hearings*, [and] dispositions . . . followed by recommendations to the supervising dependency judge." EDCR 1.46(b)(1) (emphasis added); *see* EDCR 1.46(b)(3)-(9) (enumerating additional duties and powers). Under EDCR 1.46(g)(7), the district judge hears all objections to the master's findings and recommendations and may conduct a trial de novo. And EDCR 1.46(b)'s enumeration of powers "is not a limitation of powers of the family division dependency master. *The dependency masters have all the inherent powers of the Dependency Judge subject to the approval of the Dependency Judge.*" (emphasis added).

Though the majority opinion elides any mention of these Eighth Judicial District Court local rules, they have been in place—and approved by this court—for more than 40 years. *See In the Matter of the Adoption of New Rules of Practice for the Eighth Judicial Dist. Court of the State of Nev.*, ADKT 30 (Order, December 18, 1980), Rule 1.46, at 8-9 (providing for juvenile court referees). This court adopted and approved EDCR 1.45 and EDCR 1.46 in their current form after the notice and public hearing required by NRS 2.120(2) and NRCP 83. *See In the Matter of the Amendment of Eighth Judicial Dist. Court Rules*, ADKT 418 (Order Amending Eighth Judicial District Court Rules, June 29, 2011) (amending, inter alia, EDCR 1.45 and 1.46); *cf. State v. Frederick*, 129 Nev. 251, 254, 299 P.3d 372, 374 (2013) (addressing EDCR 1.48, another standing referral rule, and its approval by this court).

By their plain terms, these statutes and court rules authorized the district court's referral order and its rejection of L.L.S.'s objection thereto. Nonetheless, Tahja and L.L.S. argue that the authorization only applies to other types of juvenile dependency matters,

not TPR proceedings, and that without express legislative authority to use masters in TPR hearings, the referral violates the Nevada Constitution. They predicate their argument on this court's unpublished decision in *In re Parental Rights of K.J.B.*, Docket No. 71515 (Order of Reversal and Remand, Jan. 18, 2018).

K.J.B. was an appeal from a TPR order in an NRS Chapter 128 case. In *K.J.B.*, the district court referred the evidentiary hearing to a master and then adopted the master's findings and recommendations as its own. We reversed and remanded, citing article 6, section 6(2)(a) of the Nevada Constitution, which provides that "[t]he legislature may provide by law for . . . [r]eferees in district courts." *K.J.B.*, Docket No. 71515 (Order of Reversal and Remand, Jan. 18, 2018). Specifically, because "[t]he termination of parental rights is governed by NRS Chapter 128 and there is no statute within that chapter providing for the appointment of a referee or master," the court deemed the reference to a master unauthorized and reversed and remanded for a new hearing before a district judge. *Id.* Of note, *K.J.B.* arose under NRS Chapter 128, not NRS Chapter 432B; the appellant in *K.J.B.* was proceeding pro se; and neither NRS Chapter 432B, EDCR 1.45, nor EDCR 1.46 was addressed.

As an unpublished disposition, *K.J.B.* does not establish mandatory precedent. *See* NRAP 36(c)(2). And, for purposes of this appeal, it is not necessary to resolve whether EDCR 1.45 and EDCR 1.46 authorize the referral of TPR petitions under NRS Chapter 128 to hearing masters[4]—by its terms, EDCR 1.45(a)(1) says that they do—but preservation issues aside, this appeal does involve whether NRS Chapter 432B, EDCR 1.45, and EDCR 1.46 authorize their use in TPR proceedings initiated under NRS Chapter 432B. They *plainly* do. And, to the extent *K.J.B.* suggests that the judicial branch needs explicit legislative authorization to refer matters to a master by order or court rule—beyond that already provided by NRS 62A.180, NRS 62B.020, NRS 62B.030, and NRS 432B.050—it is incorrect. Article 6, section 6(2)(a) was added to the Nevada Constitution in 1986 to *increase* the Legislature's authority: "The legislature *may* provide by law for . . . [r]eferees in district courts." (emphasis added). But neither the text nor the history of this provision supports that it *diminishes* the judiciary's preexisting and

[4]Tahja argues allowing referral to masters in NRS Chapter 432B but not in NRS Chapter 128 TPR proceedings violates her right to equal protection under the Fourteenth Amendment to the U.S. Constitution. The briefing on this issue is inadequate, and Tahja concedes rational basis review applies. An NRS Chapter 432B hearing master's presumed familiarity with the family and the prior proceedings on the antecedent petition to declare the child in need of protection is enough to clear this low bar, even though, in this case, the master familiar with Tahja and L.L.S. did not end up presiding over the TPR hearing. *See Sereika v. State*, 114 Nev. 142, 149, 955 P.2d 175, 179 (1998) ("If any state of facts may reasonably be conceived to justify [the legislation], a statut[e] . . . will not be set aside." (alteration in original) (quoting *State v. Eighth Judicial Dist. Court*, 101 Nev. 658, 662, 708 P.2d 1022, 1025 (1985))).

inherent authority to appoint referees and masters when appropriate. *See* Nevada Ballot Questions 1986, Nevada Secretary of State, Question No. 2 (noting as an argument for passage that "[t]he proposed amendment would allow the legislature to expand the use of referees to assist judges in district courts").

Tahja's and L.L.S.'s suggestion that the referral to the master in this case violated NRCP 53 also fails. As written at the time relevant to this proceeding, NRCP 53 referred only to special masters, appointed in a particular case for a particular purpose.[5] It did not address standing referrals under local rules such as EDCR 1.45 and EDCR 1.46. And, apart from the standing referrals in those rules, because the order overruling L.L.S.'s prehearing objection to the master referral relied on Master Gibson's extensive involvement in the prior proceedings and intimate knowledge of the case, it provided the exceptional circumstances required to justify referral to a special master under NRCP 53. Although Master Gibson was elevated to the district court bench before the hearing occurred, neither L.L.S. nor Tahja called the change in master to the attention of the district judge, so the NRCP 53 special master referral stands.

III.

A.

As laid out above, Tahja offered no evidence or testimony in the original hearing before the master and then declined to pursue a de novo hearing or to present supplemental evidence before the district judge. Regardless of whether a TPR hearing before a master in the first instance is constitutionally adequate, a hearing de novo before the district judge by definition would have been. *See Hearing De Novo*, *Black's Law Dictionary* (11th ed. 2019) (defining the phrase as "[a] new hearing of a matter, conducted as if the original hearing had not taken place"). And, where such adequate procedures exist, a person cannot state a claim for denial of due process if that person has *elected to forgo* the same. *See Correa v. Nampa Sch. Dist. No. 131*, 645 F.2d 814, 817 (9th Cir. 1981); *see also Suckle v. Madison Gen. Hosp.*, 499 F.2d 1364, 1367 (7th Cir. 1974) (noting that "[j]udicial relief is not warranted where a plaintiff rejects a seemingly adequate hearing"); *cf. Riggins v. Bd. of Regents of Univ. of Neb.*, 790 F.2d 707, 712 (8th Cir. 1986) (noting, where a plaintiff chose not to file a grievance, that "[i]n so choosing, she waived any claim that the grievance procedure did not afford her the process she was due"). In short, Tahja was offered repeated opportunities to present

[5]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). As amended, NRCP 53(h) expressly provides for "standing" masters, in addition to "special" masters.

her case, and in particular, the chance to participate in a de novo hearing before the district judge—the very same procedure that the majority seeks to impose on remand—but declined. Accordingly, and necessarily, no due process problems arose.

Moreover, the majority justifies its reaching and resolving the issue of Tahja's purported due process right to have a district judge preside over her TPR hearing in the first instance based on L.L.S.'s objection to Master Gibson's appointment in the district court. But this is error for two separate reasons. First, one party's prehearing objection to proceeding before a master or magistrate does not excuse another party's post-hearing failure to avail herself of the opportunity to present live testimony before a district judge. Second, L.L.S.'s objections say nothing at all about due process. They stemmed solely from "the concerns expressed by the Supreme Court of Nevada [in] *In re K.J.B.* [*see* discussion *supra* Section II.B]. . . . That and nothing more is [L.L.S.'s] basis." Specifically, L.L.S. worried that assigning the matter to a master could lead to "[a]n appellate challenge [that] will cause a significant delay in permanency, and delays in permanency are undeniably harmful." Sadly, these concerns have proven prescient. And, perhaps more troubling, the harm L.L.S. feared is now inflicted without need: Tahja's affirmative waiver and the unpreserved error take the due process issue that the majority tackles out of play; but, even if the record were otherwise, on the merits, I cannot agree that the referral to a master under the procedures in place in this case offended due process.

B.

Beginning on ground fully shared—there is no dispute that terminating parental rights profoundly affects the lives of the parties involved. *See, e.g.*, *In re Parental Rights as to N.D.O.*, 121 Nev. 379, 384, 115 P.3d 223, 226 (2005). Still, this court has never before suggested that the weight of the private parental interests at issue categorically demands that the full scope of every judicial procedural protection must be in place. *See In re Parental Rights as to M.F.*, 132 Nev. 209, 215, 371 P.3d 995, 999 (2016) (holding that a TPR hearing is not a matter to which a right of jury trial attaches); *N.D.O.*, 121 Nev. at 384, 115 P.3d at 226 (recognizing that due process does not require an absolute right to counsel in a TPR proceeding). Indeed, while the majority looks to the State's interest in appointing a master to hear TPR proceedings and reduces it to the "need to relieve the court's docket congestion," this both ignores the valuable familiarity a master may establish with parents and their child, *see Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (noting that "the legislature and the judiciary act responsibly when they provide and explore new, flexible methods of adjudication, especially

where the evolution of the innovative mechanism is left in large part under the control of the judiciary itself"), and misunderstands the fundamental premise of *Mathews v. Eldridge*—which examines the private and public interests at stake in the underlying action as a whole, not in the implementation of the challenged process standing alone. 424 U.S. 319, 347-48 (1976) (noting that the public interest "includes" the administrative burden of increased procedures but that alone is not "controlling"). Accordingly, as this court has previously and repeatedly recognized, the State in fact has an interest of substantial importance in any TPR hearing, which aligns with that of the subject minor—namely, facilitating prompt and accurate decision-making so as to protect children from abuse and neglect and "ensure that they have a stable family life"—which interest "will almost invariably be [as] strong" as the parent's. *N.D.O.*, 121 Nev. at 384, 115 P.3d at 226; *see M.F.*, 132 Nev. at 213, 371 P.3d at 998 (stating that because "both [the State and the parent] have compelling interests, the analysis turns on an evaluation of the risk that the procedures used would have resulted in an erroneous decision").

Given the comparably weighted private and public interests in the TPR process, this court has previously assessed its fundamental fairness by looking to the third *Eldridge* factor—that is, the risk of an erroneous deprivation of the private interest through the procedures used, 424 U.S. at 335—and closely examined the specific facts of the case in question pursuant thereto. *See N.D.O.*, 121 Nev. at 384, 115 P.3d at 226. Here, as to this factor, the majority seems to suggest that the risk of error in having a master initially hear the evidence stems from the district court's "insulation" from observing the witnesses first hand; as noted above, it is for this purpose that the majority remands.

"To be sure, courts must always be sensitive to the problems of making credibility determinations on the cold record." *United States v. Raddatz*, 447 U.S. 667, 679 (1980). However, under NRS 62B.030(3)(c) and EDCR 1.46(g)(5), a party has the right to object to the findings and recommendations of the master (which Tahja did, but L.L.S. did not). And, under NRS 62B.030(3)(d) and EDCR 1.46(g)(7), a party may request a hearing de novo before the reviewing district judge (which neither Tahja nor L.L.S. did). Taken together, these rules endow the district judge with broad discretion to review a master's findings and recommendations, which discretion would notably include its ability to hear the witnesses live should it need to resolve conflicting credibility claims. *See also In re A.B.*, 128 Nev. 764, 771, 291 P.3d 122, 127 (2012) (noting in the context of NRS Chapter 432B hearings that "[o]n review, the judge may order de novo fact-finding, or alternatively, the judge may rely on the master's findings when the findings are supported by credible evidence" (internal quotation omitted)). And with regard to Tahja's case in particular, the record was not necessarily "cold"—the district judge was able to review the videorecorded testimony

of the witnesses in question. Moreover, and in any case, Tahja more than once passed on the opportunity to present any evidence to the district judge first hand.

The majority further suggests that the initial assignment of a TPR case to a master somehow offers a parent "less process." But this is fallacious. While generally the constitutional power of a final decision in child custody and other like matters "can be exercised only by the duly constituted judge, and . . . may not be delegated to a master or other subordinate official of the court," *A.B.*, 128 Nev. at 770, 291 P.3d at 127 (quoting *Cosner v. Cosner*, 78 Nev. 242, 245, 371 P.2d 278, 279 (1962)), the provisions discussed above avoid any such infirmity in this process: "[A]lthough a master has the authority to hear dependency cases and make findings and recommendations, a master does not possess the same powers conferred to a juvenile court judge . . . ." *Id.* at 770-71, 291 P.3d at 127. That is, "only the juvenile court judge makes the dispositional decision in a [juvenile dependency] matter." *Id*. at 771, 291 P.3d at 127; *see id*. at 770, 291 P.3d at 127 (citing EDCR 1.46 for the proposition that "[t]he final determination of the case rests with the juvenile court"); *see also* NRS 62B.030(4). And here, the district court followed *A.B.* and the applicable court rules and statutes by affording Tahja and L.L.S. the opportunity to object and to request a de novo hearing after the master offered her findings and recommendation and by reviewing the videorecorded evidentiary hearing proceedings.

Simply put, then, given the procedural protections laid out above and as applied, the district judge's review "serve[d] to enhance reliability and benefit [Tahja]." *Raddatz*, 447 U.S. at 684 (Blackmun, J., concurring). Put differently, Tahja was afforded procedures by which "a neutral decisionmaker [the master], after seeing and hearing the witnesses," rendered a decision against her. *Id.* Then, Tahja "received a second turn before *another* neutral decisionmaker [the district judge]," with whom she had the option to present her case entirely anew (though, as noted, she affirmatively chose to rely on the record created before the master in the first instance). *Id.* (emphasis added). By invalidating the district court's long-standing hearing master program, the majority actually reduces the process potentially available to a parent. And, because "such a result would tend to undermine, rather than augment, accurate decisionmaking," it ought not to be embraced under the guise of due process. *Id.* at 685.

C.

Finally, undertaking to define Tahja's due process rights on this record and these briefs is also unnecessarily high risk. While the majority does not directly address EDCR 1.45 and 1.46, its decision effectively invalidates their application in TPR cases and perhaps injects a question as to their continued viability in other cases as well. A better course would be to file an administrative docket petition

to repeal or amend these rules as applied to TPR proceedings under NRS Chapters 128 and 432B. An ADKT forum would allow policy input from all stakeholders, avoiding uncertainty. And a rule change would operate only prospectively, without potentially jeopardizing past or pending decisions and throwing already-vulnerable children back into a state of uncertain impermanence. This point has special consequence in this case where L.L.S., the minor child, has only ever asked for one thing: permanence, without unnecessary delay.

IV.

On this opaque record and without adequate briefing, we do not know and cannot say whether the failure to raise a due process challenge in district court or, in L.L.S.'s case, to continue to press her prehearing objection to the appointment of a master was strategic, not inadvertent—that is, a course Tahja and her counsel and L.L.S. and her separate counsel intentionally established after careful deliberation. *Cf. Pacemaker*, 725 F.2d at 542 (noting that consent of the parties to a hearing by a magistrate rather than a judge "eliminates constitutional objections"). And reasonable minds may differ as to the wisdom of using masters in TPR proceedings. But "great knowledge is a temptation as well as a resource: a temptation to blur the separation of powers, to shift the balance between the . . . courts and state and local government too far toward the courts, and to disregard procedural niceties, all in fulfillment of a confident sense of mission." *United States v. Bd. of Sch. Comm'rs of the City of Indianapolis*, 128 F.3d 507, 512 (7th Cir. 1997) (Posner, C.J.). And procedural safeguards—including, for instance, those generally limiting precedential decisions to issues actually pursued by the parties—relate to the very due process the majority opinion purports to protect; such safeguards should be afforded. *See Jenkins v. Missouri*, 216 F.3d 720, 726 (8th Cir. 2000). And here, where the only objection voiced in district court came prehearing and concerned the risk of undue delay, not due process, the unfairness is palpable.

Perhaps, if the process offered to Tahja had abruptly ceased with a binding pronouncement by the master without an opportunity for the district court's review; perhaps, if Tahja had objected to the appointment of the master—whether Master Gibson or any other—at any time before the district court, or had done so cogently on appeal; perhaps, if Tahja or L.L.S. had requested a de novo hearing or to offer live evidence and been rebuffed; perhaps then the record could support that the TPR process established in the Eighth Judicial District Court decades ago and approved by this court was not fundamentally fair. But this is not that case, and in this case, the record supports affirmance. Accordingly, I dissent.

IN THE MATTER OF THE PARENTAL RIGHTS AS TO T.M.R., A MINOR UNDER 18 YEARS OF AGE.

MARCUS STEVEN H., APPELLANT, *v.* STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES; AND T.M.R., A MINOR, RESPONDENTS.

No. 81032

May 27, 2021 487 P.3d 783

Appeal from a district court order terminating parental rights as to a minor child. Eighth Judicial District Court, Family Division, Clark County; Robert Teuton, Judge.

Affirmed.

Karen A. Connolly, Ltd., and *Karen A. Connolly*, Las Vegas, for Appellant.

Steven B. Wolfson, District Attorney, and *Felicia R. Quinlan*, Deputy District Attorney, Clark County, for Respondent State of Nevada Department of Family Services.

Legal Aid Center of Southern Nevada, Inc., and *Patrick M. Hirsch*, Las Vegas, for Respondent T.M.R.

Before the Supreme Court, PARRAGUIRRE, STIGLICH, and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

The termination of parental rights in a civil case is akin to the death penalty in a criminal case. In these cases no less than in other civil cases, it is of the utmost importance that the State comply with the rules of procedure. Thus, in parental rights cases, the State must follow procedural rules involving the disclosure of trial witnesses prior to trial.

Here, the State sought to terminate appellant's parental rights, and the case proceeded to trial. The State did not disclose a nonexpert witness until after the trial had commenced. Nevertheless, the district court allowed the witness to testify at trial, concluding that the nonexpert witness disclosure requirements in NRCP 16.2(e)(4)[1]

[1]NRCP 16.2(e)(4) provides for the pretrial disclosure of nonexpert witnesses:

> **Nonexpert Witness.** A party must disclose the name and, if known, the address and telephone number of each individual who has information or knowledge relevant to the value of assets or debts or to the claims or defenses set forth in the pleadings, or who may be called as a witness,

do not apply to termination of parental rights proceedings. At the conclusion of trial, the district court terminated appellant's parental rights.

In this opinion, we conclude that the nonexpert witness notice requirements in NRCP 16.2 apply to termination of parental rights proceedings. Although ambiguous when viewed in isolation, when read "in pari materia," it is clear that NRCP 16.1, 16.2, and 16.205 were intended to work together to cover the entire range of civil proceedings, including termination of parental rights proceedings. Indeed, reading these rules otherwise would produce an absurd result, permitting trial by ambush despite the profound interests at stake in such proceedings. We therefore hold the district court's failure to apply NRCP 16.2(e)(4)'s mandate regarding disclosure of witnesses was error. We conclude, however, that the error was harmless in this instance, as substantial evidence supports the district court's order terminating appellant's parental rights. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Appellant Marcus H. and Dana B. are respondent T.M.R.'s birth parents. While T.M.R. was an infant, Marcus and Dana lived with Dana's 100-year-old great-grandmother, Gladys S. During a fight between Marcus and Dana, Marcus hit Gladys in the face and damaged her home. As a result of this incident, several charges were filed. Marcus ultimately pleaded guilty to felony coercion and was sentenced to a minimum of 24 months and a maximum of 60 months in prison.

Meanwhile, Dana was arrested for driving while under the influence, while texting on a cell phone, without a driver's license, and with T.M.R. improperly restrained in the vehicle. Because both parents were incarcerated, the Department of Family Services (DFS) placed T.M.R. into protective custody and later placed him with a foster family. A caseworker began talking to Marcus about reunification with T.M.R. and created a formal case plan requiring Marcus to complete treatments for anger management, drug addiction, and domestic violence, as well as regular assessments regarding domestic violence.

Thereafter, DFS petitioned to terminate Marcus's and Dana's parental rights. At the time of trial, T.M.R. was three years old and had been in foster care for over a year.[2] Marcus, his DFS caseworker,

---

> at any stage of the proceedings, including for impeachment or rebuttal, identifying the subjects of the information and a brief description of the testimony for which the individual may be called. Absent a court order or written stipulation of the parties, a party must not be allowed to call a witness at trial who has not been disclosed at least 45 days before trial.

[2]Although the trial involved termination of both Marcus's and Dana's parental rights, this opinion addresses only the proceedings regarding Marcus.

and T.M.R.'s foster mother each testified. While Marcus admitted to prior drug-related convictions, Marcus denied having a substance abuse issue and blamed his relapses on Dana's drug use. Marcus also testified that he was not an angry person and had never before been in trouble for violent behavior. When asked about the incident with Gladys, Marcus testified that Gladys blocked his path, threw a bowl of milk in his face, and yelled at him to hit her in an effort to get him arrested.

Marcus's DFS caseworker testified that she created a case plan addressing his violent behavior and substance abuse. She testified that although Marcus was not in custody prior to sentencing in his felony case, he had not made timely progress on his case plan. Instead, during the time that Marcus was out of custody, he tested positive on one drug test and refused to submit to multiple other drug tests, all while minimizing his bad behaviors. T.M.R.'s foster mother testified that T.M.R. exhibited aggressive behaviors around and towards her (but not around or towards his foster father) when he first joined their family, and these behaviors reoccurred whenever T.M.R. returned from visiting his parents. The foster mother added that T.M.R.'s behavior had greatly improved with time and therapy. She further testified that T.M.R. did not recognize Marcus when they spoke on the telephone. Importantly, she stated that T.M.R. had bonded with his foster family, and they wanted to adopt him.

At the close of the first day of trial, the parties discussed the State's request to admit a transcript of Gladys's testimony, taken during the State's criminal case against Marcus, about the altercation with Marcus. Marcus objected to admission of the transcript. The district court declined to rule on the issue at that time and continued the trial. Prior to trial resuming, the State filed a notice naming Gladys as a witness. Marcus filed a motion in limine to exclude Gladys on the grounds that she was not timely disclosed pursuant to NRCP 16.2. The district court denied Marcus's motion, concluding NRCP 16.2's nonexpert witness disclosure requirements do not apply to termination of parental rights proceedings. The court further determined that although the State improperly noticed Gladys's prior criminal testimony as an exhibit, Marcus had "sufficient notice." Thereafter, Gladys testified about the altercation with Marcus.

At the conclusion of trial, the district court terminated Marcus's parental rights. The court concluded that termination was in T.M.R.'s best interests and that parental fault existed because T.M.R. had been out of the home for more than 14 months, seen significant behavioral improvements, and bonded with his foster family, and because Marcus had engaged in only "token efforts to avoid being [an] unfit parent or to eliminate the risk of serious physical, mental or emotional injury" to T.M.R., who faced a serious risk of physical, mental, or emotional injury if returned to Marcus's care, and failed to adjust his behavior or substantially comply with his case plan.

DISCUSSION

Marcus appeals, arguing that the district court erred by denying his motion in limine to exclude Gladys's testimony and that the court's decision to terminate his parental rights is not supported by substantial evidence.

The purpose of Nevada's termination of parental rights statute is to protect the child's welfare, not punish parents. *In re Parental Rights as to A.L.*, 130 Nev. 914, 918, 337 P.3d 758, 761 (2014). Nevertheless, we recognize that terminating parental rights is "tantamount to imposition of a civil death penalty," and we therefore closely scrutinize the district court's decision to terminate parental rights. *Id.* (internal quotation marks omitted). We first address whether the district court erred by failing to apply NRCP 16.2's witness disclosure requirement to Marcus's termination of parental rights proceeding before considering whether reversal is warranted.

NRCP 16.2's witness disclosure requirements apply to termination of parental rights proceedings

Generally, we review the district court's decision to grant or deny a motion in limine to exclude evidence for an abuse of discretion. *State ex rel. Dep't of Highways v. Nev. Aggregates & Asphalt Co.*, 92 Nev. 370, 376, 551 P.2d 1095, 1098 (1976). However, the district court's interpretation of a statute or rule presents a question of law that we review de novo. *See Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014).

Termination of parental rights proceedings are governed by the Nevada Rules of Civil Procedure. NRS 128.090(2). But the rules fail to clearly account for disclosure requirements in such proceedings. NRS 3.223(1)(a) establishes that "the family court has original, exclusive jurisdiction" in proceedings brought pursuant to NRS Chapter 128, which governs the termination of parental rights. Actions under the exclusive jurisdiction of the family court are exempt from NRCP 16.1's initial disclosure requirements. NRCP 16.1(a)(1)(B)(i). The drafters of this rule indicated that "[f]amily law actions are subject to the mandatory disclosure requirements of Rule 16.2 and Rule 16.205." *See* NRCP 16.1, Advisory Committee Note—2019 Amendment. However, while NRCP 16.2 is titled "Mandatory Prejudgment Discovery Requirements in Family Law Actions" (subject to exceptions not at issue here), its text lists specific areas of family law and does not include termination of parental rights actions:

> (a) **Applicability.** This rule replaces Rule 16.1 in all divorce, annulment, separate maintenance, and dissolution of domestic partnership actions. Nothing in this rule precludes a party from conducting discovery under any other of these rules.

Similarly, NRCP 16.205 "replaces [NRCP] 16.1 and 16.2 in all paternity and custody actions between unmarried parties," but does not expressly apply to termination of parental rights actions. NRCP 16.205(a). In sum, it is unclear which rule applies to termination of parental rights actions.

To resolve this ambiguity, we read these rules "in pari materia." Rules are "in pari materia" where "they involve the same classes of persons or things or seek to accomplish the same purpose or object." *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000) (interpreting NRS 687B.385). Interpreted "in pari materia," NRCP 16.1, 16.2, and 16.205 "must be read and construed together, and so harmonized as to give effect to [each of] them . . . ." *Presson v. Presson*, 38 Nev. 203, 208, 147 P. 1081, 1082 (1915).

Here, NRCP 16.1, 16.2, and 16.205 collectively provide witness disclosure requirements for civil proceedings. NRCP 16.1 governs most civil proceedings but not family law proceedings, and NRCP 16.2 and 16.205 cover family law proceedings. Neither NRCP 16.1 nor NRCP 16.205 directly governs here, however, as NRCP 16.1 exempts termination of parental rights actions from its purview, and NRCP 16.205 applies narrowly to paternity and custody actions between unmarried persons. Although arguably imprecise when viewed granularly, the unmistakable thrust of NRCP 16.1, 16.2, and 16.205, read together, is to broadly cover the gamut of civil proceedings. It follows that NRCP 16.2 must apply to termination proceedings to the extent practicable.

Pertinent here, we conclude that when read "in pari materia," NRCP 16.2(e)(4)'s witness disclosure requirement applies to termination of parental rights trials.[3] In reaching this conclusion, we note that separately construing NRCP 16.1, 16.2, and 16.205 in a vacuum and concluding that no part of any of those rules applies to termination of parental rights trials would lead to an absurd result—that of enabling the State to ambush a parent during trial with a surprise witness. *See State v. Webster*, 102 Nev. 450, 453, 726 P.2d 831, 833 (1986) ("[S]tatutory construction should always avoid an absurd result."); *cf. Turner v. State*, 136 Nev. 545, 553, 473 P.3d 438, 447 (2020) (addressing trial by ambush). Such a result would also frustrate the goals of the statutory scheme established in NRS Chapter 128. *See In re Parental Rights as to C.C.A.*, 128 Nev. 166, 169, 273 P.3d 852, 854 (2012) (noting that "to guard the rights of the parent and the child, the Nevada Legislature has created a statutory scheme intended to assure that parental rights are not erroneously

[3]We clarify that NRCP 16.2(e)(4) applies where a termination of parental rights petition proceeds to trial and that it requires a party to disclose witnesses 45 days prior to trial. We acknowledge that not all of NRCP 16.2 applies to all termination of parental rights proceedings. In particular, we note NRCP 16.2(c), which requires financial disclosures, does not apply.

terminated and that the child's needs are protected"). Therefore, the district court erred by concluding that NRCP 16.2 does not apply in this situation.[4]

Despite the State filing a notice listing multiple trial witnesses and indicating its intent to admit Gladys's deposition testimony as an exhibit at trial, and despite its filing of an affidavit for service by publication for Gladys more than four months before trial, the State failed to *actually notice* Gladys as a witness for trial. The State's complete failure to notice Gladys as a witness contravened NRCP 16.2(e)(4).[5] This was improper, particularly given that Marcus faced termination of his parental rights—the equivalent of the civil death penalty. We therefore conclude that the district court abused its discretion by failing to exclude Gladys's testimony pursuant to NRCP 16.2.

Nevertheless, the error does not warrant reversal if it is harmless and did not affect Marcus's substantial rights. *See* NRCP 37(c)(1); NRCP 61. We therefore next consider whether, exclusive of Gladys's unnoticed testimony, substantial evidence supports the district court's termination of Marcus's parental rights.

Substantial evidence supports the district court's termination of Marcus's parental rights despite the admission of Gladys's unnoticed testimony

Marcus argues that substantial evidence does not support a finding of parental fault or that termination was in T.M.R.'s best interests, pointing to evidence in the record that is favorable to him. However, we do not reweigh the evidence on appeal or substitute our judgment for the district court's, *see In re Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 763 (2006), and we "will uphold the district court's termination order when it is supported by substantial evidence." *C.C.A.*, 128 Nev. at 169, 273 P.3d at 854. Substantial evidence "is evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

"The primary consideration in any proceeding to terminate parental rights must be whether the best interests of the child will be served by the termination." NRS 128.105(1). Termination of parental rights must be based upon two findings: first, that it is in the child's best interests; and second, that parental fault exists. NRS 128.105(1)(a)-(b). Parental fault includes the failure of parental adjustment, mere token efforts to care for the child, and risk

[4]We are unpersuaded by the State's argument that NRCP 16.2's witness disclosure requirements conflict with NRS Chapter 432B.

[5]We note that the State failed to disclose any of its witnesses 45 days before trial began in accordance with NRCP 16.2(e)(4), but Marcus objected only to the State's failure to disclose Gladys. Therefore, we address only the State's failure to disclose Gladys.

of injury to the child if he or she is returned to the parent. NRS 128.105(1)(b).

Marcus failed to rebut the presumption that termination of his parental rights was in T.M.R.'s best interests

When a child has resided outside of his or her home pursuant to a placement under NRS Chapter 432B "for 14 months of any 20 consecutive months, the best interests of the child must be presumed to be served by the termination of parental rights." NRS 128.109(2). To rebut this presumption, the parent must establish that termination is not in the child's best interests by a preponderance of the evidence. *In re J.D.N.*, 128 Nev. 462, 471, 283 P.3d 842, 848 (2012). To determine whether the parent has rebutted the presumption, courts consider (1) "[t]he services . . . offered to the parent . . . to facilitate a reunion with the child"; (2) "[t]he physical, mental or emotional condition and needs of the child"; (3) "[t]he effort the parent . . . made to adjust their circumstances, conduct or conditions to make it in the child's best interests to return the child to his or her home after a reasonable length of time"; and (4) "[w]hether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent . . . within a predictable period." NRS 128.107; *see also J.D.N.*, 128 Nev. at 474, 283 P.3d at 850 ("When the petitioner has demonstrated that NRS 128.109's presumptions apply, the burden to present evidence regarding NRS 128.107's factors lies with the parent."). "[R]egular visitation or other contact with the child which was designed and carried out in a plan to reunite the child with the parent" can indicate the parent made the requisite effort to adjust their circumstances. NRS 128.107(3)(b). Additionally, "[i]f the child was placed in a foster home, the district court must consider whether the child has become integrated into the foster family and the family's willingness to be a permanent placement." *Matter of S.L.*, 134 Nev. 490, 497, 422 P.3d 1253, 1259 (2018); *see* NRS 128.108 (imposing additional considerations where the child is living in a foster home).

Here, the presumption in favor of termination of Marcus's parental rights applies because T.M.R. was placed in a foster home and lived outside Marcus's home for over 14 months. Therefore, the burden shifted to Marcus to rebut the presumption. The child's needs "for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights." NRS 128.005(2)(c). The record shows that Marcus's home environment was chaotic and that T.M.R.'s behavior improved after DFS placed him with his foster family. T.M.R. bonded with his foster family, who wanted to adopt him, and he did not recognize Marcus while talking to him on the telephone. Moreover, Marcus's testimony shows he was unable to provide for T.M.R.'s needs within a reasonable amount of time. He admitted to being in

prison following an altercation with Gladys, and he testified he was ineligible for parole until over three years after T.M.R. was placed into protective custody.

Further, the record supports the district court's conclusion that when Marcus was not in custody prior to sentencing, he failed to adjust his conduct and behavior to make a safe environment for T.M.R.: Marcus minimized his illicit drug use, considered Dana's illicit drug use to be more serious than his own, blamed her for his relapses, and refused to take drug tests requested by DFS. The record further shows that Marcus minimized his angry behavior and failed to show improvement in that area. Finally, Marcus did not timely comply with his case plan or make improvements as necessary to create a safe and stable environment for T.M.R. Therefore, we conclude that substantial evidence supports the district court's finding that Marcus failed to rebut the presumption in favor of termination and that termination of his parental rights was in T.M.R.'s best interests.

The record supports the court's parental fault findings

As noted, in addition to finding that the child's best interests would be served by terminating parental rights, the district court must find parental fault under at least one of the factors enumerated in NRS 128.105(1)(b). Relevant here, the district court may find parental fault if the parent demonstrates "[f]ailure of parental adjustment." NRS 128.105(1)(b)(4). Failure of parental adjustment occurs when a parent, within a reasonable time, is unwilling or unable to substantially correct the circumstances that led to the child being placed outside of the home. NRS 128.0126.

Here, Marcus began discussing the issues precluding T.M.R. from being returned to his care with his caseworkers six months before the formal adoption of his case plan, yet when he was out of custody prior to sentencing, he failed to complete the domestic violence treatment required by his case plan.[6] Then, only after sentencing and incarceration did Marcus complete anger-management therapy. And at trial he refused to acknowledge that he had any anger issues. The testimony of Marcus and his caseworker indicates that Marcus refused to take responsibility for his altercation with Gladys, blaming her instead. Although Marcus attended substance abuse treatment, he did not believe he had an issue with controlled substances—even though at trial he admitted to "social use" of methamphetamine, admitted that he failed to submit to numerous drug tests requested by DFS, and conceded that he relapsed into drug abuse. Importantly, Marcus blamed Dana for his drug abuse

[6]To the extent Marcus argues that DFS failed to make reasonable efforts to promote reunification, we decline to address that argument, as Marcus raises it for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

relapses instead of taking responsibility. Based on the foregoing, we conclude that substantial evidence supports the district court's finding of failure of parental adjustment.[7]

To be sure, the district court's improper admission of Gladys's unnoticed testimony placed Marcus in the difficult position of suddenly having to prepare for an unanticipated witness. We are confident, however, that the error was harmless given the substantial, if not overwhelming, evidence supporting the district court's termination of Marcus's parental rights.[8]

CONCLUSION

NRCP 16.2's nonexpert witness disclosure requirements apply to termination of parental rights cases. Thus, the district court erred by denying Marcus's motion in limine to exclude an unnoticed nonexpert witness during trial. The error was harmless, however, because substantial evidence supports terminating Marcus's parental rights, even without the witness's testimony. Therefore, we affirm the district court's order terminating Marcus's parental rights.

Parraguirre and Stiglich, JJ., concur.

---

[7]Because substantial evidence supports the district court's findings of failure of parental adjustment, we need not address whether the evidence also supports the district court's findings of risk of injury and token efforts. *See In re Parental Rights as to K.D.L.*, 118 Nev. 737, 744-45, 58 P.3d 181, 186 (2002) (explaining that the district court must find that at least one of the factors in NRS 128.105 exists to support a finding of parental fault).

[8]We do not consider Marcus's argument that termination of his parental rights was fundamentally unfair and violated his due process rights, as Marcus failed to present a cogent argument supported by relevant authority. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

GREG ELLIOT PELKOLA, Appellant, *v.* HEIDI MARIE PELKOLA, Respondent.

No. 80763

May 27, 2021 487 P.3d 807

Appeal from district court orders in a child-custody case granting a petition for permission to relocate and awarding attorney fees. Eighth Judicial District Court, Family Division, Clark County; David S. Gibson, Jr., Judge.

Reversed and remanded.

[Rehearing denied July 19, 2021]

[En banc reconsideration denied September 23, 2021]

The Grimes Law Office and *Melvin R. Grimes*, Las Vegas, for Appellant.

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

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

OPINION

By the Court, Parraguirre, J.:

NRS 125C.006(1)(b) provides in relevant part that a "custodial parent [who] intends to relocate his or her residence to a place outside of this State . . . and . . . desires to take the child" must first petition the district court for permission if the noncustodial parent refuses to consent to relocation. In this appeal, we consider whether that provision applies only to relocation *from Nevada* to a place outside of Nevada, or also *from a place outside of Nevada* to *another* place outside of Nevada. We conclude that it applies to both. We also clarify that the district court must issue specific findings for each of the NRS 125C.007(1) factors and, if applicable, the NRS 125C.007(2) factors.

FACTS

Appellant Greg Pelkola and respondent Heidi Pelkola divorced in 2014. They have three minor children, of whom they share legal custody. Heidi has primary physical custody of the children.

Sometime after their divorce, Heidi petitioned the district court under NRS 125C.006 for permission to relocate with the children from Nevada to Arizona. The district court granted her petition and she and the children moved to Arizona.

In October 2019, Heidi petitioned the district court under NRS 125C.006 for permission to again relocate with the children, this time from Arizona to Ohio. After a hearing, the district court concluded that Heidi did not need permission for the current relocation, because it had already granted her permission to move from Nevada to Arizona. It nonetheless granted her petition and issued limited findings as to the relocation's effect on Greg's visitation rights.

Greg now appeals, arguing that the district court misinterpreted NRS 125C.006, the statute under which Heidi petitioned for permission to relocate. He argues that it applies not just to a relocation *from* Nevada to a place outside of Nevada, but to subsequent relocations from a place outside of Nevada to another place outside of Nevada. He argues that, therefore, the district court abused its discretion by failing to issue the findings that NRS 125C.007 requires for a petition under NRS 125C.006. We agree and reverse and remand for the district court to hold an evidentiary hearing and issue those findings.

DISCUSSION

NRS 125C.006(1) applies

The first issue is whether NRS 125C.006(1) applies here. It provides, in relevant part, as follows:

> 1. If . . . the custodial parent intends to relocate his or her residence to a place outside of this State or to a place within this State that is at such a distance that would substantially impair the ability of the other parent to maintain a meaningful relationship with the child, and . . . desires to take the child with him or her, the custodial parent shall, before relocating:
>
> (a) Attempt to obtain the written consent of the noncustodial parent to relocate with the child; and
>
> (b) If the noncustodial parent refuses to give that consent, petition the court for permission to relocate with the child.

Greg argues that NRS 125C.006 applies here. He argues that its plain meaning requires permission to relocate a child to a place outside of Nevada—not, as the district court concluded, only *from* Nevada to a place outside of Nevada. He argues that, therefore, the plain meaning applies not only to the first relocation *from* Nevada, but to subsequent relocations to *other* places outside Nevada. He notes that the district court's interpretation would allow a parent to move with the court's permission from Nevada to Arizona, and then simply move to Japan without permission or giving the other parent an opportunity to be heard.

Heidi responds that NRS 125C.006 does not apply. She argues that NRS 125C.006's plain meaning applies only to "relocating out of this state." She reasons that the statute does not apply here because she is not moving from Nevada to Ohio, but from Arizona

to Ohio. She concludes that she need not have petitioned for permission to move to Ohio.

We review statutory-interpretation issues de novo. *Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020). We will interpret a statute by its plain meaning unless various exceptions apply, such as ambiguity or absurd results. *Id.* But the parties agree that none of those exceptions apply and that we should interpret NRS 125C.006 only by its plain meaning, so we have limited our analysis accordingly. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").

NRS 125C.006(1) applies in two circumstances: when the parent with primary physical custody "intends to relocate his or her residence [1] to a place outside of this State or [2] to a place within this State that is at such a distance that would substantially impair the ability of the other parent to maintain a meaningful relationship with the child," and intends to take the child.

Heidi's analysis of NRS 125C.006(1) is identical to the district court's. Both refer to the statute's "plain" meaning but reword the relevant portion before interpreting it. Both refer to "relocating out of" Nevada, but the statute itself refers to "relocat[ing] . . . to a place outside of" Nevada. NRS 125C.006(1). Their phrasing suggests that it applies only to *leaving* Nevada ("relocating out of" Nevada), but the statute's true phrasing plainly includes moving from a place outside of Nevada to some other place outside of Nevada ("relocat[ing] . . . to a place outside of" Nevada).

Heidi is the parent with primary physical custody, she intended to move to a place outside of Nevada (Ohio), and she intended to take the children, so NRS 125C.006 plainly applies here.

The district court abused its discretion by issuing inadequate findings under NRS 125C.007

Although the district court erroneously determined that NRS 125C.006 does not apply and that Heidi did not need permission to relocate, it nonetheless gave her that permission and issued some findings under NRS 125C.007. Because NRS 125C.006 *did* apply and NRS 125C.007 requires the district court to issue certain findings if NRS 125C.006 applies, the next issue is whether the district court abused its discretion by issuing inadequate findings under NRS 125C.007.

Greg argues that it did. He notes that the district court did not address even the threshold requirements, such as the children's best interest, that the petitioning parent must prove before the district court considers several other relocation factors. So he asks us to

remand for the district court to hold an evidentiary hearing and issue findings.

Heidi responds that the district court did not need to issue the findings because NRS 125C.006 does not apply. She acknowledges that the district court made some findings but she does not address their adequacy. She adds that Greg waived an evidentiary hearing by agreeing that one was unnecessary.[1]

NRS 125C.007(1) requires a parent petitioning for permission to relocate under NRS 125C.006 to demonstrate to the court that:

> (a) There exists a sensible, good-faith reason for the move, and the move is not intended to deprive the non-relocating parent of his or her parenting time;
>
> (b) The best interests of the child are served by allowing the relocating parent to relocate with the child; and
>
> (c) The child and the relocating parent will benefit from an actual advantage as a result of the relocation.

The district court must issue specific findings for each of the NRS 125C.007(1) factors. *See Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015) (holding that the district court must issue specific findings when making a best-interest determination). The district court did not do so here, so it abused its discretion by permitting Heidi to relocate.

Further, NRS 125C.007(2) provides that, if the petitioning parent proves the factors under NRS 125C.007(1),

> the court must then weigh the following factors and the impact of each on the child, the relocating parent and the non-relocating parent, including, without limitation, the extent to which the compelling interests of the child, the relocating parent and the non-relocating parent are accommodated:
>
> (a) The extent to which the relocation is likely to improve the quality of life for the child and the relocating parent;
>
> (b) Whether the motives of the relocating parent are honorable and not designed to frustrate or defeat any visitation rights accorded to the non-relocating parent;
>
> (c) Whether the relocating parent will comply with any substitute visitation orders issued by the court if permission to relocate is granted;
>
> (d) Whether the motives of the non-relocating parent are honorable in resisting the petition for permission to relocate or to what extent any opposition to the petition for permission to relocate is intended to secure a financial advantage in the form of ongoing support obligations or otherwise;

[1]As we conclude, the district court must issue findings under NRS 125C.007, so we are unpersuaded that either party may waive the necessary evidentiary hearing.

(e) Whether there will be a realistic opportunity for the non-relocating parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship between the child and the non-relocating parent if permission to relocate is granted; and

(f) Any other factor necessary to assist the court in determining whether to grant permission to relocate.

As with NRS 125C.007(1), the district court must issue specific findings for each of the applicable NRS 125C.007(2) factors. Here, the district court's only relevant findings were that "it does not believe that Heidi's move to Ohio would substantially impede the current timeshare," and that "Greg can still exercise his current timeshare." Those findings seem to allude to NRS 125C.007(2)(e), but the district court abused its discretion by failing to issue specific findings under the other factors, all of which may be applicable in this case.

CONCLUSION

NRS 125C.006(1)(b) applies not only to relocation *from* Nevada to a place outside of Nevada, but also from *a place outside of* Nevada to *another* place outside of Nevada. Further, the district court must issue specific findings for each of the NRS 125C.007(1) factors and, if applicable, the NRS 125C.007(2) factors. Because Heidi sought to move with the children from Arizona to Ohio and Greg did not consent, NRS 125C.006(1)(b) applies. And, because the district court concluded otherwise, it abused its discretion by failing to issue specific findings under the NRS 125C.007 factors. For those reasons, we reverse and remand to the district court for findings under each of the applicable NRS 125C.007 factors. We also reverse the district court's award of attorney fees as to the petition to relocate and instruct the district court to recalculate the award as necessary.[2]

Stiglich and Silver, JJ., concur.

---

[2]Greg argues that the district court abused its discretion by awarding Heidi additional attorney fees. But he cites no authority and his argument is not cogent, so we decline to consider it. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

STAVROS ANTHONY, an Individual, Appellant, *v.* ROSS MILLER, an Individual; and CLARK COUNTY BOARD OF COMMISSIONERS, a Local Government Entity, Respondents.

No. 82269

June 10, 2021 488 P.3d 573

Appeal from a final judgment dismissing a complaint in an election matter. Eighth Judicial District Court, Clark County; Elizabeth Gonzalez, Judge.

Affirmed.

Hutchison & Steffen, PLLC, and *Michael K. Wall, Mark A. Hutchison, Jacob A. Reynolds*, and *Piers R. Tueller*, Las Vegas, for Appellant.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager* and *Daniel Bravo*, Las Vegas; *Clark Hill PLLC* and *Dominic P. Gentile* and *John A. Hunt*, Las Vegas, for Respondent Ross Miller.

Steven B. Wolfson, District Attorney, and *Mary-Anne Miller*, County Counsel, Clark County, for Respondent Clark County Board of Commissioners.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Hardesty, C.J.:

Appellant Stavros Anthony lost by a margin of 15 votes in the November 3, 2020, general election for Clark County Commission District C. He argues that a new election is required pursuant to NRS 293.465 because the number of irregularities in the conduct of the election exceeded the narrow margin of victory. NRS 293.465 provides for a new election when "an election is prevented in any precinct or district by reason of the loss or destruction of the ballots intended for that precinct, or any other cause." We conclude that Anthony's challenge does not warrant a new election under NRS 293.465, as nothing prevented the election from occurring or voters from casting their votes in the election. Rather, when a candidate challenges an election based on errors in the conduct of the election, as Anthony has done here, an election contest pursuant to NRS 293.407-.435 is the exclusive mechanism for such a challenge.

[1]The Honorable Abbi Silver, Justice, voluntarily recused herself from participation in the decision of this matter.

Because Anthony's challenge to the election under NRS 293.465 fails, we affirm the judgment of the district court.

FACTS AND PROCEDURAL HISTORY

Anthony ran against respondent Ross Miller in the November 3, 2020, general election for the Clark County Commission District C seat. Miller won by a margin of 15 votes[2] out of a total of 153,169 votes. When the Clark County Board of Commissioners met to canvass the results of the election, they learned from the Clark County Registrar of Voters that there were 139 unexplained discrepancies between the number of voters who signed in and the number of votes counted at the 218 precincts that comprise District C. Because the number of discrepancies exceeded the margin of victory for the District C seat, the Registrar opined that he could not verify that those discrepancies did not affect the vote count.[3] Based on the Registrar's representations, the Board initially declined to certify the District C returns and voted to hold a special election for the District C seat. However, the Board later reconsidered its decision and voted to certify the District C returns.

Before the Board reconsidered its decision, Anthony applied to the Board for a new election pursuant to NRS 293.465 and submitted an affidavit from the Registrar regarding the unexplained discrepancies in the election. Anthony also sought declaratory and injunctive relief and a writ of mandamus from the district court requiring the Board to hold a new election for the District C seat pursuant to NRS 293.465. He argued that the Board must hold a new election where the number of irregularities in the conduct of the election called into question the accuracy of the vote count. In response, Miller argued that the election was not prevented in any precinct, as is necessary for NRS 293.465 to apply, and the only way Anthony could challenge the election results was by filing an election contest in the district court pursuant to NRS 293.410.

The district court ultimately denied Anthony relief, finding that the election was not prevented within the meaning of NRS 293.465. The district court concluded that NRS 293.465 applies only when an election has been "prevented from occurring, for instance due to a natural disaster, or an accident suffered by the vehicle transmitting the ballots, or some similar incident." Because the "results of every race [had] been canvassed and certified [and no] precinct failed to complete its election," the district court concluded that a

[2]This was the total margin of victory following a recount.

[3]The Registrar later explained that irreconcilable discrepancies occur in every election and could be caused by voters signing in but leaving before casting their ballots, staff inadvertently canceling voter sign-ins, staff failing to handle troublesome machines correctly and causing double entries, or staff reactivating voter cards. The Registrar was unable to identify the cause of the 139 unexplained discrepancies in District C.

new election was not warranted under NRS 293.465. This appeal followed.[4]

DISCUSSION

Anthony argues that the district court interpreted NRS 293.465 too narrowly and that an election is effectively "prevented" when errors in the conduct of the election make it impossible for the will of the voters to be known. Miller, on the other hand, argues that NRS 293.465 only concerns limited instances in which an election or part of an election is *literally* prevented from occurring.

Because this case presents an issue of statutory interpretation, our review is de novo. *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010). When the statute's language is clear and unambiguous, we give effect to its plain meaning. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). If "a statute is susceptible of another reasonable interpretation, we must not give the statute a meaning that will nullify its operation, and we look to policy and reason for guidance." *Id.* at 109-10, 225 P.3d at 790. Further, this court will interpret a statute in harmony with other statutes whenever possible. *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993).

NRS 293.465 provides:

> If an election is prevented in any precinct or district by reason of the loss or destruction of the ballots intended for that precinct, or any other cause, the appropriate election officers in that precinct or district shall make an affidavit setting forth that fact and transmit it to the appropriate board of county commissioners. Upon receipt of the affidavit and upon the application of any candidate for any office to be voted for by the registered voters of that precinct or district, the board of county commissioners shall order a new election in that precinct or district.

This statute, by its plain terms, applies only when an election is "prevented" due to "the loss or destruction of ballots . . . or any other cause." No ballots were lost or destroyed here; instead, this appeal turns on whether the election was "prevented" by "any other cause." Anthony reads this language expansively as requiring a new election whenever errors in the conduct of the election may have affected the election results. We conclude that this interpretation is

[4]Anthony appeals from both the denial of his motion for a preliminary injunction and the denial of his motion for a writ of mandamus and dismissal of his complaint. We conclude that his appeal from the denial of injunctive relief is moot because the relief sought by Anthony in the district court—an injunction preventing the Board from certifying the District C election—can no longer be granted. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (concluding that an appeal is moot when the court cannot "grant effective relief" from the district court's order).

unreasonable when considered in the context of the election contest statutes in NRS Chapter 293.

NRS 293.407-.435 sets forth a process by which a candidate may contest an election based on errors in the conduct of the election. *See* NRS 293.410(2). An election contest must be filed in the district court within a short time after the election results are certified, NRS 293.407; NRS 293.413(2), and must be heard by the district court in an expedited manner so that the "results of elections shall be determined as soon as practicable," NRS 293.413(2). If the district court finds that the election contest has merit, the district court may annul or set aside the election and, unless the district court declares a candidate elected, the certificate of election issued is void and the office is vacant. NRS 293.417(4). The grounds for an election contest include votes that were not properly counted, illegal votes that were improperly cast or counted, and errors by the election board "in conducting the election or in canvassing the returns." NRS 293.410(2)(c)(3), (2)(d). It is thus clear from the election-contest statutes that the Legislature has established a carefully delineated and accelerated procedure by which a candidate may challenge the conduct of the election, including any discrepancies or errors that may have affected the outcome of the election. And the Legislature has seen fit to grant the judiciary, not the Board, the authority to decide such a contested county election.

To interpret NRS 293.465 in the manner urged by Anthony—as requiring the Board to call for a new election when unexplained discrepancies exceed the margin of victory—would conflict with the election-contest framework. *See Szydel v. Markman*, 121 Nev. 453, 457, 117 P.3d 200, 202-03 (2005) (providing that when two unambiguous statutes "conflict with each other when applied to a specific factual situation," this court must attempt to harmonize them). In other words, Anthony's proffered interpretation would effectively give the Board the authority to decide certain challenges to an election, such as votes not being counted and errors in conducting the election, even though NRS 293.410 specifically provides for those challenges to be made to the district court. *See* NRS 293.407. And, under Anthony's interpretation, the remedy for such challenges would be a new election—the most costly and time-consuming possible remedy—rather than annulment of the certificate of election and appointment of an individual to the office by the Governor. *See* NRS 244.040(1) (providing for a vacancy in the Board to be filled by appointment of the Governor). Moreover, unlike the election-contest statutes, NRS 293.465 does not set forth strict statutory timelines for challenging the election and litigating the time-sensitive challenge, which might prevent such challenges from being decided promptly.

Anthony nevertheless argues that an election contest is not the exclusive remedy under the circumstances here, where the number

of unexplained discrepancies exceeds the margin of victory and those discrepancies could represent voters whose votes were counted twice or not at all. In support, he relies on *LaPorta v. Broadbent*, in which this court stated that "the real will of the electors should not be defeated by errors in the conduct of an election." 91 Nev. 27, 30, 530 P.2d 1404, 1406 (1975) (citing NRS 293.127, which provides for a liberal interpretation of the election statutes to ensure "the real will of the electors should not be defeated"). Based on the language in *LaPorta* and NRS 293.127, he argues that NRS 293.465 is not just about whether an election occurred but rather whether errors in conducting the election prevented an accurate determination of the real will of the voters. And, when the margin of victory is so narrow that discrepancies in the election make it impossible for the will of the voters to be known, he contends that the election has been "prevented" under NRS 293.465.

We conclude that Anthony reads *LaPorta* too broadly. *LaPorta* concerned an election in which a voting machine did not include the candidates for the state assembly race on the ballot, and we held that a new election was required because voters were prevented from being able to vote for those candidates. The only question before this court in *LaPorta* was whether NRS 293.465 required a new election when ballots were unavailable. *See LaPorta*, 91 Nev. at 29-30, 530 P.2d at 1406 (characterizing the question before it as "what happens when the ballots aren't there but the voters are"); *id.* (stating that "NRS 293.465 is unequivocal on the subject of a faulty election when the ballots are unavailable" and concluding that the election was prevented by the "absence of ballots"). The statement relied upon by Anthony explains the need for a new election under those circumstances; it does not stand for the proposition that a new election is required whenever errors in the conduct of the election cast doubt on the election results. In fact, as our caselaw makes clear, the key purpose of requiring a new election when an election is prevented is to ensure the opportunity for voter participation in the election. *See id.* at 30, 530 P.2d at 1406 ("The fundamentals of suffrage require that electors shall have the opportunity to participate in elections . . . ."); *cf. State ex rel. McMillan v. Sadler*, 25 Nev. 131, 191, 58 P. 284, 296 (1899) (stating that a new election would protect voters' constitutional rights and allow them "an opportunity of expressing their choice for any and all candidates for office at a different time and in due form of law"). Accordingly, when voters have the opportunity to participate in an election and are not prevented from voting, then NRS 293.465 is not implicated.

Thus, reading NRS 293.465 in harmony with the election-contest statutes, we conclude that the Legislature did not intend for NRS 293.465 to apply when an election actually occurs in each precinct. Instead, NRS 293.465 requires some event that, similar to the loss or destruction of ballots, prevents eligible voters from casting their

votes. Once an election takes place and the voters have had the opportunity to vote, any challenge to the conduct of the election must proceed by way of an election contest brought pursuant to NRS 293.407-.435.

CONCLUSION

Because voters had the opportunity to vote in the November 3, 2020, general election and were not prevented from casting their votes for District C, we conclude that the district court properly found that the election was not "prevented" under NRS 293.465. Accordingly, we affirm the judgment of the district court.[5]

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

---

[5]We note that Anthony also challenges the district court's finding that the Registrar's affidavit was not an affidavit submitted for the purposes of NRS 293.465. Because we conclude the election was not "prevented" under NRS 293.465, we need not address whether the affidavit would satisfy the requirements of the statute.