GUILLERMO RENTERIA-NOVOA, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 68239

March 30, 2017 391 P.3d 760

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Reversed and remanded.

Guillermo Renteria-Novoa, Carson City, in Pro Se.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, Clark County, for Respondent.

Before PICKERING, HARDESTY and PARRAGUIRRE, JJ.

OPINION

Per Curiam:

Appellant Guillermo Renteria-Novoa was convicted, pursuant to a jury verdict, of 36 felony sexual offenses and sentenced to a total term of life with the possibility of parole after 85 years. After the judgment of conviction was affirmed on direct appeal, Renteria-Novoa filed a timely pro se postconviction petition for a writ of habeas corpus in the district court and moved for the appointment of counsel. Under Nevada law, the appointment of postconviction counsel was discretionary with the district court because Renteria-Novoa had not been sentenced to death. *Compare* NRS 34.750(1), *with* NRS 34.820(1). Exercising that discretion, the district court declined to appoint postconviction counsel and denied the petition following a hearing at which Renteria-Novoa was not present.[1] This appeal followed. We take this opportunity to address the factors that are relevant to the district court's exercise of its discretion to appoint postconviction counsel under NRS 34.750(1). Because we conclude that the district court abused its discretion, we reverse and remand for further proceedings.[2]

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[1]Senior Judge Charles Thompson presided over the hearing on the postconviction petition and orally denied the petition and the motion for appointment of counsel. Judge Johnson entered the written order denying the petition and motion.

[2]Although this matter was docketed before the amendments to the Nevada Rules of Appellate Procedure that allow parties appearing without the assistance of counsel to file briefs and other documents without seeking leave of court, *see* NRAP 28(k) (effective October 1, 2015); NRAP 46A (effective October 1, 2015), we have considered the pro se brief received on October 20, 2015, and the pro se informal brief received on February 12, 2016.

Under NRS 34.750(1), the district court has discretion to appoint counsel to represent a petitioner who has filed a postconviction petition for a writ of habeas corpus if (1) the petitioner is indigent and (2) the petition is not summarily dismissed. The statute sets forth a nonexhaustive list of factors that the district court "may consider" in deciding whether to appoint postconviction counsel: the severity of the consequences that the petitioner faces, the difficulty of the issues presented, the petitioner's ability to comprehend the proceedings, and the necessity of counsel to proceed with discovery. We review the district court's decision to deny the appointment of counsel for an abuse of discretion.

The threshold requirements for the appointment of postconviction counsel were met in this case. First, the district court necessarily found that Renteria-Novoa was indigent when it granted him permission to proceed in forma pauperis in the postconviction proceedings. Second, the petition was not subject to summary dismissal as it was Renteria-Novoa's first petition challenging the validity of his judgment of conviction and sentence. *See* NRS 34.745(1), (4).

In briefly considering some of the factors identified in NRS 34.750(1), the district court noted in its written order that Renteria-Novoa had not demonstrated that the issues were difficult, that he was unable to comprehend the proceedings, or that discovery was needed. We disagree.

The motion for appointment of postconviction counsel generally tracked the factors set forth in NRS 34.750(1) without much explanation. With respect to Renteria-Novoa's ability to comprehend the proceedings in particular, the motion recited that he had "very limited knowledge of the law and process thereof." The petition made a similar representation, but it also indicated that Renteria-Novoa has limited English-language proficiency. The potential language barrier is further supported by the trial record, which shows that Renteria-Novoa had the assistance of a Spanish language interpreter throughout the trial proceedings. The use of an interpreter throughout trial indicates that Renteria-Novoa may be unable to comprehend the postconviction proceedings due to a language barrier. While the district court specifically found that Renteria-Novoa did not demonstrate an inability to comprehend the proceedings, this finding, which was made after a hearing where Renteria-Novoa was not present and which appears to have been based solely on the petition, lacks support in the record, particularly as the petition was not well pleaded and Renteria-Novoa had previously needed an interpreter.

The other factors identified in NRS 34.750(1) also weigh in favor of the appointment of counsel in this case. The consequences that Renteria-Novoa faces are severe: he has been convicted of 36 felony offenses following a jury trial and is serving what arguably is the

functional equivalent of a life-without-parole sentence as he must serve approximately 85 years before being eligible for release on parole. This petition is Renteria-Novoa's only opportunity to assert ineffective-assistance and other claims that could not have been raised at trial or on direct appeal. The pro se petition, although not well pleaded, raised several ineffective-assistance-of-counsel claims, including the failure to investigate, which may require discovery and investigation of facts outside the record.

We also are troubled by the possibility that the district court's decision as to the appointment of counsel was influenced by the assertion in the State's responsive pleading that, quoting *Peterson v. Warden*, 87 Nev. 134, 136, 483 P.2d 204, 205 (1971), Renteria-Novoa had to "show that the requested review is not frivolous before he may have an attorney appointed." The quoted language from *Peterson* referred to former NRS 177.345(2). That provision addressed the appointment of counsel to assist a petitioner on appeal from the district court's judgment on a petition for postconviction relief. 1969 Nev. Stat., ch. 87, § 5, at 107. It provided for the appointment of appellate postconviction counsel only if the appellate court determined that the petitioner's appeal "is not frivolous." NRS 177.345(2) (1969). In contrast, the appointment of postconviction counsel to represent the petitioner in the district court proceedings was mandatory if the petitioner was indigent, with no regard for whether the allegations in the petition were frivolous. NRS 177.345(1) (1969). And, when the Legislature later made the appointment of postconviction counsel to represent the petitioner in the district court proceedings discretionary and added the factors that today appear in NRS 34.750(1), the Legislature did not include the "frivolous" language that previously had restricted the appointment of appellate postconviction counsel under NRS 177.345(2) (1969). *See* 1987 Nev. Stat., ch. 539, § 42, at 1230-31 (amending NRS 177.345(1)). For these reasons and because NRS 177.345 was repealed in its entirety effective January 1, 1993, 1991 Nev. Stat., ch. 44, § 31, at 92, the language in *Peterson* has no bearing on a district court's decision to appoint postconviction counsel to represent a petitioner under current Nevada law set forth in NRS 34.750(1).

We take this opportunity to stress that the decision whether to appoint counsel under NRS 34.750(1) is not necessarily dependent upon whether a pro se petitioner has raised claims that clearly have merit or would warrant an evidentiary hearing. In some cases, such as this one where a language barrier may have interfered with the petitioner's ability to comprehend the proceedings, the petitioner may be unable to sufficiently present viable claims in his or her petition without the assistance of counsel. *See generally Woodward v. State*, 992 So. 2d 391, 392 (Fla. Dist. Ct. App. 2008) (noting that the decision to appoint counsel "turns upon whether, under the cir-

cumstances of a particular case, the assistance of counsel is essential to accomplish a fair and thorough presentation of a defendant's claim(s) for collateral relief" (internal quotation marks omitted)); *cf. Martinez v. Ryan*, 566 U.S. 1, 11-12 (2012) (recognizing inherent difficulties for prisoners in presenting claims of trial error without the assistance of counsel). In such cases, the district court's failure to appoint postconviction counsel may deprive the petitioner of a meaningful opportunity to present his or her claims to the district court.

In light of the severity of the consequences that Renteria-Novoa faces, the potential need for discovery, and Renteria-Novoa's questionable proficiency with the English language, we conclude that the district court abused its discretion in declining to appoint postconviction counsel to represent Renteria-Novoa. Accordingly, we reverse the district court's order denying Renteria-Novoa's petition and remand this matter for the appointment of counsel to assist Renteria-Novoa in the postconviction proceedings.[3]

THE STATE OF NEVADA, OFFICE OF THE ATTORNEY GENERAL, PETITIONER, *v.* THE JUSTICE COURT OF LAS VEGAS TOWNSHIP; AND THE HONORABLE JUSTICE OF THE PEACE DEBORAH J. LIPPIS, RESPONDENTS, AND MARIA ESCALANTE; AND RAMIRO FUNEZ, REAL PARTIES IN INTEREST.

No. 70795

April 6, 2017 392 P.3d 170

Original petition for a writ of mandamus or prohibition challenging a justice court order denying a motion to reconsider an order dismissing a criminal complaint.

Petition denied.

Adam Paul Laxalt, Attorney General, Carson City; *Lawrence VanDyke*, Solicitor General, and *Jordan T. Smith*, Assistant Solicitor General, Carson City, for Petitioner.

McCracken, Stemerman & Holsberry and *Richard G. McCracken* and *Paul L. More*, Las Vegas; *Pitaro & Fumo, Chtd.*, and *Thomas F. Pitaro*, Las Vegas, for Real Parties in Interest.

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[3]We express no opinion as to the merits of Renteria-Novoa's postconviction petition. Given our disposition of this matter, we deny the motion for appointment of appellate counsel submitted to this court on December 16, 2015.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, HARDESTY, J.:

This original proceeding requires us to determine whether NRS 30.130 entitles petitioner Nevada Office of the Attorney General (AG) to notice and an opportunity to be heard when constitutional challenges to Nevada statutes are raised in criminal proceedings. We conclude that the AG is not entitled to such notice or opportunity to be heard, and we thus deny the AG's petition for writ relief.

FACTS AND PROCEDURAL HISTORY

In December 2015, real parties in interest Maria Escalante and Ramiro Funez were cited for trespassing at Red Rock Casino Resort & Spa in Las Vegas. An amended criminal complaint was filed charging Escalante and Funez (collectively, Escalante) each with one count of trespass in violation of NRS 207.200(1)(a). Escalante moved to dismiss both charges arguing that NRS 207.200(1)(a)[1] is unconstitutionally vague. Specifically, Escalante argued that the "vex or annoy" intent requirement is void for vagueness. The AG was not notified of the constitutional challenge to NRS 207.200(1)(a).

The justice court subsequently issued an order granting the motion to dismiss in part, determining that the "vex or annoy" intent requirement in NRS 207.200(1)(a) is unconstitutionally vague. The justice court ordered defense counsel to provide a copy of the order to the AG. Upon receiving notification of the justice court's order, the AG filed a "motion to place on calendar," arguing that the AG was entitled to notice of the constitutional challenge under NRS 30.130.[2] Escalante objected, arguing that the AG was not entitled to notice before the court ruled on the constitutionality of NRS 207.200(1)(a).

After briefing, the justice court issued a second order denying the AG's motion and deciding that NRS 30.130 only applies to declaratory relief actions, has no applicability to criminal proceedings, and only entitles the AG to notice and opportunity to be heard in con-

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[1]NRS 207.200(1)(a) provides:

> Unless a greater penalty is provided pursuant to NRS 200.603, any person who, under circumstances not amounting to a burglary . . . [g]oes upon the land or into any building of another with intent to vex or annoy the owner or occupant thereof, or to commit any unlawful act . . . is guilty of a misdemeanor.

[2]The justice court treated the AG's motion as a motion to reconsider.

stitutional challenges to municipal ordinances or franchises.[3] This petition for writ relief followed.

DISCUSSION

Consideration of the AG's writ petition

A writ of mandamus is available to "compel the performance of an act" that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160. Because mandamus is an "extraordinary remed[y], we have complete discretion to determine whether to consider [it]." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). "This court will exercise its discretion to consider petitions for extraordinary writs . . . when there . . . are . . . important legal issues that need clarification in order to promote judicial economy and administration." *State v. Eighth Judicial Dist. Court (Logan D.)*, 129 Nev. 492, 497, 306 P.3d 369, 373 (2013) (internal quotation marks omitted).

Whether NRS 30.130 entitles the AG to notice of constitutional challenges to statutes in criminal proceedings is an important legal issue in need of clarification, and statutes are often challenged on constitutional grounds in criminal proceedings. Therefore, in the interest of judicial economy and to provide guidance to Nevada's lower courts, we exercise our discretion to consider the AG's petition for a writ of mandamus.[4]

NRS 30.130 does not require notice to the AG of constitutional challenges to Nevada statutes in criminal proceedings

A writ of mandamus may be issued "to control a manifest abuse or arbitrary or capricious exercise of discretion." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). "A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *Id*. at 932, 267 P.3d at 780 (internal quotation marks omitted). In the context of a writ petition, questions of statutory inter-

[3]Because we conclude that the AG is not entitled to notice of constitutional challenges in criminal proceedings under NRS 30.130, we do not address whether that statute applies only to constitutional challenges to municipal ordinances and franchises.

[4]Alternatively, the AG seeks a writ of prohibition. A writ of prohibition is applicable when a tribunal acts "without or in excess of [its] jurisdiction." NRS 34.320; *see also Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). A writ of prohibition is inappropriate here because the justice court had jurisdiction to rule on Escalante's motion to dismiss and the AG's motion to reconsider. *See Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (explaining that we will not issue a writ of prohibition "if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration").

pretation are reviewed de novo. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008).

"It is well established that when the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001). The plain meaning of a statute is generally "ascertained by examining the context and language of the statute as a whole." *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009).

NRS 30.130 provides:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard.

The AG argues that NRS 30.130 unambiguously requires that it be provided with notice of any constitutional challenge to any statute in any proceeding. In support of its argument, the AG asserts that this court's decision in *City of Reno v. Saibini*, 83 Nev. 315, 429 P.2d 559 (1967), is directly on point.

In *Saibini*, a battalion chief for the City of Reno Fire Department sought declaratory relief, arguing that a Reno city ordinance setting a mandatory retirement age for police and firefighters was unconstitutional. *Id*. at 317-18, 429 P.2d at 560-61. The trial court ruled in the battalion chief's favor. *Id*. at 318, 429 P.2d at 561. On appeal, the City of Reno argued that the trial court's decision should be overturned because (1) the city ordinance was valid, and (2) the Attorney General did not appear at the trial court proceedings as required by NRS 30.130. *Id*. at 321, 429 P.2d at 563. In addition to holding that the challenged ordinance was unconstitutional, this court held that NRS 30.130 only requires that the AG be given notice and an opportunity to appear, not that he "be made a party to the action." *Id*. Because the AG was served in that case, the requirements of NRS 30.130 were satisfied. *Id*.

In reaching its conclusion, the *Saibini* court stated that "NRS 30.130 requires the [A]ttorney [G]eneral to be served with a copy of the proceedings and to be given opportunity to be heard in a constitutional attack on any statute, ordinance or franchise in any proceeding." *Id.* Relying on this statement, the AG argues here that

NRS 30.130 requires that the AG be served and given the opportunity to be heard in any proceeding, including criminal proceedings, involving a constitutional challenge to a statute. We disagree.

Saibini involved an action for declaratory judgment, not a criminal proceeding, *id*. at 317, 429 P.2d at 560, and this court took the "any proceeding" language directly from the last sentence in NRS 30.130. *Id*. at 321, 429 P.2d at 563. Thus, when the *Saibini* court stated that the AG is entitled to notice in "any proceeding," it was in the context of a declaratory judgment proceeding. Indeed, the first sentence of NRS 30.130 states that "[w]hen *declaratory relief is sought*, all persons shall be made parties who have or claim any interest which would be affected by the declaration, *and no declaration shall prejudice the rights of persons not parties to the proceeding*." (Emphases added.) Reading the language of the statute as a whole, it is clear that "any proceeding" refers only to proceedings seeking "declaratory relief." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("A word or phrase is presumed to bear the same meaning throughout a text.").

The overall statutory scheme also supports this interpretation of NRS 30.130 as not referring to criminal proceedings. NRS 30.010 to 30.160, which is the Uniform Declaratory Judgment Act (UDJA) clearly applies only to declaratory relief in civil actions. *See* NRS 30.040 (providing for declaratory relief in contract actions); NRS 30.060 (providing for declaratory relief in trust actions). And, a proceeding for declaratory relief itself is a civil action. *See* NRS 30.110 (providing that when a proceeding for declaratory relief "involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other *civil actions* in the court in which the proceeding is pending" (emphasis added)).

Other states that have enacted the UDJA agree that the AG is not entitled to notice in criminal proceedings. *See, e.g.*, *State v. Kinstle*, 985 N.E.2d 184, 191 n.6 (Ohio Ct. App. 2012) (holding that the defendant was not required to provide the AG with notice of his constitutional challenge because it was raised in a criminal proceeding, not a declaratory relief action); *Ex parte Williams*, 786 S.W.2d 781, 782 (Tex. Crim. App. 1990) ("The [UDJA] is purely a creature of civil law. It has no application in criminal proceedings. Moreover, we are aware of no authority that requires a defendant who is asserting a statute is unconstitutional to serve the [AG]."). We find those decisions persuasive given the requirement that the UDJA be "interpreted and construed as to effectuate [its] general purpose to make uniform the law of those states which enact [it]." NRS 30.160.

This interpretation of NRS 30.130 also is consistent with *Moldon v. County of Clark*, 124 Nev. 507, 188 P.3d 76 (2008), an eminent

domain action. In that case, landowners argued that a statute governing interest earned on money deposited with the court was unconstitutional. The district court denied relief based in part on the landowners' failure to serve the AG under NRS 30.130 with notice of their constitutional challenge. *Id*. at 516 n.23, 188 P.3d at 82 n.23. Although it is unclear from this court's opinion whether the parties challenged that decision on appeal, this court concluded that the district court improperly relied on NRS 30.130 because "[t]he [landowners] were not seeking declaratory relief with their application; they were merely seeking to recover the interest earned on the condemnation deposit." *Id*. This observation in *Moldon* indicates that NRS 30.130 applies only to declaratory relief actions.

Based on the plain and unambiguous language of the statute and our existing caselaw, we conclude that NRS 30.130 does not entitle the AG to notice and opportunity to be heard when constitutional challenges to statutes arise in criminal proceedings.[5]

CONCLUSION

Because we conclude that NRS 30.130 does not entitle the AG to notice and opportunity to be heard in criminal cases, we further conclude that Escalante was not required to notify the AG of their constitutional challenge to NRS 207.200(1)(a). Accordingly, we conclude that the justice court did not manifestly abuse its discretion in deciding that NRS 30.130 applies only to actions for declaratory relief, and we thus deny the AG's petition for writ of mandamus.[6]

PARRAGUIRRE and STIGLICH, JJ., concur.

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[5]We note that, under NRS 228.120, the AG may "[e]xercise supervisory powers over all district attorneys of the State in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge." Thus, the AG's supervisory authority over Nevada's district attorneys ensures that the AG's and the State's interests are already protected in criminal cases. Although not mandated by statute, it appears that NRS 228.120 would allow the AG to require district attorneys to report on constitutional challenges to statutes in criminal proceedings as a "condition of public business entrusted to their charge."

[6]Because our decision in this opinion is dispositive, we decline to address the AG's remaining arguments raised in this petition. We also decline to address the constitutional challenge to NRS 207.200(1)(a).

TRP INTERNATIONAL, INC., a Delaware Corporation, Appellant, *v.* PROIMTU MMI LLC, a Nevada Limited Liability Company, Respondent.

No. 71398

April 6, 2017 391 P.3d 763

Appeal from a district court order granting a motion to amend judgment or, alternatively for reconsideration, vacating a prior judgment, and denying a motion to dismiss. Fifth Judicial District Court, Nye County; Steven Elliott, Judge.

Dismissed.

Pintar Albiston, LLP, and *Becky Ann Pintar*, Las Vegas, for Appellant.

Fennemore Craig, P.C., and *Christopher H. Byrd* and *Brenoch R. Wirthlin*, Las Vegas, for Respondent.

Before Hardesty, Parraguirre and Stiglich, JJ.

OPINION

Per Curiam:

In this appeal, we consider whether an order granting a motion to amend or reconsider a final judgment and vacating the judgment is appealable as a special order after final judgment. We conclude that it is not and therefore dismiss this appeal.

FACTS AND PROCEDURAL HISTORY

Respondent Proimtu MMI LLC filed an amended complaint alleging several causes of action related to the construction of a solar electricity plant in Tonopah. On February 16, 2016, the district court entered an order granting appellant TRP International, Inc.'s motion to dismiss the claims asserted by Proimtu against it and certified the judgment as final under NRCP 54(b). Proimtu timely filed a tolling motion pursuant to NRCP 59(e), *see* NRAP 4(a)(4)(C), asking that the district court amend or reconsider the order dismissing the complaint and allow the action to proceed. The district court granted the motion, vacated the February 16, 2016, order granting the motion to dismiss, and denied the motion to dismiss. TRP appeals from this order.

This court entered an order directing TRP to show cause why this appeal should not be dismissed for lack of jurisdiction, questioning whether the order granting the motion to amend and vacating the order granting the motion to dismiss is appealable. TRP has filed a response and Proimtu has replied.

DISCUSSION

TRP contends that the challenged order is appealable as a special order after final judgment where the February 16, 2016, order is a final judgment (under NRCP 54(b)), and the challenged order was subsequently entered and substantively affects TRP's rights arising from the February 16, 2016, order. *See Gumm v. Mainor*, 118 Nev. 912, 920, 59 P.3d 1220, 1225 (2002) (defining an appealable special order after final judgment as a post-judgment order that affects the rights of a party to the action, growing out of the previously entered judgment). Proimtu counters that orders amending or vacating a judgment are not appealable under NRAP 3A(b) or this court's caselaw, and an order denying a motion to dismiss is an interlocutory nonappealable order. Proimtu specifically asserts that the order is not a special order after final judgment because once the judgment is vacated, there can be no special order after final judgment.

The final judgment in this case (pursuant to NRCP 54(b)) was the February 16, 2016, order granting TRP's motion to dismiss. The post-judgment order granting the motion to amend or for reconsideration and vacating the judgment affected TRP's rights arising from the final judgment because TRP was once again subject to Proimtu's claims. Thus, the challenged order could arguably be interpreted as meeting the definition of a special order after final judgment and deemed appealable under NRAP 3A(b)(8).[1] *See, e.g.*, *Bates v. Nev. Sav. & Loan Ass'n*, 85 Nev. 441, 443, 456 P.2d 450, 452 (1969) (stating that an order granting a motion for rehearing is appealable as a special order after final judgment).

However, this court has also held that a post-judgment order vacating a final judgment is not a special order after final judgment. In *Reno-Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 6 n.24, 106 P.3d 134, 137 n.24 (2005), this court noted that an order granting a motion for a new trial cannot be a special order after final judgment because once a new trial is granted, the judgment is vacated. Thus, an order granting a new trial would be a nonappealable interlocutory order if it were not independently appealable under NRAP 3A(b)(2). More recently, in *Estate of Adams v. Fallini*, 132 Nev. 814, 818, 386 P.3d 621, 624 (2016), we concluded that a post-judgment order granting a motion to set aside the judgment under NRCP 60(b) for fraud upon the court was interlocutory and not appealable. *See also* 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper,

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[1]Proimtu cites *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010), for the proposition that an order granting a motion to vacate under NRCP 59(e) is not appealable. Proimtu misreads *AA Primo*. That case does not address the appealability of an order resolving a motion to vacate under NRCP 59(e), but rather its tolling effect. *Id.* at 581, 245 P.3d at 1192. Further, *AA Primo* deals with an order *denying* an NRCP 59(e) motion to vacate, not an order *granting* that motion, as is the case here. *Id.* at 580, 245 P.3d at 1192.

Federal Practice and Procedure § 3916 (2d ed. 1992 and Supp. 2017) ("Orders granting motions to vacate should be treated in the same way as orders granting a new trial, and ordinarily are. An order that vacates a judgment and sets the stage for further trial court proceedings is not final."). Similarly, we conclude that an order granting a motion to amend or reconsider and vacating a final judgment is not a special order after final judgment; once a final judgment is vacated, there cannot be a special order after final judgment unless and until a new final judgment is entered. Accordingly, the challenged order is not appealable as a special order after final judgment.[2]

CONCLUSION

An order granting a motion to amend or reconsider and vacating a final judgment is not appealable as a special order after final judgment under NRAP 3A(b)(8). Because TRP fails to demonstrate, and it does not appear, that the challenged order is otherwise appealable, *see Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (providing that the right to appeal is statutory; where no statute or court rule authorizes an appeal, no right to an appeal exists), we conclude that we lack jurisdiction and dismiss this appeal.

NEW HORIZON KIDS QUEST III, INC., A MINNESOTA CORPORATION, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN SCANN, DISTRICT JUDGE, RESPONDENTS, AND ISABELLA GODOY, A MINOR BY AND THROUGH HER MOTHER, VERONICA JAIME, REAL PARTIES IN INTEREST.

No. 69920

April 6, 2017 392 P.3d 166

Original petition for a writ of mandamus challenging a district court order denying a motion to disqualify counsel.

Petition denied.

Olson, Cannon, Gormley, Angulo & Stoberski and *Felicia Galati* and *James R. Olson*, Las Vegas, for Petitioner.

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[2]To the extent TRP makes the suggestion, it fails to demonstrate that the challenged order is appealable as an order granting a new trial under NRAP 3A(b)(2). It does not appear, and TRP does not allege, that TRP moved for a new trial, and the district court did not grant a new trial. *See Fallini*, 132 Nev. at 818 n.3, 386 P.3d at 624 n.3.

Kravitz, Schnitzer & Johnson, Chtd., and *Martin J. Kravitz, Jordan P. Schnitzer*, and *Wade J. Van Sickle*, Las Vegas, for Real Parties in Interest.

Before CHERRY, C.J., DOUGLAS and GIBBONS, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this original petition for a writ of mandamus, we are asked to consider whether an attorney and his current firm should be disqualified from representing real parties in interest in a case against petitioner when the attorney's prior firm defended petitioner in a previous and separate case.

We conclude that the Nevada Rules of Professional Conduct operate to disqualify a lawyer only when that lawyer, while employed at his former firm, gained actual knowledge of information protected by rules of confidentiality. In particular, if a lawyer acquired no confidential information about a particular client while at his former law firm and that lawyer later joins another firm, neither the lawyer nor his current firm are disqualified from representing a different client in the same or related matter even though the interests of the former and current clients conflict. We therefore deny the petition.

FACTS

In 2007, the law firm Hall Jaffee & Clayton (HJC) defended petitioner New Horizon Kids Quest III, Inc., in a tort action, namely *Robann C. Blue, a Minor, by and through her Guardian ad Litem, Sandi Williamson v. New Horizon Kids Quest III, Inc.* (*Blue*). Only two attorneys at HJC participated in HJC's representation of petitioner in *Blue*. Ultimately, the district court dismissed *Blue* with prejudice through stipulation and order.

For about the last half of HJC's representation in *Blue*, Jordan P. Schnitzer worked as an associate attorney at the firm. However, Schnitzer never represented petitioner in *Blue* or obtained confidential information regarding petitioner while employed at HJC. In 2011, Schnitzer left HJC to join the law firm Kravitz, Schnitzer & Johnson, Chtd. (KSJ).

In 2014, Martin J. Kravitz from KSJ filed a tort action on behalf of real parties in interest Isabella Godoy, a minor, by and through her mother Veronica Jaime, against petitioner. After accepting this case, Kravitz discovered that HJC defended petitioner in *Blue*. He knew that Schnitzer previously worked at HJC and further inquired into Schnitzer's involvement in *Blue*. Schnitzer told Kravitz that he "had absolutely no knowledge about the *Blue* case" and confirmed

that he had not gained any confidential information concerning petitioner while at HJC. Thus, Kravitz determined screening was not required and permitted Schnitzer to assist on this case.

In 2015, petitioner also discovered that Schnitzer worked at HJC during part of its representation in *Blue*. Petitioner then filed a motion to disqualify real parties in interest's attorneys, Kravitz and Schnitzer. Based on Schnitzer's affidavit denying obtainment of any confidential information concerning petitioner, and an affidavit from an attorney at HJC who participated in *Blue* confirming that Schnitzer had not worked on that case, the district court concluded that Schnitzer never obtained confidential information from *Blue*. The court further concluded that the cases cited by petitioner in support of its position were distinguishable. Ultimately, the district court denied the motion. Petitioner then filed the instant petition for a writ of mandamus seeking review of the district court's order. Real parties in interest filed a timely answer, and oral argument was held.

DISCUSSION

This court has original jurisdiction to grant a writ of mandamus, and issuance of such extraordinary relief is solely within this court's discretion. Nev. Const. art. 6, § 4; *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012). "A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Furthermore, "[t]his court has consistently held that mandamus is the appropriate vehicle for challenging orders that disqualify counsel." *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). Therefore, this petition for a writ of mandamus is properly before us.

Petitioner argues that the district court erred in denying its motion to disqualify Schnitzer and KSJ pursuant to the Nevada Rules of Professional Conduct (RPC). Specifically, petitioner argues that a presumption of imputed knowledge applies, and thus, Schnitzer and KSJ are disqualified based upon HJC's prior representation of petitioner in *Blue*. In contrast, real parties in interest argue that such a presumption of shared confidences does not apply due to the absence of evidence indicating that Schnitzer acquired confidential information regarding petitioner while employed at HJC. We agree with real parties in interest and conclude that petitioner's interpretation of the RPC is too strict in light of the lack of evidence showing that any confidential information was gained.

This court pays deference to the district court's familiarity with the facts of the case at issue to determine if disqualification is warranted. *Nev. Yellow Cab Corp.*, 123 Nev. at 54, 152 P.3d at 743.

Accordingly, we will not overturn the district court's decision in attorney disqualification matters absent an abuse of its broad discretion. *Waid v. Eighth Judicial Dist. Court*, 121 Nev. 605, 609, 119 P.3d 1219, 1222 (2005). Additionally, "[t]his court reviews a district court's interpretation of a statute or court rule . . . de novo, even in the context of a writ petition." *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006). "When a rule is clear on its face, we will not look beyond the rule's plain language." *Morrow v. Eighth Judicial Dist. Court*, 129 Nev. 110, 113, 294 P.3d 411, 414 (2013).

RPC 1.9(b) governs duties to former clients and states that:

> A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
>
> (1) Whose interests are materially adverse to that person; and
>
> (2) *About whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter*;
>
> (3) Unless, the former client gives informed consent, confirmed in writing.

(Emphasis added.)[1] Pursuant to RPC 1.10(a), an attorney's disqualification under RPC 1.9 is imputed to all other attorneys in that disqualified attorney's law firm. However, a disqualified attorney's law firm may nevertheless represent a client in certain circumstances if screening and notice procedures are followed. *See* RPC 1.10(e).

The plain language of RPC 1.9(b) requires that a lawyer be disqualified if (1) the current representation is materially adverse to the attorney's former firm's client, and (2) the attorney acquired confidential information about the client that is material to the current representation, unless the attorney's former firm's client gives informed consent. The requirement that the attorney actually acquire confidential information about his former firm's client is not a presumption; rather, it is a factual matter for the district court to resolve. In the absence of an attorney acquiring such confidential information, it follows that the attorney is not disqualified, and imputed disqualification pursuant to RPC 1.10 does not apply. Therefore, we conclude that the district court appropriately ended its inquiry when it determined that Schnitzer never obtained any confidential information.

Comments by the American Bar Association (ABA) further support our conclusion. RPC 1.9 is identical to the ABA Model Rule

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[1]RPC 1.6 governs the confidentiality of information that an attorney received from a client, and RPC 1.9(c) governs an attorney's use of a former client's confidential information.

1.9, and thus, the ABA's comments provide clarity to the rule with an instructive example. *See* RPC 1.0A (stating that comments to the ABA Model Rules "may be consulted for guidance in interpreting and applying" the RPC). The ABA has commented that Rule 1.9(b) only disqualifies a lawyer moving to another firm when that lawyer "has actual knowledge of information protected by [rules of confidentiality]." Model Rules of Prof'l Conduct r. 1.9 cmt. 5 (2016). For example:

> [I]f a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Id. This example is supported with sound reasoning:

> [I]t should be recognized that today many lawyers . . . move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Model Rules of Prof'l Conduct r. 1.9 cmt. 4 (2016).

Thus, the comments to the model rules expressly require Schnitzer to have actually received confidential information from HJC's former representation in *Blue* to warrant disqualification. This comports with our interpretation of RPC 1.9(b), and in the absence of Schnitzer's disqualification, imputing disqualification to the other attorneys of Schnitzer's second firm, KSJ, is inappropriate.

In addition to the plain language of RPC 1.9(b) and the ABA's comments illustrating this rule, our prior case law also supports our conclusion. In the context of a nonlawyer formerly employed by a different law firm, this court has held that the nonlawyer's current employer is not disqualified because "mere access to the adverse party's file during the former employment is insufficient to warrant disqualification." *Leibowitz v. Eighth Judicial Dist. Court*, 119 Nev. 523, 530, 78 P.3d 515, 519 (2003). Rather, imputed disqualification of the nonlawyer's new employer only applies when the nonlawyer acquired confidential information. *Id.* at 530, 78 P.3d at 520.

Petitioner misinterprets *Ryan's Express Transportation Services, Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 279 P.3d 166 (2012), and relies upon distinguishable federal cases to support its argument. In particular, while RPC 1.10, 1.11, and 1.12 do impose a presumption of shared confidences for imputed disqualification amongst at-

torneys and their current firms, RPC 1.9(b) does not. RPC 1.9(b) presumes that an attorney did not participate in representing the former firm's client.[2] *Edwards v. 360° Communications*, 189 F.R.D. 433 (D. Nev. 1999), is more analogous to the facts here. In *Edwards*, the court found it inappropriate to disqualify an attorney or apply imputed disqualification when the attorney was uninvolved in his former firm's prior representation. *Id.* at 437. The court explained that "an attorney who was not directly involved in a law firm's representation of a client cannot be imputed with actual knowledge of confidential information once that attorney resigns from employment with that firm." *Id.* at 436. We agree.

Here, due to absence of evidence in the record indicating that Schnitzer acquired any confidential information from HJC's prior representation of petitioner in *Blue*, the district court did not abuse its discretion by denying petitioner's motion to disqualify real parties in interest's attorneys. Accordingly, we deny the petition for writ relief.

CHERRY, C.J., and GIBBONS, J., concur.

PAIGE ELIZABETH PETIT, APPELLANT, *v.*
KEVIN DANIEL ADRIANZEN, RESPONDENT.

No. 66565

April 13, 2017 392 P.3d 630

Appeal from a decree of divorce regarding the surname of the parties' child. Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie, Jr., Judge.

Affirmed.

Law Office of Telia U. Williams and *Telia U. Williams*, Las Vegas, for Appellant.

Pecos Law Group and *Shann D. Winesett* and *Bruce I. Shapiro*, Henderson, for Respondent.

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[2]If an attorney was directly involved in representing his former firm's client in a matter, then RPC 1.9(b) does not apply, RPC 1.9(a) does. This was the situation that we considered in both *Waid*, 121 Nev. 605, 119 P.3d 1222 (examining whether an attorney's former representation of a client was substantially similar to the attorney's current adverse representation of another client), and *Nevada Yellow Cab Corp.*, 123 Nev. 44, 152 P.3d 737 (examining a situation wherein one attorney transferring to a new firm had represented the former firm's client), and they are both distinguishable on their facts.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

In this appeal we consider, as a matter of first impression, the standard of proof to be applied by district courts in resolving initial naming disputes for a child of married parents. Because neither married parent should have the burden of proof in an initial naming dispute, the focus should be on the best interests of their child. In the matter before us, the district court determined that the child's name should be hyphenated to include both parents' surnames, and in doing so, considered the best interests of the child. We thus affirm.[2]

FACTS AND PROCEDURAL HISTORY

Following their marriage, appellant Paige Elizabeth Petit and respondent Kevin Daniel Adrianzen had a child. Before their child's birth, the parties agreed on the child's first and middle names but disagreed on the child's surname. The parties were estranged when their child was born, and Petit gave the child her surname.

Two months after the birth of their child, Adrianzen filed a complaint for divorce and petitioned to change the child's surname to Adrianzen. The complaint for divorce and petition were consolidated, and an evidentiary hearing was held. After reasoning that it was in the child's best interest to have a surname that allowed the child to identify with both parents, the district court ordered that the child's surname be changed to Petit-Adrianzen. This appeal followed.

DISCUSSION

Petit argues that the district court abused its discretion by using an incorrect standard of proof in deciding to change the child's surname. Whether a district court used the proper standard of proof is a legal question we review de novo. *Matter of Halverson*, 123 Nev. 493, 509, 169 P.3d 1161, 1172 (2007). And we review a district court's findings of a child's best interest for an abuse of discretion. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004).

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[1]THE HONORABLE LIDIA STIGLICH, Justice, did not participate in the decision of this matter.

[2]Petit also challenges the constitutionality of NRS 440.280(6)(c), which instructs on how a child's surname is to appear on the original birth certificate when both mother and father voluntarily acknowledge paternity. However, because this issue was not raised before the district court, we do not consider it here. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Generally, there are two types of disputes that arise in naming a child. The first type is an initial naming dispute where the child's parents never reached an agreement on the child's surname and seek to have the issue resolved for the first time after the child is born and has been named by one parent without the consent of the other parent. *See, e.g.*, *In re A.C.S.*, 171 P.3d 1148, 1150-51 (Alaska 2007). The second type is a general change-of-name dispute where the parents originally agreed upon a surname for the child, but one parent later seeks to change the child's surname. *See, e.g.*, *Acevedo v. Burley*, 994 P.2d 389, 390 (Alaska 1999); *Schroeder v. Broadfoot*, 790 A.2d 773, 781 (Md. Ct. Spec. App. 2002).

We previously addressed the general change-of-name dispute in *Magiera v. Luera*, 106 Nev. 775, 802 P.2d 6 (1990). In that case, a child was born to an unmarried couple, but the father acknowledged his paternity and signed the birth certificate listing the mother's surname as the child's agreed-upon surname. *Id*. at 776, 802 P.2d at 7. Four years later, during child support proceedings, the father urged the district court to change the child's surname to his surname. *Id*. The district court ordered the child's surname changed to the father's surname after determining that, since the father was making child support payments, he was entitled to have the child bear his surname. *Id*. at 777, 802 P.2d at 7. This court reversed the district court's order, holding that the child's best interest is the only relevant factor in deciding the child's surname and that "the burden is on the party seeking the name change to prove, by clear and compelling evidence, that the substantial welfare of the child necessitates a name change." *Id*.

Petit argues that this court should apply *Magiera*'s clear and compelling standard of proof in all child-name-change cases. Adrianzen argues that *Magiera*'s clear and compelling standard of proof is inapplicable here because he and Petit were married at the time their child was born, and the couple never agreed on the child's surname.

This is an issue of first impression in Nevada, as this court has not previously established the standard of proof for initial naming dispute cases. However, several jurisdictions apply a best interest of the child standard in such instances, with no burden on or presumptive advantage to either party. *See In re A.C.S.*, 171 P.3d at 1150-51; *In re Marriage of Schiffman*, 620 P.2d 579, 583 (Cal. 1980); *Schroeder*, 790 A.2d at 783-84; *Cohee v. Cohee*, 317 N.W.2d 381, 384 (Neb. 1982); *Brooks v. Willie*, 458 N.Y.S.2d 860, 862 (N.Y. Fam. Ct. 1983).

Similar to the facts of this case, in *Keegan v. Gudahl*, the child's parents were married at the time of birth but the mother gave the child her surname. 525 N.W.2d 695, 695 (S.D. 1994). The mother instituted divorce proceedings two months after the child was born, during which the father contended the child's surname should be changed to his surname. *Id*. at 696. The trial judge agreed, reasoning that a child born during marriage traditionally takes the father's

surname, and ordered that the child's surname be changed without considering the child's best interest. *Id*. The Supreme Court of South Dakota reversed, holding that the trial court should determine a child's surname based on best interest considerations:

> "[T]he mother does not have the absolute right to name the child because of custody due to birth." As a result, the mother "should gain no advantage from her unilateral act in naming the child." Likewise, the custom of giving a child the father's surname should not serve to give father an advantage. Only the child's best interest should be considered by the court.

Id. at 700 (quoting *In re Quirk*, 504 N.W.2d 879, 882 (Iowa 1993) (Carter, J., concurring) (citations omitted)).

We find the reasoning of the *Keegan* court persuasive. Neither parent should automatically have an advantage in determining a child's surname at birth. Rather, the sole concern should be the best interests of the child, and we reaffirm our holding in *Magiera* in this regard. *See Magiera*, 106 Nev. at 777, 802 P.2d at 7 ("[T]he only factor relevant to the determination of what surname a child should bear is the best interest of the child."). Unlike the change-of-name case in *Magiera*, however, the parties in an initial naming dispute appear before the court on equal footing, and accordingly, neither party bears the burden of proof. *See In re A.C.S.*, 171 P.3d at 1151-52 (remanding an initial child surnaming dispute for consideration of the child's best interest unweighted by burden of proof considerations). Instead, the district court must determine the child's surname based only on considerations of the child's best interest. *See Rivero v. Rivero*, 125 Nev. 410, 421, 216 P.3d 213, 221-22 (2009) (stating that parents with joint legal custody may appear before the court on equal footing for the court to decide the child's best interest).

Several jurisdictions[3] have established a nonexhaustive list of factors for courts to consider when determining a child's best interest in an initial naming dispute case:

> (1) the length of time that the child has used his or her current name; (2) the name by which the child has customarily been called; (3) whether a name change will cause insecurity or identity confusion; (4) the potential impact of the requested name change on the child's relationship with each parent; (5) the motivations of the parties in seeking a name change;

[3]*See, e.g.*, *In re A.C.S.*, 171 P.3d 1148, 1152-53 (Alaska 2007); *In re Marriage of Schiffman*, 620 P.2d 579, 583 (Cal. 1980); *Montgomery v. Wells*, 708 N.W.2d 704, 708-09 (Iowa Ct. App. 2005); *Cohee v. Cohee*, 317 N.W.2d 381, 384 (Neb. 1982); *Bobo v. Jewell*, 528 N.E.2d 180, 185 (Ohio 1988); *Doherty v. Wizner*, 150 P.3d 456, 461-62 (Or. Ct. App. 2006); *Keegan v. Gudahl*, 525 N.W.2d 695, 699 (S.D. 1994); *see also In re H.S.B.*, 401 S.W.3d 77, 84-85 (Tex. App. 2011) (rejecting certain factors that "inappropriately shift the inquiry to the parents' interests").

> (6) the identification of the child with a particular family unit, giving proper weight to stepparents, stepsiblings, and half-siblings who comprise that unit; and (7) any embarrassment, discomfort, or inconvenience that may result if the child's surname differs from that of the custodial parent.

57 Am. Jur. 2d *Name* § 14 (2012).

Because we believe this list of factors will assist our district courts when determining the best interests of the child in initial naming dispute cases, we adopt this nonexhaustive list of factors for utilization by the courts. We further determine that cultural considerations should be added to this nonexhaustive list of factors for district courts to contemplate when making a determination. *See Doherty v. Wizner*, 150 P.3d 456, 466 (Or. Ct. App. 2006) (noting that surnames "serve[ ] as a link to a person's family heritage and ethnic identity"). In reaching its determination as to the best interests of the child in an initial naming dispute case between married parents, the district court must explicitly state whether it found any of these factors relevant.

We view the matter before us now as an initial naming dispute case. Even before their child was born, the parties disagreed as to the child's surname. At the time of their child's birth, Petit and Adrianzen were married, but apparently estranged, and Petit gave the child her surname. Adrianzen raised the surname issue in the divorce action he filed within two months of the child's birth. There was no agreement or acquiescence to Petit's unilateral decision to give their child her last name.

Although the district court did not have the benefit of the list of factors we adopt in this opinion, the court did evaluate the best interests of the child, and its determination was based on several of the factors we now adopt. For instance, the district court considered "the length of time the child" used his current surname, which also addresses whether the name change would "cause insecurity or identity confusion." 57 Am. Jur. 2d *Name* § 14 (2012). The court further noted that Adrianzen filed the action to change the child's surname within two months of birth. The court also considered the "potential impact of the requested name change on the child's relationship with each parent," *id*., noting that the hyphenated name would allow the child to identify with both parents. Further, Adrianzen testified that in many Hispanic families children have hyphenated last names. Therefore, we conclude that the district court did not abuse its discretion in determining that it was in the best interest of the child to change the child's surname, and we affirm the district court's order.

CHERRY, C.J., and DOUGLAS, GIBBONS, PICKERING, and PARRAGUIRRE, JJ., concur.