IN THE SUPREME COURT OF THE STATE OF NEVADA

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PAIGE ELIZABETH PETIT, Appellant, vs. KEVIN DANIEL ADRIANZEN, Respondent.	Supreme Court Docket No.: 66565 District Court Case No. D-13-489540-N (Consolidated with D-13-489542-D)

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

(A) The basis for the Supreme Court's appellate jurisdiction:

The order appealed from is a final judgment that is independently appealable under Nevada Rules of Appellate Procedure 3A(b).

(B) The filing dates establishing the timeliness of the appeal:

The date of the entry of the written judgment or order appealed from was August 19, 2014. The Notice of Appeal was filed September 18, 2014.

(C) An assertion that the appeal is from a final order or judgment, or information establishing the Supreme Court's jurisdiction on some other basis:

This appeal is from a final order or judgment, the Decree of Divorce, issued by the district court on August 18, 2014.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the trial court erred in applying what appears to be a lower standard than clear and convincing in ruling that changing the subject minor's child from his maternal surname to an hyphenated name involving his father's surname was in the child's best interests; and alternatively, if the court used the correct standard, was it nonetheless an abuse of discretion in so ruling.

II. Whether NRS 440.280 is unconstitutional on its face because it unjustifiably treats married women and unmarried women unequally, thus implicating the Equal Protection Clause.

STATEMENT OF THE CASE

This is an appeal from a final Decree of Divorce, which effectuated a name change of the minor child, presided over by the Honorable T. Arthur Ritchie, Jr., Eighth Judicial District Court, Clark County, Nevada. The district court issued the Decree of Divorce on August 18, 2014.

In 2013, the appellee-plaintiff, Kevin Daniel Adrianzen, filed for divorce from the appellant-defendant, Paige Elizabeth Petit.[1] At the same time, Kevin separately filed a Petition for Change of Name for the minor child, Ryder Blake Petit.[2] Paige filed an answer and counterclaim for divorce and/or annulment.[3] Paige petitioned the district court to consolidate the two cases, the divorce/annulment case, with the name change.[4] The district court consolidated

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[1] *See* PETIT 002-017. For the sake of ease, brevity, and clarity in this case, especially where one of the parties shares the same, or parts of the same name of the parties, Paige and Kevin, all of the major players, Paige, Kevin, and Ryder, will be referred to by their first names. No disrespect is intended by these informal appellations.

[2] *See* PETIT 016-017.

[3] *See* PETIT 018-026.

[4] *See* PETIT 027-034.

the two cases: Case no. D-13-489540-N (the name change petition) and Case no. D-13-489542-D (the divorce case)[5].

An evidentiary hearing was held in this case on June 10, 2014.[6] In October 2014, the Supreme Court of Nevada referred this matter to its Settlement Program[7]. The parties met for an initial settlement conference on or near December 2, 2014. The settlement judge filed an Interim Settlement Program Report on December 12, 2014. The settlement judge continued the settlement conference until December 16, 2014. After several meetings with both parties' counsel with the assigned mediator, including the aforementioned one in person with both of the parties, the case failed to settle. On May 7, 2015, the settlement judge filed a final report indicating that the parties did not settle. This appeal therefore ensues.

STATEMENT OF FACTS

Paige and Kevin met several years ago when they attended high school.[8] They did not date each other, and did not talk again until they met again a few

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[5] *See* PETIT 049-065
[6] *See* PETIT 087-175.
[7] The parties were assigned to settlement judge, Carolyn A. Worrell.
[8] *See* Transcript (June 10, 2014), at 10 (PETIT 096)

years ago in approximately October 2012.[9] After "going out" for a short while, Paige became pregnant.[10] Paige and Kevin married on April 19, 2013.[11] Paige was then nineteen years old. (She is now twenty-two.)[12] Paige and Kevin married in order to obtain health insurance benefits for Paige's impending childbirth, and for their unborn child.[13] Paige and Kevin stopped speaking immediately after they were married.[14] Paige and Kevin have never lived together.[15]

Ryder was born via Caesarean section on September 22, 2013.[16] Due to a moderately serious health concern, Ryder remained in the hospital for ten days after his birth.[17] During this time, Kevin visited the baby some of the days that he was hospitalized.[18] Paige was hospitalized with Ryder for the first four or five days, and then was discharged.[19] She visited with Ryder every single day

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[9] *See id.*
[10] *See id.* at 9-10 (PETIT 095-96)
[11] *See id.*
[12] *See id.*
[13] *See id.*
[14] *See id.* at 10 (PETIT 096)
[15] *See id.* at 9 (PETIT 095)
[16] *See id.* at 9-10 (PETIT 095-96)
[17] *See id.* at 10-11 (PETIT 096-97)
[18] *See id.* at 11 (PETIT 097)
[19] *See id.*

thereafter.[20] But Kevin was not present when Paige took Ryder home from the hospital.[21] Paige named the baby "Ryder Blake Petit."[22]

Paige contacted Kevin to come visit with their baby once they were both home from the hospital.[23] Kevin initially showed little interest in visiting with Ryder after he came home from the hospital.[24] But then Kevin came around to see Ryder and to take him for visits to Kevin's parents' house, where he lives.[25] Due to insurmountable friction with Kevin's parents, Paige was "not allowed" to enter Kevin's parents' house.[26] But Paige waited in her vehicle while Kevin had his visit with Ryder so that she could be available to breastfeed him when he needed it.[27] Kevin did not adhere to their agreement, and doctor's orders, that Ryder be exclusively breastfed, which led to greater friction between them.[28] That friction escalated on October 17, 2013 when Kevin attempted to abduct Ryder from

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[20] *See id.*
[21] *See id.* at 11-12 (PETIT 097-98)
[22] *See* Birth Certificate (PETIT 001)
[23] *See* Transcript (June 10, 2014), at 11-12 (PETIT 097-98)
[24] *See id.*
[25] *See id.* at 12-15 (PETIT 097-101)
[26] *See id.*
[27] *See id.*
[28] *See id.* at 14 (PETIT 100)

Paige's parents' home where she and the baby live.[29] The police were called, but the baby was returned to Paige unharmed.[30] Kevin's conduct caused Paige to fear his impulses and to question his judgment, including his ability to care for Ryder.[31] Paige also expressed concern about the level of violence she perceived displayed by both Kevin, as well as his stepfather, towards each other, as well as others.[32]

In or near December 2013, Kevin filed for divorce and petitioned the court to change Ryder's last name from "Petit" (Paige's last name) to "Adrianzen" (Kevin's last name).[33] Paige answered and counterclaimed for divorce and annulment.[34] The parties were unable to decide custody or the name change issue, and so an evidentiary hearing was set.[35] Kevin had refused or failed to pay child support and was ordered to do so.[36] The district court divorced the parties, and

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[29] *See id.* at 15-16 (PETIT 101-102)

[30] *See id.*

[31] *See id.* at 17-31 (PETIT 103-117)

[32] *See id.*

[33] *See* Petition for Name Change (PETIT 016-17 and PETIT 448-452) and Complaint for Divorce (PETIT 002-015)

[34] *See* Answer and Counterclaim (PETIT 018-026)

[35] *See* Motion for Child Custody (Feb. 5, 2014) (PETIT 038-048) and Return Hearing (March 19, 2014) (PETIT 066-086)

[36] *See* Transcript (June 10, 2014) at 49 (PETIT 135) and Divorce Decree at 3 (PETIT 178)

awarded primary physical custody to Paige.[37] The district court awarded Kevin visitation and joint legal custody of Ryder with Paige.[38] The district court ordered that Ryder's name be changed from "Ryder Blake Petit" to "Ryder Blake Petit-Adrianzen."[39]

Paige returned to court approximately three months after the evidentiary hearing for a Motion to Amend the Judgment (solely on the issue of child visitation), in approximately October 2014, which was denied.[40] At the hearing on

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[37] *See* Divorce Decree at 2 (PETIT 177)

[38] *See generally, ids.*

[39] *See* Divorce Decree at 3 (PETIT 178)

[40] *See* PETIT 182-447. Paige filed Motion to Amend Findings or Make Additional Findings Pursuant to NRCP 52(b) or Alternatively, Motion to Alter or Amend Judgment Pursuant to NRCP 59 (PETIT 413-443); Reply, Notice, and Supplement Regarding Motion to Amend or Alter Judgment (PETIT 182-412).

Paige only sought review of the district court's decision on the issue of award of visitation to Kevin, not the name change, for which she had already filed a Notice of Appeal. Paige also sought to provide concrete evidence for the domestic violence that she had suffered from Kevin, which she had testified to at trial on June 10, 2014, but which the district court deemed "uncorroborated." *See* Transcript (June 10, 2014) (PETIT 166). Paige provided the court with extensive records of threatening and abusive text messages and photographs of Kevin brandishing a firearm at her via text message. (*See generally,* PETIT 182-443; *see particularly*, PETIT 188). *Although this issue is not apropos of this current appeal* (and thus the court is not being provided a transcript or full briefing of the hearing), it is nonetheless interesting to note that the district court verbally stated at the hearing on this matter that he found credible Paige's allegations of domestic violence, and urged her to seek a restraining order against Kevin, though the court denied her request for modification of his visitation.

the motion, Paige revealed to the district court, for the first time, that Kevin had threatened her with a gun, by way of text message.[41]

SUMMARY OF THE ARGUMENT

I. The trial court erred in not applying a clear and convincing standard in requiring that the subject minor's child be changed to a hyphenated name. Alternatively, the district court abused its discretion in finding that the best interest of the child was met by changing his surname to a hyphenated name containing his father's last name.

II. Nevada Revised Statutes (NRS) 440.280 is unconstitutional on its face because it treats married women and unmarried women unequally, thus implicating the Equal Protection Clause. The statute allows unmarried women the option—once paternity is established—to either appoint their non-marital child's father's name as his[42] surname, or the women's own "maiden" or prenuptial names. But, under the same naming statute, on its face, married women are not afforded the same discretion.

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[41] *See id.* (PETIT 184-188)

[42] Throughout the brief, any generic references to a child (as well as the specific child at issue here), will be referred to by the pronoun "he," rather than "he or she," or "they," for the sake of clarity and uniformity.

ARGUMENT

I.

1. The standard for deciding whether a child's surname should be changed from that listed on the child's birth certificate has been established by the Nevada Supreme Court to be "clear and compelling."

a. *The district court failed to adopt the correct standard as set forth in Magiera and Russo.*

Twenty-five years ago, the Supreme Court of Nevada held in *Magiera v. Luera*, 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."**[43] The Supreme Court reiterated nearly a decade later, in *Russo v. Gardner,* that "clear and compelling" is the proper standard of proof in a case involving the change of a surname of a child.[44]

At the conclusion of the evidentiary hearing in this case, on June 10, 2014, the district court ordered that "in the best interest of the child, the child's name shall be changed to **Ryder Blake Petit-Adrianzen**."[45] The district court, in ruling that Ryder's surname be changed from what was listed on his birth certificate

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[43] *See Magiera v. Luera*, 106 Nev. 775, 777 (1990).
[44] *See Russo v. Gardner,* 114 Nev. 283, 291 (1998).
[45] *See* Decree, at 3:17-18 (PETIT 178)

("Petit") to a hyphenated name "Petit-Adrianzen," expressly decided that it was in Ryder's best interest, but did not do so under the correct standard. The district court incorrectly stated that, "As far as the name change of the child, *the best interests of the child is the standard.*"[46] But this is only partly correct. The district court was certainly charged with deciding the best interest of the child. But, the district court was also charged with making that determination at a relatively high standard of proof; that is, by means of "clear and compelling" evidence, as set forth by *Magiera* and *Russo.*

Determination of the correct standard of proof to be used by a tribunal is a legal question subject to *de novo* review.[47] The appellant leaves aside for the moment whether or not the district court correctly assessed that a change of Ryder's surname was reasonably in his best interest. The initial issue is that the district court in no way demonstrated that it was making the determination of Ryder's name by "clear and compelling" evidence. Instead, the district court appeared to utilize a generic lower standard of proof, or a preponderance of the

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[46] *See* Transcript at 84:14-15 (PETIT 170) (emphasis added)

[47] *See IBEX,* 240 P.3d 1042 (citing *Matter of Halverson*, 123 Nev. 493, 509, 169 P.3d 1161, 1172 (2007)).

evidence standard.[48] That is far lower than it was compelled to do by precedent in this jurisdiction. Instead, the district court should have used a standard of "clear and compelling," or perhaps better known in other contexts as, "clear and convincing,"[49] for changing Ryder's surname.

Moreover, the burden to prove that a name change is required for a child lies upon the party seeking the name change, in this case, Kevin. Yet, the district court appeared to equalize the burdens between the two parties, and erred by not imposing a higher burden on Kevin to prove by *clear and compelling* evidence that changing Ryder's surname from Petit to Petit-Adrianzen was in the child's best interest. At no point did the district court even acknowledge that "clear and

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[48] *See J.D. Construction v. IBEX Intl Group*, 240 P.3d 1033, 1043 (Nev. 2010) (noting that preponderance of the evidence is the "general civil standard," and that such standard refers to "the greater weight of the evidence.") (citing *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 925-26, 34 P.3d 573, 576 (2001) (quoting *Black's Law Dictionary* 1201 (7th ed. 1999)) (internal quotation marks omitted). *See also, Betsinger v. D.R. Horton, Inc.*, 126 Nev. 232 (2010) (A preponderance of the evidence is generally required to resolve a civil matter); *Brown v. State*, 107 Nev. 164, 166 (1991) (A preponderance of the evidence amounts to whether the existence of the contested fact is found to be more probable than not.)

[49] *See Magiera,* 106 Nev. at 777. *See also, Albert H. Wohlers & Co. v. Bartgis,* 114 Nev. 1249, 1260 (1998) ("Clear and convincing" evidence is beyond preponderance-of-the-evidence standard).

compelling" is the standard of review for the change of Ryder's surname, let alone adhere to it.[50]

In both *Magiera* and *Russo*, the surname change involved a child born "out of wedlock," or a non-marital child. In the way of context, in *Magiera*, Dawn Magiera gave birth to a daughter and gave her the surname "Magiera." The child's father, David Luera, who was never married to Ms. Magiera, acknowledged his paternity and signed the birth certificate. Subsequently, in a hearing involving child support payment, Mr. Luera petitioned the court for the child's surname to be changed to reflect his last name. Inasmuch as Mr. Luera was providing child support to the child (and had earlier acknowledged paternity), the district court ruled that the child should bear his surname.[51]

On appeal, the *Magiera* court concluded *generally* that a father has no greater right than the mother to have a child bear his surname.[52] The only factor relevant to the determination of what surname a child should bear is the best

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[50] The district court did acknowledge a "clear and convincing" evidence standard during the parties' evidentiary hearing, but *only* with respect to Paige's allegations of domestic violence again Kevin—not with respect to Ryder's name change. *See* Transcript (June 10, 2015) (PETIT 165-166)

[51] *See Magiera,* 106 Nev. at 777.

[52] *See Magiera,* at *id.*

interest of the child, *and* the person seeking the name change has "the burden…to prove, by clear and compelling evidence, that the substantial welfare of the child necessitates a name change."[53]

Similarly in *Russo,* John Gardner petitioned the court to change the surname of his daughter from Russo, (the child's mother's surname), to Russo-Gardner. The district court approved the request, requiring the parties' daughter to take a hyphenated name. The Nevada Supreme Court reversed, concluding that "no showing of 'clear and compelling' evidence" necessitated a name change.[54] The Supreme Court emphasized that the child would continue to live with her mother (whose surname was Russo).[55]

Significantly, the Supreme Court of Nevada, in neither case, made its determination of the child's surname on the mere basis that the fathers were not married to the mothers of the children. Instead, the Court's reasoning fairly demonstrates that any person seeking the name change of a child—regardless of marital status—had a burden to prove by *clear and compelling evidence* that the

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[53] *See id.* (citing *Robinson v. Hansel*, 302 Minn. 34, 223 N.W.2d 138 (1974); *Collinsworth v. O'Connell*, 508 So.2d 744 (Fla. Dist. Ct. App. 1987)).

[54] *See Russo,* 114 Nev. at 291.

[55] *See id.*

change was in the best interest of the child.[56] That is the standard that the district court should have used here. Its failure to do so should lead this Court to reverse its decision.

b. The district court did not review clear and compelling evidence that a name change was in Ryder's best interests.

At the evidentiary hearing, Kevin did not present any evidence whatsoever in support of his petition for a name change, let alone clear and compelling evidence. In fact, Kevin did not spend much time on the issue of Ryder's surname at all, in either his testimony or in his cross-examination.[57] Kevin, who petitioned for the name change, had the burden of proving, by clear and compelling evidence, that a name change was necessary for Ryder. Presented with such dearth of evidence, the district court should clearly have been left with no choice but to allow Ryder's name to remain as it was. Instead, after the close of evidence, and during closing arguments, the district court *sua sponte* addressed Kevin's name change petition and solicited brief oral argument by counsel—but, plainly not evidence—concerning it:

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[56] *See generally*, *Magiera* and *Russo*, at *ids*.

[57] *See generally*, Transcript (June 10, 2014), PETIT 145-149. *See also,* Transcript (Feb. 26, 2014), PETIT 049-065; Transcript (March 19, 2014), PETIT 066-086.

Plaintiff's (Kevin's) counsel: Thank you, Your Honor. The evidence had shown that my client had made attempts to see the minor child and was unable to do so partly due to the Defendant's [Paige's] unilateral control.

The court: Before your argument—

Kevin's counsel: I'm sorry.

The court: --and I don't mean to interrupt you. One of the things that's on my plate, [Defense counsel, Paige's counsel], and I'm sure it's an omission, is the Court's consideration to change the name of the child. You [Paige's counsel] never asked your client what her position was concerning that. She had told me at a previous hearing that you represented for her that she named the child. I assume that the names that she selected were important to her and yet the child isn't identified with the paternal side of the family. And so—

Paige's counsel: And, Judge, it was—

The court: --either you're going to represent in an argument or you're going to ask her right now what her position is concerning that. It's only fair before I make the order.

Paige's counsel: And I do appreciate that, Judge. And what I would—what I would state to the Court without—it would have been addressed in my closing, which is that obviously the burden is on the parent seeking to change the surname, and that would be the Plaintiff [Kevin]. We don't think that he set forth a valid reason as to doing it. However, I did ask my client what she preferred and she would indicate that she would, if the hyphenation would [be] the order of the Court, that her name be first and dad's name be second...

And again, Judge, finally with regard to the name change, I'll put it in the closing just so we're clear. The case law, as you are aware, puts the burden on Plaintiff [Kevin]. We do not believe that [Kevin's] amount of testimony rose to the level of showing it was in the child's best interest that

the name be changed. However, as I indicated to Your Honor, if the hyphen is the order of the Court, mom would suggest that her name go first.[58]

But rather than at that time instructing Kevin to put forth evidence or argument as to why he sought Ryder's surname change, the Court instead turned to Paige and imposed upon *her* the duty of explaining why the name that she chose for the child, and which was placed on the child's birth certificate, should remain. (Curiously, the district court seemed to focus on the child's middle name, ("Blake"), rather than the surname that was at issue[59]):

The court: Is Blake an important name for her?

Paige's counsel: I'm sorry, Judge?

The court: Is Blake an important name, a family name or something that's very important or attachment? She named the child Ryder Blake Petit. Is that an important name? Is it something that has special significance for either you or your rel—family or was it just because you liked the name?

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[58] *See* Transcript, at 64-65:1-6; 71-72:1-4 (PETIT 150-151 and PETIT 157-158)

[59] For the record, mercifully, Ryder's assigned middle name of "Blake" is not a point of contention between the parties. Neither is Ryder's first name. In his Petition for Name Change, Kevin allowed that his and Paige's choices of "Ryder" as the child's first name, and "Blake" as the middle name should be preserved. *See* Petition for Name Change, at 2 (PETIT 016 and PETIT 449). *See also,* Transcript (Feb. 5, 2014), at 6 (PETIT 054). It goes without saying that Ryder, born in 2013, is too young to express an opinion on his name change.

Paige: Your Honor, it was just because both of us—me and Kevin have liked the name and I would like to see his name stay the same just because it's very important to me.

The court: I—I understand that, but the—I guess what I'm saying is I don't want to –I don't want to make a conclusion about what to or not to do with the change of the name based on—I mean, I think clearly from your counsel's argument you want the surname of the child to be Petit or have that be some semblance of the surname.

Paige: Yes.

The court: I mean, if it were up to you, you'd leave it the same.

Paige: Yes.

At an earlier hearing, the district court tacitly revealed that it incorrectly saw the parties' burdens as equal—both had to prove the reason that Ryder's surname should be what each of them, Paige and Kevin, wanted it to be. The court thereby tacitly revealed its intent to release Kevin from the burden that case law required him, the party seeking to have the child's name, to bear:

> …[I]f we have to have a trial in this case to resolve unfinished business, custody issues, then one of the things that your lawyers are going to ask you about is what you feel about the name and why and what you think is best for the child. And they are hard issues to resolve, but there—it will be left up to the State or the Court to make final decision on that case.[60]

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[60] *See* Transcript (Feb. 26, 2014), at 7:20-24, 8:1-2 (PETIT 055-056)

Kevin presented no evidence at all regarding his request for a name change for Ryder, let alone clear and compelling evidence supporting it. The court took it upon itself to make a name change as though it were compelled to decide the issue, despite the burden precedent imposed upon Kevin to bring forth evidence warranting the court's inquiry. Having inquired into the reason for the request, the court was evidently satisfied that insofar as Kevin wanted the child to bear his surname in some way, it should, *ipso facto*, be granted. In fact, rather than just soliciting and entertaining argument on the issue—and that, after the evidentiary hearing was concluded[61]—the district court should have required that Kevin produce evidence, as was his burden, regarding his requested name change. But by the standards put forth by *Magiera* and *Russo,* the district court's order changing Ryder's name from Petit to Petit-Adrianzen "cannot stand."[62] Likewise, in the

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[61] *See* Transcript, at 63: 4-7 (PETIT 149) ("The Court will consider the evidence portion of this case closed, documentary proof and the testimony of the parties and dad's and mom's petition for the Court to be able to resolve the matter...")

[62] This is exactly how the *Magiera* court succinctly put it: "[I]t is apparent that the district court's order cannot stand. At no time did the district court consider the interests of the child in this matter. No evidence was presented tending to suggest, let alone prove by clear and compelling evidence, that it would be in the interest of the child to have her surname changed." *Magiera,* 106 Nev. at 777.

present case, the district court did not appear to seriously evaluate the interests of the child in this matter.

The district court could not take it as an article of faith that a parent's request for a name change—from a name that already stands as the child's name on his birth certificate—must be granted, absent persuasive objection by the parent who named the child. It was *not* Paige's duty to convince the court that Ryder's name *not* be changed from the one already listed on his birth certificate. Conversely, it was Kevin's duty to make the affirmative showing, and by clear and compelling evidence, that Ryder's "substantial welfare necessitates the change."[63]

The district court did not hold Kevin to the proper standard, and consequently, did not require Kevin to meet his burden of proving, by clear and compelling evidence, that a change of Ryder's surname was in his best interest. Instead, the court appeared to impose this burden on Paige, not Kevin. The court mildly chided *Paige's* counsel that it was "an omission" for him not to bring up the name change issue for which Kevin, not Paige, petitioned the court. The district court had no occasion to review any evidence regarding how a change of Ryder's surname was substantially in his best interest, because Kevin did not present any.

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[63] *See Magiera,* 106 Nev. at 777.

Again, this evidence was Kevin's responsibility to produce. Instead, the district court apparently took the position that a name change to include a father's surname is presumptively in a child's best interest. Thus, the district court only sought Paige's "position" on the issue before making its ruling. But *Magiera* had already instructed the court that "a father has no greater right than the mother to have a child bear his surname."[64]

Neither did the district court press Kevin to produce evidence to show that the name change was in Ryder's best interest, which was his burden, as the standard was set by *Magiera* and *Russo*. Again, even before the hearing the district court apparently took the position that once Kevin petitioned the court for the name change, the burden then lay upon Paige to prove that it was not in the child's best interest. But this was in error. The district court was to assign that burden, as cogently articulated by *Magiera* and *Russo*, to Kevin to put forth evidence (as well as argument) to support his petition that the child's substantial welfare or best interest necessitated a change to the child's surname, already listed on a state-issued birth certificate. Kevin's reticence about the benefit of changing Ryder's surname means that his request should have been denied.

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[64] *See Magiera,* at 106 Nev. at 777.

c. It was improper for the court to consider Kevin's interests to the exclusion of Ryder's best interests in deciding the name change.

It was also improper for the court to reflexively take issue with Ryder's surname on the basis that "the child isn't identified with the paternal side of the family."[65] There is no obligation, either in civil or moral law, that a child be "identified with the paternal side of the family" by means of his surname. Although it is customary, particularly in the United States, that a child be given the surname of his father, this is not universal.[66] Nor is this patronymic naming system necessarily uniform, even in the United States[67]. Certainly, with respect to Nevada law, the district court received no mandate that a child must have his paternal family "identified" in the child's surname. To the extent that the district court apparently thought so, such thinking should be found in error, (based on a reading of *Magiera*), and corrected.

Even had the court heard evidence from Kevin in support of the requested name change, it is evident that it would have been insufficient to carry his burden.

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[65] *See* Transcript (Feb. 26, 2014), at 7 (PETIT 055)

[66] http://www.salon.com/2000/01/20/surnames/ ("Why Should a Baby Get the Father's Last Name?") (last visited, Sept. 8, 2015).

[67] *See* http://www.theguardian.com/lifeandstyle/2013/dec/28/why-shouldnt-children-have-mothers-surname (last visited, Sept. 8, 2015).

That is because Kevin's professed purpose for seeking Ryder's surname changed had to do with *his* interests: The only reason that Kevin desired that Ryder's name be changed was for his supposed rights as a father and (former) husband, and not because the change would necessarily be in *Ryder's best interest*. But not Kevin, and indeed no father, whether a biological, married father or no, has an inherent, paternal "right" to change the surname of his child, particularly one that has already been recorded on the child's birth certificate. Yet, in his Petition for a Name Change, Kevin admitted:

> ...Petitioner wishes to change the child(ren)'s name(s) because he is the biological father and was married to the biological mother at the time of child's birth.[68]

Even taking into account Kevin's status as representing himself in proper person, and his lack of legal training, his explanation falls short. Kevin merely referred to his own interests in seeing Ryder's name changed, as vaguely having something to do with his purported rights as a husband and father. None of these concerns has anything to do with his concerns for the well-being of his child. Even without much legal training, Kevin could have stated in some way what he hoped a name

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[68] *See* Petition for Name Change, at 2:13-15 (PETIT 449) (sub-lineation in original).

change would accomplish for his child. At the very least, Kevin could have stated something along the lines of, "I believe Ryder should have my last name so that he will feel connected to me and/or my family." At least such a statement would set forth a rudimentary *prima facie* case for Kevin's seeking a name change for the benefit of Ryder. Daresay, such is not above the ability of a committed *pro se* litigant.

But for his part, the only sentiment that Kevin could muster at the evidentiary hearing,—aside from his rights in paternity and former marriage to the child's mother—was that *his* culture and heritage should be preserved in Ryder's surname. Now speaking by way of his counsel, Kevin attested:

> **Kevin's counsel:** Additionally, in terms of the name change, my client has met the burden in terms of showing **why it's important to not only him but his family** in terms of his heritage as to why it would be a hyphenated name as to not only identify with the child but in terms of heritage and culture. So it's not just a whimsical matter that was proposed by my client but something that is of a fundamental interest in terms of his family and his heritage.[69]

At no point does Kevin articulate any concern nor set forth any argument as to how a name change was important to or for *the child,* only respectfully, how it is

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[69] *See* Transcript, at 65:22-24; 66:1-6 (PETIT 151-152) (sub-lineation and italics added for emphasis)

"important to him, and to his family." It is admirable that Kevin's family apparently takes such familial pride in the heritage and culture of their surname.[70] But as genuine an interest Kevin may have with having Ryder reflect his heritage and culture, such does not necessarily argue in favor of a substantial benefit to Ryder.[71]

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[70] It is not clear exactly what cultural heritage "Adrianzen" derives from, and Kevin did not enlighten the court regarding it. (A webpage dedicated to the history and meanings of surnames reports that people with the surname "Adrianzen" are most densely located in Peru. *See* http://forebears.io/surnames/adrianzen (last visited, September 8, 2015)). However, Kevin is not of Peruvian extraction, upon information and belief. Although it was apparently not an issue brought up at the evidentiary hearing and thus may not be appropriate for this court's consideration, Kevin's surname of "Adrianzen" is not necessarily a part of his "heritage" and/or "culture." Quite the contrary, Kevin took on his stepfather's surname as a youngster when his mother remarried. Kevin's stepfather did not adopt him. "Adrianzen" represents neither Kevin's *nor Ryder's* "culture" or "heritage," not by either adoption or consanguinity. Nor does Kevin appear to be in close or any contact with his stepfather's family. Aside from that, Paige's family enjoys a very strong pride in its last name, as well, which is prominent not only in Europe, particularly in France (from which Paige's grandparents hail), (*see, e.g.,* http://www.ancestry.com/name-origin?surname=petit, last visited Sept. 8, 2015). But Paige's family has achieved prominence in nearby California, where the United States branch of the Petit family has become involved in relatively high-profile business, medicine, and political affairs. Had the district court seriously entertained evidence on the issue of Kevin's surname, this evidence could have been introduced.

[71] As one court has stated, "Positive benefits can accrue to a child from a knowledge and awareness of the people and cultures the child is related to. However, if the unstated goal of father in giving his name to his daughter is to develop in her an awareness of her roots and family heritage, requiring that she use

Ryder spends most of his time with Paige and her family, not Kevin and Kevin's family. It is Paige who will enroll Ryder in school, take care of the majority of his social and physical needs, and raise him with her family, and any siblings that he may acquire by way of his mother. If anything, Paige's "culture" and "heritage" would play more than an equal part in Ryder's upbringing insofar as the court awarded Paige primary physical custody of Ryder.

d. The fact that Paige and Kevin were "technically" married should not lower the standard from "clear and compelling" nor make any other change to the reasoning set out in Magiera and Russo.

To the extent that the district court concluded that the clear and compelling standards set forth by *Magiera* and *Russo* were inapplicable to Paige and Kevin because they were married at the time of Ryder's birth, this Court should disagree with this conclusion. Neither the reasoning nor thrust of *Magiera* and *Russo* leads one to a reasonable interpretation that the court's imposition of the high burden of

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her father's surname does not, by itself, accomplish this important goal. Passing on a surname, by itself, only identifies a child as being connected to a limited number of ancestors, unless the name can be connected to a history, a culture, a family heritage, or an ethnic identity that can give added meaning and a sense of belonging to a child's life. There is no evidence in the record that father has made, or plans to make, that connection." *Doherty v. Wizner*, 210 Or. App. 315, 332 (2006). Likewise, here, Kevin has offered no evidence that he identifies with a family, or cultural connection with respect to the name "Adrianzen" that he will somehow share with Ryder.

"clear and convincing" on parents seeking name changes for their children depends exclusively upon the marital status of the parties. It is true that in both landmark cases the parties were not married at the time of the requested name change, but that did not constitute a material consideration, nor a key step in the analysis undertaken by the Nevada Supreme Court. Rather, the court appeared to tacitly narrow in on the fact that the children in both *Magiera* and *Russo* had already been named, and were living with parents whose surnames they shared. Although the fathers seeking the name changes in *Magiera* and *Russo* were not married to the mothers, and in some cases had a tortured and not altogether stable history with their children, the Supreme Court, nonetheless, did not carve out an exceptionally high burden for them based upon those exceptional, (though perhaps, not unusual), circumstances. Rather, in general, *Magiera* and *Russo* fairly can be read as imposing upon name-change-seeking parties a high burden to disturb a child's surname, once it has been recorded.

That the fathers in *Magiera* and *Russo* had problematic facts, including their non-marital status, only went to their failure to meet their burden, not their burden in general. If the district court believed, as it appears to have, that Kevin was not required to present evidence at the high level of clear and compelling simply because he was "married to the mother" at the time of Ryder's birth, this was in

error. Aside from the fact that *neither Magiera nor Russo* made an exception to the high burden of seeking a child's name due to the married status of the moving party, common law also prohibits the district court from making a distinction between the standard set for changing the name of a marital child versus changing the name for a non-marital child. The United States Supreme Court long ago abolished the legal status differentiation between legitimate and "illegitimate" children in this country.[72] Once paternity has been established, the child of a non-marital father should not be on the receiving end of a greater or lesser burden to demonstrate that a name change would be in child's best interests. If indeed a name change is in a child's interest, whether or not the child is born of marriage or not, this Court should have a uniform standard of review. And indeed it already does; that standard, as previously set by *Magiera* and *Russo,* is "clear and compelling."

e. The district court abused its discretion in not treating Paige in the same way as an unmarried woman insofar as she was only "technically" married.

If this Court deems that the district court reasonably utilized a lower standard of proof than clear and compelling, as called for by *Magiera* and *Russo,*

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[72] *See Levy v. Louisiana,* 391 U.S. 68 (1968); *Weaks v. Mounter,* 88 Nev. 118 (1972).

for the sole reason that Kevin and Paige were *a married couple,* the Court should find that the district court *nonetheless* abused its discretion. That is because the district court did not fully appreciate the fact that even though Paige and Kevin may have been married at the time of Ryder's birth, they were not "married" in any real or essential sense. The parties testified, which testimony the district court deemed credible, that Paige and Kevin were married "in name only." They did not have even an approximation of a committed relationship, either before or after Ryder was born.[73] Paige testified that she and Kevin had met each other in high school, but did not even talk to each again other for "a few years after."[74] In October 2012, they "started talking again."[75] And then six months later, in April 2013, Paige, at nineteen years old, married Kevin for the sole purpose of obtaining insurance benefits for their, as yet, unborn child.[76] Kevin and Paige stopped speaking to each other again immediately after the wedding.[77] When Paige left the hospital with the baby ten days after being admitted, Kevin was not present.[78]

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[73] *See* Transcript (June 10, 2014), at 85:6-13 (PETIT 171)
[74] *See id.*
[75] *See id.*
[76] *See id.*
[77] *See id.*
[78] *See id.*

Kevin did not see the child again for some time thereafter.[79] In spite of their tumultuous history, Kevin and Paige had never lived together.[80] It is clear from the facts, which were accepted as credible by the district court, that Paige and Kevin did not have anything like an authentic marriage such that their situation would serve as an exception to the standards set by *Magiera* and *Russo*.

Rather than an "estranged" status,[81] Kevin and Paige had little to no relationship at all. They certainly had no proverbial "meeting of the minds" with respect to a true union. They had no plans to live together, and have still never lived together. [82] The district court acknowledged that Paige and Kevin only married for the sake of obtaining insurance.[83] In essence, Paige was more akin to an *unmarried* woman than a married woman when she gave birth to Ryder. Had Paige been an unmarried woman in fact, this dispute would daresay never have reached this level of argument. For example, NRS 440.280 unequivocally provides that an unmarried woman may elect to give her infant the child's father's

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[79] *See id.* at 9, 11-12 (PETIT 095-98)
[80] *See id.*
[81] *See id.* at 84:20 (PETIT 170)
[82] *See* Transcript (March 19, 2014), at 10 (PETIT 075) and Transcript (June 10, 2014) at 9 (PETIT 095).
[83] *See* Transcript (June 10, 2014), at 73: 10-12 (PETIT 159)

surname, or her *own* surname, even where paternity has been conclusively established. But a married woman has no such liberty. (More on this *infra*).

But in this case, even any warranted presumptions in favor of a father imposing his surname on his child when he was "married to the mother" should be set aside under circumstances wherein the couple was more like an *unmarried* couple than a married couple. As the court stated in *dictum*,

> Usually, this type of dispute arises amongst folks that are not married. You guys are *technically* married and you have the same rights under statute. Married folks who have children have joint legal custody rights and that includes making decisions like what name the child has. Okay?[84]

Yet, the district court, while acknowledging that what Paige and Kevin engaged in was something short of a true marriage, (calling it a "technical marriage"), the district court nonetheless afforded Kevin greater leeway in appending his family's surname to Ryder's than the court likely would have afforded Kevin in the same situation had Paige and Kevin never married. Kevin and Paige were a couple for altogether a month. The couple shared none of the incidents or trappings of marriage. In fact, it is a stretch to call them a "couple,"

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[84] *See* Transcript (Feb. 26, 2014), at 7:15-20 (PETIT 055) (Emphasis added).

inasmuch as they have never shared a single thing in common, not their expenses, debts, surname, not even their residence.[85] It is obvious that under the circumstances of Paige and Kevin's ersatz union, they could not "make decisions like what name the child has." That is the reason that in similar situations—*i.e.*, where the woman is not married to the father of her child—the state legislature (for example, in Chapter 440), and the Nevada Supreme Court, in *Magiera* and *Russo*, among others, has not required such a couple to agree on something so contentious as what surname to give the child.

Instead, these authorities have granted *unmarried* women more or less the unfettered right to give their children their own surnames, even over the objections of their children's fathers, including where paternity has been conclusively established.[86] Paige, more akin to an unmarried woman than a married woman, should have been afforded the same presumption of correctness in naming the child with her family's surname. Indeed, today, even women who marry may not take their husband's surname, even as a hyphenated name.[87] Paige retained her

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[85] *See* Transcript (June 10, 2014), at 7-10 (PETIT 093-096)

[86] *See generally,* NRS Chapter 440.

[87] Though not solicited in the record, Paige has indicated that she intends to retain her "maiden" or prenuptial name even if she marries again.

prenuptial name after her marriage to Kevin. She never changed her surname to Adrianzen or a hyphenated name of Petit-Adrianzen.[88] It is bizarre to insist that an unmarried woman (or one who was only "technically" married), particularly one with *primary physical custody* of the minor child, should be required to raise her child with a hyphenated name when the relevant statute and case law do not require it.

It is also not clear how such would necessarily be in the best interest of a similarly-situated woman's children. This is particularly evident if the said woman were to engage in another relationship and have another child over which she gained primary physical custody. Hypothetically, if a woman were to be required to give all of her children various surnames (or hyphenated surnames) from different spouses or unmarried partners of their mother where such spouses or partners did not agree that the children should bear their mother's surname, the children could grow up with siblings with an *externally-imposed* lack of familial commonality in nomenclature. In any event, with the court having awarded Paige primary custody, it is more logical that Ryder bears the family name of the family with which he spends most of his time. Considering the totality of the

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[88] *See* Transcript (June 10, 2014) at 7:18-19 (PETIT 072)

circumstances, including the failure of the district court explicitly to consider this, constitutes an abuse of discretion.

2. Alternatively, even if the district court were correct in using a lower standard than clear and compelling, it was an abuse of discretion to change Ryder's surname.

Even if the district court were correct in using a lower standard than "clear and compelling" in determining whether it was in Ryder's best interest to have his surname changed from Petit to Adrianzen, the district court abused its discretion. (And if the district court used the wrong standard, then it is not entitled to discretion, at all)[89]. Whether or not a name change is in the child's best interests should necessarily depend upon elemental factors that tend to show the child's best interests in the change. Although these factors are potentially innumerable, they should not include the father's interest in "identifying" with the child, or the father's unilateral interest in having the child's surname reflect his heritage and culture, rather than the child's. To the extent that the district court only considered Kevin's interest in adding his surname to Ryder's, this Court should hold that it abused its discretion.

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[89] *See Bergmann v. Boyce,* 109 Nev. 670, 676-77 (1993) (concluding that a district court abused its discretion in misapplying the law).

a. The court's consideration of Kevin's concern that he would better "identify" with Ryder if the child shared his surname was not valid.

The court determined that the relevant considerations—the only factors that Kevin needed to prove—were 1) that Kevin did not consent to the child being named Ryder Blake Petit, 2) that Kevin was married to the mother at the time that Ryder was named, and 3) Kevin attempted to petition the court for Ryder's name to be changed within a reasonable time after his birth:

> **The court:** As far as the name change of the child, the best interests of the child is the standard. [Paige's counsel] is correct, that when somebody petitions the Court, they have the burden of proof. The Plaintiff proved that he did not name the child or consent to the child being named Ryder Blake Petit and that he was married to the mother at the time. And because of their estranged status and probably because the child was in the hospital, he had little or no say in it. He filed his action within two months of the birth of the child and he persuaded the Court that the child's best interests would be served, especially in this case, by having a name that would identify the child with both parties.[90]

Unfortunately, the district court left it a mystery how Kevin "persuaded the Court that the child's best interests would be served" by having Ryder's surname changed from his mother's last name of Petit to a hyphenated name including his estranged father's last name of "Adrianzen." Nor did the district court explain

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[90] *See* Transcript (June 10, 2014), at 84:14-24 (PETIT 170)

what it meant by "especially in this case" that such a change could be in the best interest of the child.

Certainly, the district court, which did not even note the clear and compelling standard, did not explain what was clear or compelling to support changing Ryder's last name. Finally, the district court failed to explain or indicate how "identifying the child with both parties" was in Ryder's best interests, particularly where the court awarded primary physical custody of Ryder to his mother. It very much seems that the district court was swayed by, for lack of a better word, paternalistic, traditions and customs in saying, at an earlier hearing, and then at the evidentiary hearing, respectively:

> **The court:**
>
> Okay. Well, guess what? Neither one of you have a greater right than the other to have the surname of the child and best interest is the consideration which is this nebulous concept of identification of the child with both. There are different traditions that different cultures have about how to name a child, but I can't tell you today how that's going to come out. One of three things is going to happen. The child's name is going to remain the way that it is, the child's name is going to be changed in some fashion, either as Dad requests or in some other way. You know, parents have agreed to add surnames or to hyphenate certain surnames. It's a big can of worms that you guys are going to have to work through.[91]

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[91] *See* Transcript (Feb. 26, 2014), at 7:2-14 (PETIT 055)

> What I though is that the parties' last names should be both part of the child's name, and the child is going—I—what the Court concluded might be best is different than what I heard today in trial...It will be Ryder Blake Petit-Adrianzen. And the parties also can stipulate to modify that. The birth certificate will be amended in that respect.[92]

It may be true that neither Paige nor Kevin had a "greater right" to name Ryder. But the fact remains that Ryder had already been named. In that case, the district court should have required Kevin to show that a change of his name benefited Ryder's "substantial welfare," and by clear and convincing evidence.[93] Again, the district court did not articulate the reason that both parents' last names "should be both part of the child's name." Indeed, this Court can take judicial notice that hyphenated last names of children are not at all common[94], even for children raised by single and/or divorced parents.[95]

Neither does Kevin's concern, no matter how sincere, that he will better "identify" with Ryder if the child bears his surname constitute a valid argument for a name change. Certainly these considerations do not rise to the level of "clear and compelling" evidence. Indeed, despite granting, in part, Kevin's petition by

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[92] *See* Transcript, at 85:6-13 (PETIT 171)
[93] *See Magiera,* at *id.*
[94] *See, e.g.*, footnotes 58 and 59, *supra.*
[95] *See "Rights and Remedies of Parents Inter Se With Respect to the Names of Their Children,"* American Law Reports, 40 A.L.R. 5th 697 (1996).

requiring Ryder to take a hyphenated name, the court had earlier cautioned that seeking a surname change in order to better identify with a child is a "nebulous concept."[96]

The district court's reasoning in this appears especially clumsy where neither Paige nor Kevin sought a hyphenated name, or thought that such was in the best interest of their child. Rather than selecting between the name that Ryder had already been given—which would make the most sense and satisfy the high burden that Nevada law places on changing a child's surname—the district court sought to satisfy neither parent and impose on Ryder an unfavorable choice (to both parents), as well as a long and difficult to pronounce, (Petit-Adrianzen), surname. This might be acceptable had the district court intimated on what basis such a choice benefited Ryder, but it did not. The district court apparently just thought it was "right" for a child to be identified by name with *both* parents. But that does not approximate an identifiable, let alone a correct, legal standard. If that is the case, then most children in the United States—who, it can be safely said, and this Court may take judicial notice of this—are not properly "identified" with both parents inasmuch as most children, (even after their parents are divorced), simply use their

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[96] *See* Transcript (Feb. 26, 2014) at 7:3-5 (PETIT 055)

fathers' surnames.[97] That would lead to a conclusion that such children are not "identified" with their mothers.[98]

And, though the district court was correct in stating that "neither one of [them—Paige and Kevin] have a greater right than the other to have the surname of

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[97] *See "We are Family": Valuing Associationalism in Disputes Over Children's Surnames,* Weiner, Merle H., North Carolina Law Review, 75 N.C.L. Rev. 1625 (June 1997) (citing *M.D. v. A.S.L.*, 646 A.2d 543, 544 (N.J. Super. Ct. Ch. Div. 1994) ("In modern society, it has been customary for a child to assume the surname of the father..."); *Rio v. Rio*, 504 N.Y.S. 2d 959, 960-61 (Sup. Ct. 1986) ("Most American children born in wedlock are given their father's surname," this is a "practically universal custom."); *Kay v. Bell*, 121 N.E. 2d 206, 208 (Ohio Ct. App. 1953) ("It has been the custom in our country since the time 'when the memory of man runneth not to the contrary' to give to a child the surname of its father.") (some citations omitted). "In fact, '[t]oday, few American mothers are aware that they are not legally required to give their children their father's surnames.'" *"We Are Family,"* at footnote 50 (citing *Rio*, 504 N.Y.S.2d at 963). *See also,* footnotes 66 and 67, *supra.*

[98] *C.f., J.N.L.M. ex rel. Killingsworth v. Miller*, 35 Kan. App. 2d 407, 413-17 (Ct. App. 2006) (noting that Kansas has embraced as consisted with Kansas law the authorities from other jurisdictions that reject any presumption for paternal surname. "These authorities note that any tradition for a child to bear its paternal surname has become inappropriate in today's culture. There is little reason today to fear the stigma of illegitimacy; 'it is doubtful that [the child's] retention of [his or] her mother's surname would even raise an eyebrow, let alone subject [him or her[to ridicule or scorn.'") (citing *Lufft v. Lufft*, 188 W. Va. 339, 341, 424 S.E.2d 266 (1992); *O'Connell*, 508 So. 2d at 747; *Aitkin County Family Service Agency v. Girard*, 390 N.W. 2d 906, 908 (Minn. App. 1986); *Gubernat v. Deremer*, 140 N.J. 120, 140, 657 A.2d 856 (1995); *Petition of Schidlmeier by Koslof*, 344 Pa. Super. 562, 569-70, 496 A.2d 1249 (1985); *In re M.C.F.*, 121 S.W.3d 891, 897 (Tex. App. 2003)).

the child," the fact is, Nevada law has not made the parties equal in the situation presented here. Once a child is named and said name has been recorded on the child's birth certificate, the court accords a certain respect and finality to the choice. A burden is then placed upon the objecting parent to show by clear and compelling evidence that that name should be disturbed. That was not done here, and the district court abused its discretion in so doing.

b. The district court abused its discretion by not reviewing or promulgating factors that would tend to assist the court in determining Ryder's best interest.

The paramount concern of the court must be the best interest of the child. But this begs the question. There are many factors to be considered in determining what comprises the best interests of a child.[99] The district abused its discretion in not reviewing or promulgating at least some of those factors that would tend to assist the court in determining Ryder's best interest. As already discussed, *Kevin's* interest in having Ryder carry on Kevin's cultural or ethnic heritage by way of his father's surname is not properly one of those factors. *Nor* is Kevin's interest in better "identifying" with Ryder, nor Kevin's "rights" as a father who was "married to the biological mother."[100]

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[99] *See generally, "Rights and Remedies,"* 40 A.L.R. 5th 697.
[100] *See* Petition for Name Change, at 2:13-15 (PETIT 449)

What are some of the appropriate factors that the district court should have reviewed or considered in determining the best interest of a child with respect to a request to change his surname? In *Magiera,* the Supreme Court looked to the fact that the child had for three years lived exclusively with the mother, (the parent who had given the child her surname), and that the child would continue in *primary custody* with the mother.[101] The *Magiera* court said:

> When a child bears a surname different from the surname of the parent with whom the child lives, the child may experience confusion about her identity, difficulties in school and society, and embarrassment among friends. These consequences are surely not warranted at the request of a father who did not even support his child until a court ordered his wages garnished. Under the circumstances of this case, the district court erred in ordering the child's surname changed.[102]

In *Russo* the Supreme Court determined the most important factor to be that the child, Samantha, had lived continuously with her mother, Russo, (the naming parent), and not father, Gardner, the parent requesting the name change:

> A current examination of the facts of this case reveals that Samantha is and will be living with Russo, and that Zachary's [Samantha's half-brother] surname has changed...since the district court's judgment. After a thorough review of the record, we conclude that there is no showing of "clear and

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[101] *See Magiera*, 106 Nev. at 777-78.
[102] *Magiera,* 106 Nev. at 778.

> compelling" evidence to necessitate a name change...Accordingly, we reverse the order changing Samantha's surname on her birth certificate.[103]

Here, as was the case in *Magiera* and *Russo,* Ryder has lived exclusively with Paige and her family his entire life. As in *Magiera* and *Russo,* Ryder will continue living exclusively with Paige, his mother, as the court awarded primary custody to Paige. As noted earlier, it is Paige who will enroll Ryder in school, take care of the majority of his social and physical needs, and raise him with her family, and any siblings that he may acquire by way of his mother. Moreover, just as the father in *Magiera,* Kevin did not support Ryder until a court ordered it.[104] And just as the court stated in *Magiera,* it is true here that, "[u]nder the circumstances of this case, the district court erred in ordering the child's surname changed."

Aside from Nevada, other courts addressing requests for surname changes in situations similar to the one presented by Paige and Kevin have looked at similar, and other relevant factors. Some courts have stated that the factors to consider in a

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[103] *Russo*, 114 Nev. at 291 (citing *Magiera v. Luera,* 106 Nev. 775, 777, 802 P.2d 6, 7 (1990)(holding 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."))

[104] *See* Transcript (March 19, 2014) at 17-21 (PETIT 082-86); Transcript (June 10, 2014), at 56: 7-24; 57:1-5; 60:16-24; 61-62 (PETIT 142-143, 146-148)

best interest analysis for a name change are: 1) misconduct on the part of one of the parents, if any; 2) failure to support the child; 3) failure to maintain contact with the child; 4) the length of time the surname has been used; 5) whether the surname is different from that of the custodial parent; 6) whether it would be more convenient or easier for the child to have the same name as or a different name from the custodial parent, either the changed name or the present name; 7) whether the changed name or the present name would best avoid embarrassment, inconvenience, or confusion for the child; and, 8) the degree of community respect associated with the present or changed name, among others.[105] But precisely *none* of these factors was considered by the district court.

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[105] *See Keegan v. Gudahl,* 525 NW2d 695 (S.D. 1994) (In a case of first impression, holding that the trial court should not have deferred to the custom of giving a child the father's surname) and *In re S.M.V.,* 287 S.W. 3d 435, 449 (Ct. App. TX, 2009) (Enumerating factors to be considered in deciding name change and noting, "Courts consider the factors that address the best interest of the child, ***not the needs of a particular parent or customs or traditions*** that reflect a constitutionally prohibited inequality.") (citing *In re Guthrie,* 45 S.W.3d 719, 725 (Ct. App. TX 2001)) *See also, Matter of Morehead,* 10 Kan. App.2d 625 (Ct. App. Kan. 1985) (There was reasonable cause for changing minor child's paternal surname, where child's natural father was deceased, child had no interaction with paternal relatives, and person she regarded as her father, her natural mother, and her half-brother all had different surname). *See generally, also*, "Rights and Remedies," 40 A.L.R. 5th 697, particularly at §14 (noting that in a number of cases, where there was a dispute between divorced or never-married parents as to a proposed name change for their child, some courts have noted that a factor

In the event this Court determines that the district court erred in the application of the law, and/or abused its discretion in applying the law insofar as it did not evaluate any relevant factors in determining whether to change a child's surname, respectfully, this Court should also specifically enumerate for the benefit of Nevada's family courts, (as courts in other jurisdictions have done), the relevant and important factors in evaluating a non-naming parent's petition for a child's surname change. In any event, though, this Court should hold that in not applying any recognizable factors for determining the best interest of a child pursuant to a requested name change, particularly those suggested by *Magiera* and *Russo,* the Court abused its discretion, and its decision should not stand.

c. It is unfair to saddle Ryder with this unjustifiably "Solomon-like" decision.[106]

It is without question that a district court has the discretion to fashion a remedy, even one not necessarily requested by either party, as in this case; neither Paige nor

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militating in favor of the child bearing the mother's choice of surname, such as a maiden or prenuptial name or a stepfather's surname, is the assurance by the mother to the court that she would not change her name if she married or remarried.)

[106] The judgment of King Solomon refers to a story in the Holy Bible in which King Solomon of Israel ruled between two women both claiming to be the mother of a child by ordering that the child be split in half to be given to each of them. *See* 1 Kings 3:16-28.

Kevin sought a hyphenated name, but each requested that the child's surname be theirs. But, although a district court may fashion a remedy in its discretion, in making what appears to be an equitable, reverse "Solomonic" decision to just give Ryder two last names instead of one, in fact the district court should not be entitled to deference. What the district court did was actually avoid the question entirely, and unfairly saddled a very little boy with a difficult compound surname not shared by either of his parents, and which will not be shared by any of his siblings.[107]

It may seem that giving Ryder *both* his parents' names is the "perfect" solution, and disputing it could seem frivolous, even churlish. But the point of this appeal is not to make Paige happy with the name, but to serve what is in Ryder's best interest. Having a hyphenated surname is admittedly cumbersome even under the *best of circumstances,* (i.e., where both parents collaborate, and make it a

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[107] *Cf., In re Marriage of Douglass*, 205 Cal. App. 3d 1046, 1055-56 (Ct. App. Cal. 1988) (Child custody expert testified that use of a hyphenated name is just *"too much to saddle a child with."*) (Emphasis added) Although such is not a part of the court's record, it is at least interesting to note that Kevin has a girlfriend who gave birth to his second child several months ago. It is not known what surname the second child has or will have, whether "Adrianzen," or simply the new mother's surname—which likely Kevin could not easily contest if she remains unmarried to Kevin.

deliberate choice for their child.)[108] It is an outright burden for a child where such name is imposed by a court, and whose parents are in a high state of conflict and who, furthermore, *did not choose it.*[109] Sadly, it is very possible that Ryder could be saddled with a hyphenated name that might make him stand out (in an unfavorable way) in *both* of his families. Such is a likely source of embarrassment, confusion, and, not to mention, inconvenience.[110] That cannot reasonably be adjudged to be in Ryder's best interest—even if it was an obviously convenient resolution to the conflict for the district court.

What can reasonably be made of a situation where the district court takes a child who already bears one parent's surname and then turns his surname into a

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[108] *See Rebecca Tuhus-Dubrow, "Children of the Hyphens, the Next Generation,"* New York Times, Nov. 23, 2011. Ms. Tuhus-Dubrow, herself the bearer of a hyphenated surname given voluntarily to her by both of her married parents notes, "The problem, of course, is that this naming practice is unsustainable. (Growing up, I constantly fielded the question, 'What will you do if you marry someone else with two last names? Will your kids have four names?') Like many of the baby boomers' utopian impulses, it eventually had to run up against practical constraints." *The author also notes that the trend of hyphenated surnames is on the decline. See id.*

[109] *See* Transcript (June 10, 2014), at 89:1-5 (PETIT 175) (alluding to the "conflict and hostility" between Paige and Kevin and their families).

[110] *See In re S.M.V.*, 287 S.W. 3d at 449. *And see*, "Rights and Remedies," at §6, **("[I]t is clear that to an extent, a minor child having the same name as the custodial parent generally 'makes things easier' for the child.")** (citations omitted)

hyphenated combination of both parent's names, especially when the requisite proof for changing any child's surname is "clear and compelling"?[111] If it is not because the district court believes that every child must bear his father's surname in some fashion, then it can only be because appending a father's surname to his offspring "rewards" or compensates the father. It is admirable that Kevin has taken responsibility for Ryder and provides financial support, but that does not, under the circumstances, give him an inherent "right" to have the child's surname reflect his. "The father of a child has a legal duty to support his child. The father is entitled to no 'tangible benefit' for fulfilling this responsibility."[112] Giving Ryder Kevin's surname in some form should not be a reward for his complying with his legal duties. Frankly, the district court's reverse "Solomonic" decision sidesteps the task of deciding whether clear and compelling evidence existed for

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[111] *Cf., In re D.A.*, 307 S.W.3d 556 (Tex. App. Dallas 2010), *reh'g overruled* (Apr. 7, 2010) (Although the family code provides that a court may order a child's name changed, the general rule is that courts exercise that power reluctantly and only when the substantial welfare of the child requires it.); *In re Saxton*, 309 N.W.2d 298, 301 (Minn. 1981) ("Judicial discretion in ordering a change of a minor's surname against the objection of one parent should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates the change.") (citation omitted)

[112] *See Magiera,* 106 Nev. at 777 (citing NRS 125B.020) (other citations omitted)

finding that changing Ryder's name was in his best interest, by simply short-circuiting the process and giving the child *both* parents' surnames, instead. (A better Solomonic decision would have been for the district court to have Ryder retain Paige's surname—his custodial parent's surname—for daily use, while order his *birth certificate* to bear both parents' surnames. But this would have still not been preferable to the district court just making a reasoned ruling based on the facts and the law that avoids merely "splitting the difference" on difficult questions.) This, along with all of the above reasons, should lead to a conclusion that the district court abused its discretion.

II.

1. NRS 440.280 is unconstitutional on its face because it unjustifiably treats married women and unmarried women unequally, thus implicating the Equal Protection Clause.

NRS Chapter 440 addresses the duties of registering and accounting for the birth of persons in Nevada. In particular, NRS 440.280 provides for the recordation of paternity and the surnames of said newborn persons. The statute provides for different allowances for an unmarried woman versus a married

woman to appoint a surname for her newborn.[113] Specifically, NRS 440.280(6)(c) states in pertinent part:

> If the mother was unmarried at the time of birth...
>
> *If both the father and mother* execute a declaration *consenting to* the use of the surname of the father as the surname of the child, the name of the father *must* be entered on the original certificate of birth and the surname of the father must be entered thereon as the surname of the child.[114]

The statute allows unmarried women the option—once paternity is established—to either appoint their non-marital child's father's name as the child's surname, or their own "maiden" or prenuptial name[115]. That is, *only* if the mother consents, (once the father has established paternity and also consented), must she put the surname of the father on the birth certificate of the child. If only the unmarried *father* desired that the child bear his surname, that would be insufficient on the face

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[113] The statute provides for when and whether a non-marital child's father's name may be recorded as the father on the infant's birth certificate, and when a marital child's father's name may be recorded as the father on the infant's birth certificate. *See* NRS 440.280(1)-(6)(a)(b). These provisions are not at issue in the appeal, and will not be addressed.

[114] NRS 440.280(6)(c) (emphases added).

[115] Throughout the brief, references to a woman's or mother's "surname," means a woman's or mother's birth or prenuptial name. It excludes a woman or mother who uses her married name.

of the statute. (And also, if only the mother consents to put the father's surname before paternity has been established, that would be insufficient). So, upon satisfying the conditions precedent, the options for an unmarried mother are: 1) The unmarried mother could conceivably give her child her surname, or 2) The unmarried mother could give the child the father's surname. That is, an unmarried woman can do either.

However, the statute apparently affords married woman one option: She may give her child the surname of the child's father. Nowhere in NRS 440.280, or in its related provisions, does the statute explicitly afford married women the option of giving their children their surnames. As already discussed, the Nevada Supreme Court has ruled on cases involving the surnames of non-marital children chosen by their mothers, which were later challenged by their non-marital fathers. However, the Nevada Supreme Court has not apparently had the occasion to address the same situation where a *marital* child was given a surname, which was later challenged by the marital father, as in this case. And the statutory regulations provide little assistance here. On the face of the statute, NRS 440.280 is silent as to whether it affords married women the discretion to, like unmarried women, *choose either* their own surname or the marital father's surname. Ostensibly, married women lack the unequivocal right to give their children their own

surnames, as unmarried women do. This, *ipso facto*, makes the statute unconstitutional because it violates equal protection under the law. The standard of this court's review of the constitutionality of a statute is *de novo*.[116] The standard of review, inasmuch as the issue revolves around gender, as well as illegitimacy, demands intermediate-level scrutiny.[117] To satisfy this standard, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.[118]

The district court did not explicitly invoke this statute in deciding Ryder's surname. But it is undisputable that this naming statute provides a tacit guide or "shadowing" of the district court's decisions in surname cases; the statute lies

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[116] *See In re Sang Man Shin,* 125 Nev. 100 (2009). It is important to note that the appellant does not argue that the statute is ambiguous, just that it appears to be unconstitutional. This court does not look to other sources, such as legislative history, unless a statutory ambiguity exists. *See Davis v. Beling,* 278 P.3d 501, 508 (Nev. 2012); *State, Div. of Ins. v. State Farm Mitt. Auto Ins.,* 116 Nev. 290, 294 (2000). As parsed out, the statute is not subject to multiple interpretations. It can be interpreted on its plain meaning by reading it as a whole and giving effect to each word or phrase. *See Beling,* 278 P.3d at 508.

[117] *See* U.S. Const. Art. XIV, sec. 1.; Nev. Const. Art. 4, Sec. 21. Nevada's equal protection clause mirrors its federal counterpart, and Nevada looks to federal authority for guidance on these provisions. *See In re Candelaria,* 245 P.3d 518, 523 (Nev. 2010) ("The standard for testing the validity of legislation under the equal protection clause of the state constitution is the same as the federal standard.") (quotation omitted)

[118] *Craig v. Boren*, 429 U.S. 190, 197 (1976)

surreptitiously in the background of any family court's ruling on a child's surname change. Paige acknowledged Kevin as Ryder's father, but desired to give her newborn her surname despite her marriage to Kevin.[119] (Paige did not change her surname upon marriage.)[120] Such an action would have been presumptively correct if Paige remained an unmarried woman when she gave birth to Ryder.

Thus, Paige has standing to contest the statute. Married women who choose to give their children their own surnames *are statutorily more vulnerable than unmarried women* to a challenge by their spouses or ex-partners who desire that the child bear the spouse's or ex-partner's name, or *some part* of the spouse's or ex-spouse's name, such as a hyphenated surname, because of this statute. But the statute makes unmarried women generally impervious to such challenges.

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[119] *See* Birth Certificate (PETIT 001) *See* also, NRS 440.280(5)(a): "If the mother was…[m]arried at the time of birth, the name of her husband must be entered on the certificate as the father of the child…" The statute provides exceptions to the rule. *And see*, Doll, *Harmonizing Filial and Parental Rights in Names: Progress, Pitfalls, and Constitutional Problems*, 35 Howard L J 227, 231 (Winter 1992) (Women regard their birth names as important as men do, yet "[s]ince a woman's name customarily changed upon marriage, the wisdom was that her investment in nominal identity must be less than a man's…The identification of adults with their names, in turn, suggests the significance of a name to a child.")

[120] *See id.*

Nevada's naming statute should not allow unmarried women and married women, similarly situated, to have such different liberties with respect to the surnames of their children. Frankly, had the court been faced with an unmarried woman whose child's father wanted to impose his surname on the child, the naming statute would erect a secure bar against it. After all, the statute clearly spells out that an unmarried mother must *consent* to using her non-marital child's father's surname as the child's surname. But in the same situation, with a married woman, the court is not similarly guided by the naming statute. At that point, the court must reason that it is an incontrovertible truth that the child's best interest is served by having the father's surname—or some part thereof—serve as the child's surname, and not the mother's alone. And that is exactly what the lower court did in this case. For this reason, the court should find the governing statute unconstitutional.

NRS 440.280, for all intents and purposes, coerces the woman who chooses to marry, to give up her right to name her child with her own surname, in favor of her husband's surname. The married mother who chooses to disregard the convention, has little to no statutory protection (unlike unmarried mothers). Aside from being unconstitutional, it is also antiquated, if not obsolete. Although many married women may ordinarily elect of their own accord to give their children the

surnames of their children's fathers, it is not necessarily so. Some women may elect to give their children hyphenated names joined to their own surnames, or simply their own surnames. This privilege should not extend only to unmarried women whose partners have acknowledged paternity. Paige should have been allowed not only to place her own surname on the minor child's birth certificate, but also to survive a judicial challenge to having done so.

Most importantly, pursuant to statutory construction, the name statute's silence regarding married women's freedom to name their children with their prenuptial surnames—in the absence of an agreement with their husbands—leads to an interpretation that women may not do so, violating equal protection. Other states considering similar statutes have rendered unconstitutional statutes and case precedent that do not grant women equal status to name their children after their surnames, and have invalidated any "automatic" imposition of the paternal surname to a child's name, whether in a hyphenated form or other construction.[121]

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[121] *See, e.g., D.W. v. T.L.*, 134 Ohio St. 3d 515 (2012); *see generally,* MacDougall, *The Right of Women to Name Their Children,* Law & Inequality: A Journal of Theory and Practice, 3 Law & Ineq. 91 (July 1985). *But see*, Powers, *An Illegitimate Use of Legislative Power: Mississippi's Inappropriate Child Surname Law in Paternity Proceedings*, 8 U.C. Davis Journal of Juvenile Law & Policy 153 (Winter 2004) (Note); Curtis, *Sexism and Bias in the Name of*

Neighboring jurisdictions of California have had significant occasion to address statutes and common law that involve the changing of surnames of children, and the gender issues encompassing them. The Supreme Court of California decided thirty-five years ago in *In Re Marriage of Schiffman* that "***any rule*** giving the father, as against the mother, a primary right to have his child bear his surname should be abolished."[122] The court wisely intoned the following:

> "When the reason for a rule ceases, so should the rule itself. The true doctrine is, that the common law by its own principles adapts itself to varying conditions, and modifies its own rules so as to serve the ends of justice under the different circumstances."[123]

The *Schiffman* court helpfully outlined the legal and civil history of surnames in Western civilization, concluding:

Tradition: Missouri's Standard of Inequality Regarding Children's Surnames, 66 UMKC L. Rev. 169 (Fall 1997) (Note)

[122] *In re Marriage of Schiffman*, 28 Cal. 3d 640, 647 (Sup. Ct. Cal. 1980) (emphasis added). *And see, Douglass*, 205 Cal. App. 3d 1046 (affirming that child should bear surname of mother with whom he lived, and not a hyphenated name, and stating, "[W]e can perceive of no rational basis why the reasoning and conclusions of *Schiffman* should not apply with equal logic to…a custody dispute ***regarding a legitimate child*** and a quarrel concerning the child's surname between…two biological parents," *but* nonetheless citing favorably the court's "Solomon-like" decision.) (Emphasis added) (citations omitted)

[123] *Schiffman,* 28 Cal. 3d at *id.* (citing and quoting Cal. Civ. Code, §3510 and *Katz v. Walkinshaw*, 141 Cal. 116, 123, 70 P.663 (1903))

The custom of patrilineal succession seems to have been a response to England's medieval social and legal system, which came to vest all rights of ownership and management of marital property in the husband. The inheritance of property was often contingent upon an heir's retention of the surname associated with that property. The trend toward paternal surnames was accelerated by Henry VIII, who required recordation of legitimate births in the name of the father. Thence the naming of children after the fathers became the custom in England...

After marriage, custom dictated that the wife give up her surname and assume the husband's. She could no longer contract or litigate in her own name; nor could she manage property or earn money. *Allowing the husband to determine the surname of their offspring was part of that system, wherein he was sole legal representative of the marriage, its property, and its children.*

Today those bases for patrimonial control of surnames have virtually disappeared...Progress toward marital and parental equality has accelerated in recent years. Most important for our purposes are many steps the California Legislature has taken to abolish outmoded distinctions in the rights of spouses and parents...and have eliminated many sex discriminations in parental rights and responsibilities.[124]

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[124] *Schiffman*, 28 Cal. 3d at 643-44 (citing Thornton, *The Controversy over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests*, 1979 Utah L. Rev. 303, 305 (Note); *Montandon v. Montandon*, 242 Cal. App. 2d 886, 890 (Dist. Ct. App. 1966), ***disapproved by Schiffman***; *United States v. Yazell*, 382 U.S. 341, 361, 86 S.Ct. 500, 511, 15 L. Ed. 2d 404 (dis. opn. of Black, J.) (1966); Babcock, Freedman, Norton & Ross, Sex Discrimination and the Law, pp. 561-563, 593 (1975)) (internal quotations omitted).

Finally, the United States Supreme Court has recently ruled in *Obergefell v. Hodges* that two people of the same sex may marry.[125] Under such circumstances, Nevada's naming statute is not only obsolete, but also potentially oppressive to married couples of the same sex who give birth to children in Nevada. A mother who gives birth to a child in Nevada while a partner in a same-sex marriage theoretically should give her child the surname of her non-birthing partner, the "father" to the child. After all, being a partner in a same-sex marriage, such a woman would not qualify as "unmarried" under the naming statute, unequivocally possessing the liberty to give her newborn her own surname. In such a situation, though, the application of the law would be more readily seen as unconstitutional, and even, absurd. A married mother in an *opposite*-sex marriage should no more be required to place her male partner's name on their child's birth certificate than a married mother in a same-sex marriage should be required to place her female partner's surname on their child's birth certificate.

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[125] *See Obergefell v. Hodges,* 2015 WL 213646 (U.S. Sup. Ct., June 26, 2015) (holding that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State).

When women, married or not, in same-sex unions or not, face different challenges regarding the government's guidance of the selection of surnames by their children, it automatically implicates equal protection. The state should not, implicitly or expressly, arbitrarily presume that the surname of a non-birthing spouse or partner should be added to, or imposed as the child's surname.

To the extent that the naming statute compels such a result, explicitly or impliedly, such goes to the very heart of conduct prohibited by the equal protection clause.[126] There can be no important governmental objective served by treating unmarried women and married women so differently in naming their children, and in any case, no objective can be uncovered in the naming statute that substantially relates to any such goal.

III.

CONCLUSION

The court should reverse the district court's ruling that Ryder bear a hyphenated name, and just reinstate his name as is listed on his birth certificate, "Petit." Alternatively, inasmuch as the district court did not engage in a "clear and

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[126] *See*, Omi, *The Name of the Maiden*, 12 Wis. Women's L.J. 253, 263 (Fall 1997) ("To subject different groups to disparate treatment because society historically has done so undermines the very purpose of equal protection.")

compelling" standard of review in deciding whether appending his father's surname to his already-assigned surname served Ryder's best interests, even if the Court does not reverse, it should at least remand the case for the district court to actually engage in the appropriate analysis. The Court should similarly find that NRS 440.280 is unconstitutional on its face as it violates the Equal Protection Clause.

Respectfully submitted,

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Dated this 8th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The Law Office of Telia U. Williams, and on the 9th day of September, 2015, I deposited in the United States mail, postage prepaid, in Las Vegas, Nevada, a true and correct copy of the Appellant's Opening Brief, addressed to:

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/s/ David DaSilva
Employee of Law Office of Telia U. Williams