

A legal note from Marshal Willick about alimony versus religious tithing and attorney's fees during family court litigation, and the new Financial Disclosure Form

A lawyer wrote in, asking whether, in an alimony case, the obligor's monthly payment to his church could be "disallowed" in figuring his income available for support. The lawyer noted that the obligor was a few hundred dollars "in the red" every month, but asked whether this could be seen as a First Amendment issue, figuring that a family court order requiring payment to the spouse of money that the obligor felt he had to send to his church would be tantamount to telling him that "he cannot practice his religion." Also in contention was the monthly payment the obligor made toward his attorney's fees for the ongoing divorce case.

## I. CONSTITUTIONAL FRAMEWORK RE: RELIGIOUS TITHING

The first amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

## II. FEDERAL "FREE EXERCISE" LAW

While a full-blown constitutional analysis is beyond the scope of this note, there has been some historical tension between the competing guarantees of "free exercise" on the one hand, and the State's *parens patriae* duty to protect minor children, on the other. It is usually manifested in child custody cases involving things like exposure to religious practices seen as damaging or dangerous by the other parent, or refusal of medical treatment on religious grounds.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Warren Court applied the strict scrutiny standard of review to the free exercise clause, holding that a state must demonstrate a compelling interest in restricting religious activities. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court retreated from that standard, permitting governmental actions that were neutral regarding religion. In other words, no matter how much a law burdens religious practices, it is constitutional so long as it does not single out religious behavior for punishment and was not motivated by a desire to interfere with religion.

Congress attempted to restore the earlier standard by passing the Religious Freedom Restoration Act, but in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that such an attempt was unconstitutional regarding state and local government actions (though permissible regarding federal actions). A "neutral law of general applicability" need only have a "rational basis," but one directed at religious practices must satisfy a "strict scrutiny" standard to survive.

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all governmental regulation of religious beliefs as such.

The question is sharper when it concerns not belief, but activity of some kind. It has come up most often in the taxation cases, where imposition of some tax has been argued to violate “free exercise” by making it more expensive to conduct some religious activity; these have been resolved, usually, on the basis that if prohibiting or burdening the exercise of religion is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. *See Citizen Publishing Co. v. United States*, 394 U. S. 131, 139 (1969) (upholding application of antitrust laws to press).

More to the point, the United States Supreme Court has not held that an individual’s religious beliefs excuse him from compliance with otherwise valid laws requiring or prohibiting conduct that the State is free to regulate. *See Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U. S. 586, 594-595 (1940) (flag-saluting may be compelled).

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *See United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring) (Amish may be compelled to pay Social Security taxes); *Hernandez v. Commissioner*, 490 U. S. 680 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).

### III. NEVADA INTERSECTIONS OF “FREE EXERCISE” AND CHILD CUSTODY

The Nevada experience has been pretty mainstream, and consists primarily of the Nevada Supreme Court’s rejection of claims that trial courts violated litigants’ “free exercise” rights.

For example, in *Flynn v. Flynn*, 120 Nev. 436, 92 P.3d 1224 (2004), the trial court had refused to grant consent to one joint custodian of a child to relocate to California to attend divinity school, noting in part that identical training was available in Las Vegas. She asserted a free exercise violation on appeal, which the Nevada Supreme Court rebuffed:

There is nothing in the record that would evidence that the district court denied Terri’s motion based on her religious beliefs. On the contrary, the overwhelming evidence supports that the district court’s decision was based on objective factors unrelated to Terri’s desire to obtain a theology degree. Therefore, we conclude that Terri’s First Amendment argument is without merit.

Similarly, in *Blandino v. State*, 112 Nev. 352, 914 P. 2d 624 (1996), the Court refused to permit a defendant convicted of violation of custody rights to represent himself on appeal under NRAP 46, despite his claim that God had ordered him to represent himself, finding that the effect of its order was incidental to religious beliefs.

### IV. NEVADA CHILD SUPPORT AND FREE EXERCISE

There does not appear to be direct Nevada precedent addressing both child support and the free exercise clause. Given the child *custody* precedent, however, courts probably can and should treat religious contributions no differently than any *other* obligations founded upon personal and moral judgments rather than legal obligations.

This is the same reason why NRS 125B.080(9)(e) was amended some years ago to make only the *legal* responsibility of a party for the “support of others” a potential deviation factor for child support.

Last year, this office had a case in which we represented the wife, who was trying to feed two kids on food stamps and handouts, living in a one-room apartment, while the husband, who ran the family business, had given some \$300,000 to his church for its “work” because that was “required.” In exchange, there was some mumbo-jumbo about the church paying for his travel and meals “on account.” The money was treated as either still within the husband’s possession, or wasted if beyond it, because the transfer to a third party (his church) was voluntary. The husband is now a fugitive with a bench warrant out in his name.

If our courts are not going to get into the business of deciding which religions – and which doctrines or requirements *within* religions – are “legitimate” (which would certainly take us into prohibited first amendment territory), then the law must look at all alleged “obligations,” religious or otherwise, as simply “discretionary” or “mandatory.” This makes the review “neutral” as to religion, and permits a court to make a determination on the basis of “objective factors unrelated to religious belief.”

If not legally required, or required as a matter of survival (no law says you have to eat, but doing so is pretty much required for a litigant to stick around for the length of a case), an expenditure is *discretionary*, and appropriately considered something that can and should be “dis-allowed” when looking at a litigant’s ability to comply with a court order.

Otherwise, when a litigant says he has joined the Church of What’s Happening Now, taken a vow of poverty, and given everything he owns and earns to Minister Jim down at the Rectory and Pool Hall, a judge would have to say “Gee, I’m sorry Mrs. Smith, but you and the kids will have to be thrown out in the street and starve despite your husband’s six-figure income. Sorry.”

So the bottom line is that a court is free to treat funds expended for religious tithing as income the obligor has, or has chosen to waste, for purposes of child and spousal support law. In the case giving rise to the question written in, the judge was perfectly correct to reject the claim of “I can’t support my family because I must give money to my church.”

## V. ASIDE ABOUT ATTORNEY’S FEES

Interestingly, the inquiring lawyer’s question had presumed that any possible payment of attorney’s fees by the obligor would be entitled to lower priority in the analysis. Here, he had it completely backward.

While a divorce case is in active litigation, payments to the attorney qualify as expenditures for one of the “necessities of life.” They **must** – or every party who is not independently wealthy would violate the standard Joint Preliminary Injunction simply by hiring counsel and paying a retainer.

It is in recognition of the necessity of legal services that NRS 18.015 allows an attorney to place a lien upon his client’s claim or cause of action in the amount of a reasonable fee for the attorney’s services. This lien “attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action, from the time of service of the notices required by this section.” Therefore, NRS 18.015 broadly allows an attorney’s lien to attach to a client’s interest in the judgment or decree. *Bero-Wachs v. Law Office of Logar & Pulver*, 123 Nev. \_\_\_, 157 P.3d 704 (Adv. Opn. No. 10, May 3, 2007).

It is appropriate for the court to review how **much** has been paid to counsel, and how much is needed. But the **fact** of retention of counsel is necessary so that the case at issue can be and is handled properly – after which people are free to go back to running their lives (including their religious practices) as they see fit. In the eyes of the law, during the pendency of a family law case, payment to counsel is of a much **higher** objective priority than whatever some Church Deacon/Bishop/Rabbi/Accountant says is necessary to the “give money away to third parties” fund.

## VI. REVISED FINANCIAL DISCLOSURE FORM

The lawyer’s inquiry fits in well with completion of some behind-the-scenes work that should be publicly acknowledged.

As those working in family law know, the current State-wide Financial Disclosure Form was rolled out at the end of 2007, as part of the adoption of NRCP 16.2 discovery and case management rules. The form and those rules were specifically tailored to litigation of family court matters, and a first step in what the Family Law Section Executive Council of the early 1990s hoped would be the increasing State-wide uniformity of family law practice.

Now that bench and Bar have had a couple of years to “crash test” the form, some problems with its use have appeared. An *ad hoc* committee began a re-design of the form, intended to address the various problems identified; the revised form has been finalized and tested, and is now pending before the Nevada Supreme Court 16.2 Committee for adoption.

Part of the re-design was intended to make it easier to tell, at a glance, what is gross income (for child support), what is net income, after mandatory expenses (for spousal support, etc.), and what, if anything, is left as discretionary income that can be redirected for fees, costs, income equalization, etc. The new form has a summary page to make it easier for judges to see all necessary information on one screen in our “paperless” courts, and the form is auto-calculating throughout – we should no longer have problems with inaccurate monthly income figures from those paid weekly or semi-weekly rather than twice per month, since internal formulas will handle such variations.

Special thanks for the work on the re-design are owed to Jennifer Abrams, Esq., of Las Vegas

(<http://www.theabramslawfirm.com/>), and Todd Torvinen, Esq., of Reno (<http://www.toddtorvinenlaw.com/>). Their efforts will make the actual litigation of family law cases more efficient and accurate for everyone.

## VII. QUOTES OF THE ISSUE

“We must respect the other fellow’s religion, but only in the sense and to the extent that we respect his theory that his wife is beautiful and his children smart.”

– H.L. Mencken’s *Notebooks* (1956).

“Men never do evil so completely and cheerfully as when they do it from religious conviction.”

– Blaise Pascal (1623-1662), *Pensees*, No. 894.

“We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’ Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”

– Justice Black, *Torcaso v. Watkins*, 367 U.S. 488 (1961).

“I wonder if other dogs think poodles are members of a weird religious cult.”

– Rita Rudner.

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