1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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3 **MICHELLE RIVERO,**)	
4)	
Appellant,)	DOCKET NO. **46915**
5)	
6 vs.)	
)	
7 **ELVIS RIVERO,**)	
)	
8 Respondent.)	
)	

FILED
JUN 11 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY ______
CHIEF DEPUTY CLERK

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10 **MOTION TO FILE ERRATA**
TO AMICUS BRIEF

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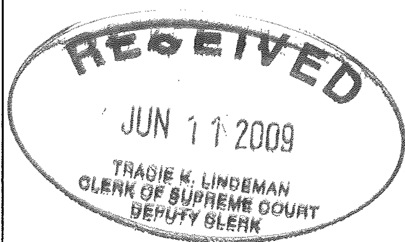


As the Court is aware, the request by the Nevada State Bar Family Law Section ("FLS") for further extension of time to file the *Amicus Brief* was granted only in part, giving us a short time window within which to draft and submit the brief. It was filed on May 15, 2009.

What the FLS did not have time to do was circulate the brief to the Section membership for review and comments before filing. So FLS did so ***after*** filing, and a mathematical error was brought to the attention of the drafters. While it does not affect either the policies at issue or the recommendation made, it would be unfortunate if the error was relied upon in the Court's analysis, or potentially repeated in this Court's hoped-for substituted *Opinion*. Accordingly, the FLS requests permission to file the errata set out below.

A copy of this errata has been provided to both parties, and it is not believed that there could be any prejudice to anyone from the granting of this motion. Nothing in the rules appears to prohibit a motion such as this one. NRAP 27; NRAP 1(c).

This *Motion* is made in good faith and not to delay justice.

ERRATA

Page 18 of the brief contained the following discussion:

> Under the brackets now in effect, a minority time-share parent earning $10,000 per month would have a percentage-of-income obligation for a single child (18%) of $1,800, but would pay the majority time-share parent $785 under the presumptive maximum for that income bracket. If the majority time-share parent made $5,000 per month, that parent's income would be invisible to any normal guideline support analysis, because in a Wisconsin-guideline State, a percentage of income expended by the majority time-share parent for the benefit of the child is presumed but not calculated.
>
> In a *Wright/Wesley* situation (50/50 custody), there would be cross-calculations, and the flow of support would be $664 – the presumptive maximum where there is a $5,000 differential in incomes.

In a joint-but-not-equal-custody situation, under our proposal, if the minority time-share parent were granted a custodial schedule of 43% of the time, the trial court would find a *prima facie* case for downward deviation, and proceed to the benefit/detriment balancing test, considering the potential deviation at issue to be $121 – the difference between guideline support, and support payable in a *Wright/Wesley* analysis.

The error that has been pointed out is that the hypothetical incorrectly performed the *Wright/Wesley* cross-calculation by subtracting one parent's gross income from the other. What this Court actually directed in *Wesley* was:

> The district court must "[c]alculate the appropriate percentage of gross income for each parent; subtract the difference between the two and require the parent with the higher income to pay the parent with the lower income that difference." In Wright, we did not specifically address the question of when application of the statutory presumptive maximum should occur.
>
> The Wright offset should take place before, not after, application of the cap. This conclusion supports "the general philosophy of NRS 125B.070, which is to make sure adequate monthly support is paid to our children."
>
> As we have previously stated, the fixed child-care expenses incurred by each parent are usually not appreciably diminished as a result of shared custody. "The sad reality that must be faced is that the desirable sharing of custody responsibilities by [another] custodian in joint custody situations has the inevitable result of increasing total child-related expenses." Nonetheless, we must still attempt to maintain the comparable lifestyle of the child between the parents' households.
>
> In this case, there is a disparity in the gross monthly income of the two parents. Consistent with our holding in Wright, Wesley's percentage of gross monthly income should first be subtracted from Foster's percentage of gross monthly income. Then, after this offset is made, the cap should be applied. "Of course, the district court also has the option to adjust the amount of the award where special circumstances exist."

What should have been offset is "the appropriate percentage of gross income for each parent," not the gross income of each parent.

In the hypothetical, the $10,000 minority time-share parent would have $785 obligation under the presumptive maximum, and the $5,000 parent would have a theoretical child support obligation of $664 in a *Wright/Wesley* situation, as the original brief set out. But the offsetting should have been 18% of the first parent's percentage of income ($1,800) against 18% of the second parent's percentage of income ($900), yielding $900.

The brackets were not directly addressed in *Wright* and *Wesley*, because were both decided before the statute was amended to put the sliding scale income brackets in place. The above quote, however, indicates that the presumptive maximum that would be applied in the

hypothetical is that corresponding to the income bracket of the $10,000 parent, making the flow of support from that parent $785, not $664.

Since there is no difference between that result and the presumptive maximum that the minority time-share parent was already paying, there would still be no need to deviate.

On page 19, another hypothetical reversed which parent was the minority time-share parent and which was the majority time-share parents. The same error was made (gross incomes, rather than percentages of incomes, were offset).

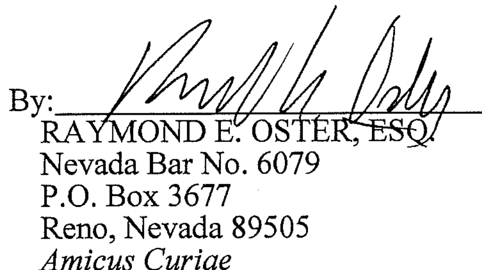
The hypothetical correctly notes the presumptive maximum of the $5,000-earning, minority time-share parent as $664, but the *Wright/Wesley* offset yields $785 in the reverse direction, not $664. The range of potential deviation is even larger than indicated, between paying $664 if considered a "secondary custodian," to receiving $785 under the *Wright/Wesley* analysis if considered a "joint custodian." The conclusion reached and stated, however – that the district court is required to exercise its discretion to provide adequately for the child in both households – remains exactly the same.

The calculation errors were repeated in the corresponding hypotheticals attached within Exhibit 4.

We apologize for the oversight, but wanted the policy questions, which are unchanged by the errors noted above, to be considered as cleanly and clearly as possible.

DATED this 11th day of June, 2009.

STATE BAR OF NEVADA,
FAMILY LAW SECTION



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CERTIFICATE OF MAILING

I hereby certify that I am an employee of the law firm of FAHRENDORF, VILORIA, OLIPHANT & OSTER L.L.P., and that on the date shown below, I caused service to be completed by:

________	personally delivering
________	delivery via Reno-Carson Messenger Service
________	sending via Federal Express or other overnight delivery service
___X___	depositing for mailing in the U.S. mail with sufficient postage affixed thereto
________	delivery via facsimile machine to fax No. ()

a true and correct copy of the **MOTION TO FILE ERRATA TO AMICUS CURIAE BRIEF** addressed to:

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8925 South Pecos Rd., #14A
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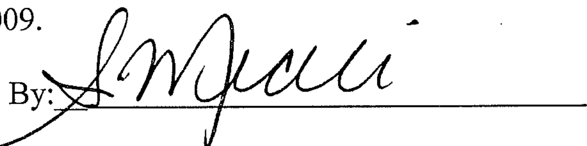
DATED this 11th day of June, 2009.



By: ____________________