INDEX AND SUMMARY OF RECOMMENDATIONS

I. INTRODUCTION AND PRELIMINARY MATTERS

A. Scope of Responsibility under statute

On June 21, 1991, the Legislature of Nevada passed S.B. 280, a portion of which is codified at NRS 125B.070(2). That provision provides:

> On or before January 18, 1993, and on or before the third Monday in January every 4 years thereafter, the State Bar of Nevada shall review the formulas set forth in this section to determine whether any modifications are advisable and report to the legislature their findings and any proposed amendments.

The State Bar of Nevada, through its Board of Governors, formally delegated this task to its Family Law Section, and directed the Chairperson of the Section, Israel L. Kunin, to form an appropriate committee for that purpose.

The precise scope of review called for by the statutory language is not clear. The Committee uniformly agreed, however, that it would not be possible to review the percentage listings in NRS 125B.070(1)(b) in isolation, since that provision expressly incorporates the substantive parts of NRS 125B.080. Accordingly, the Committee reviewed the entire legislative child support scheme.

1. No preconceived recommendation or goal

Of central importance to the Committee was that no member held a pre-existing objective to make any particular recommendations. The Committee unanimously believes that this goal was achieved. This Report is based upon the objective data studied by the Committee, the subjective input of all those who contributed, and the combined professional experience of the Committee's members.

As a condition precedent to appointment to serve on this Committee, each member had to verify that he or she had no relevant connections to, or obligations to act for, any special-interest or partisan groups working in this area.

2. Methodology

The Committee began by reviewing the history of our current statutory scheme and its underlying policies. The recommendations and legislative proposals that resulted in our current guidelines were studied and several individuals who were instrumental in bringing those proposals were interviewed or otherwise contacted.

Next, the Committee examined how Nevada compared to other states in the administration of child support guidelines. The committee analyzed the available data collected by researchers throughout the country. Time and money constraints prohibited independent collection of data by this Committee, and is the reason for the Committee's recommendation to authorize a study for this purpose during the next biennium. The statutory schemes of all other states were analyzed by means of a check list of factors.

The Committee analyzed the available data to discern how Nevada's statutory scheme matched, or varied from, that found elsewhere in structure or impact upon custodial and non-custodial parents (generally termed "Recipients" and "Obligors" in this Report). For the most part, the data available to this Committee was insufficient to evaluate the sufficiency of awards under the Nevada guidelines. The Committee debated the assumptions underlying the guidelines along with the implications of those assumptions.

The evaluation outline formulated to review the statutes of other states, and summaries of the child support statutes of all states, is set out in Appendix I.

The Committee assembled a list of perceived failings of the existing statute by looking at the legislative history of proposals for changes to the child support guidelines since 1987, along with the input given to the Committee directly and lists of complaints made known to the Committee's members in their practices. Those complaints were analyzed and formulated into a list of technical or corrective proposals, which are set forth in Section IV. The Committee also discussed the Nevada Supreme Court cases which interpret the child support statute, to determine whether or not they are philosophically compatible with the assumptions underlying the statutory scheme.

The intention of the Committee was to state facts, analyze possibilities, and stress costs and benefits of the available options. The Committee highlighted recurring situations where the current guidelines appear problematic, and made suggestions as to matters that were not fully explored when the guidelines were adopted.

Neither the *status quo* nor the proposed changes should be viewed as "good" or "bad," but only as having differential impact in various cases. The recommendations of this Committee are made in recognition that the full effect of any legislative change cannot be foreseen. The role of this Committee is not to tell the legislature what decision to make, but to educate the legislature as to the advantages and disadvantages of the choices available.

Although the Committee does not recommend that our child support scheme be abandoned, the alternative approaches to child support are set forth in Section V of the Report to inform the legislature of available alternatives. Each of the major theoretical guideline models is explored.

Section VI provides a glossary of references utilized by the Committee.

Section VII is a list of the Appendices and Exhibits referenced throughout the Report.

3. Budget and administration

The Committee's work was financed by the State Bar of Nevada. Incidental costs of the work of the Committee were contributed by the members of the Committee.

The Report was assembled by Mr. Willick from notes taken during the Committee's meetings and conference calls, and from sub-parts created by various members of the Committee; the entire document was approved by the entire Committee by majority vote. Dissenting or minority opinions are noted in the body of the Report.

B. Membership of Committee

The members of this Committee were selected by Section Chair Israel L. Kunin, in consultation with Stewart L. Bell, President of the State Bar. Ms. Kunin sat on the Committee in a non-voting status except to break ties.

Marshal S. Willick

Marshal S. Willick, chair of this Committee, is a sole practitioner in Las Vegas, practicing primarily in family law. He writes and lectures extensively on domestic relations and legal technology issues. Mr. Willick is a member of the Nevada, California, and American Bar Associations, and of the Family Law Sections of each of those Bar Associations. He is a member of the Executive Council of the Nevada State Bar Family Law Section and is Chairman of the Federal Legislation and Procedures Committee of the American Bar Association Family Law Section.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, Mr. Willick served on the Central Legal Staff of the Nevada Supreme Court for two years.

Israel "Ishi" Kunin

Israel L. Kunin is a sole practitioner in Las Vegas, emphasizing her practice in the area of family law. She received her B.A. degree from the University of California at San Diego and her J.D. degree from the California Western School of Law.

Ms. Kunin served as the deputy attorney general for the Nevada State Welfare Division for three years. She has been a sole practitioner, practicing primarily in family law, since 1987.

Ms. Kunin is a member of the State Bars of Nevada and California, as well as the American Bar Association. She is also a member of the Family Law Section for both the American and Nevada Bar Associations. Ms. Kunin currently serves as Chairperson of the Nevada State Bar Family Law Section. She is a member of the American Academy of Adoption Attorneys and she also sits on the Board of the Nevada Association of the Handicapped.

Rhonda L. Mushkin

Rhonda L. Mushkin is in private practice with the law firm of Michael R. Mushkin and Associates, and has concentrated her practice in the area of contested domestic litigation, family law, and personal injury.

Ms. Mushkin received her B.A. from Arizona State University in 1981, and her Juris Doctor from Southwestern University School of Law in 1984. She served as an Eighth Judicial District Court law clerk for now Nevada Supreme Court Justice Robert E. Rose prior to going into private practice in 1987.

Ms. Mushkin is a member of the American Bar Association and the State Bar of Nevada, and is admitted to practice in all courts in Nevada. She is also a member of the Nevada Bar Association's Family Law Section where she sits as a member of the Executive Council. In addition, Ms. Mushkin is a member of the American Academy of Adoption Attorneys and is the Vice-Chairperson of the Nevada Law Foundation.

Bruce I. Shapiro

Bruce I. Shapiro is in private practice with the Law Offices of Kent J. Dawson, Chtd., and has practiced primarily in the area of family law.

Mr. Shapiro received his B.A. from the University of Nevada, Las Vegas, in 1984, M.A. from the University of Nevada, Las Vegas, in 1986, and J.D. from Whittier College School of Law in 1990. He is a member of the American Bar Association, State Bar of Nevada, State Bar of Nevada Family Law Section, and is admitted to practice in all courts of Nevada.

Peter B. Jaquette

Peter B. Jaquette is a sole practitioner in Carson City, Nevada, where he has practiced primarily in Family Law since 1976. He received a B.S. Degree from the University of Maryland and his J.D. from UCLA School of Law. Mr. Jaquette is a member of the Nevada, California, and American Bar Associations and a member of the Executive Council of the Nevada State Bar Family Law Section. He has been married for 16 years and has four children.

Cassandra "Casey" Campbell

Casey Campbell is a member of the Law Offices of Ronald J. Logar, practicing primarily in family law. She received her B.A. degree from California State University/Fresno in 1978 and her J.D. degree from the University of the Pacific, McGeorge School of Law in 1981.

Ms. Campbell is a member of the State Bar of Nevada and the State Bar of California and is admitted to practice in the United States Courts of the District of Nevada and the Eastern District of California. She is a member of the Family Law Section of the Nevada Bar Association.

Ms. Campbell served as a law clerk for the Honorable Edward Dean Price in the United States District Court/Eastern District and as a deputy district attorney for the Washoe County District Attorney's Office. She has been a member of the Law Offices of Ronald J. Logar, practicing exclusively in family law, since 1987.

Mary Anne Decaria

Mary Anne Decaria is a partner in the firm Silverman & Decaria, Chtd., in Reno Nevada. Her practice is devoted primarily to family law. Ms. Decaria received her B.A. Degree from the University of Utah and her J.D. from Gonzaga University School of Law. She is a member of the Nevada, California, and American Bar Associations and is a member of the Executive Council of the Nevada State Bar Family Law Section. She is also admitted to practice before the United States Court of the District of Nevada and the United States Court of Appeals for the Ninth Circuit.

C. Meeting schedule and Committee methodology overview

The Committee was formed in mid-January, 1992. Since the members of the Committee were separated by hundreds of miles, the work of the Committee was accomplished primarily by mail, fax, and conference calls. Materials were distributed, reviewed, and prepared between conference calls.

The Committee met in person on April 4, 1992 as part of the annual Tonopah Showcase sponsored by the State Bar of Nevada Family Law Section. At that time, additional input was solicited from the family law practitioners attending the Showcase. The Committee also had an all-day work session on May 30, 1992, in Las Vegas.

D. Announcements and solicitations of input

1. Goal to ensure public notification of Committee and obtain constructive assistance

The Committee gave broad notice of its existence immediately after formation in the hope of ensuring that the Committee would obtain and examine all relevant information, regardless of source. This committee did not have, and did not represent itself to have, legislative authority. The Committee's task was not the legislative one of decision-making, but an academic one of reviewing and evaluating data to assist the legislature in assessing conflicting demands for statutory changes in this subject area. Thus, no public hearings were held. Notice was given as listed below.

2. Notice to judges and members of the State Bar

Written announcements were printed in the publications of the State and County Bar Associations and ancillary organizations.

Written responses were received from many private attorneys and one District Attorney. The responses generally mirrored those of the Committee or the general public, but are referenced throughout this Report[1] where notable or appropriate.

Additionally, every District Court Judge and Domestic Relations Referee was sent a request for opinions and observations. For these judicial officers, guarantees were given of confidentiality of opinions expressed, so that valuable information could be provided without fear that the judicial officers could be perceived as commenting upon the merits of pending cases.

Written responses were received from judicial officers throughout the state. Their comments, where appropriate, are incorporated directly into the discussion of specific topics. Generally, responding judicial officers were supportive of the existing statutory framework and did not feel that drastic change is required, since both a presumptive result and an ability to alter that result in certain circumstances are currently provided.

3. Those previously involved in the process

An effort was made to solicit input from all members of the original 1985 Governor's Commission. Those involved in the earlier effort were asked whether the existing statutory scheme carried into effect the recommendations of the Commission. Additionally, they were asked whether changes were warranted by the passage of time since the original Commission report in 1985.

Extensive information was received from Nancy Angres (former chair of 1985 Northern Governor's Commission) and Kay Zunino, Chief of the Child Support Enforcement Program, Nevada Department of Human Resources, Welfare Division. Ms. Zunino provided a great deal of the written background material used as references by the Committee. The Committee greatly appreciates the assistance provided.

While no written responses were received from those individuals, several such persons gave informal comments to various Committee members.

4. Special interest groups

The various special interest groups in this State with concerns pertaining to child support were notified by mail and invited to submit written materials for review by the Committee. The groups were asked to support any suggestions with studies or other information available to them. To make this easier, the Committee offered to send committee members to meetings of these organizations at the beginning and/or end of the Committee's work, to ensure that input was received and interested persons were informed. Several organizations sent written materials.

Written responses were received from "Parents Against Inequities in Nevada [P.A.I.N.]," "Parents for Children," "The Blended Family Coalition," "The Nevada Network Against Domestic Violence," and "Mothers on Trial." All materials supplied by the various groups were reviewed by the Committee and are listed in the "references consulted" section of this Report.

5. Mass media

To ensure meaningful notice to the general public, members of the Committee contacted the primary newspapers in the State (the Las Vegas Review-Journal and Sun, the Gazette-Journal in Reno, and the Nevada Appeal in Carson City). Additionally, public television was notified, and law-related radio and television programs were asked to run notices of the Committee's existence and operation.

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[1] Generally in the form "It has been suggested that . . . ."

6. Public input

Many individual members of the public called or wrote to the Committee's members with suggestions or comments. Unfortunately, most of this input was of the "horror story" variety, in which unverifiable claims about unnamed persons were made without any data permitting a meaningful analysis of how the system itself allowed or caused the perceived problem to occur. These comments were, nonetheless, discussed and analyzed.

II. EVALUATE "WHAT IS" AND NEVADA'S RELATIVE PLACEMENT

A. Historical recap of the child support statute

1. 1985 Governor's Commission on Child Support Enforcement

The first work of importance in Nevada was the 1985 report of the Nevada Commission on Child Support Enforcement, which was given to Governor Richard H. Bryan in October, 1985.

That Commission had a broader scope than this Committee, in that it expressly incorporated extensive suggestions for facilitating visitation reforms as well as objective standards for child support determinations. The "establishment of child support guidelines" was only one of the eight issues that the report suggested required further study.[2]

The Commission's conclusions regarding child support formulae were set out on pages 5-8 of the 1985 report, which are attached to this Report as Exhibit 1. The Commission specifically recommended adoption of the philosophy embodied in the Washington and Income Shares formulae, in conjunction with the California Uniform Schedule of Child Support, and had recommendations for modifying those models.

The Commission believed that child support should ensure that children benefit from the same proportion of parental income in a divided household as they have in an intact family. This philosophy was not entirely embodied in the child support statute enacted, which contains elements of both income sharing and needs satisfaction approaches to child support. One commentator suggests that states have been unwilling to enact guidelines that would actually ensure maintenance of children's standard of living, because it would be impossible to raise the standard of living for a child without also raising that of the child's primary custodian, and there was reluctance to adopt any standard that appeared to award "hidden alimony."[3]

The Commission made a number of recommendations for specific statutory enactments. In 1989, the specific votes on the "Lists of Actions/Recommendations" were added to the legislative history.[4] They are attached as Exhibit 2. As discussed below, several of those recommendations have since been implemented.

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[2] *See* 1985 Report at 36.

[3] *See* Dodson, *A Guide to the Guidelines*, Family Advocate 4, 6 Spring 1988 (reprinted in 1989 legislative history of A.B. 85 at 1064).

[4] *See* 1989 Legislative History of A.B. 85 at 222-232.

2. The 1987 Legislature

Fairly early in the 1987 legislative session, AB 424 was introduced. Its terms largely mirrored those of the Governor's Commission recommendations, including the set-off for shared custody over a 40% time-share threshold. The legislature considered a number of proposed hypotheticals intended to reflect likely factual scenarios to which the guidelines would apply.[5] The original bill included a statement of policy that custody and visitation were entirely separate and distinct from child support.[6]

In May, the Assembly Judiciary Committee met to review proposed amendments and discuss objections to the bill. One member requested a provision that ultimately became the statutory "ceiling" provision (called a "cap" in this part of the legislative history), explaining that support beyond that level would be possible, but discretionary and not based on the formula.[7] The policy statement that support obligations were entirely unrelated to visitation was removed.[8]

When the Senate Judiciary Committee examined the revised bill, there was a consensus that the ceiling should be removed.[9] The committee further refused to change the gross income based formula to a net-based system. There was discussion of including a second spouse's income in the sums available for the payment of support, but no action was taken.

In conference committee, the ceiling was retained but modified with the caveat that the ceiling was not to apply if "the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 5 of section 3 of this act."[10]

The report of the conference committee was accepted by both chambers and the amended bill was signed by the Governor on June 27, 1987. It was made effective as to all contested child support cases or requests to modify support.

3. The 1989 Legislature

In 1989, a backlash against the statute was felt. Two main bills were produced, A.B. 3 and A.B. 85. A.B. 3 dealt with the security deposit requirements.[11] It was amended to encompass federally mandated periodic reviews of support orders and to delete statutory reference to "contested" cases in order to make the guidelines universally applicable.[12] A.B. 85 would have amended the child support formula by excluding from "income" all overtime income, taxes paid, and retirement benefit contributions. The bill generated much attention and debate.

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[5] *See* 1987 Legislative History of A.B. 424 at 18.

[6] *See* 1987 Legislative History of A.B. 424 at 2. Under this policy, visitation problems, for example, would not affect a support obligation.

[7] *See* 1987 Legislative History of A.B. 424 at 72-73.

[8] *See* 1987 Legislative History of A.B. 424 at 79.

[9] *See* 1987 Legislative History of A.B. 424 at 87.

[10] *See* 1987 Legislative History of A.B. 424 at 96.

[11] These provisions were enacted and are now found at NRS 125B.200 *et seq*.

[12] *See* comments of Assemblyman Sader to Senate Judiciary Committee, as reported in 1989 Legislative History of A.B. 3 at 1697-98.

Nancy Angres, then Deputy Attorney General, appearing on behalf of the Nevada State Welfare Division, reiterated the history of the child support statute.[13] There was considerable debate throughout the session on various aspects of the child support formula, including the role of second families, second spouses' incomes, whether the statute should be need-based or income sharing based, and the appropriate allocation of certain expenses such as medical insurance.

During the session, the Attorney General's office was requested to, and did, submit a report on the statutory ceiling. The report concluded that the ceiling "does not establish a limit on the amount a parent may be ordered to pay for child support. It does, however, establish a statutory formula to determine the obligation of support and allows deviation from that formula by the judge only upon a finding of fact to support the deviation."[14] The 1985 Governor's Commission "list of actions/recommendations" was re-examined, along with the Wisconsin Guidelines from which the Nevada guidelines were derived.[15]

Testimony critical of the existing statute throughout the session was centered in three areas. There were those who felt that a gross-based formula was improper. Others complained that the statute was too rigid and unduly limited the court's discretion to consider the unique facts and circumstances of the parties before the court. Finally, there were those who complained that the courts exercised too much judicial discretion and were not enforcing the statute as written. Bits and pieces of child support statutes from other states were discussed, but were not extensively or thoroughly analyzed.

The Assembly Judiciary Committee debated matters at length. The committee reporter noted that:

> the discussion included, but was not limited to: gross vs. net; children's rights, family rights, and women's rights; the matter of interpretation; are the courts considering the guidelines as mandated in the existing bill; leave it as it is and work with education of the judiciary; the need to set policy and let the judges work with the problem of collection; create better language for better enforcement in the courts; what is the economic impact of this bill and legislative intent.[16]

Several research texts, studies, and books were submitted in whole or part in support of the arguments made by the various advocates.[17] On March 21, 1989, after considerable testimony and debate, the committee voted to indefinitely postpone further consideration of A.B. 85. Two administrative matters addressed in the bill were moved to A.B. 3.

There were also a few minor changes to other parts of the child support statute. S.B. 454 was enacted to add "health care" to the list of parental duties in NRS 125B.020. The garnishment statutes were amended to facilitate their use in A.B. 247, which amended NRS 28.010 and various parts of NRS chapter 31. A.B. 552 made certain language changes to facilitate wage withholding.

4. The 1991 Legislature

1991 saw a return of the same forces that faced each other in the 1989 session. Advocates for non-custodial parents sponsored S.B. 448, which would have conditioned child support on visitation compliance, required courts to attempt equal divisions of child time shares, permitted the ordering of polygraphs,

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[13] *See* 1989 Legislative History of A.B. 85 at 178-79.

[14] *See* 1989 Legislative History of A.B. 85 at 207-209.

[15] *See* 1989 Legislative History of A.B. 85 at 222-246.

[16] *See* 1989 Legislative History of A.B. 85 at 684.

[17] *See* 1989 Legislative History to A.B. 85 at 1064-1087.

replaced the definition of gross income with a net income formula,[18] and added certain additional factors to the list now codified at NRS 125B.080(9). The bill died in the Senate Judiciary Committee with no action taken.

S.B. 280 was generated by a Welfare Division request as a means of compliance with new federal requirements. It proposed a quadrennial report by the welfare division as to the child support formula, allowance of genetic testing in addition to traditional blood typing, and certain minor terminology and administrative changes. Debate on this bill centered on the mistrust of the Welfare Division felt by various advocates of non-custodial parents. Ultimately, the Senate Judiciary Committee proposed that the Family Law Section of the State Bar perform the required review.[19] The Assembly concurred and the bill was signed into law on June 25, 1991.

Throughout the 1991 session, as in 1989, there was a substantial, yet disorganized debate concerning the theory, practice, application, and enforcement of the child support statutes. Certain Nevada Supreme Court cases interpreting the statutes were examined, including *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989), *Hoover v. Hoover*, 106 Nev. 388, 793 P.2d 1329 (1990), and *Herz v. Gabler-Herz*, 107 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 20, Mar. 28, 1991). Ultimately, no substantial changes to the existing formula were approved.

5. Current Congressional Mandates for future implementation

The legislative history of the last two sessions indicates that the enacted statutory changes were reactive to congressional mandates which required enactment to avoid withholding of IV-D program funds. Review of pending congressional requirements for legislative determination thus appears necessary.

The base document is the Family Support Act of 1988.[20] While the Act itself is as difficult to review as most other congressional enactments, a good summary was produced by the National Governors' Association in 1988 and is attached as Exhibit 3.

Many parts of the Act have already been implemented by Nevada, but the legislature should note that various requirements have different effective dates. For example, automatic wage withholding was required for all IV-D cases as of November, 1990, but a similar requirement for *non*-IV-D cases was not required until January, 1994. Our current statute (NRS 125.450(2)) already applies to both IV-D and *non*-IV-D cases and need not be modified by the 1993 legislature. Similarly, NRS 125B.145 already requires the triennial review of orders mandated by Congress to be in place by October 12, 1993.

The Act required various pilot programs and studies, several of which were to be concluded by 1993. It seems likely that congressional review of those studies and pilot programs will lead to further congressional action in the next few years.

The most notable of these studies was the Commission on Interstate Child Support, which has recently released its preliminary report. That report is attached as Exhibit 4.

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[18] The formulation would have deducted from the income to which the child support formula applied all of the following: income taxes, contributions for retirement benefits, contributions to a pension, commuting expenses, union dues, health insurance, other child support or other support orders, reasonable direct costs for other dependents, reasonable day care expenses, mortgage expenses benefitting the supported child, household purchases and expenses benefitting the supported child, reasonable costs for retraining or educating a parent who is a displaced worker, or other personal expenses.

[19] *See* 1991 Legislative History of S.B. 280 at 35-36.

[20] Pub. Law No. 100-485, 102 Stat. 2343 (October 13, 1988).

B. Sources of data relied upon in determining Nevada's comparative child support rankings

Time and budgetary constraints prevented the Committee from conducting its own study. The Committee believed that the most efficient way to proceed was to review available demographic data, and that the necessary trade-off in reliability of data would be offset by examining data from multiple sources.[21]

C. The purpose of our statutory scheme

A prerequisite to determining whether Nevada's child support statutes fulfilled their purpose was identifying that purpose. The legislative history gives few clues other than testimony as to award inadequacy and variability,[22] and statements of concern that statutory terms are required to retain IV-D funding.

The statutory language is not very helpful. The only hint of purpose is in NRS 125B.080(5), which maintains that:

> It is presumed that the basic needs of a child are met by the formulas set forth in paragraph (b) of subsection 1 of NRS 125B.070 [the percentages of income per child list]. This presumption may be rebutted by evidence proving that the needs of a particular child are not met by the applicable formula.

From this provision, one commentator concluded that the *purpose* of the statute was to meet basic needs of children and nothing else. That commentator complained that cases granting support in excess of the guidelines are in derogation of legislative intent and award "hidden alimony" under the guise of maintaining the child's standard of living in both homes.[23]

Our statute is based upon the Wisconsin formula, the underlying concept of which is that children should benefit from a non-custodian's income to the same extent that a percentage of that income would be spent on them if the household were intact. That underlying purpose is not one of "need," but of income sharing, so that the child's lifestyle reflects that of both parents. Essentially, a Wisconsin-type formula tends to produce orders that provide children with a standard of living that their parents can afford to provide.

The various factors set out in NRS 125B.080(9) tend to look both forward and backward in time, concerning themselves with educational and other factors that involve the standard of living both before and after a divorce. At the same time, our statute inconsistently refers to "need" and contains "floor" and "ceiling" provisions.[24] The Nevada Supreme Court has interpreted the statute in a manner implicating maintenance of the child's standard of living.[25]

The Committee believes the legislative intent is mixed and the statutory purpose is unclear. Thus, this Committee cannot evaluate whether the statute has been applied consistently with its purpose. Accordingly, this Report evaluates applications of the statute in light of the general purposes of adequacy,

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[21] A review of other studies indicates that such a review of other states "from scratch" would take about two years of continuous effort, and a sufficient budget to allow for extensive interstate communication, data acquisition, and processing.

[22] I.e., similar people in similar circumstances being treated differently by different judges.

[23] *See* Logar, *Wealth, A Substitute For Need*, 57 *Inter Alia*, April, 1992, at 8.

[24] The implied purposes inherent in such provisions are discussed elsewhere in this Report.

[25] *See Herz v. Gabler-Herz*, 107 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 20, Mar. 28, 1991).

consistency, and efficiency required by the original federal mandates, and otherwise as the context dictates. Enactment of a statement of purpose would greatly assist the courts.

III. IS CHILD SUPPORT AMOUNT SUFFICIENT TO MEET CHILDREN'S NEEDS?

The Committee studied all of the available statistical data. Many of those references are cited below under "references consulted". It was hoped that an objective determination based upon statistics would show the minimum amount necessary to support a child. Then, using Nevada income figures, it could be determined whether child support awards under our statute satisfy those needs.

Unfortunately, the available information does not answer this question. The existing data does not reflect measurements of need, but measurements of expenditures made in various households. The data is subject to interpretation.[26]

If the legislative purpose of the child support statutes is satisfying children's basic needs, then the Committee urges the Legislature to commission and fund a study specific to Nevada to research, distill, and present meaningful data to establish whether child support awards in this state are adequate to meet children's needs and thus whether the awards satisfy that purpose. Because of the shortage of available information, the adequacy of child support awards under our statutes could not be evaluated. Accordingly, that issue is not squarely addressed in this Report.

IV. SURVEY OF TECHNICAL OR CORRECTIVE PROPOSALS (PRESUMING CURRENT MODEL RETAINED)

A. General Comments as to "fairness factors" and efficiency

The beauty of our child support statute lies in its simplicity. Using a hand calculator, a pencil and paper, or a simple chart,[27] virtually anyone can determine the presumed support amount under our guidelines. Some judicial officers expressed the opinion that the simplicity and clarity of the guidelines prevent many cases from going to court because the litigants have an idea as to how the court will rule. The same judicial officers believe that the statute gives the courts flexibility to deviate from the guidelines, when appropriate factors are present, allowing them to do substantial justice in the cases before them.

Rigid application of the support guidelines can cause inequity. Therefore, our statute sets forth factors the court may consider in determining the propriety of a child support award under the unique facts and circumstances of each case. Unfortunately, it is impossible to formulate an all-inclusive set of factors which will avoid inequity in all cases. Additionally, while equity may be aided by adding more factors to the guidelines, the cost would be considerable.

Each "fairness factor" added to the statutory formula will require the courts and the parties in each and every case to consider that factor before a child support determination may be made. Thus, there is a time and money cost to both the litigants and to the system for every component added to the basic formula. Some state formulas are so complex that presumptive support cannot be determined without a computer. A large market in computer programs and guideline application books exists to assist practitioners in those states.

The same concerns, to a lesser degree, apply to any factors that can be used by the courts in *deviating* from the presumptive support indicated by the formula. While the basic formula remains simple, a certain

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[26] A brief summary of the data that is available is in Appendix II.

[27] *See* Exhibit 5.

amount of additional litigation can be expected for each factor that *could* be argued in deviating from guideline support. Again, there will be direct and indirect costs to the litigants and the system for every degree to which the court outcome is made less certain. Flexibility and economy are often in direct opposition.

Public commentary to the Committee was of two opposing schools. Some complained that the guidelines were strictly applied without review of the facts of their particular cases. By contrast, others complained that judges exercised too much discretion and ignored the guidelines. The Committee did not investigate individual claims. Only the fact that these complaints were made, not their legitimacy, is noted in this Report.

If the legislature elects to make our statute more complex by adding supplementary "fairness" factors to the formula itself, or to the guideline factors that can be considered in deviating from the presumptive formula support, it must first weigh the costs against the benefits. For every litigant helped by extra factors, another may be harmed, and both will have to do some additional work.

B. Review of "floor" and "ceiling" after recent court cases

1. "Floor" matters; NRS 125B.080(4)

a. The statutory language

The current statute provides that:

> Notwithstanding the formulas set forth in paragraph (b) of subsection 1 of NRS 125B.070, the minimum amount of support that may be awarded by a court in any case is $100 per month per child, unless the court makes a written finding that the obligor is unable to pay the minimum amount. Willful underemployment or unemployment is not a sufficient cause to deviate from the awarding of at least the minimum amount.

b. Preliminary discussion

There appear to be few cases involving awards under the minimum support of $100.00 per month per child. Cases in which lower awards are made seem to be truly unusual cases in which the obligor cannot pay the minimum amount.

A review of other states' guidelines indicated that Nevada has the *highest* minimum child support award of any state.[28] The majority of states have a $50.00 minimum award, and some states have a minimum as low as $10.00.

It was noted that the floor affected the poorest members of our society, with the greatest impact on poor persons with multiple children.

For example, under application of the formula, child support for a worker making $4.50 per hour and having one child would be $140.40,[29] well above the floor. If the same worker had three children, his formula support would be $241.80, while the floor would push his support obligation to $300.00.

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[28] Child Support Abuse of Discretion Reviews (National Center for State Courts, pre-publication draft tables, 1991), Table 6.

[29] A chart showing guideline Child Support by Hourly Wages, Average Monthly Salaries, and Annual Incomes is attached as Exhibit 5.

Application of the floor would require this worker to pay about 45% of gross wages in child support, substantially greater than the 29% provided by the formula.

c. Selection of philosophy behind mandated floor

The Committee debated whether the minimum child support amount should be based upon need or ability to pay. It appears that the legislative intention was to provide a minimum level for *all* children irrespective of parental ability (indicating a primary focus on keeping children out of poverty). The Committee did not have sufficient data to determine whether or not the floor kept children out of poverty, or even at poverty level.

Because of inflation, the floor does not have the same value that it did in 1987 when first enacted. In June, 1987, when the statute was enacted, the CPI-U[30] was 340.1. As of January, 1992, it was 413.8.[31] In other words, the 1987 $100.00 minimum is today worth only $82.19. Put another way, for the floor to have the same relative value as when the statute was passed, it would have to be raised to $121.67.

RECOMMENDATION: In light of all factors considered, the Committee recommends that the floor be left at $100.00 per month per child at this time.

2. Ceiling matters; NRS 125B.070(b)

a. The statutory language

The current statute provides that:

> "Obligation for support" means the amount determined according to the following schedule:
> (1) For one child, 18 percent;
> (2) For two children, 25 percent;
> (3) For three children, 29 percent;
> (4) For four children, 31 percent; and
> (5) For each additional child, an additional 2 percent,
> of a parent's gross monthly income, but not more than $500 per month per child for an obligation of support determined pursuant to subparagraphs (1) to (4), inclusive, unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 5 of NRS 125B.080.

The referenced subsection, NRS 125B.080(5), provides that:

> It is presumed that the basic needs of a child are met by the formulas set forth in paragraph (b) of subsection 1 of NRS 125B.070. This presumption may be rebutted by evidence proving that the needs of a particular child are not met by the applicable formula.

b. Statistical realities in application of the ceiling; apparent technical errors

The Committee noted that the ceiling (like the floor) has a differential impact on persons at different income levels, depending on the number of children involved. For one child, the ceiling is a factor when the Obligor's income reaches $33,335.00 per year. For two children, the ceiling applies when the Obligor's

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[30] The Consumer Price Index for All Urban Consumers, per the U.S. Department of Labor, Bureau of Labor Statistics.

[31] The CPI-U chart is attached as Exhibit 6.

income exceeds $48,000.00 annually. For three children, the ceiling is a factor above $62,100.00. For four children, Obligor income must reach $77,450.00.

Statistics submitted to the 1989 legislature by the Junior League indicated that average yearly income in Nevada at that time was $15,984.00.[32] The Employment Security Statistics Division in Carson City reported that the 1991 average income in Nevada was $19,035.00, ranking Nevada 13th among states. The Division related that California average income was $20,667.00, and Western United States average income was $20,133.00. United States average income was $18,691.00.

United States Commerce Department figures were not very different. The federal figures indicated that in 1991, Nevada had a per-capita income of $19,175.00, ranking Nevada 15th in the nation, as compared with California's $20,952.00 and a far western regional average of $20,455.00.[33]

The practical effect of the ceiling is to impose the *same* child support obligation on a group of Obligors across a variety of income levels, although as discussed below, the ceiling is not absolute.[34] The consensus was that the ceiling is most commonly applied when an Obligor's gross income is not much higher than the cutoff.

For example, the one-child Obligor income cutoff is $2,777.75 per month ($33,333.00 per year). Above that income level, the presumptive ceiling applies. In the experience of the Committee, an Obligor with an annual income of $35,000.00 to $50,000.00 is more likely to benefit from application of the ceiling than an Obligor with an income of $50,000.00 to $100,000.00 per year. The higher the Obligor's income, the more likely the court would exceed the presumptive ceiling. Not all committee members viewed this as a problem.

The legislature should consider whether the ceiling should be raised to reflect inflation since passage of the original legislation. Using the same figures referenced above, for the ceiling to have the same relative value that it had in 1987, the $500.00 per month per child would have to be increased to $608.35. If the ceiling remains at $500.00, an increasing number of Obligors will pay less child support than if the percentage were applied, because income levels are increasing due to inflation.

In any event, there appears to be an inadvertent error in the phrasing of the statute. As currently set out *there is no ceiling whatsoever in cases where there are more than four children*. The statute applies the ceiling to support "pursuant to subparagraphs (1) to (4), inclusive," implying the *exclusion* of cases in which there are five or more children. The legislative history sheds no light on this.

RECOMMENDATION: The ceiling should apply to all families, regardless of size; the "(4)" in the last part of NRS 125B.070(b) should be changed to "(5)."

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[32] *See* legislative history of A.B. 85 at 1044, 1104.

[33] *See* Las Vegas Review-Journal, April 23, 1992, at 16A, col. 3, citing 1991 "Household and Family Characteristics" study by the Commerce Department. The article recounted several other statistical rankings, but it should be noted that per capita income is a different measure than average income.

[34] The matter may be one of perspective. From the view of providing for children, the ceiling could be said to provide the same support for children irrespective of the differing incomes of their non-custodial parents, thus denying to some children the share of non-custodial income provided to others. Focusing on the non-custodians, it could be said that the ceiling defines the maximum income that would be tapped for child support, thus requiring the same payments from persons with varying abilities to make those payments.

c. Philosophical basis of the ceiling; applicable cases

There was considerable debate between Committee members as to whether or not the presumptive ceiling was enacted because the legislature believed that $500.00 per month per child was sufficient to meet a child's basic needs and the guidelines were only intended to fulfill that purpose. There is also some question as to what "basic needs" means, since it could reasonably be interpreted as referring to either an absolute standard correlated to the poverty level, or a relative standard that would be based on the on the standard of living enjoyed by the family. The debate was not resolved because the legislative history does not reflect intent.

The structure of the child support statute appears to be designed to facilitate a child's sharing in the parents' wealth. That is the conclusion reached by the Nevada Supreme Court.

In *Herz v. Gabler-Herz*, 107 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 20, Mar. 28, 1991) the court held that an award of child support of $1,000.00 per child does not require proof that amount is necessary to meet the child's needs. Support above the ceiling may be based upon what is "fair and equitable" in light of "the vastly different incomes and financial resources of the plaintiff and defendant, and the amount of time the children will spend with each parent as a result of this decree." The court found no abuse of discretion in the district court's finding that "extensive evidence of defendant's wealth" was an appropriate basis for a child support award at double the presumptive ceiling.

Herz thus suggests that "factors other than need" may be properly looked to in exceeding the presumptive ceiling. Although the case does not indicate *what* other factors might be appropriate, it does suggest that disproportionate wealth is one such factor.

Herz certainly implies that the primary goal of our child support statute is to ensure that a child shares the standard of living enjoyed by the non-custodial parent. The case does not address the question of "hidden alimony." The elimination of need as a prerequisite for additional support, however, impliedly subordinated any such concern to the desire to allow children to share in the standard of living of the wealthier parent.

In *Chambers ex rel. Cochran v. Sanderson*, 107 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 132, Dec. 6, 1991), the court reversed a $500.00 per month support award in a paternity action. The Supreme Court criticized the trial court for incorrectly assuming that support beyond $500.00 under what is now NRS 125B.070(1)(b) can only be awarded on showing that the needs of a particular child are not met by that sum.

Chambers makes it clear that it is appropriate for a wealthy non-custodial parent to pay more in child support than a less wealthy non-custodial parent. If the court's analysis is correct, then the statute *must* have a "standard of living maintenance" or at least "income sharing" purpose, rather than solely a "meeting of need" purpose, irrespective of the statutory language regarding a child's "basic needs."

Having reached that conclusion, the Committee examined whether the ceiling should be deleted entirely as philosophically inconsistent with maintaining children's standard of living. The Committee unanimously concluded that there is an unavoidable tension between maintenance of a child's standards of living (or at least income sharing) on the one hand, and avoiding subsidization of the former spouse as primary custodian on the other.

A majority of the Committee concluded that "penalizing the child" (by keeping support awards low enough that the former spouse would *not* be substantially subsidized) was the greater evil. A minority felt that it would be inappropriate to take any action within the bounds of the child support statute that would have the effect of a *de facto* alimony award, even if it was temporary (since measured by the minority of the children).

If the legislature agrees with the majority of this Committee, and the Nevada Supreme Court, that the child support statutes have a "maintenance of lifestyle" or "income sharing" purpose, then that goal

should be reflected in a statutory statement of purpose, and the ceiling should be modified or eliminated. If the legislature disagrees and believes that the statute should be based solely on satisfaction of some definition of "basic needs," then that purpose should be reflected in a statutory statement of purpose.

d. Discussion of means of rectifying perceived conflict in the statutory ceiling

If the legislature agrees that a purpose of the child support statute is "maintenance of lifestyle" or "income sharing," then it must also recognize that the ceiling interferes with that purpose. That interference should then be eliminated, or at least minimized.

One suggestion is to change the focus of what the statute is intended to preserve, from access by a child to a percentage of the non-custodian's income, to maintenance of the child's standard of living. Such a change of focus, of course, would require an entirely different starting point for the statute. Instead of beginning with the Obligor's income, the court would have to determine the cost of maintaining the child's standard of living, and *then* examine the wherewithal of the parties to find the resources for doing so. The Committee noted that this would necessarily entail at least a partial abandonment of the Wisconsin Guideline model.[35]

One possible approach discussed is to make the matter one of evidentiary burdens. There would be no statutory ceiling except where the Obligor could prove that its application would *not* alter the lifestyle of the child. This would have the real-world effect of eliminating application of the ceiling in the majority of cases, while maintaining the Wisconsin approach. Again, the actual question is one of legislative priorities. This proposal would be reasonable if priority is given to maintaining the child's standard of living, rather than protecting Obligors from subsidizing their former spouses.

Another option is to limit its application above a certain income level of the Obligor. In substance, this is what the *Herz* and *Chambers* cases already do, but those cases do not give any guidance as to the appropriate income levels. If the legislature wishes to formalize application of the principals set out in those cases, more uniform application of the rules will be achieved if a specific Obligor income level is selected beyond which the ceiling would not apply. For example, the statute could provide that the ceiling is inapplicable if the non-custodial parent's income is $60,000.00 or greater. Note that under the current statute, an Obligor at that income level with two children would save about $250.00 per month, while an Obligor with three children would not yet reach the ceiling.

Additionally, if the ceiling is made expressly inapplicable in some circumstances, then guidance should be given as to what the trial courts are to do instead in such cases, whether it be the application of judicial discretion, the analysis of the needs or lifestyle of the child, or something else.

A variation of this approach would make the ceiling inapplicable once there is a specified gap between Obligor and Recipient incomes, so if both parents were wealthy the non-custodian would not simply be transferring wealth to the primary custodian.

Presuming the ceiling is retained, there is still the question of setting it at the appropriate level. The Committee is divided as to whether the ceiling (apart from considerations of inflation) should be higher than it is. The legislature must choose whether it wishes to shield the Obligor from application of the otherwise applicable guideline percentages at a given income level. Because of the differential impact of the ceiling based upon number of children, the legislature must also consider whether the "dollars per child" *form* of the ceiling is unfair.

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[35] Please see Section V of this Report for a discussion of the theoretical bases underlying the alternative formulae that are in use elsewhere.

RECOMMENDATION: The majority of the Committee recommends, in light of all the factors discussed above, that the presumptive ceiling be raised to $1,000.00 per month per child. It is believed that this change would prevent more hardship and inequity than it would cause.

C. Role of child care expenses

This matter concerns day care costs and other child care costs exclusive of medical care. The question is whether an amount in addition to guideline support should be assessed to compensate the custodial parent for the additional cost of such care above and beyond normal living costs. The underlying presumption in asking this question is that child care costs are *not* already factored in as a cost of living for which the statutory formula compensates the custodial parent. This presumption may be incorrect.

It is uncertain how the existing statutory framework should be interpreted. Unlike medical expenses (discussed in the next section), there is no presumptive treatment of child care expenses in the existing guideline. Rather, "the cost of child care" is one of the enumerated factors that the court shall consider when adjusting the amount of support of a child upon specific findings of fact.[36]

In her 1990 article entitled "A Guide to the Guidelines," Diane Dodson observed that under the Wisconsin model, there is no separate consideration given to child care costs, which are presumed subsumed in guideline support.[37] She also noted that the guidelines were based on a number of different studies, and "because many of the studies were based on data gathered between 1950 and 1980, these estimates were probably made before many mothers worked and before there were such large resulting child-care costs." In other words, it is possible that the economic data underlying the Wisconsin model contains a false premise: that such costs are not an important component of figuring a support obligation.

The Committee consensus is that child care costs are *not* adequately reflected in the current statutory framework, at least in cases where both parents are working, and at least one child is not yet of school age. While expenditures for food, clothing, recreation, etc., increase as children get older, the Committee did not believe that in most cases total expenditures for older children were any higher than for pre-school children's child care, which typically costs $65.00 to $75.00 or more per child per week.

In the experience of the Committee, Nevada courts seldom apply NRS 125B.080(9)(b) as a factor in deviating either upwards or downwards from formula support. This is likely because there is no legislative indication as to whether or not the formula presumes that such costs are being incurred.

Several income-shares states use their child support formulas to derive a guideline obligation, and then *add* to that obligation a further sum representing the non-custodian's share of the costs of child care. Forty states add "child care" to their formula child support, in some way.[38] The implicit conclusion is that most states believe that child care should be separately added in cases in which it is actually involved.

Older studies attribute 1.57 percent to 4.67 percent of gross income to payment of both child care *and* extraordinary medical expenses, with the smallest percentage expended by the wealthiest individuals,

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[36] *See* NRS 125B.080(9)(b).

[37] Dodson, *A Guide to the Guidelines; New child support rules are helping custodial parents bridge the financial gap*, Spring, 1988 Family Advocate 4 (American Bar Association), at 9.

[38] Child Support Abuse of Discretion Reviews (National Center for State Courts, pre-publication draft tables, 1991), Table 7.

and the largest percentage paid by the poorest individuals.[39] The actual *dollars* spent on both items increased with the parents' incomes, but the percentage of income spent declined as incomes rose.

A more modern survey examined children whose primary custodians were employed in the labor force.[40] The survey found that cash payments were made by a third of employed women for child care services, and that child care consumed 5 percent to 21 percent of monthly family income, depending upon the economic level of the family.[41] The studies underlying the original Wisconsin formula thus seem to be outdated. Child care costs are a much more significant percentage of total expenditures on children than they were at the time of those studies.

As a matter of fairness, it would be best not to presume the existence of such expenses and raise all child support accordingly, since in some cases the expense will be zero, while in others it might be considerable. The best approach would be to leave child care factors outside of the formula and add them to the support obligation only when the facts of the case so warrant.

If child care costs are already included in the percentages of the formula, however, then this separate treatment may require *lowering* the guideline support by whatever portion of the support percentage was intended to pay for that cost, and then adding *actual* expenses on top of guideline support.

There are problems with the logic of lowering the percentages in the existing formula by any particular amount. As noted elsewhere in this Report, it appears that when the original formula percentages were established in Wisconsin, they were artificially lowered for political purposes after the statistical evidence gave percentages of income used for the support of children that were considered "too high."[42] Thus, any reduction designed to compensate for the portion of the formula corresponding to child care costs

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[39] *See* Development of Guidelines for Child Support Orders, *supra*, at II-135. The data dates from 1972-1973, and is graphed across income categories ranging from "$0-2,999" to "$25,000 or more." While not an entirely smooth curve, the chart seemed to show that the proportion of gross income spent on child care and extraordinary medical expenses was greatest for those in the lower socioeconomic groups. It seems possible that the uneven results that lowest end of the income spectrum reflects the impact of social programs.

[40] O'Connell & Bachu, *Who's Minding the Kids? Child Care Arrangements: Winter 1986-87*, Current Population Reports, Household Economic Studies, Series P-70, No. 20, U.S. Department of Commerce, Bureau of the Census, as excerpted and reprinted in U.S. Dept. of Agriculture, Agricultural Research Service, 4 Family Economics Review No. 1, at 26. The researchers found that 51% of women between the ages of 18 and 44 who had given birth in the prior year were employed in the labor force, up from 31% in 1976. Another recent study found that 70% of divorced women with children under 6 years of age were in the labor force. U.S. Department of Commerce, Bureau of the Census, 1989, *Statistical Abstract of the United States, 1989* (109th ed.), cited in Lino, *Expenditures on a Child by Single-Parent Families*, Family Economics Review, Mar. 1991, 2, at 5.

[41] This survey included intact families, so these percentages represent the portion of the *combined* income from both parents. The percentage would be higher if only the mother's income was considered.

[42] *See*, *e.g.*, discussion in Dodson, *A Guide to the Guidelines*, Spring 1988 Family Advocate 4, at 7, 9 (American Bar Association).

would have to be some *fraction* of that portion.[43] There is no reliable evidence available upon which to base a reduction.

Nothing in the legislative history indicates what costs were presumptively included or excluded.[44] If the statute does *not* already include a component that estimates these costs, then a reduction would be unwarranted.

A majority of the committee believes that the Nevada statutory formula should be interpreted as *not* including child care costs, so that the costs may be awarded separately in those cases where such costs are incurred. A separate subsection preceding or following, and similar to, the existing NRS 125B.080(7) should be added explicitly dealing with child care expenses, and the existing NRS 125B.080(9)(b) should be deleted.

How to *allocate* child care costs is another question. Presumably, some form of income comparison between the parents would be required,[45] unless the legislature wished to simply impose an equal division of the expense.[46] For reasons set out at greater length in the next section of this Report, the Committee recommends a proportional, rather than equal, split of these expenses.

RECOMMENDATION: Child care expenses should be awarded in addition to the formula amount and allocated between the parents in proportion to their relative incomes. The current formula percentages should not be modified to reflect this addition.

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[43] If, as seems likely from the available information, the drafters of the Wisconsin formula had assigned a 2% value to child care and medical expenses, it would not be appropriate to simply lower the Nevada guideline from 18% for one child to 16% if child care is to be separately added to our statute. If the Wisconsin drafters had derived an original percentage of 25% for support of one child, but lowered that percentage to 17%, then the portion of the formula percentage corresponding to child care *and* medical expenses would have shrunk from 2% to 1%. *See* Dodson, *A Guide to the Guidelines*, Spring 1988 Family Advocate 4, at 9 (American Bar Association). Eliminating the "child care component" in the formula would therefore cause a change of half a percent or less, depending upon how much of the original item was for child care and how much was for medical expenses.

[44] The original Governor's Commission report listed child care as a ground to be considered for *variance* from the formula, but did not indicate if it was to be considered for *increasing* support if such expenses existed and were paid by the custodian, or for *decreasing* support if paid by the noncustodian.

[45] This is essentially a short form version of an income shares approach. Note that there are at least two different ways of doing the math. If the non-custodian made $30,000.00 per year, and the custodian made $10,000.00 per year, it could be said that the non-custodian should pay 75% of the child care expense, since that party made 75% of the parties' combined income. Alternatively, it could be said that the non-custodian had three times more income than the custodian, and therefore should pay 66.66% of the expense (i.e., three times more than the custodian's share). If the legislature enacts a pro-rata division, one approach or the other should be specified to avoid confusion.

[46] That is the approach taken in the existing statutory framework for medical expenses. *See* NRS 125B.080(7). As noted below in this Report, the Committee generally disfavors such a mandated equal division because it has a disproportionate impact upon the poorer parent.

D. Role of medical expenses (normal and extraordinary)

The current statute provides that:

> Expenses for health care which are not reimbursed, including expenses for medical, surgical, dental, orthodontic and optical expenses, must be borne equally by both parents in the absence of extraordinary circumstances.

Two issues are presented. First, whether this matter should be subsumed in the guidelines or determined separately when the circumstances warrant it; and second, whether the division of medical expenses should be "equal" or "proportionate."

1. Whether medical expenses should be presumed or calculated

Many of the considerations addressed in the discussion of child care above, are equally applicable here. As with child care, medical expenses may be considerable in some cases and non-existent in others. The same policy considerations of fairness and simplicity apply as whether such widely varying costs should be averaged and made part of the formula, or left out of the formula and added to formula support in appropriate cases.

Twenty-nine states add "extraordinary medical expenses" to their formula child support, in some way.[47] The implicit conclusion in that method of calculating support is that actual, not presumed, medical expenses should be considered. Of course, a somewhat smaller number of states have implicitly concluded otherwise.

The Nevada statute varies from the Wisconsin model in that it does *not* subsume medical expenses within the basic support obligation.[48] Accordingly, it could be said that our statutory scheme is more generous than the Wisconsin model, to the extent that the guideline percentages *already include* some consideration of medical expenses. As noted above, however, the economic data used to construct the model is dated, and it is common knowledge that medical costs have been rising at a pace far in excess of inflation, therefore increasing the percentage of income necessary to pay medical expenses.

One more modern statistical study indicates that medical expenses comprise 4 to 5 percent of all expenditures on children.[49] The Committee was unable to find a trustworthy measure of income typically consumed for children's medical care. This is of lesser concern, since the existing statutory framework *already* adds this component to formula support.

As with the issue of child care, however, the question is whether it *should* be subsumed in the general guideline support or broken out (as it is currently) to be divided between parents and paid over and above that support.

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[47] Child Support Abuse of Discretion Reviews (National Center for State Courts, pre-publication draft tables, 1991), Table 7.

[48] It was Ms. Dodson's observation in 1988 that both child care *and* medical expenses were subsumed in guideline support in Wisconsin model states. *See A Guide to the Guidelines, supra,* at 9. This observation may not have been entirely accurate. In North Dakota, for example, medical expenses paid are deducted from gross income before support is calculated, which has the effect of lowering support owed by something less than dollar-for-dollar. Mississippi and Alaska allow modification of guideline support for "extraordinary" medical expenses.

[49] *See Expenditures on a Child by Husband-Wife Families*, U.S. Dept. of Agriculture, Agricultural Research Service, reprinted in 4 Family Economics Review No. 1, at 32-34.

RECOMMENDATION: The statutory treatment of medical expenses (as an item separately calculated and added to formula support) should not be changed.

2. Whether medical expenses should be divided equally or proportionately

This particular issue has a very low complaint rate; i.e., both in their practices and in Committee service, the members have found few persons who feel that they have been treated unfairly under the existing statutory provision.

Nevertheless, the Committee is troubled by the inherent inequity of the current heavy presumption favoring equal division of medical costs in cases in which the parents have greatly dissimilar abilities to meet those expenses. An alternative would be *proportionate* allocation of the cost in accordance with the income of the parents.

If, for example, the non-custodian has five times more income than the custodian, it seems logical that the non-custodian should pay five times more toward the expenses. Obviously, if there were no such expenses, there would be no such charge.[50]

RECOMMENDATION: Liability for uncovered medical expenses should be shared by parents in proportion to their relative incomes rather than equally.

3. Question of contradictions/interference with other statutory provisions; examine interplay with NRS 125.510(1)(a), NRS 125.450(1)

NRS 125.510(1)(a) currently provides as follows:

> In determining custody of a minor child in an action brought under this chapter, the court may: . . . During the pendency of the action, at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such an order for the custody, care, education, maintenance and support of the minor children as appears in their best interest . . . .

NRS 125.450(1) currently provides as follows:

> No court may grant a divorce, separate maintenance or annulment pursuant to this chapter, if there are one or more minor children residing in this state who are the issue of the relationship, without first providing for the medical and other care, support, education and maintenance of those children as required by chapter 125B of NRS.

It would appear that there is some question raised by these statutes as to the discretion of the District Court in fashioning orders for support of children. Does NRS 125.510(1)(a) constitute a general equitable exception to the guidelines? If not, is the provision subject to the restrictions in the guidelines? Is it mere surplusage?

For example, one Domestic Relations Referee in Las Vegas has expressed the opinion that the guidelines presume "zero contribution" in addition to guideline support.[51] Therefore, in cases in which the non-custodian is bearing a cost for insurance premiums, that parent is given a dollar-for-dollar reduction in

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[50] As noted above, there is more than one way to do the math for such pro-rata divisions.

[51] The validity of this position is examined at greater length in the discussion below of shared custody cases.

child support owed. At least one other Referee gives a credit to the non-custodian for *half* of such premium payments. Several judges follow neither approach.

For items that are not explicitly addressed (such as health care premiums), some legislative guidance is desirable to achieve greater uniformity in the courts. The available choices are: that such expenses are presumptively to be borne by the custodial parent, with the non-custodian's share subsumed in the general support amount; that such expenses are to be divided equally between the parties; or that such expenses are to be divided proportionately between the parties in accordance with their incomes.

Currently, with the exception of health care costs, the presumption in the courts appear to be in line with the view of the Referee who believes that unless noted otherwise, the non-custodian's contribution to all other expenses are subsumed in the guideline support. This presumption weakens with a widening income gap between the parents, so that (on a variety of grounds) judicial officers have had non-custodial parents pay for various additional costs in addition to guideline support where the non-custodian has greatly superior resources. If this state of affairs is not acceptable to the legislative will, then further clarification should be given in the form of amendment of these statutes.

E. Role of other children/second or later families

A large proportion of child support cases involve multiple families. It is no longer unusual for parents to have one or more former spouses, or to be custodians of children from one marriage and non-custodians of children from another. One commentator has stated:

> multiple family situations are no longer the exception, but the rule. About half of marriages -- and an even greater proportion of divorces -- involve at least one partner who has been married before. A substantial portion, as well, involve at least one partner with a child or children from that former marriage or another former union.[52]

There are two basic questions. First, should a support obligation be adjusted because of an Obligor's responsibility to support others? If so, then the second question is how, if at all, should those obligations be ranked? In other words, does the existence of the earlier obligation have any impact on the sums that should be considered "available" for support under the statute for the later obligation? Does the earlier obligation have priority, or should the existence of the second obligation justify reduction of the earlier obligation? Should it make any difference whether the second obligation is within the context of an intact second family or by means of a later court-ordered obligation? These questions are addressed below.

1. Review of *Hoover* and *Scott*

In *Hoover v. Hoover*, 106 Nev. 388, 793 P.2d 1329 (1990), the Nevada Supreme Court examined NRS 125B.070 to decide whether statutory child support should be reduced by taking into account other children of a noncustodial parent. Because there were two children before the court, it imposed a 25% of gross obligation against the non-custodian. Mr. Hoover, arguing that he had two other children from another relationship, alleged that the court should have applied the four-child percentage (31%) to his income, and then divided that sum in half to yield child support to the custodian of the children before the court.

Rejecting that argument, the court noted the existence of the "first mortgage" and "equal treatment" approaches to determining the relative rights of first and second families (without so titling them)[53] The

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[52] Takas, The Treatment of Multiple Family Cases Under State Child Support Guidelines at 2 (U.S. Dep't of Health and Human Services 1991), citing V. Fuchs, *How we live; an economic perspective on Americans from birth to death* (1983).

[53] These are explored in greater detail below.

court found the current statutory language unambiguous, and held that it is for the legislature to determine if the existence of subsequent children should lessen a pre-existing duty of support. The court also noted that if appropriate, courts were free to modify support in light of obligations to support others under NRS 125B.080(9)(e).

A year later, in *Scott v. Scott*, 107 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 130, Dec. 6, 1991), the court looked at a proceeding to modify child support. The court found that deviation from the formula by the district court (from $793.43 for two children to $600.00) was proper under NRS 125B.080 because of the Obligor's responsibilities to his second wife and two other children, plus direct payment of unspecified "other necessary expenses" for the two subject children, and in light of the relative income of the parties. The court distinguished *Hoover* since in this case no "formula" approach was used and the order was not based entirely on the new children.

Hoover was viewed by some as an absolutist view that no downward modification of support should be countenanced by courts based on the Obligor's duty to support others after the first obligation was established, notwithstanding the court's discussion of 125B.080(9)(e). Such concerns were alleviated by *Scott*, which shows that the "support of others" clause is applicable equally to establish or modify earlier or later support obligations based upon the existence of responsibility to support others. What the court would not allow, however, was a formulaic approach to such modifications, thereby requiring the application of judicial discretion in all cases in which support of others was alleged to be a factor.

The legislative question is whether these interpretations of the statutory scheme are compatible with the legislative intent in enacting the guidelines. If *no* modification of any support obligation based upon any other support obligation was intended, then 125B.080(9)(e) should be repealed, or substantially rephrased. If it was intended to apply to only later-created obligations (i.e., if it was intended to modify the support available in a second divorce, but not apply to reduce an obligation from a first divorce), the provision should be reworded to so state, since the current court interpretation is otherwise. If the intention of the provision is to *always* reduce support when another support obligation exists, the provision should be removed from NRS 125B.080(9) and moved to apply more directly to the determination of support.

It must be pointed out that other states approach this question in different ways. There are even differences between Wisconsin-model states. In Wisconsin itself, for example, the formula reduces the amount available for support, against which the guidelines are applied, by the amount of support actually paid pursuant to prior court order.

a. Presuming second family *should* be considered, should we have a "first mortgage" or "equal treatment" approach to evaluation of second family?

This matter is the one alluded to in *Hoover*. It is worth noting that learned bodies have made conflicting recommendations in this area. The 1985 Governor's Commission made the following assertion in the "Preliminary Statement of Intent in Regard to Visitation and Child Support":

> In determining support obligations many courts have taken the position that the creation of a new family is a voluntary act. They have taken the position that the father's prior support obligations take precedence over the needs of a new family, and that it may be appropriate to give priority to children from an earlier marriage or relationship in assessing the extent to which children born subsequently may reduce pre-existing child support obligations.
>
> As a result, the more feasible approach in taking other support obligations into account is to subtract pre-existing child support obligations from net income prior to establishing the amount of a new order. The effect of this mechanism is to give economic preference to pre-existing obligations because the court order for such obligations would have been made without taking into account the obligor's financial responsibility for subsequent children.

> After extensive examination of the literature, it is the opinion of the Commission that until a sense of responsibility, as it relates to visitation and support, is established with custodial and non-custodial parents for initial obligations, we will continue to encourage irresponsible treatment of children who are the product(s) of multiple marriages.[54]

Thus, the Commission adopted a "first mortgage" approach to families, whereby the earliest obligation has priority and presumably would not be affected by later-created support obligations. This approach carried with it a number of policy recommendations involving treatment of these cases. Under this approach, children of a first marriage are insulated from the post-divorce choices made by the Obligor parent.

Theoretically, resources deemed "available" for support of the second relationship could either be lowered by the amount of support paid under the earlier obligation, or not. The existing statutory scheme makes it possible, but not mandatory, for a court to do so, by making "the support others" a factor that *could*, but need not, be utilized by the court in varying from guideline support otherwise payable.

On the other hand, the Advisory Panel to the U.S. Department of Health and Human Services, in authoring the Development of Guidelines for Child Support Orders, included in the preface to their final report eight guiding principles. Number four of those was:

> Each child of a given parent has an equal right to share in that parent's income, subject to factors such as age of the child, income of each parent, income of current spouses, and the presence of other dependents.[55]

Thus, the Advisory Panel adopted the "equal treatment" approach, which necessarily colored its view of which models were most appropriate for adoption by states.[56] Starting from this basis, the children of the first relationship are in the same position as those of the second relationship as to the pool of resources from the Obligor deemed "available" for support.

It should be noted that in the state of Wisconsin, the total amount that would be owed by an Obligor with two successive support obligations is lowered by the support payable under the earlier obligation, but the reverse *also* occurs, so that support under the earlier obligation is lowered by imputed support payable to the children of a later relationship, whether that relationship is intact or has been dissolved by court order.

Some useful information is found in the literature on this subject. Recently, the U.S. Department of Health and Human Services released a study entitled "The Treatment of Multiple Family Cases Under State Child Support Guidelines."[57] After noting that *most* cases today involve multiple family situations, the author noted that lack of adequate consideration of such situations will probably lead to inequitable

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[54] Governor's Commission Report, *supra*, at 1-2.

[55] Development of Guidelines for Child Support Orders, *supra*, at I-4. Some commentators have taken the position that such an approach is a constitutional necessity. *See* Note, *Second Children Second Best? Equal Protection for Successive Families Under State Child Support Guidelines*, 18 Hastings Const. L.Q. 881 (1991).

[56] The Panel recommended adoption of the Income Shares Model or Delaware Melson formula. *Id*. at I-15-17,

[57] Published July, 1991. The study was conducted by Marianne Takas, Assistant Staff Director, Child Support Project, Center on Children and the Law, American Bar Association (hereafter, "Treatment of Multiple Families").

treatment of custodians, non-custodians, or both.[58] In examining how the various model formulas fare in multiple-family cases, the author concluded:

> The simplicity of the percentage of income method proves a practical asset when addressing multiple family issues. Because the guideline does not require an intricate formula in a simple case, it can more easily incorporate additional steps in a more complex case.
>
> The fact that the percentage of income method [Wisconsin model] does not directly address custodial parent income, however, may be a significant political barrier to addressing multiple family issues. While the support amounts are set based upon a concept of shared responsibility, nowhere in the formula does custodial parent income actually appear. It may therefore be perceived as inequitable and even illogical to consider the impact of prior and subsequent children and partners, while custodial income remains only indirectly reflected in the formula.[59]

The only formula the author found would deal with multiple-family cases without any necessary adaptation was the Cassety (equalization of household living standards) model, which has not been enacted in any state, and which has a significant drawback:

> While appealing in its simplicity and apparent perfect equality, the Cassety model would almost certainly be controversial as applied to multiple families. It would equalize living standards no matter what the decisions and actions of each parent. If one parent had the fortune to marry a high earner, the other would share the benefit equally. If one chose to have four new children, the other would share equally in the economic cost. Two parties who had chosen to divorce would be economically wedded for life, each sharing the full impact of decisions over which he or she had no control.[60]

The majority of states have some numerical consideration in their support formulas for support obligations that exist for an earlier family at the time a later support obligation is determined.[61] A clear majority of states also deny modification to earlier support obligations on the basis of the existence of children later acquired as dependents of the Obligor:

> The traditional approach has been to refuse any adjustment to an existing child support order based upon claims of hardship due to subsequent children. The Montana guidelines explain the reasoning behind approach in unyielding terms: "A parent's pleas that his or her new responsibilities are a change in circumstances justifying a reduction in a prior child support award will not serve as a basis for a reduction of support. Creation of the new family is a voluntary act and that parent should decide whether or not he or she can meet existing support responsibilities and provide for new ones before taking that step." This may be called the First Family First approach.[62]

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[58] Treatment of Multiple Families, *supra*, at 3-4.

[59] Treatment of Multiple Families, *supra*, at 9.

[60] *Id*. at 10. Of course, this is somewhat overblown; while the extent of economic interdependence is correctly stated, the duration would be only so long as there were unemancipated children of the parties living with one of them.

[61] Treatment of Multiple Families, *supra*, at 16. Note that this includes allowing the Obligor to deduct from available income *spousal* support as well as child support paid under earlier orders.

[62] Treatment of Multiple Families, *supra*, at 23 (citations omitted).

The author went on to criticize the approach of the Wisconsin state guidelines, since its deduction of actual or imputed support for any other pre-existing or current children of the Obligor effectively left the children in the case before the court positioned behind any other dependents whether the obligations to those children were created before or after that to the children at issue in the current case.[63]

After lengthy discussion, a majority of the Committee believed that the statute should be amended to give some guidance to courts in multiple-family cases. Reasoning that the existence of the earlier support obligation necessarily limited the resources available to the second family from its beginning, the Committee majority felt that a first mortgage approach was proper to safeguard the children from the later actions of the Obligor parent.[64]

Thus, the Committee would approve of the result in *Hoover*, since the Obligor's subsequent assumption of a duty to support others should not impact his or her earlier obligation of support.[65] This could be accomplished by adding words to NRS 125B.080(9)(e) sufficient to show that it does not apply to modifications of support obligations by reason of having acquired obligations for the support of other children after the earlier support was determined.

At the same time, the Committee majority felt that the statute should explicitly give the Obligor some credit for support actually paid under the *earlier* obligation, in setting support payable for children of the *second* family.[66] If the legislature is concerned with the effect this will have on subsequent children, their interests and those of the Obligor could be balanced by using a multiplier to limit the reduction in guideline support attributable to payment of the earlier support obligation. This is explained in greater detail in the next subsection of the Report.

The Committee believes that a first mortgage approach will decrease pressure for re-litigation of support matters, since the non-custodian will not be able to unilaterally affect the support payable under the earlier obligation by entering into obligations in the second relationship.

RECOMMENDATION: The Committee believes that the legislature should give greater guidance to treatment of multiple-family cases, and agrees with the 1985 Governor's Commission that a "first mortgage" approach should be followed. The statute should be amended to state that support owed under an earlier obligation should *not* be reduced by the Obligor's acquisition of a later support obligation, whether the second family is intact or is later divided.[67] In fairness to the Obligor, calculation of support obligations

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[63] *Id*. at 24.

[64] A minority would have adopted the "equal treatment" approach mentioned by the Advisory Panel to the U.S. Department of Health and Human Services.

[65] One obvious flaw in this reasoning is essentially one of notice or "due process" -- that the statute may well have not existed when the Obligor took on the later obligation, since the guidelines are only five years old. This concern will necessarily lessen over time, but the legislature could put whatever general equitable language it believed was appropriate into the statute for this situation, perhaps having it "sunset" in another twelve or thirteen years, since by then all earlier-obligation children born before the guidelines will be over the age of 18.

[66] By contrast, the discretionary language of the current statute (NRS 125B.080(9)(e)), could be applied so as to favor the earlier children, the later children, or the Obligor.

[67] Some states, apparently in a spirit of compromise, allow *defensive* use of subsequent children to resist any *increases* in support obligations under their guidelines. *See* Treatment of Multiple Families, *supra*, at 26. This might be an appropriate way of dealing with the "due process" concerns discussed above where an initial guideline determination is made only after the Obligor already has

for subsequent children should presumptively include consideration of the existing support obligation, rather than leaving it as a discretionary factor the court "may" use in adjusting support. If the second marriage breaks up, the Obligor's income considered available for support should be reduced by the sum paid under the earlier obligation.

b. Mechanics of working child support calculations using a "first mortgage" approach

For example, in a hypothetical situation where John and Mary had two children and were divorced, and then John married Susie and had two more children, the analysis would be as follows: Assuming John has a monthly income of $3,000.00 per month, under the guidelines, he pays 25% ($750.00) to Mary. His child support obligation would not be reduced by his marriage to Susie, or the birth of the later two children, or by his subsequent divorce from Susie. His child support obligation to Susie, however, would be determined from income already reduced by support paid, or $3,000.00 - $750.00 = $2,250.00. His support payable to Susie (25%) would be $562.50. John would be left with $3,000.00 - $750.00 - $562.50 = $1,687.50.

If the second support obligation is based upon John's gross income without the recommended reduction, then in the above hypothetical Susie and Mary would each receive $750.00, leaving John with $1,500.00.

If the legislature finds that the "first mortgage" approach penalizes the second custodial parent too severely, the impact may be reduced by adding a multiplier to the credit against income. For example, in the above hypothetical, the statute could be made to reduce income available for second family support by *half* of that paid under an earlier support obligation. Mary would still receive $750.00, but available income for support to Susie would be defined as $3,000.00 - (½ x $750.00) = $2,625.00; support payable to Susie (25%) would be $656.25. John would be left with $1,593.75.

A few states have engaged in such experimental approaches to balancing the needs of first and second families. In Michigan, the reverse of the above example is used, deducting from support for the earlier children half the imputed support to the subsequent children.[68] Such an adjustment in reducing the earlier obligation would be incompatible with the recommendations made herein. If used for reducing second family support, however, the formula approach has the attraction of lessening the total burden on the Obligor with some measure of predictability.

F. Split custody (i.e., one or more of the parties' joint children in each parent's home) methodology

For the purpose of this section, the Committee defines split custody as a situation in which one parent is awarded physical custody of one or more children and the other is awarded physical custody of another child or children of the relationship. In most Nevada split custody cases, the practice appears to be that child support is determined for each parent as if the child in the custody of the other were the only child at issue, and then the sums each would owe to the other under the formula are offset. In other words, if each party had custody of one child, and the formula would yield a $300.00 obligation of father to mother, and a $200.00 obligation of mother to father, the sums would be offset so that father simply paid to mother $100.00.

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subsequent children.

[68] Treatment of Multiple Families, *supra*, at 24.

An alternate method of calculation is set out in the Nevada Civil Practice Manual.[69] Under the approach taken in that reference, in the above fact pattern each of the parents would figure out a 25% (i.e., two child) support obligation. That sum would be divided by the number of children to derive a "per child" rate, and the numbers would *then* be offset.[70] In the above fact pattern (presuming that the "floor" had not come into play), the mother would have a monthly income of $1,111.11. The father would have a monthly income of $1,666.67. Multiplying each by the two-child (25%) rate yields $277.78 for the mother and $416.67 for the father. Dividing those obligations by the number of children (in this example, two) yields an obligation of mother to father of $138.89, and an obligation of father to mother of $208.33. When offset, this formulation results in the father paying to the mother $138.89.

Results may vary depending upon the split custody calculation method used by the court. There is no guidance at this time from the Nevada Supreme Court as to which, if either, of these approaches is preferable, or even allowable. The legislature could elect to clarify this situation with a provision giving explicit guidance, or not do so. It is difficult to assess whether there is sufficient inconsistency at the trial level to warrant further legislation.

The main question in a split custody offset situation is whether this produces an inequity to the child in the custody of the parent earning less. Some commentators suggest that the primary custodian in the household with the smaller income is less likely to adequately support a child after the offset, since there is already less money to allocate. The problem can be severe where there is a very substantial disparity between the household incomes.

In the above hypothetical, for instance, if the father's income was so high that the statutory ceiling limited his child support obligation to $500.00, but the mother was earning minimum wage and was paying support at the floor of $100.00, the father would be paying $400.00. The $100.00 difference between $400.00 and $500.00 would be relatively inconsequential to the father, but would represent the loss of a large percentage of the mother's total monthly income.

The Committee noted that some judges are applying an offset, while others are not. After discussion, the Committee concluded that the current statute gives the courts sufficient discretion to give or not give an offset as the circumstances of the parties may dictate. That discretion also permits a court choosing to apply an offset the ability to adjust the equities in a split custody case where a disparity of income created injustice under the offset method. If the wealthier primary custodian could adequately support the child in his or her custody without support from the poorer primary custodian, the court could find that the obligation of primary support of the child in that home rendered the poorer primary custodian "unable to pay the minimum amount" within the meaning of NRS 125B.080(4), thus limiting or eliminating the offset. Alternatively, the court could vary from the guideline numbers used in the offset by consideration of the "support of others" factor in NRS 125B.080(9)(e).

G. Joint and shared custody questions

1. Revisit *Barbagallo* discussion of original A.B. 44 from 1987

Generally speaking, the *Barbagallo* case stands for the proposition that there should be no abatement in child support for the time a child spends in the actual physical custody of the secondary custodian, unless an "injustice" would result. The court noted that provisions in the original bill draft in 1987 would have provided such reductions, but were removed from the statute prior to its passage. Thus, the basis of the court's ruling was its determination of an implied legislative intent *not* to grant such abatements.

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[69] Published by the State Bar of Nevada (Michie 1988).

[70] *See id*. at 705.

2. Abatements upon extended visitation (e.g., summers) or time-share percentage

There is, however, a widespread practice by which at least a partial abatement is granted to secondary custodians during lengthy visitations (e.g., summers). Typically (but certainly not in all cases), certain Referees in southern Nevada have reduced child support by half during such periods.[71] The usual explanation is that while certain fixed expenses (rent, utilities, etc.) are not much affected by such visitation, others (day care, food, perhaps clothes) will be assumed by the secondary custodian during the visitation period.

There are jurisdictions that have a statutory abatement keyed to the percentage of time that the non-custodian spends with the child. Such statutory schemes typically phase in the abatement only for the time spent with the child in excess of some (apparently arbitrary) minimum figure seemingly considered to be "normal." In most jurisdictions, including this one, any expenditures for or on behalf of a minor child by a non-custodian are normally considered gifts that have no impact on a child support obligation.

One of the most frequent requests by non-custodians who submitted written materials to the Committee was for some lowering of support during visitation periods. The general theme of the comments from such non-custodians was that if support was not partly abated during the visitation period, limited finances would not allow them to actually exercise their visitation, to the child's detriment.[72]

a. Technical matters; proper percentages for time cut off

If the legislature chooses to formalize a process by which abatements to support are granted during visitation, then a level of visitation that is presumed to not affect support must be determined.[73] It would also seem wisest to avoid a "bright line" test, and instead phase in any effect given to time share arrangements. This avoids the "football" mentality of seeking a specific visitation schedule (that may have nothing to do with the interests of the child in maintaining a relationship with both parents) either to maximize support payable or to obtain a specific abatement.

b. How to define "time"?

Again, if abatements are to be made part of the statutory scheme, it would be appropriate to give some indication of the units of measurement for the courts. There are several alternatives. As noted above, Wisconsin refers to overnights. Alternative measures include clock hours, or meals taken while in a parent's custody. Also to be considered are the role of sleep time or school time in figuring whether the child is "within a parent's custody" for purposes of making the required calculation.

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[71] Although there does not appear to be much compliance with the requirement of issuing "specific findings of fact" when adjusting support under the statute, such deviation could arguably be based upon NRS 125B.080(9)(j), the "amount of time the child spends with each parent."

[72] One group, called "Equal Rights for Divorced Fathers," copied the Committee with a petition "in opposition" to the Nevada Supreme Court's decisions in *Barbagallo* and *Hoover*, and specifically requesting a legislative change to reduce support payments "for time spent with their children in order to provide a proper home environment for those children while in that parent's custody." The petition copies appeared to have some 2,000 signatures.

[73] In Wisconsin, for example, overnight visitations greater than 109.5 are determined, to reach a starting threshold. This corresponds essentially to alternate weekends, plus one evening per week, plus alternating major holidays and a month of summer visitation. Below that number of overnights, there is no abatement. Beyond it, a percentage abatement of support on a dollar-for-dollar basis is implemented.

c. Is certain percentage time share or extent of visitation *already presumed* by statute?

A problem inherent in the discussion of abatements is whether the award from which the abatement is taken already took into consideration the existence of a certain amount of direct contribution from the secondary custodian. Certain of the references discussed above indicate that the percentages used for child support obligations were artificially lowered for political purposes after the statistical evidence gave percentages of income used for the support of children that were considered "too high."

One plausible rationalization for the lowering of those original figures is that the non-custodial parent would spend a certain amount of time with the child, and expend a certain amount of money for the child's care that would otherwise be payable by the custodial parent. This can be called the "presumed contributions" interpretation. Under this theory, the child support paid may well be too little for the non-custodian's share of a child's complete support, but could be seen as not intended to provide it.[74] Some members of the Committee find this view to be the most reasonable way of accommodating conflicting studies and testimony previously presented.

At least one Referee has expressly rejected this view of the statute, and has opined that the statutory scheme encompasses a "zero contribution" theory that a non-custodian is not expected to provide anything at all beyond statutory support. Under this analysis, the non-custodian would be positioned to at least request an abatement, or offset, for any sums directly expended on the child.

If the rationalization of presumed contributions turns out to be valid, then giving any abatement during periods of visitation would essentially give a double return to the non-custodian at the expense of the primary custodian. Similarly, it would lead to the conclusion that rather than subtract from support payable when a non-custodian *does* have contact with a child, perhaps there should be some supplemental support paid when a non-custodian does *not* have any such contact and thus has no direct expenditures.

d. Discussion of policy alternatives and conclusions

Some members of the Committee believe that an abatement is appropriate as a matter of equity, since the non-custodian in such cases is directly increasing expenses on behalf of the child. Additionally, advocates for certain special interest groups allege that there is a correlation between frequency and extent

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[74] This helps interpret the *Herz* decision. Child support of double the presumptive ceiling was awarded, at least in part, on the basis of "the amount of time the children will spend with each parent as a result of this decree." The court made an implied finding that the decree resulted in the Obligor spending less than normal time with the children. If child support can be *increased* because of limited or no contact with the non-custodian, then the child support statute must be interpreted as *already factoring in* an adjustment for expenditures expected to be made for the children by the non-custodial parent.

This implied presumption that there will be some expenditures by the non-custodial parent would be partially consistent with the original design of the child support statute. As originally introduced, the full guideline amount applied if the non-custodial parent had physical custody for fewer than 147 days a year (approximately 40% of the time). If that time-share was exceeded, then the guideline child support was multiplied by the custodial parent's fractional time and only that sum was payable. *See* 1987 Legislative History of A.B. 424 at 2.

of contact with the non-custodian, and payment of support.[75] Others on the Committee felt strongly that abatements are inequitable and should be the exception rather than the rule.

The big problem in any sort of explicit connection between child support on the one hand and time share or visitation on the other, is that the determination of visitation becomes a surrogate arena for disputes over the level of child support. Any such possibility should be avoided to the degree possible, for the benefit of the children involved, and must be acknowledged as a probable cost of any statutory abatement provision.

Further, there is a distinction between a large time-share percentage on a weekly basis, and extended visitation. Several members of the Committee found a support abatement more reasonable as a concept in the extended-visitation context, since for that period the usual non-custodian will have to take responsibility for more of the direct expenses that come with having a sense of primary responsibility for a child, such as providing food and child care. Also, it is easier to demonstrate an actual reduction in expenses in the primary household during such an extended period. This line of thinking would limit abatements to visitation periods exceeding some period of weeks or months.

The Committee had a consensus that support should not be abated in the absence of reasonably reliable data establishing a reduction in expenses to the primary custodian, and that the abatement should not exceed the amount by which the primary custodian's expenses are actually reduced. The available data indicates that, by and large, there is not an appreciable reduction in the primary custodian's total expenses for maintaining a child despite a significant visitation period with the non-custodian, even when there is a considerable increase in the expenditures of the non-custodian.

Unfortunately, this is not a "zero-sum" situation in which a dollar of increased expense for the non-custodian correlates to a dollar decrease in the expenses of the primary custodian. The question in deciding whether to abate support in an extended visitation or large percentage time-share situation then becomes whether to focus on the rising expenses of the non-custodian, or the essentially static expenses of the primary custodian. In the balancing of hardships with focus on the best interests of the child, the Committee found it less damaging to risk making visitation costlier and more difficult than to risk making the primary household financially untenable.

Given the child-centered view of the support statutes, the Committee concludes that the focus must be on impact on the primary custodian. Currently, the data available for review does not indicate a basis for automatic abatements during visitation. This conclusion is consistent with and supports the court's reasoning in *Barbagallo*.

Of course, each individual case must be decided on its own merits, and it is not difficult to create a hypothetical situation in which an abatement would be appropriate. Contiguous visitation may justify a reduction in support during the period of visitation, although it is believed that the differences between the income levels of the parents must be considered by the court. The Committee was almost evenly divided on this topic.

RECOMMENDATION: Given the necessity of fact-specific determinations for abatements, the Committee majority recommends adding a discretionary power of the court to specifically allow this

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[75] This correlation, if authentic, indicates that there could be a legitimate legislative goal in providing abatements, since it might make visitation more frequent and thus make enforcement of support somewhat easier.

As noted elsewhere in this Report, issues relating to enforcement of support obligations are considered outside the Committee's scope. Thus, this Report does not go into much depth on matters relating to improvement of collections. Rather, this Report focuses on the formulas used in setting the support obligation, and the attendant factors referenced in modifying the support level reached under the formulas.

provision when appropriate, by adding a new subsection "(m)" to NRS 125B.080(9), to provide substantially as follows:

> In the discretion of the court, for the purpose of a reduction in a child support obligation during that visitation period, consecutive visitation in excess of fourteen days.[76]

A Committee minority would further condition any such statutory amendment by addition of language requiring the court to find clear and convincing evidence establishing that the expenses of the primary custodian would be reduced by such visitation, and would limit any abatement to the amount of the actual reduction in the primary custodian's expenses.

H. Role of a parent's "current spouse's income" -- theory and practice

This subject area presents an unfortunate collision whereby social policy and community property principles are at odds. Generally speaking, an individual is only liable for the support of his or her own children. On the other hand, Nevada law gives both parties to a marriage a "present, existing, and equal" interest in all income (or other property) acquired after marriage.[77]

At its most simple, the question is whether the income of an Obligor's new spouse increases the Obligor's "gross monthly income" against which the statutory formula should be applied, or whether a Recipient's new spouse's income can justify a reduction in support on the basis of a lessening of need, in that "the relative income" of the Recipient is higher when measured against that of the Obligor.

The problem for both parties is that, if the new spouse's income is to be considered, it is in the best financial interest of both parents to remain unmarried. This runs afoul of existing social policies in favor of encouraging marriage. At least in southern Nevada, certain Referees have been presuming access to half of a new spouse's income, and using that figure as "gross monthly income" against which the child support formula is applied, under some circumstances.

In each of the areas discussed below, there is no clear guidance from the Nevada Supreme Court, although the issues are cropping up at the trial court level. The question for the legislature is whether it feels strongly enough about the outcomes that are resulting from current interpretations of the law to take action in advance of a definitive interpretation of the existing law at the appellate level.

1. If parent is voluntarily un- or under-employed

The case law coming from the Nevada Supreme Court, focuses upon the individual Obligor only -- without mention of his or her current spouse's income at all. In *Minnear v. Minnear*,[78] for example, the court's focus was upon the historical wages of the Obligor parent. Even in cases in which the Obligor or the

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[76] A minority of the Committee believed that no abatement should be ordered unless visitation is exercised for a period in excess of 30 consecutive days, rather than 14.

[77] *See* NRS 123.225. Of course, the parties can alter this attribute of the community property law by entering into a premarital agreement, although they expressly cannot agree that no child support will be payable to the children of *their* marriage. *See* NRS 123A.050(2).

[78] *Minnear v. Minnear*, 107 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 81, July 12, 1991) (willful underemployment found within meaning of child support statutes based upon ability of physician to have higher income than that stated; child support set at $500.00 per month per child; "where evidence of willful underemployment preponderates, a presumption will arise that such underemployment is for the purpose of avoiding support"; burden on employee to show some other reason for underemployment).

Recipient had remarried, such as in *Scott v. Scott*,[79] the court's opinion is concerned solely with the income of the parent, not the parent's new spouse.

It is now known that voluntary unemployment will be considered as intended to avoid paying support under *Minnear*. Where a parent is unemployed and is essentially living off of the new spouse's income, however, the court would apparently be able to look to either (or both) of the parent's "imputed" income (i.e., how much he or she *could* earn if working) *or* half the wages of the new spouse.

Of course, there does not seem to be any logical reason to only look at a new spouse's income in the event of a parent's unemployment. Counting the new spouse's income would seem equally valid -- or invalid -- irrespective of the employment status of the parent. In practice, however, a new spouse's income only seems to come into the picture when the parent is unemployed.

There was a division of opinion on the Committee as to whether the statute should be clarified to explicitly *state* that the court is not to consider a new spouse's income in setting a parent's child support obligation. Although the majority believed that a new spouse's income should not be a consideration, the majority favored leaving the matter to the discretion of the courts for now.

2. Is Obligor's new spouse's income an appropriate factor for reduction in living expenses and therefore freeing up funds for child support?

Essentially, this question asks whether the child support formula should recognize the "two can live as cheaply as one" theory. Of the states studied, only those embracing the Melson/Delaware model reach the conclusion that an Obligor's remarriage automatically leads to an increase in support owed because of increased resources available.[80]

It could be argued that since "the responsibility of the parents for the support of others" is already a factor the court may consider in deviating from guideline support, it makes as much sense to consider the income contributed by a new spouse as it does to consider the additional financial burdens imposed by the new spouse (and any children of that new spouse). Still, the Committee saw no need for any legislation in this area at this time; it is possible that re-examination would be warranted after further development of case law on this subject.

3. Question of community property status and imputations.

a. Income of Obligor's spouse part of "income" for formula?

The Committee consensus was that income of an Obligor's spouse should *not* be considered "income" for purpose of applying the child support formula. It was felt that the state child support laws should be interpreted so as to take precedence over general community property principles. There is no case law on the subject, although anecdotal accounts indicate that one or more cases might now be working their way through the court system.

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[79] *Scott v. Scott*, 107 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 130, Dec. 6, 1991).

[80] But note that the "hybrid" California support formula would probably lead to similar results by its explicit consideration of all sums earned by any party in either household.

b. Income of Recipient's spouse presumed/factored to reduce need?

Again, the Committee consensus was that remarriage of a Recipient should not be grounds for modifying downward a support obligation based upon lessened need. To find otherwise would be to tacitly admit that the new spouse undertook an obligation of support of the children in Recipient's household, without benefit of any right of access to or control over those children.

c. Unmarried cohabitant of either parent

Except to the degree that an overview of household income and expenses is relevant to understanding the full situation when determining need or the ability to pay, the Committee consensus was that unmarried cohabitant income should not be considered in making a child support determination.[81]

4. Formalize income imputation rules?

The question here is whether the statute should expressly enumerate those situations in which income will be imputed. The Committee notes that the existence of the statutory "floor" necessarily imputes income to a certain degree, since it only comes into play if the non-custodian lacks the income for a greater amount to be determined according to the formula.

The only matter to address is whether the *Minnear* holding should be formalized. If the legislature agrees with the court's analysis, there seems little reason to do so.

Whether or how the courts should treat imputation of a non-working new spouse of either a custodial or non-custodial parent is an unanswered question. Theoretically, the former situation could lead to imputation of reduced need, and the latter to greater ability to pay, but apparently the courts are not performing any such analysis. After discussion, the Committee suggests that despite the theoretical relevance of certain scenarios, they were unlikely to have much of an impact in actual cases.

Accordingly, the Committee recommends that no changes to the statute in the area of attribution are necessary unless the legislature believes that the Nevada Supreme Court has erred in its interpretations to date.

I. Provide for easy/easier *pro se* modification after establishment of child support amount?

Essentially, this topic relates to empowering individuals to modify support when called for by appropriate facts with the minimum possible expenditure. One frequent scenario is the construction worker who finds that his or her company is out of business and is laid off for the season. Under current rules, that individual must bring a motion on changed circumstances to modify the support previously set, which usually entails each side hiring a lawyer. Also common is a custodial parent who is informed that the non-custodian has gained a substantial increase in income (or who suffers some increase in child-related expenses), and who wishes support increased accordingly.

Presuming no substantial change in any other circumstances, cases such as these could be handled without intervention of counsel if the process could be safeguarded against fraud, harassment, etc. Persons forced to modify support obligations because of a new economic burden such as unemployment are those *least* able to retain counsel to assist them. This leads to a situation in which orders are left unmodified but are merely not followed, leading to accrual of arrears and an increased sense that the system does not work. Our current law permits any person to act without an attorney, but that guarantee is largely without meaning

[81] *But see Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984) (generally approving *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), which allowed non-married partners to make enforceable express or implied contracts analogous to partnership obligations).

given the technical difficulty faced by a layman in complying with all the rules for pleadings and papers. There has been at least one recent government study of how to set up effective procedures in such cases.[82]

While the Committee found this subject compelling, it was decided that it is outside the scope of the charter given to the Committee. The Committee recommends that consideration and implementation of procedures for low cost or no cost *pro se* modification proceedings be attempted at the local level, given the differences between the court systems in Washoe and Clark County. Special attention must be paid to the costs inherent in any such effort, in terms of system overhead, as compared with money saved by the litigants.

J. Should overtime income be included?

One aspect of a recent case that immediately provoked complaints in some quarters was the holding in *Scott v. Scott*[83] that overtime income should be considered for purposes of determining child support under the guidelines "if it is substantial and can be determined accurately." Prior to that decision, certain judges and Referees had expressed the opinion that the child support statute was not intended to reach such income, and excluded it from the calculation in most cases.

The legislature last visited this issue in 1989, at which time a proposed A.B. 85 would have prevented the courts from taking into account "compensation received for hours worked in excess of 40 hours per week." The bill was indefinitely postponed in committee.

Review of the literature in the field was not very helpful. Generally, the Committee consensus was in line with the thrust of the *Scott* decision that "income is income." Since the theoretical model embodied in our child support statute is one of income sharing, all income should presumptively be included in a child support determination. Of course, if a second job is taken only to *compensate* the obligor for the loss of disposable income caused by a child support award, there may be some consideration otherwise, but the Committee notes that child support only consumes a percentage portion of the overtime income.

In sum, the Committee consensus was that further legislation is not required regarding this issue, and the *Scott* test of substantiality and accuracy provides sufficient protection against injustice.

K. Build in mechanism for coping with cost of living changes?

A proposal largely explored only in theory would allow for automatic adjustments to support based on changes in the cost of living. The idea is to keep parties out of court longer by making awards reflect changing economic conditions so as to maintain the same amount of *relative* support irrespective of inflation, etc. The goal is to save money for both the litigants and the system that they would otherwise have to expend to get a modification. The idea is not new; the original 1987 Development of Guidelines for Child Support Orders text suggested implementing an indexing system to tie orders to inflation or the lesser of inflation or increases in obligor earnings.[84]

An indexed approach tends to *presume* that an obligor's income will increase over time or with inflation, and it thus shifts the burden of going forward from Recipient to Obligor, as the cost of living

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[82] *See* "Developing Effective Procedures for *pro se* Modification of Child Support Awards" (HHS 1991).

[83] 107 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 130, Dec. 6, 1991).

[84] *See* Development of Guidelines for Child Support Orders, *supra*, at II-x.

increases, to show why child support should *not* increase. Whether this is a good thing, of course, depends on which side of the case one is on.

Currently, there is a statutory requirement for review of all support orders every three years even in the *absence* of changed circumstances.[85] Conceivably, this statutory requirement (largely the result of federal requirements for IV-D funding continuation) could be adequately satisfied by some easy or automatic procedure for an indexed adjustment to be performed in the absence of changed circumstances.

Some members of the Committee favored a process of automatic adjustments in accordance with an index to be published by the state (as is done now with the statutory interest rates under NRS 17.130(2) and NRS 99.040(1), which change every six months). Others would have preferred a *pro se* procedure of some sort. Some consideration was given to whether the existing child support enforcement office of the District Attorney could handle this function.

Ultimately, the Committee consensus was that *some* form of streamlined adjustment procedure would be a proper supplement to the current, rather expensive, modification procedure. The Committee could not achieve agreement on whether the process should be automatic or merely simplified. In light of the above recommendation for allowing the development of *pro se* procedures at the local level, it might be best to defer consideration of this idea until the family courts have been in operation long enough to see whether further direction at the legislative level is necessary.

L. Poverty level treatment

Unlike certain other states, Nevada's statutory scheme does not have an explicit method of treating those at the poverty level any differently from any one else. Nevada has the highest minimum, or "floor" amount of support of any state. This could be interpreted as a conscious legislative intention to protect children from falling into poverty. Of course, our statutory scheme contains no explicit protection for Obligors from the same fate, except the discretion of the court as set out in enumerated factors.

If the legislature wishes to have Recipients, children, or Obligors at or below the poverty line treated differently in any way, that intention should be more clearly set out.

M. Practical consideration by the courts of a net-based standard.

Many Obligors who wrote to the Committee commented that the existing statute was "unrealistic" in that it simply called for them to expend in support more money than they had. The usual response by the Referees to such comments in open court is that the need to support a child should be considered paramount, so that if sufficient funds are not available, it is the Obligor's responsibility to re-order his or her priorities so that there *are* sufficient funds to meet this obligation.

Nevertheless, the existing Affidavits of Financial Condition derive total income and expenses, giving a version of "net," and at least in southern Nevada there are anecdotal accounts of the Referees adjusting support based in part on ability to meet the percentage of gross set out in the statutory formula. It appears that the judges in northern Nevada are less inclined to vary downward from guideline support based on an Obligor's claimed inability to maintain payment of such an award. Presumably, specification of when such lowering is proper will appear as the case law develops on this point.

Interestingly, many of those who wrote to the Committee did not appear to understand that the percentages were explicitly based on gross so as to derive an approximate flow of actual income, so that if

[85] *See* NRS 125B.145; NRS 125.450(2).

the base were changed to net, the percentages would presumably increase so as to maintain a consistent level of support.

Put another way, Nevada's child support laws are based on either maintenance of standard of living, income sharing, or child need satisfaction. Presuming that the same economic data is used as the basis of the statutory scheme, and presuming that the estimates of percentage of income shared with children in intact families (the Wisconsin goal) or of the level of need of children (as measured by traditional expenditures on them) remains constant, a mere change from a gross-based formula to a net-based formula would not result in any change at all to the actual dollar sum of support orders.

In the real world, of course, any change in the method of determining child support would cause *some* individuals' support obligations to go up and others' to come down, as the happenstance of their particular facts caused the court to include or exclude income, expenses, etc.[86] In the absence of a determination that the data underlying the terms of the statute (percent of income to be expended on children or traditional sums spent on them) was incorrect, most obligations of support would be unchanged regardless of the mechanism used to arrive at that support level.

The Obligors who wrote to the Committee tended to claim that Nevada's gross-based formula failed to take into consideration facts that under a different statutory scheme would have yielded far different (i.e., lesser) support.[87] The Committee does not believe this opinion to be well-founded. Again, this is an area where there is a lack of good, reliable evidence from a number of different sources to properly analyze this issue. On the available data, however, as noted elsewhere in this Report, Nevada's statute produces fairly unremarkable awards very nearly average in most respects, as compared with awards from other states using different approaches.[88]

Presuming that the "bottom line" will be nearly the same in most cases, consideration should be given to the various other reasons for using a net or gross-based formula. The legislature has repeatedly expressed its desire for a gross-based formula based on considerations of simplicity.[89]

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[86] This is true even if the precise components of a gross-based standard are changed. In Wisconsin, for example, "gross income" includes imputed income as a percentage of the value of all assets owned by an individual. This factor, if adopted here, would certainly raise some Obligors' support levels.

[87] A mere switch to a net-based formula would not necessarily eliminate the perceived problems with statutory presumptions. In Texas, for example, nets on standardized taxes, etc., are *presumed*. If the goal in switching to a net-based formula is consideration of individual circumstances, such a change would not achieve it since it is just substituting one set of presumptions for another.

[88] The draft copy reviewed of the Women's Legal Defense Fund 1990 survey was the most exhaustive data set reviewed. Twelve separate hypotheticals, using different income, custody arrangements, numbers of children, child-care costs, etc., were applied to all states' child support statutes. Nevada's results were sometimes higher than average, and sometimes lower, but almost always much nearer the average award than nearer either extreme. The hypothetical data sets and results, and ancillary charts, are attached as Exhibit 7.

This does not necessarily mean that Nevada tends to set each award at the middle of a possible scale, of course. It is possible that we make extremely high and extremely low awards that happen to balance to average. In the absence of any evidence to support that supposition, however, it should not be assumed.

[89] *See*, *e.g.*, 1987 Legislative History of A.B. 424 at 88-89. It is worth noting that the alternate, rejected language defining net income would have specifically *included* imputed income from a new spouse by means of community property attribution.

The Committee, in re-examining the history of our child support statute and the experience in other states, echoes the conclusions and the reasoning of the original Governor's Commission on this point. The gross-based formula embodies the saving grace of simplicity. For every layer of complexity added to the statute that yields guideline support, a certain increased expense is added to the cost of being in the court system and is paid by every litigant in terms of time and attorney's fees. Additionally, the entire public pays for those complexities by paying the salaries of the public servants who must spend more time on each case to calculate support under the more complex guideline.

Of course, the expense to both litigants and the public would be acceptable if it could be said with any degree of certainty that a fairer result for a sizeable number of people would be achieved from a net-based system rather than a gross-based system with some discretion to the court built in, as the current model allows. The available data not only does not support any such conclusion, but indicates otherwise.

The original 1987 HHS study included a discussion of the choice between gross and net bases for formulae; it is a succinct and well-stated summary of the considerations on both sides of the issue and has been attached as Exhibit 8 to this Report. Essentially, given the choices that must be made in creating a net-based system, which would then be applied to the different facts of similarly situated individuals in ways that will generate arbitrary results, a net based system may well produce more perceived (and actual) inequity than one based on gross income. As stated in the 1987 study:

> Despite initial expectations, then, it appears that gross income may be generally more equitable than net income as a starting point for application of a guideline.[90]

Given that the actual awards would probably not change much if the same economic data used for the gross-based system were used to produce a net-based system, that there is no strong evidence that the system would be better at avoiding arbitrariness, and that system overhead and its attendant costs could reasonably be expected to rise in a net-based system, the question becomes whether there is any good reason to make such a change. In reality, the gross versus net debate in Nevada appears to be a mere smoke screen for the proposal that support should be lowered.

The Committee's consensus is that there is no demonstrable superiority to a net-based formula sufficient to overcome the advantages of a gross-based formula. In any event, the Committee recommends that under no circumstances should discretionary expenditures be added to the list of deductions from income before establishing the formula base. To do so would turn almost every case into a contest of legitimacy of deductions, and the resulting variances between courts would eliminate the consistency the guidelines were intended to provide.

N. Collection and enforcement issues

After discussion, the Committee determined that the legislative charter set out in NRS 125B.070(2) did not include such issues. The Committee is constrained to note, however, that the issues may well be intertwined. As with the question of visitation and its impact on support, addressed elsewhere in this Report, the issue is worthy of a separate report to the legislature, perhaps during the next biennium.

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[90] *See* Development of Guidelines for Child Support Orders, *supra*, at II-43.

O. Other

1. "Accountability" by Recipient for money received

The most frequent request made by Obligors who wrote to the Committee was that the statute be amended to require tracking and record-keeping by the primary custodian to account for the way child support is spent. The usual complaint was that the Obligor believed that his or her ex-spouse was squandering the child support and did not spend the money for the benefit of the child or children.

There are some attractions to such a proposal. Precise accountings could show whether support being paid is excessive or inadequate in a *particular* case, whether or not child support was being utilized as tax-free "hidden alimony," and might provide peace of mind to a large number of Obligors who would then be more willing to pay the support ordered.

On the other hand, the available data shows that a child's standard of living is inextricably intertwined with that of the child's primary custodian, so it may be impossible to show how the custodian's improved living standard is not, in fact, that of the child. Further, anecdotal accounts indicate that there is a significant "control" issue present in some of these cases, and a provision for accounting would be a further means for an Obligor to control by audit the actions of the Recipient. Additionally, a large record-keeping burden would be imposed on the Recipient.

Compromises are possible. For example, accountings could be required only upon a showing of "reasonable cause" or of a showing of "abuse of funds." Accountings might be proper only when support in excess of the presumptive ceiling is ordered. In any event, ordering an accounting is already within the plenary power of the court. The question is whether *Obligors* should have the power to compel such accountings.

Already, comprehensive Affidavits of Financial Condition are in use in Washoe and Clark counties, and there is the practical question of the amount of further accounting work that can reasonably be expected of laymen. If the information desired is too technical in form, this could present another area in which experts will have to be hired.

The Committee was closely divided on this question. A majority concluded that concerns with opening a "Pandora's box" of abusive litigation in the form of accounting requests outweighed any advantages that would likely result in most cases, and recommends no legislative change at this time. A minority felt that at least in cases in which support is awarded in excess of the presumptive ceiling, and upon a putative showing of waste, the court should specifically be empowered to require periodic accountings or updated Affidavits of Financial Condition in order to ascertain whether the support in excess of the ceiling is being expended for the benefit of the child.

2. Age (e.g., infancy/teen) adjustments up or down

The available data strongly indicates that there is indeed a variation by age in the financial demands presented by a child. There is a dispute between the studies as to the precise pattern of expenditure fluctuations, but several states have nonetheless instituted two or three "brackets" by which guideline support is increased or decreased as the child ages and the presumptions as to expenditures reasonably required for the child change.[91]

The caveats noted above as to factors which complicate a formula are equally applicable here. Presumably, our "age-blind" statute has an averaging effect in which support is somewhat higher than it

[91] *See*, *e.g.*, description of Washington and an alternate approach in Development of Guidelines for Child Support Orders, *supra*, at II-76.

would be at some ages, and somewhat lower than it would be at others, all of which averages out over the minority of the child.

Of course, this would not be true for a marriage that dissolved when the children were teenagers (and therefore most expensive to support); for those cases, the custodian would only receive support at the lower average amount rather than the presumably higher sum required for their support. On the other hand, generally speaking, income increases with age, so with a higher base against which support is figured, this difference should not be overly damaging to the primary custodian in most cases, especially if the ceiling is raised.

After considering a host of possible scenarios, the Committee's consensus was that no amendment was necessary to deal with variations in need according to age.

3. Is there, and should there be, a connection between support and visitation?

a. Relevant statutory and case law

Nowhere in the child support statute is there a formal connection between the payment of child support and the facilitation of visitation. In fact, the legislature deleted a provision from the original bill that would have made it official state policy that there is no connection between the two.[92]

The Nevada Supreme Court has established linkage between the two subjects, going both ways. In *Chesler v. Chesler*, 87 Nev. 335, 337, 486 P.2d 1198 (1971), the court held that "we do not believe [the noncustodial parent] should be allowed to transport the children away from Las Vegas until he is current in all child support payments required by the Decree of Divorce as originally entered; for, to permit this, would in effect allow him to expend money for his own purposes that he should properly channel to the support of his children." This constituted effective denial of visitation based upon delinquency in support payments.

While there is no precise counterpoint to *Chesler* (i.e., there is no case expressly eliminating child support during a temporary denial of visitation), there is a more extreme case. In *Parkinson v. Parkinson*, 106 Nev. 481, 796 P.2d 229 (1990), the non-custodian stopped making child support payments one year after divorce. The custodial parent waited until after the child turned 18 to bring a motion to reduce arrears to judgment. The court found an implied waiver of right to child support. This was upheld by the supreme court, which held that entry of judgment for arrears under NRS 125.180 is within the court's discretion. The court further held that extrinsic fraud is a sufficient basis for denying arrears, and that parties may, by express or implied agreement, modify support terms.

The court specified that additional equitable defenses to modification or enforcement of child support, or to a motion to reduce child support to judgment, include estoppel or waiver. Waiver requires intentional relinquishment of a known right, but may not be asserted if the waiver is the result of fraud or duress, or if its application would be injurious to the child. Further, waiver may be express or implied from conduct which is inconsistent with any other intention than to waive a right, all of which are questions of fact. In the circumstances of this case, the court found that despite repeated contact, the custodial parent made no demand upon the non-custodian for money, nor pursued legal rights for 5 1/2 years, and told the non-custodian that the child did not want to see him, she would not allow visitation, and he should "stay away." The court found that in this case, the evidence supported the non-custodian's story that he discontinued efforts to involve himself in the child's life by visitation or support, and the custodian "accepted that arrangement without objection." Finally, the supreme court found no abuse of discretion by the trial court and upheld the judgment.

The *Parkinson* result seems antithetical to the principle stated in NRS 125B.140(1) that a child support order is a judgment upon entry that "may not be retroactively modified or adjusted." After

[92] *See* 1987 Legislative History of A.B. 424 at 79.

Parkinson, however, judicial recognition of prior conduct as an *implied* waiver of child support does not constitute a retroactive modification, although the result is the same.

While the Committee deals with the questions presented by these cases below, the discussion is set out with some trepidation. There was concern that this matter may well be beyond the scope of the Committee's legislative charter, in that the policy choices contain both legislative and judicial elements. On the presumption that the legislature would prefer an analysis setting out the policy choices, a discussion of the alternatives is below.

(1) Terminating child support for failure to comply with visitation order

The Committee finds the policy choices contained in *Parkinson* troubling. It is not philosophically compatible with the goals of the child support statute to permit a custodial parent to make an express or implied agreement to sacrifice the children's financial support from the non-custodial parent just so the custodian can be rid of contact with the non-custodian. On the other hand, of course, it is not appropriate to permit a custodial parent to go into hiding or otherwise avoid contact with the noncustodial parent, and then present that parent with a bill for back child support after the children have grown.

Perhaps the question is one of burdens -- the choice for the legislature is to decide which parent should have the burden of going forward. Depending on one's perspective, it could be said that a non-custodian wishing to be relieved of an existing child support order should be required to get an order from the court so stating. Alternatively (and as the court decided in *Parkinson*), it could be said that if either party violates an essential term of the decree relating to the children, he or she endangers the benefits flowing to that party from the decree.

The Committee concurs with the recommendation of the 1985 Governor's Commission that child support and visitation questions should be analyzed separately (with adequate deterrence for violation of court orders built into both matters).[93]

RECOMMENDATION: A majority of the Committee reluctantly recommends that the courts be given explicit power to waive child support during periods that visitation is withheld. This coercive power of the courts has such a high potential of harm to the children, however, that the majority recommends a very high standard of proof to justify such a result.[94] Further, the level of visitation interference rising to a level at which support could be withheld must not be allowed to be trivial, or intermittent; rather, it must reflect action by the custodial parent rising to the level of a *de facto* termination of parental rights. Conduct short of that should not justify interference with an existing child support obligation. Of course, it must also be established that the loss of child support will not be detrimental to the child.

A minority of the Committee believes *Parkinson* to be an aberration and as such should be limited exclusively to its facts, because there should be no connection between visitation and support.

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[93] Specifically, the Commission position was that "support is not a prerequisite for visitation nor is visitation a prerequisite for support. All court orders relating to visitation or support must be specific in their terms and enforceable." *See* 1985 Governor's Commission Report at 4.

[94] In other words, beyond a mere preponderance to "clear and convincing" evidence.

(2) Terminating visitation for failure to comply with child support order

Ongoing contact between a parent and his or her children is a social good that state policy should encourage. It would not be proper to harm the children in the effort to mete out punishment to a non-custodial Obligor, if there were alternatives. In the peculiar facts of the *Chesler* case, visitation and money issues seemed intertwined, since the issue was travel costs. At least where the parties are in the same jurisdiction, the same considerations would not apply, and this is *not* a sanction that should be used. Other, more traditional methods of enforcement that do not directly involve the children are preferable.

Again, the Committee believes that visitation and support should be separately evaluated and managed by the courts, with problems in each area being dealt with in a manner that is consistent with public policy. Continuing access to children should be encouraged, and temporary financial problems should not be allowed to create a barrier between a non-custodial parent and his or her children. Ensuring payment of child support necessary to adequately provide for children should be encouraged, and those funds should not be terminated because the parents have difficulties in achieving a visitation schedule they can both live with.

If the legislature disagrees with this Committee and current legislative thinking remains the same as in 1987 -- that a connection between visitation and support should not be ruled out -- then the development of case law in this field should be examined for compliance with legislative policy. If the legislature believes that the *Chesler* and *Parkinson* cases do not reflect the weighing of factors in a manner that the legislature feels is proper, then appropriate legislation defining the discretion of the courts in making such a connection between visitation and support should be enacted.

b. Could/should child support flow to minority time share or 50/50 time share parent for maintenance of child's standard of living?

This question has to do with competing objectives. It has been suggested that it is not beneficial for a child to go from relative wealth with one parent to relative poverty with another. While the existing legislative scheme does something about that situation when the non-custodial parent is the wealthier of the two, nothing in the statute permits a *secondary* parent to make a claim for support during those periods the child spends with that parent. Some commentators have suggested that such support might be appropriate in the interest of maintaining the child's standard of living, even if this enriched a secondary custodian at the expense of the primary custodian.

After discussion of the alternate possibilities, the Committee consensus is that there is no justification at present to vary from the *Barbagallo* reasoning under which the court would find that support should flow from the secondary to the primary custodian.[95]

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[95] The court actually said:

> The party having the majority of custodial time in a joint physical custody situation is presumably, but not unexceptionally, the primary custodian. It is certainly possible that a party entitled to three days physical custody could convince the trial court that he or she was exercising the majority of child rearing responsibilities and financial burdens, but experience probably dictates that the person having physical custody most of the time will probably turn out to be the primary custodian.

Barbagallo v. Barbagallo, 105 Nev. 546, 549 n.1, 779 P.2d 532 (1989).

c. Is there an equal protection problem with such considerations in other cases?

The Committee noted the testimony in a prior legislative session that IV-D Program *cannot* allow visitation considerations in child support hearings that relate to that program.[96] Some members of the Committee felt that this raised a constitutional issue since a defense which could be decisive in the regular domestic courts might be excluded from consideration entirely in a URESA action. After discussion, the Committee elected not to address this issue on the basis that such potential equal protection problems were not within the scope of the Committee's legislative charter. On the merits, some members of the Committee did not see a constitutional problem.

4. Was the Nevada Supreme Court correct in *Barbagallo* that NRS 125B.080 factors were not all to be given equal weight? Was its ranking of those factors correct?

Examination of the legislative history gave no indication of a legislative mandate to the courts to equally weigh the various factors set out in what is now NRS 125B.080(9). After going over the details of that opinion, the Committee saw no inherent difficulties with the comparative values given to the factors, wherein the court assigned primacy to the standard of living and circumstances of each parent, their earning capacities and the relative financial means of the parents. The court assigned lesser value to the time spent with each parent.

Nothing in the legislative history supplies any reason to recommend altering this ranking of factors. If the legislature had a different ranking in mind, or course, it would be a simple matter to list the factors in the order desired by the legislature for the courts to consider, and to indicate it was doing so. If there was a specific legislative intent to have them equally weighed, that too could be easily provided. The Committee sees no need to recommend changes relating to this matter at this time.

5. Support termination date (i.e., 18, 19, 21?) and post-secondary (college) expense support

a. Interpretative problems under the current statute

NRS 125.510(6) provides that except where a valid separation agreement under NRS 125.080 has been entered into by the parties to lengthen the term of support,[97] the obligation

> for care, education, maintenance and support of a minor child created by any order entered pursuant to this section ceases:
> (a) Upon the death of the person to whom the order was directed; or
> (b) When the child reaches 18 years of age if he is no longer enrolled in high school, otherwise, when he reaches 19 years of age.

Subsection (b) is interpreted differently in the northern and southern courts. The courts are uniform in holding that if a child is not yet 18 years old upon graduation, child support terminates at age 18. Likewise, the courts are uniform in holding that if a child turns 19 before graduation, child support terminates at the child's 19th birthday. Mixed results occur, however, if the child turns 18 *before* graduation. In some courts, child support is ordered to continue through age 19 despite the child's graduation from high school. In other courts, child support terminates upon graduation.

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[96] *See* 1991 Legislative History of S.B. 280 at 25 (testimony of Kay Zunino).

[97] Presumably, it is beyond the power of the parties to *shorten* the term of support, as it is beyond their power to contract that there should be no child support at all.

RECOMMENDATION: Presuming that the legislature wishes to preserve the existing statutory cut-offs for support (see discussion below), the Committee suggests rephrasing this provision to provide that child support terminates at age 18 or graduation from high school, whichever occurs last, but in no event beyond the age of 19.

b. Proposals for extension of child support to later date

The 1985 Governor's Commission report suggested that post-secondary support should be available "in those cases where it is economically feasible" either by mediated agreement or by court order.[98] No such provision was enacted in the child support statute. Currently, if the parties contract by a property settlement agreement or stipulated decree to provide such support, the provision is enforceable, but no post-secondary, post-majority support for a non-handicapped child may be ordered in this state over the objection of an Obligor.[99]

A number of states have enacted some form of a post-majority or post-secondary education statute.[100] Additionally, the Tentative Recommendations of the U.S. Commission on Interstate Child Support include the suggestion that:

> States shall provide that child support tribunals have the discretionary power to order child support, payable to the adult child as a rebuttable presumption, at least up to the age of twenty-two for a child enrolled in an accredited post-secondary or vocational school or college and who is a student in good standing. Both parents are responsible for post-secondary school support based on each parent's ability to pay. States are encouraged to set criteria for tribunals to use when determining whether a particular case is suitable for extension of the support duty.[101]

The arguments are reasonably straightforward on both sides of this question. A college diploma is not the unusual prize of the wealthy that it once was, and in many families may well be a necessary part of the reasonable education expected of a child while a marriage was intact. In other words, it is possible to say for many families that but for the divorce, a college education would have been provided by the parents. In Indiana, for example, the court order of child support may include, "where appropriate," sums for "institutions of higher learning, taking into account the child's aptitude and ability and the ability of the parent or parents to meet these expenses."[102]

On the other hand, there is an equal protection question as to whether the state can or should force upon persons who are divorced a burden that it cannot force upon persons who remain married. If passed, would it give a child of an intact family who was receiving no college assistance a right to sue his or her parents for such support? At the least, there are unanswered questions about the impact that such a provision would have.

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[98] The recommendation was unclear as to whether the support should be payable only if agree or over the objections of a non-custodian. *See* 1985 Governor's Commission Report at 7-8.

[99] *See* NRS 123.080; NRS 125.510(6).

[100] *See* Appendix I.

[101] *See* Recommendation 13(f), reprinted at 18 Fam. L. Rptr. 2006 (BNA March 3, 1992). The entire text of the Recommendations is attached as Exhibit 4.

[102] *See* Ind. Code § 31-1-11.5-12(b)(1).

The Committee was evenly divided as to whether Nevada should proceed at this time to enact such a provision. Accordingly, while the legislature should be aware of this topic and of the reasonable possibility of federal action on the subject, no recommendation is made at this time.

6. Grandparental support

A district attorney wrote in to the Committee with a novel recommendation of expanding the pool of available Obligors by holding *grandparents* liable for the child support payable by their minor children. In other words, the parents of a teen-aged parent could be made expressly liable for the support payable by their child during his or her minority. The underlying problem is that too many young people are becoming parents while they are still children themselves, creating a self-perpetuating impoverished class for which the state is forced to take financial responsibility, to the detriment of the people caught in the system and to the public generally.

This suggestion raises a host of legal issues. It is possible that there are constitutional issues, although Nevada has long had laws on the books holding parents responsible for the torts of their children.[103] Further, existing law already provides that "spouse for spouse and parents for minor children are liable for the support of an applicant for or recipient of public assistance."[104]

While it is not much discussed in the child support literature, this proposal would not be unprecedented. States with some form of grandparental liability for child support owed by their minor children include New Hampshire and Wisconsin, although it appears the matter is not pursued in New Hampshire, and the Wisconsin statute is so drafted that it only holds the paternal grandparents liable, and is new enough that reliable data as to enforcement and cost-effectiveness is not available. Colorado declined to enact such a provision in 1990 when a study commission criticized the idea as uneconomical.

There are technical questions, such as whose actual or imputed income would be the basis for calculations under the formula (i.e., the parent's putative income, or the grandparents' income). Further, the policy considerations of seeking actual payment of support, versus the imposition of additional liability of parents for the actions of their children, and the impact such a law might have on teen pregnancy and abortion, are appropriate for legislative determination.

The Committee consensus is that there is insufficient data to evaluate the proposal at this time. Accordingly, a majority opposes taking any action on this proposal.

V. ALTERNATIVE FORMULAE

A. Alternative Formulae and Their Best and Worst Features

Interestingly, the Committee found that the count of how many states use what model varied considerably depending upon whose assessment was used. It may be fairly stated, however, that about 20 to 25 states use some variation of the "income shares" model, while between 5 and 22 states use a "Wisconsin type" percent of Obligor income percentage payment. The Delaware/Melson model is used in two or three states, and Massachusetts and Washington, D.C., share an unusually detailed form of income sharing.

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[103] *See*, *e.g.*, NRS 41.470, which imposes liability upon parents or guardians up to $10,000.00 for the acts of "willful misconduct" by a minor which results in any injury or death to another person or the person's property.

[104] *See* NRS 422.310(1).

The reason for the confusion as to categories is that each state has taken one or more of the basic theoretical models and engrafted upon it rules and procedures seen as necessary in that jurisdiction. Often, the "grafts" of other provisions do not really fit in with the rest of the formula.[105] This has led different authors to classify states differently, depending on their focus, and has caused several commentators to list a variety of states as "hybrid" or "other" rather than as utilizing one of the models.[106]

1. Incomes Shares Model

   a. Philosophical basis: Calculates child support as the share of each parent's income estimated to have been allocated to the child if the parents and child were living in an intact household. Idea is to shield children from impact of dissolution.

   b. Method of Operation

      (1) A basic child support obligation is computed based on the combined income of the parents (replicating income in an intact household). This basic obligation is then pro-rated in proportion to the income of each parent. Proportion of income apportioned to child support generally decreases as income increases.
      (2) Pro-rated shares of child care and extraordinary medical expenses are added to each parent's basic obligation.
      (3) If one parent has custody, the amount calculated for that parent is presumed to be spent directly on the child. For the non-custodial parent, the calculated amount establishes the level of child support.

   c. Primary Features
      (1) Can be based on net or gross
      (2) Usually does not take into account effect of remarriage
      (3) Does take into account other children, differently in different states
      (4) Frequently has various items deleted from consideration of formula amount and re-added later in calculation
      (5) Shared physical custody usually factored in by some percentage taken off of support dollars payable if custody/visitation share exceeds some arbitrary statutory threshold.

   d. Discussion
      (1) Due primarily to the recommendation of the original federal studies and directives causing child support guidelines to be adopted, this is the most common system used. Usually partially dependent upon the post-divorce choices made by the other parent, inherently making the parties more intertwined with each other's post-divorce choices.
      (2) It should be noted that the 1985 Governor's Commission indicated that it recommended the "philosophy embodied in the Washington and Income Shares Formula in conjunction with the California Uniform Schedule of Child Support with certain modifications and additions."[107] The formulation ultimately put forward, of course, was

[105] For example, as discussed above, Nevada's presumptive ceiling in our statute may not be philosophically consistent with the remainder of the guideline.

[106] The 1990 Women's Defense Fund survey, for example, classified 14 states as "other."

[107] *See* 1985 Governor's Commission Report at 5.

not an income shares formula, but a percentage of Obligor income (Wisconsin) formula. No obvious reason for this variation is apparent in the Commission Report or the legislative history. It seems as likely as not that the "philosophy" mentioned by the Commission had to do with the goals, not the formulas, used in those jurisdictions.

2. Melson Formula

   a. Philosophical basis: Starts with presumption that each parent should have a sufficient "self-support" amount to provide for his or her own basic needs, but should not keep any additional income until the needs of dependent children are met. Additional income allocated like income shares (children presumed entitled to share in non-custodian's higher standard of living).

   b. Method of Operation

      (1) Each parent's available income is determined, to yield a "self-support reserve" or "primary support allowance" at subsistence level.
      (2) Children's primary support needs are calculated at subsistence level. Work-related child care and extraordinary medical expenses are added to the basic amount. This amount is pro-rated between the parents based on their available income as determined in step 1.
      (3) Percentage of non-custodian's additional income allocated to children as Standard of Living Allowance ("SOLA") per percentage formula, starting at 12-15% for first child.

   c. Primary Features
      (1) Can be based on net or gross
      (2) Does take into account remarriage (actual or imputed income of new spouse, with latter a result of voluntary unemployment)
      (3) Does take into account other children, variably
         (a) Pre-existing court orders "off the top" before income is determined
         (b) If no court order, other children's primary support amount deducted from income available for "SOLA."
      (4) Extraordinary visitation/shared custody factored in by chipping away at SOLA on sliding scale to extent non-custodian's time with child exceeds determined norm.

   d. Discussion
      (1) As a necessary feature, this approach makes each Obligor parent's obligations dependent in part upon the post-divorce choices made by the Recipient parent. This may well cause the Obligor to more genuinely wish the Recipient to do well after divorce, but also inherently makes the parties more intertwined with each other's post-divorce choices.

3. Wisconsin Percentage of Income Standard

   a. Philosophical basis: Children are entitled to continue benefitting from a certain portion of the non-custodian's income, based on the percentage of income that would be spent on them in an intact household.

   b. Method of Operation

(1) Non-custodian's relevant income level (gross or net) determined, with certain deductions or additions for some expenses or property holdings, etc.
(2) Relevant income multiplied by percentage figure, which could vary according to income bracket or age of children at issue to yield basic support obligation.
(3) Percentage or entirety of certain "non-guideline" expenses added to basic support obligation to yield actual child support obligation.

c. Primary Features
(1) Can be based on net or gross; percentages higher in net states.
(2) Child care and extraordinary medical expenses not separately figured and compensated in most states, but are generally subsumed in guideline. Sometimes separately calculated and added on to support by division or pro-ration between parents.
(3) Can take into account other children, variably
(a) Pre-existing court orders "off the top" before income is determined (Nevada does not do so)
(b) If no court order, model statute would deduct for pre-existing children only by imputing a support order for them before figuring gross income (and therefore calculating child support).
(c) Alternative approach previously used in Nevada took other children into account by including them as "children" considered in coming up with a percentage, and then dividing by number of children. This methodology was overruled in *Barbagallo*.
(4) Model silent as to whether extraordinary visitation/shared custody is to be factored in; prior Nevada practice in doing so largely overruled in *Barbagallo*.

4. Washington Uniform Child Support Guidelines

a. Philosophical basis: Children are entitled to share in their parents' net incomes, varying in amount according to the number and ages of children. Functionally similar to the income shares model, which was partially derived from the Washington set-up. Allocates a percentage of both parents' net income to child support based on level of income, number of children, and age category of each child. The combined obligation of the parents is divided between them based on their individual net incomes.

b. Method of Operation: See income shares explanation.

c. Primary Features
(1) Formula not applied below monthly net income of $500.00.
(2) Percentage of income allocated to child support varies, with percentage lowering as income rises; since parties' incomes are combined, high custodial parent's income can lower Obligor's support.
(3) Payment schedules vary according to ages of children, bracketed at 0-6, 7-15, and 16-17.
(4) Child care expenses are outside formula, separately allocated between parents by income.

(5) Shared physical custody results in lowered support by calculating each parent's obligation to the other and offsetting. Second spouse, presence of step-children, imputed income, all ignored by guidelines.

5. Cassetty Model

a. Philosophical basis: Using an income equalization standard, children should suffer the least possible economic hardship and continue to enjoy a standard of living which is as close as possible to the original pre-divorce standard.

b. Method of Operation: Like Melson formula, exempts poverty-level support for each member of divided household. Remaining income is distributed proportionately depending on the number of persons in the household.

c. Primary Features: Time share is accommodated by varying number of persons in household by percentage multiplier of their presence there. Total net income of *households* is focus, so second spouses' incomes are factored in, along with new dependents (step-children, etc.). If new dependents are in *Recipient's* household, support goes up; if in Obligor's household, support goes down. Child care probably subtracted from net income before formula applied. While based in very accurate economic realities, allows parties to vary their obligations considerably by their own actions.

d. Discussion

(1) As a necessary feature, this approach makes each parent's obligations dependent in part upon the post-divorce choices made by the *other* parent, not just in career field, but in the larger questions of remarriage, other children, etc.

B. Award Adequacy

In terms of the model followed, Nevada's Wisconsin-based formula produces a result rather similar to that which could be derived by alternate means. Those who have studied variations among guidelines tend to conclude that none of them produce consistently higher or lower awards. For example, one review showed that the Income Shares Model produced the highest awards for low-income families, the Melson formula produced the highest awards in middle-income families, and the Percentage of Income Approach produced the highest awards in upper-income families.[108]

From the time of the earliest studies of the effect of the various models, it has been apparent that the Wisconsin-style guidelines are moderate in approach and effect.[109] There are a few bonuses, as well -- the Percentage of Income/Wisconsin model is the only one that does not provide a disincentive to the Recipient to be in the work force.[110] Per federal mandate, the Department of Health and Human Services completed

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[108] Thoennes, Tjaden, & Pearson, *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency* XXV Fam. L. Quarterly 325, 344 (ABA 1991).

[109] Attached as Exhibit 9 is all of Chapter V of the original Development of Guidelines for Child Support Orders. The graphs are fairly straightforward, and attention is drawn to the hypothetical summary on page II-112, which shows that the Wisconsin guideline award was neither highest nor lowest for any of the hypotheticals.

[110] *See* Development of Guidelines for Child Support Orders, *supra*, at II-104. The theory is that if child support takes into consideration a Recipient's income, that person will have to factor that loss into the cost of going to work, and if the margin between income lost from support and gained from

a report for Congress in October 1990. A copy of the Summary and Recommendations from that report is attached as Exhibit 10. It does not appear that Nevada's statutory scheme is contrary to any of the recommendations of the Congressional study.[111]

The Committee does not believe, on the basis of the information now available, that any other theoretical model is demonstrably superior to that now in place. A formula providing the benefits of ease of use by the public and efficiency for the system should not be abandoned in the absence of strong data indicating that support under our guidelines is inadequate or excessive in a statistically significant number of cases, and in the absence of evidence indicating that an alternate guideline would prevent those problems. No alternative model or guideline reviewed was free of deficiencies.

Unfortunately, this Committee did not have the data available to ascertain a question of vital importance: Whether awards of child support in Nevada are adequate, inadequate, or excessive for the purposes intended. As noted elsewhere in this Report, the preceding sentence begs the question, because our statutory scheme lacks a clear statement of purpose (income sharing, basic need satisfaction, etc.)

While the Committee is unable to answer concerns as to absolute adequacy, the analysis of Nevada's relative placement indicates that even *if* Nevada's children are receiving inadequate awards, those awards are not significantly different in most cases than they would be elsewhere.

There was insufficient data available to the Committee to perform a cross-index of Nevada's comparative welfare/abandonment and other public statistics vis-a-vis other states.[112] The utility of such an indexing, to be performed in a statistically sound manner, would be to see whether Nevada suffered more, less, or the same amount of such social ills as compared with other, demographically similar states that use alternate child support guidelines. There may well be persons available to the legislature if it is believed that such a statistical indexing study would be helpful to the legislative process.[113] A summary of the sort of data available is set out in Appendix II.

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employment is too small, may decide that employment is simply not worth it. Of course, this advantage of the Wisconsin model is somewhat offset by not taking separate account of child care costs, which means that the substantial expense of such care falls entirely to the primary custodian in a Wisconsin-guideline state.

[111] Two caveats should be added. The recommendations included an observation that, since older children cost more to maintain than younger ones, "it may be desirable" to vary child support according to age. Lewin/ICF, Estimates of Expenditures on Children and Child Support Guidelines 7-13 (HHS 1990). The authors also suggested that states contrast the awards generated by their guidelines with estimates of actual expenditures on children, to see if the one reasonably matches the other. *Id*. As noted above, the Committee did not believe that with the available information, this could be done for this Report.

[112] The Committee also lacked the professional expertise that it felt would be required to properly interpret such statistics. While correlations and absolute numbers are easy to review, making figures present statistically significant results by control of extraneous factors is a task best left to expert statisticians.

[113] Mr. Phil Bushard, who is Family Mediation Program Coordinator in the Washoe County court, has previously done similar work in Arizona, and is apparently able to perform a study of levels of support and adequacy in split, joint, and shared custody cases, etc. It is possible that federal grants would be available for this purpose, but some funding of such an effort would probably be required.

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AF. Institutions and individuals consulted or who provided assistance

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4. Craig Jorgenson, Esq., Mineral County D.A.: background research and proposal.

VII. LIST OF APPENDICES AND EXHIBITS

A. APPENDIX I -- Factor-by-factor analysis of 50 states guidelines.

B. APPENDIX II -- Summary of primary information available in current statistics.

C. EXHIBIT 1 -- "Establishment of Appropriate Objective Standards for Support," pages 5-8 from the Report of Nevada Commission on Child Support Enforcement (1985 Governor's Commission).

D. EXHIBIT 2 -- List of Actions/Recommendations from meetings of June 23, 24, and 25, 1986, and June 16 and 17, 1986, which provided the basis of the Report of Nevada Commission on Child Support Enforcement (1985 Governor's Commission).

E. EXHIBIT 3 -- National Governors' Association InfoLetter dated November 8, 1988, summarizing key provisions of Family Support Act of 1988.

F. EXHIBIT 4 -- U.S. Commission on Interstate Child Support, reprinted at 18 Fam. L. Rptr. 2001 (BNA March 3, 1992).

G. EXHIBIT 5 -- Child Support by Hourly Wages, Average Monthly Salaries, and Annual Incomes (chart of results and presumptive ceilings under existing Nevada statute).

H. EXHIBIT 6 -- CPI-U Chart.

I. EXHIBIT 7 -- Charts with results of hypotheticals and selected supporting data from Women's Legal Defense Fund: Survey results of 50-state study of child support levels (untitled draft copy marked with 1990 copyright; Dodson study).

J. EXHIBIT 8 -- Selected pages from Chapter III (Factors to be Considered in the Development of Guidelines) from Development of Guidelines for Child Support Orders (HHS 1987).

K. EXHIBIT 9 -- Chapter V (Levels of Orders Yielded by Guidelines) from Development of Guidelines for Child Support Orders (HHS 1987).

L. EXHIBIT 10 -- Summary and Recommendations from Lewin/ICF, Estimates of Expenditures on Children and Child Support Guidelines (HHS 1990).

This Report is respectfully submitted by the members of the Child Support Statute Review Committee.

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