1996 CHILD SUPPORT STUDY COMMITTEE REPORT

I. INTRODUCTION AND PRELIMINARY MATTERS

In keeping with the intentions expressed in the 1992 Report of the Committee, that three-volume work is incorporated and referenced in this Report as a baseline, and this Report should be taken as an addition to the earlier work.

The Board of Governors of the State Bar of Nevada formally met on March 8, 1996, to consider objections to allowing the Section to comply with the legislative duty set out in NRS 125B.070(2). The Board of Governors considered objections raised under *Keller v. State of California*, ___ U.S. ___, 110 S.Ct. 228 (1990), as well as more general concerns concerning separation of powers under the United States Constitution. Specifically, the issue raised was whether there was a legal problem in allowing this review to proceed, given that the Bar is an arm of the judicial branch (the Nevada Supreme Court), but is apparently directed by legislation to participate in the legislative process. The Board of Governors noted that membership in the Family Law Section is entirely voluntary, and decided, after discussion, that so long as the Section used its own budgetary and other resources to do the work and produce the Report, the legal and constitutional objections were not well-founded. Accordingly, this Report could be and was created.

The Executive Council of the Family Law Section, for its part, agreed, and expressly voted to re-appoint the original Committee that did the work in 1992. That Committee chose Marshal S. Willick as its chair.[1]

Methodologically, the Committee proceeded through the outline set out in the 1992 Report, in a series of phone conferences and in-person meetings; this Report follows that outline, noting any changes prompted by evolution in known facts, decided cases, or upon further reflection. Formal and informal input was sought from the judges and administrative workers in the Family Court (established just after the 1992 Report was completed), but a survey of the Committee members indicated that the various interest groups were not believed to have significantly altered their positions or to have developed much new information. The Committee explicitly reviewed every Nevada appellate child support case issued since the last Report was completed, as well as all legislative changes made in the 1993 and 1995 sessions.

For the convenience of those reviewing this Report that are using the 1992 Report as a baseline (as intended), this Report will reference the outline headings of the 1992 Report, and will only contain a discussion for those sections for which there is some change from the 1992 Report. Otherwise, the discussion in the earlier work should be referenced.

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[1] As Mr. Willick is now Chair of the Family Law Section, his position on the Committee was made non-voting except to break ties. In 1992, as then-Section Chair, Ms. Kunin had the non-voting position.

The Family Law section specifically reaffirms its belief that this review is a positive, appropriate and necessary process and should continue to be conducted at appropriate intervals to assist the Nevada Legislature in addressing the serious issues surrounding the obligation for the support of children. In order to avoid any perceived problems concerning the separation of powers or with the prohibitions of *Keller* and to ensure that the review process includes an appropriately broad range of perspectives, the section suggests the following change to NRS 125B.070(2):

> On or before January 17, 2000, and on or before the third Monday in January every four years thereafter an independent committee of experts in the field of child support shall be appointed by the Legislature to review the child support law of the State of Nevada to determine whether any legislative modifications are advisable, and report to the legislature their findings and proposed amendments. The Family Law section of the State Bar is requested to make recommendations to the Legislature as to individuals qualified for appointment to such committee.

This change will call for the appointment of the review committee one year in advance of the due date of each future Report.

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

C. The purpose of our statutory scheme

Throughout the 1992 Report, it was noted that the lack of guidance as to the intended purpose that the child support guidelines were to serve made some of the Committee's decisions difficult or impossible, and in practice caused some judicial decisions to be made inconsistently, and the statutes themselves to appear partially contradictory. The 1992 Report noted the Committee's belief that "the legislative intent is mixed and the purpose is unclear," and invited the Nevada Legislature to enact a statement of purpose to assist the courts.

The 1993 and 1995 Legislatures did not do so, leading to continuation of the problems of interpretation noted in 1992. Upon reflection, the Committee believes it likely that the legislature would find it difficult to draft such a statement of purpose, out of lack of familiarity with the various options and the likely effect to expect from any choice made.

Accordingly, the Committee has reviewed possible statements of purpose in view of the history of the Nevada child support statutory scheme since its inception, the cases that have issued from the Nevada Supreme Court, all statements of intention from the 1985 Governor's Commission

forward, including opinions expressed in law review articles that have been written by members of the Nevada Bar.[2]

After a great deal of thought and debate, the Committee unanimously concluded that a new subsection should be added to the beginning of the child support statutes, stating:

> The purpose of this Chapter is to provide a mechanism whereby children benefit from the income of the non-custodial parent to the same extent that income would be spent on such children if the household were intact.

This language paraphrases the recommendations of the 1985 Governor's Commission, which in turn paraphrased the stated purpose from the legislative history of the Wisconsin guidelines (from which our child support statutes were derived). In terms of likely effects, the Committee predicts that such a statement would likely be raised in cases in which it could be proven that historical expenditures on a particular child were higher than that which would be called for under the guidelines, or where there was an extraordinary disparity in income potential between the parents.

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

No changes from 1992 Report.

IV. TECHNICAL OR CORRECTIVE PROPOSALS

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

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

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

The Committee unanimously agreed that this was a most troublesome area. As noted in a recent law review article,[3] the inexorable process of inflation has had the effect of distorting the lines drawn by the legislature (deliberately or otherwise) in 1987. The "statistical realities" discussed in the 1992 Report at pages 16-17 are still with us, but the effect of inflation is cumulative, and so is more severe than it was in 1992.

In this Committee's 1992 Report, it was noted that for the $500.00 presumptive ceiling to have the same relative value that it had upon passage in 1987, it would have to be changed to a little

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[2] *See*, *e.g.*, Ron Logar, *Wealth, A Substitute for Need*, 57 Inter Alia, Apr., 1992, at 8.

[3] *See* 11 Nev. Fam. L. Rep. No. 3 (Fall, 1996) at 6, attached as Exhibit 1.

over $600.00. Now, four years later, to have the same value, the ceiling figure would have to be over $700.00.[4] In other words, the problems noted in 1992 are worse now than they were then. These problems are inherent whenever child support guidelines reference a percentage to apply against income, while some fixed number is used as an upper or lower limit on awards determined under that percentage. All available statutory mechanisms used in other states to address this subject area were reviewed by the 1996 Committee.

For all the reasons discussed at pages 16-20 of the 1992 Report, this was a most difficult subject area. The Committee examined all possible means of dealing with the problems, from simple abolishing of the presumptive ceiling to retaining it exactly as it is. It was believed that there was an appreciable portion of the public that would want to keep some form of presumptive maximum to a potential child support obligation, even though it was philosophically inconsistent with the rest of the child support guideline, and that therefore no improvements were likely unless some realistic alternative limiting mechanism was proposed in place of the existing presumptive ceiling.

This Committee's 1992 recommendation (raising the presumptive ceiling from $500.00 to $1,000.00) would "work" as an inflation adjustment -- at the moment. However, that recommendation would continue the same problem of being a fixed number limiting a percentage, and so would probably, sooner or later, be made obsolete by changing economic conditions. It also did not resolve certain problems noted with multiple-children families. The available choices boiled down to either maintaining the existing ceiling (or some alternate dollar number) until some significantly higher income was at issue, or altering the mechanics of the ceiling so that it only became applicable once some significantly higher income was at issue.

Ultimately, the latter approach was chosen, for several reasons. Among these was the desire to avoid creating a system where people situated very similarly are treated differently under the law when some arbitrary (income) line is crossed.

By refocusing the court from the amount actually paid per child to the total income of the payor, it was also hoped to avoid some of the inequity between otherwise similarly situated persons who had different numbers of children, thus more closely adhering to the theoretical model's perspective of percentage of income allocated in an intact household to direct and indirect support of children.

The Committee concluded that the "cap" as it is today should be eliminated, by deleting from NRS 125B.070(b)(5) all words after the word "income," adding a period after that word and adding two sub-sections as set out below:

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[4] As of September, 1996, the Consumer Price Index for Urban Consumers (CPI-U) was 472.7. It was 340.1 in 1987. The dollar equivalent of $500.00 as of September, 1996, was $694.94. The CPI equivalent of $500.00 in 1987 dollars is expected to exceed $700.00 by the time this Report is submitted to the legislature.

(a) **For the portion of a non-custodial parent's gross monthly income up to $10,000.00, "obligation for support" has the meaning set out above, unless a deviation is warranted pursuant to NRS 125B.080.**

(b) **For the portion of a non-custodial parent's gross monthly income in excess of $10,000.00, the court shall have discretion to impose an additional obligation of support upon setting forth findings of fact as to the basis for the additional award.**

While the entire Committee was in favor of this structure for the replacement presumptive ceiling, there was some disagreement as to the level at which straightforward application of the percentage guidelines would end, and the "discretionary review" of the court would begin. A majority of the voting members favored the $10,000.00 level set out above (corresponding to $120,000.00 per year), while a minority would have preferred a $6,000.00 monthly income level (corresponding to $72,000.00 per year).

The higher level favored by the majority has the effect of causing a greater number of people to be treated the same way by the child support laws. The lower number would have had the effect of reducing the child support obligations of non-custodial parents earning $72,000.00 to $120,000.00 per year. Put another way, the majority approach would not presume a deviation from the statutory percentages for child support until the income of the obligor exceeded $120,000.00. At either level, the distortion of the existing "cap" on individual obligors depending on how many children are involved has been eliminated.[5]

Additionally, the proposed income levels should provide a little more time before inflation causes the statute to require further amendment. The Committee realizes that the proposed reformulation will not -- eventually -- prevent an inflation-caused collision between the fixed income levels and the percentage-based guidelines. As noted above, that problem is inherent in any "ceiling" or "cap" provision. Rather, it is hoped that the guidelines will seem to be -- and will actually be -- fairer, by treating the vast majority of child support payors equally (i.e., the same percentage guidelines will apply to them as applies to everyone else), while allowing the judiciary sufficient leeway to address the small number of cases in which the income considered is truly extraordinary.

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[5] Previously, the presumptive ceiling came into play at different income levels depending on how many children were involved. For one child, the ceiling started reducing guideline support at $33,335.00 per year, but the income had to be $48,000.00 if there were two children, $62,100.00 if there were three children, and $77,450.00 if there were four children. This seemed particularly inequitable, and was not a result that could be squared with either the theoretical model, or the statistical studies of expenditures on children in households.

C. Role of child care expenses

The 1992 Report noted the inadequacy of current child support orders to fairly acknowledge and apportion the costs of child care. It also noted the unfairness to those paying support that would occur if child care expenses were presumed and *all* child support awards were raised accordingly. The 1992 Report suggested a specific additional award, outside the guideline, apportioning child care costs only when they actually exist, as is already done with medical expenses; where they do not exist, there should be no implied award for those expenses.

It should be noted that the United States Commission on Interstate Child Support came to the same conclusion. The Recommendations of the U.S. Commission included the suggestion that child support guidelines should include a "quantitative method" to take into account child care expenses (as well as the cost of health insurance, which is addressed separately below, and school expenses).[6]

A report released by the Bureau of the Census noted that the cost of child care jumped from about $40.00 per week in 1984, to $54.00 per week in 1988 (the last year reported) with continued steady increases in *excess* of inflation. As of 1988, the average cost reported was $1.91 per hour per child, or nearly $80.00 per week for a parent working a forty-hour work week.[7] The census numbers echoed the data reported by this Committee in 1992,[8] finding that an ever-increasing percentage of children were being placed in organized child care (up to 57% by 1988), and that the percentage of an entire family's income dedicated to child care averaged seven percent, but tripled to 21% for families living in poverty.[9] Review of the information published since the Census report indicates no significant change in these trends or percentages.

Given all this data, the Committee reiterates and emphasizes its recommendation to delete the existing and almost completely-ignored NRS 125.080(9)(b), and in its place add a new section above NRS 125B.080(9) explicitly dividing child care costs in accordance with proportionate income.

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[6] Summary of Commission Recommendations to Congress of the U.S. Commission on Interstate Child Support, 18 Fam. L. Rep. 2105, 2108 (BNA, Aug. 4, 1992).

[7] "Study: Child-care costs keep rising," Las Vegas Review Journal, Wed., Sept. 16, 1992, at 6A.

[8] *See* 1992 Report at 20-23.

[9] As noted in the 1992 Report, the percentages would be much higher still in divorced households, since there is only one wage-earner and a smaller total pool of money to allocate. *See* 1992 Report at 22 & n.41.

In part to avoid abuse of the proposed provision, the Committee unanimously recommends making the cost of child care divisible only if the cost is incurred for the purpose of allowing employment by the recipient of child support.

There are several problems the Committee hopes to solve with this mechanism for contribution to child care. Among these is the trap (common to cases seen by the Committee's members) in which the custodial parent of young children can only make minimum wage -- which does not even cover the cost of child care. In such cases, the custodial spouse's re-entry into the work force is delayed, sometimes for years, because the existing child support statutes do not make it economically reasonable for the spouse to work outside the home until the child at issue is old enough to be in school (and thus not require full-time child care).

For the sake of equity (to avoid "double-dipping") a majority of the Committee recommends that the expenses be divided by comparing the obligor's income *after* deducting child support paid, to the recipient's income *after* adding child support received. In this way, the obligor will end up contributing substantially to child care costs only if that party truly has substantially more available resources than does the recipient (it is presumed that any spousal support being paid is deducted from the obligor's income and included in the recipient's income). A minority would have preferred making the allocation discretionary upon consideration of the incomes of the parties, the child support being paid, and the age of the children involved.

D. Role of medical expenses (normal and extraordinary)

The 1992 Report recommended leaving medical expenses broken out as an item outside the percentage guidelines, but changing the division from equal to proportional based on the income of the parties. This is another area in which the 1992 Committee reached the same conclusion announced by the United States Commission on Interstate Child Support, which also recommended providing "a quantitative method" for addressing these expenses.

Since that time, the Nevada Supreme Court has issued an opinion in *Anastassatos v. Anastassatos*.[10] There, the Nevada Supreme Court effectively affirmed an apportionment of the cost of medical insurance between the parties as a "medical expense." The Committee believes that the holding is correct under the law as now stated, and that the interpretation should be codified, by adding to and altering NRS 125B.080(7) as follows:

> 7. Expenses for health care *and medical insurance* which are not reimbursed, including expenses for medical, surgical, dental, orthodontic and optical expenses, must be [borne equally by both parents] *allocated between parents in proportion to their respective gross monthly incomes* in the absence of extraordinary circumstances.

[10] 112 Nev. 317, 320, 913 P.2d 652, 654 (1996).

E. Role of other children/second or later families

AND

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

AND

G. Joint and shared custody questions

The 1992 Report examined the large body of literature indicating the severity of the multiple-children problem, since most divorces now involve such families.[11] After reviewing the available cases, the Committee made two recommendations: that the legislature should give greater guidance to the treatment of multiple-family cases, codifying the "first-mortgage" approach[12]; and that a provision should be added allowing for discretionary abatements during extended consecutive visitation.

In the four years since then, the Nevada Supreme Court has issued a number of cases dealing with deviations from guideline support, but there has been no clear guidance as to how to handle multiple family situations. Hearing masters and judges from both ends of the state reported to this year's Committee that a great deal of the confusion and uncertainty involved in child support exists when applying the child support guidelines in cases involving multiple families, and gave specific situations in which practical application of the guidelines was difficult.

The Committee, upon reconsideration, reaffirms its recommendation regarding multiple families (and details it below). It affirms, but alters, its recommendation regarding discretionary abatements, on the basis that, in practice, offsets have been too liberally and too inconsistently granted, making predictability difficult.

The Committee examined all of the published cases involving multiple families, and all cases involving claims to abatements. The Committee notes that the Nevada Supreme Court has been fairly consistent in holding that abatements are only to be granted in "exceptional" circumstances. *See*, *e.g.*, *Anastassatos v. Anastassatos*, 112 Nev. 317, 320, 913 P.2d 652, 654 (1996).

In that case, the Court took an "opportunity to reiterate this court's position on the issue," and found that based on its prior holdings in *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992), and *Westgate v. Westgate*, 110 Nev. 1377, 887 P.2d 737 (1994), "the compelling force of the statutory guidelines is of such a magnitude that in the event of a deviation from the statutory formula . . . the justification for the non-conformity must be specified in written findings of fact."

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[11] *See* 1992 Report at 26-38. This was one of the most complicated and difficult areas addressed by the 1992 Report.

[12] *See* 1992 Report at 31-32.

Additionally, citing *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989), the Court held that the "basis for deviation" must be found in "the unfairness, the injustice, which may result to the secondary custodian if he or she, after making a substantial contribution of a financial or equivalent nature to the support of the child, were required to pay the full formula amount."

In the *Anastassatos* case, the Court rejected the non-custodian's position that having the children spend four weeks with him in the summer was enough to justify an abatement, quoting at length from the *Barbagallo* caution about the fixed expenses of the primary custodian not decreasing just because the secondary custodian's expenses increase. The Court therefore reversed the lower court's deviation since it was not "adequately supported."

On the other hand, the Committee noted the large numbers of persons, apparently including many district court judges, who feel that some kind of abatement is appropriate under some circumstances, including extended visitation, since there is more likely to be a demonstrable reduction in actual expenses in the primary household during such periods.

Regarding multiple families, the Committee examined a number of recurrent scenarios that have not yet been the subject of appellate resolution, including the recurrent problems with how to calculate child support in a split custody situation. The Committee worked through each of the inconsistent and largely undocumented approaches used by judges around the state in dealing with multiple families, and applied against those approaches a number of fact patterns involving multiple families, including later-born children, dissolution of second marriages,[13] and varying income levels among custodians and non-custodians.

After lengthy examination and debate, the Committee makes the following recommendations:

1. NRS 125B.070 should be amended by adding after the current sub-section (1)(a), a new sub-section stating: "For the purpose of establishing an obligation of support of a child, gross monthly income shall be reduced by the sum paid pursuant to an earlier-established obligation for support of another child. Gross monthly income shall not be reduced on the basis of any later-established obligation for support of another child. Once an obligation of support has been established, it remains 'earlier-established' irrespective of any subsequent modification."

2. NRS 125B.080(9)(e) should be deleted.

3. A new sub-section should be added to NRS 125B.080 indicating that an obligation for support of a child, once established, shall not be reduced on the basis of the birth of subsequent children to the obligor, or of the establishment of an

[13] The statistics reviewed in 1992 indicated a higher likelihood of failure of second marriages than first marriages, so it was necessary to consider the second family both when it is intact, and in the event it dissolves.

obligation of support for any such children. Modification of an earlier-established obligation for support (as defined in NRS 125B.070), shall be grounds for modification of a later-established obligation for support.

4. A new sub-section should be added to NRS 125B.080 indicating that in the event 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, the court shall presumptively establish a child support award for each non-custodial parent in accordance with the guidelines of this chapter, and directly offset the awards.

5. A new sub-section should be added to NRS 125B.080 indicating that the court shall have discretion to abate child support established pursuant to the guidelines up to one-half the amount thereof, when the non-custodian exercises primary custody for at least 28 out of 45 days.

H. Role of a parent's "current spouse's income"

The Committee explored the varying results obtained upon presentation of evidence that an obligor parent was voluntarily unemployed, given the language in the existing NRS 125B.080(8) that such voluntary underemployment or unemployment is "to avoid an obligation for support of a child." In 1992, the Committee majority felt that a new spouse's income should not be a consideration, but that no legislative change to that end was required.[14]

At the time of this review, the Committee noted three cases in the Nevada Supreme Court touching on these issues. First, in *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992), the Court held that:

> The statutory scheme does not authorize consideration of spousal income. In fact, the Nevada Legislature rejected a proposal to include spousal income. . . . A trial judge might properly consider spousal contributions where they have a significant impact on recognized statutory factors, such as the parents' standards of living or their relative financial means. However, Nevada law does not authorize using spousal income directly.

However, two years later, in *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994), the question presented was again whether the income of a non-custodian's new spouse should be factored in when setting child support. The Court rejected the custodian's position that the new spouse's income should be factored in as "income" under NRS 125B.070, but held that "under appropriate circumstances, a noncustodial parent's community property interest may be taken into account pursuant to NRS 125B.080."

[14] *See* 1992 Report at 39.

The Court was quite critical of the statutory framework of the Nevada child support guideline, labeling it "hardly a model of clarity." While the Court affirmed its earlier holding that the definition of "gross monthly income" in NRS 125B.070(1)(a) does not include a parent's community property interest in a new spouse's income, it went on to note that under NRS 125B.080, the lower courts can, upon making appropriate findings of fact, deviate from the statutory schedule, and noted that NRS 125B.080(9)(1) lists "the relative income of both parents" as a factor. The Court reiterated its holding in *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989) that

> [w]hat really matters in these cases is whether the children are being taken care of as well as possible under the financial circumstances in which the two parents find themselves. Greater weight, then, must be given to the standard of living and circumstances of each parent, their earning capacities, and the 'relative financial means of parents' than to any of the other factors.

From dicta in *Barbagallo*, *Lewis*, and *Herz v. Gabler-Herz*, 107 Nev. 117, 808 P.2d 1 (1991), the Court inferred that "considerations such as standard of living and financial means may be intimately connected to community income," and noted that under the community property scheme, a spouse has a present, vested one-half interest in the other spouse's earnings under NRS 123.130, 123.220, and 123.225, and under California Family Code sects. 751, 760. The Court also found support for this stance under tax law.

The following year, in *Jackson v. Jackson*, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 183, Dec. 19, 1995), the Court extended this analysis in part to unmarried cohabitants, finding that "insofar as a parent's expenses are affected by a cohabitant's contributions to rent and other household payments, the district court may take [the contribution of a cohabitant to a party's expenses] into account when setting or modifying child support under NRS 125B.080(9)," since "A parent's relative income may be significantly increased due to the cohabitant's contributions to the parent's expenses."

On their faces, these cases appear to follow Nevada law and the apparent intent of our statutory scheme for child support; however, the reliance on California authority, given the different theoretical model underlying the statutes there, is troubling. After examining these cases, the Committee believes that there may be some analytical confusion of factors appropriate for consideration in our statutory scheme of child support with those that might be considered in California (which uses a hybrid formula expressly taking into consideration total household income, including that of second spouses). The Committee concurs that the income and expenses of a cohabitant or later spouse, to the degree actually contributed to the non-custodian's household, may have an impact on the "standard of living" in the non-custodian's household, and on the expenses of the non-custodian. However, the current line of case authority appears to be blurring the lines of responsibility, leaving us close to abandoning the responsibility of the actual obligor in favor of some incomes-share methodology involving comparison of total income in the two households. To the extent they do so, they are inconsistent with the Nevada statutory scheme and should be legislatively overruled.

The Committee notes the line of authority established by *Minnear v. Minnear*, 107 Nev. 495, 814 P.2d 85 (1991), in which the Nevada Supreme Court held that "where evidence of willful underemployment preponderates, a presumption will arise that such underemployment is for the purpose of avoiding support." More generally, this case stands for the proposition that an obligation for the support of a child is personal to the obligor, which is why a court might consider income capacity rather than actual income.

Many court decisions from around the country have noted the public policy in favor of promoting marriage.[15] The Committee is concerned that it would create a significant dis-incentive to marry for state policy to create a presumption that a new spouse's income was a resource to normally be considered in determining child support.

Additionally, the Committee is concerned about the disparate effect on persons according to their access to counsel before marriage. Specifically, a review of the holdings from the Nevada Supreme Court indicates that a properly-worded pre-nuptial agreement would probably be adequate to prevent any consideration of spousal income, leading to disparate treatment of those with and without such agreements.

The Committee believes that the personal responsibility emphasized in *Minnear* and hinted at throughout the domestic relations law of this state is the most appropriate foundation for determining the source of child support -- the parents of children should be responsible for contributing the percentage of their income (or income capacity) that would have been expended on those children in an intact household. To the degree that a parent shares expenses with a third party, only the expenses that the parent actually carries should be considered by the court when determining whether or not to use its discretion to vary from the guidelines, whether that third party is a later spouse or any other cohabitant.

Accordingly, there should be no direct application of a second spouse's income to a child support obligation. In the hypothetical situation in which an obligor parent has ceased work because of the financial arrangements in a second marriage, it is the income capacity of the parent, and not some derivation of the new spouse's income, that should provide the basis for the support award to be imposed on the parent. A minority of the Committee would have provided that under traditional notions of community property law, a share of the second spouse's income would belong to the obligor (in the absence of a prenuptial agreement stating otherwise) and therefore should properly be considered in setting support.

The direct holdings of the Nevada Supreme Court in keeping with the theory of the Nevada statutory scheme should be set out in statutory language to make future interpretations clear; the

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[15] Many of these holdings, and much of the social science underlying them, was recently re-examined in the novel case of *Baehr v. Miike*, ___ P.2d ___ (Cir. Ct. No. 91-1394, Dec. 3, 1996), 23 FLR 2001 (BNA, Dec. 10, 1996), *on remand from Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993). Even in the context of that extreme case, neither side challenged the basic premise that the institution of marriage is a social good to be promoted where possible.

dicta appearing to head in the direction of comparing household incomes should be overruled. In keeping with the concept of individual parental responsibility, the language holding a parent responsible for voluntary underemployment or unemployment should be tightened. Specifically, the following changes should be made:

1. NRS 125B.070 should be amended by adding after the current sub-section (1)(a), a new sub-section stating: "Notwithstanding community property law, gross monthly income shall not include an imputed community property share of a spouse's income."

2. The language now set out at NRS 125B.080(9)(l) should be clarified to read: "The relative incomes and standards of living of the parents, but the income of a later spouse shall not be included as part of the relative incomes of the parents."

3. The words: "to avoid an obligation for support of a child" should be removed from NRS 125B.080(8).

N. Collection and enforcement issues

The 1992 Report concluded that the assigned review did not appear to include these issues, although collection, enforcement, and substantive support "may well be intertwined."[16]

The 1996 Committee notes that no entity has taken up the 1992 recommendation for some other group to make recommendations in this area. In the interim, one Family Court judge has gone on record as stating the belief that a change in enforcement procedures "would solve the issue of non-payment in as much as 75% of all cases."[17] Based on this impetus, the Committee debated the question of automatic, mandatory, uniform wage-withholding orders in all cases.

In favor of such a proposal is the likelihood that actual payments would increase, and that there would be a corresponding decrease in welfare cases, applications to the district attorney for arrears collection, and ultimately an increase in the percentage of children adequately supported. Against such a proposal is the embarrassment that would be suffered by payors needlessly, since they meet their obligations, and persistent anecdotal accounts of repercussions by employers against employees who have such wage assignment orders against them, including termination from employment, which of course would result in negative effects for the obligor and for the child.

After extensive debate, the Committee remained tied; the Chair therefore voted to break the tie, coming down in favor of making wage assignments automatic in all cases, based on the

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[16] *See* 1992 Report at 46.

[17] *See* T. Marren, "Domestically Speaking," in *The Communiqué*, Clark County Bar Assn., May, 1996, at 9-10 (attached as Exhibit 2).

likelihood of greater actual support to more children. The Committee majority therefore favors legislation making wage assignments mandatory in all cases in which they may be ordered.

O. Other matters

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

In 1992, a majority of the Committee "reluctantly recommended" that the courts be given the explicit power to waive support during such periods as visitation is withheld to the extent of constituting a "*de facto* termination of parental rights."[18] That recommendation has now changed.

In the ensuing four years, the Committee members have watched the Family Court judges deal with these problems in several ways, and the Nevada Supreme Court has issued its opinion in *Westgate v. Westgate*, 110 Nev. 1377, 887 P.2d 737 (1994), which addressed a ten year fight between parents over child custody and support since 1982, including a move, molestation allegations, and other involved facts. Ultimately, the Court held that the absence of "visitation refusal" from the list of factors permitting deviation from the child support guidelines indicated that such refusal could not be used as a deviation factor, and that "the best interest of the child cannot be served by refusing to reduce arrearages to judgment as a form of punishment for failing to allow visitation."

After reviewing all developments in the field, the majority withdraws its prior recommendation, and now unanimously states that judges have adequate remedies available to them to enforce visitation (including contempt, and imposing ramifications for noncompliance, in the child's best interest, up to and including changes of custody), if they would only utilize those remedies. The Committee specifically notes the now-well-established law of *Parkinson v. Parkinson*, 106 Nev. 481, 796 P.2d 229 (1990) and the existence of NRS 125.480(3)(a), under which one parent's increased likelihood of allowing "the child to have frequent associations and a continuing relationship with the noncustodial parent" may be used to determine custody.

6. Grandparental support

In 1992, the Committee did not believe that there was sufficient data to evaluate the proposal, under which the parents of an under-aged parent could be held responsible for that under-aged parent's child support obligation.

The Committee majority, upon reconsideration and further experience, now favors making that liability explicit. In keeping with the individual responsibility theory of the statutory scheme, the measurement for the amount of support should be "the true potential earning capacity" of the under-age non-custodial parent.

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[18] *See* 1992 Report at 48-50.

V. ALTERNATIVE FORMULAE

No changes from 1992 Report.

VI. REFERENCES CONSULTED

In addition to the references reviewed for the 1992 Report, the 1996 Committee noted many newspaper, law review, and other articles, including reports of relevant cases from other jurisdictions as reported in legal periodicals such as *The California Lawyer*, *Fairshare*, and the Bureau of National Affairs' "Family Law Reporter." Where directly relevant, the language of those articles has been quoted. Attached as Exhibits to this Report are just a few of the items reviewed:

1. 11 Nev. Fam. L. Rep. No. 3 (Fall, 1996) at 6.

2. T. Marren, "Domestically Speaking," in *The Communiqué*, Clark County Bar Assn, May, 1996, at 9-10.

3. List of Nevada Supreme Court cases addressing child support decided since 1992.

4(a). Proposed statutory language; amendments to NRS 125B.070 and NRS 125B.080.

4(b). Proposed statutory language; amendments to other statutory sections.

CONCLUSIONS

Certain changes to the legislative scheme governing child support in Nevada should be made in the best interest of the children of this state. Some of these changes must be made in the very near future, since further delay will work an unjustifiable hardship on those children. Many of the specific recommendations made in this Report address policy questions on which there is more than one legitimate and defensible point of view, but there is no question that some reforms are necessary to ensure that the statutes continue to provide substantial justice to the citizens of this state, and their children, in a changing world.

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Marshal S. Willick, Esq., Chair