Why the Nevada Welfare Division is Calculating Interest and Penalties Incorrectly, and How It Injures Nevada Litigants

by

Marshal S. Willick[1]

July 20, 2008

[1] Mr. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American and International Academies of Matrimonial Lawyers, former Chair of the Nevada Bar Family Law Section and current President of the Nevada chapter of the AAML. He has authored several books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual. He is the creator of the "Marshal Law Judgment & Arrearage Interest Calculator," which automates the calculation of interest and penalties under Nevada statutory and case law. Mr. Willick practices at the trial and appellate levels, and has drafted various state and federal statutes. He sometimes represents the ABA in congressional hearings. He has served on many committees, boards, and commissions of the Nevada Bar, American Bar Association, American Academy of Matrimonial Lawyers, International Academy of Matrimonial Lawyers, and other organizations, and sometimes serves as an expert witness. Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown in 1982. Before entering private practice, Mr. Willick served on the Central Legal Staff of the Nevada Supreme Court for two years.

TABLE OF CONTENTS

I. INTRODUCTION

After years of pressure by Clark County Legal Services and other agencies, the Clark County District Attorney's Office finally agreed to start calculating and collecting interest on judgments as of about 2005. In the meantime, political consolidation within the Nevada Welfare bureaucracy brought the District Attorneys of the various counties under the effective control of the State Welfare Division,[2] resulting in a few political games, some unfortunate choices and orders, and some less than forthright assertions as cover.

Having been compelled to comply with the child support laws, the bureaucracy has attempted to subvert both those laws and even public policy to serve its internal limitations and interests. Frustrated in that effort, the bureaucracy has become increasingly strident in its defense of its own errors, to the point of attacking those attempting to serve the public good, and voluntarily assisting those whom it should be prosecuting. It seemed appropriate to bring to the attention of the Bench and Bar what brought us to this point, with the hope that someone in a position of sufficient authority might actually see fit to do something about it.

II. A TRIP DOWN MEMORY LANE

A. Why Our Interest Laws Are What They Are

Unpaid installments in child support or spousal support become judgments as a matter of law as of the date they come due and remain unpaid.[3]

The Nevada legal rate of interest was 7% from 1960 to 1979, 8% from 1979 to 1981, and 12% from 1981 to 1987, altered repeatedly in reaction to the hyper-inflation that raged periodically in that time. The Nevada Legislature had to keep amending the legal rate of judgment interest statute – NRS 17.130(2) (along with NRS 99.040(1), governing contracts) each session, and always "behind the curve" of whatever was happening in the economy, since the Legislature met only every two years.

In 1987, the Legislature decided to have the legal interest rate "float," self-adjusting every six months to the prime rate at the largest bank in Nevada, plus 2%.[4] The legislation itself was devoid

---

[2] The bureaucratic euphemism for the process is that the State of Nevada, Division of Welfare and Supportive Services, Child Support Enforcement Program ("CSEP") "contracts with various District Attorneys' Offices to provide child support services as required under [a federal funding program]." In other words, they control the budget, and accordingly ensure no one in the system is willing to say or do anything that might rock the boat, or endanger their own continuing employment.

[3] NRS 125B.140(2)(c) (court orders for child support arrears shall include "interest upon the arrearages at a rate established pursuant to NRS 99.040, from the time each amount became due . . . interest continues to accrue on the amount ordered until it is paid.")

[4] NRS 17.130(2) provides for interest when no rate is provided by contract, or by other statute, or otherwise specified in a judgment:

the judgment draws interest from the time of service of summons and complaint until satisfied, except

of details as to precisely how such calculations were to be done, but some instructions were supplied by Nevada Supreme Court decisions before and after the statutory change.[5]

Unfortunately, the cases were not much studied by the Bar or their hired experts. Most lawyers simply ignored interest, except in the biggest cases. Others (such as my office) either developed the ability to perform the calculations by spreadsheet, or hired a local accountant to do the calculations for them. Most of those accountants, however, applied "generally accepted accounting principles" when they were hired to do such calculations – even when such principles directly conflicted with the controlling case law (which, of course, the accountants had never read).

This led to significant variability in whether, how, and how much, interest was applied to judgments in Nevada cases. The multiple changes to applicable interest rates also made the calculations technically difficult. For example, pre-July, 1987, arrears had a "fixed" interest rate, while post-July, 1987, arrears "floated," and the number of changes increased every six months. Spreadsheets done by hand had to have separate columns tabulating interest for each "class" of arrearage, to determine when each individual dollar of arrears was paid.

To my knowledge, my office was about the only one to try to do so consistently in family law cases, but even with experience the supporting spreadsheets grew increasingly complex and difficult to follow within a year or so of the 1987 amendments.[6]

B. Calculations by the Bar and Agencies Differed a Little

In September, 1990, I wrote the first article recapping Nevada law on this subject,[7] explaining both what was known and unknown, and how the problem was being addressed. From that time to this, there has been no published authority of which I am aware criticizing or contradicting any of the positions reached and recited.

> for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the commissioner of financial institutions, on January 1 or July 1, as the case may be, immediately preceding the date of the judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

[5] The cases are collected and analyzed in the article entitled "A Matter of Interest: Collection of Full Arrearages on Nevada Judgments," first published in the September, 1990, issue of the NTLA *Advocate*, and revised several times since then, most recently as CLE materials at the Twelfth Annual Family Law Showcase (Tonopah, Nevada, 2001). A reworking including an analysis of the Penalties calculation is in draft.

[6] By 1989, it was obvious that an automated solution was necessary, and I began work on what ultimately became the Marshal Law ("MLAW") program.

[7] *A Matter of Interest: Collection of Full Arrearages on Nevada Judgments*, NTLA *Advocate*, September, 1990.

Following the Nevada Supreme Court's directions to calculate interest from and to specific dates,[8] the private Bar has always calculated interest on a daily basis. The Clark County D.A.'s legacy mainframe computer system – NOMADS[9] – was set up originally to operate and report on a monthly batch cycle, and had no provision to calculate or track interest.

There were some variations between what public agencies and private attorneys did that could create differences when interest was being calculated. For example, back in the days when URESA was the controlling interstate law (now replaced by UIFSA), one distinction between the District Attorneys' and Family Courts' methodologies was the proper first application of an incoming payment. The IV-D methodology required application of payments to present support first, but Nevada case law required application of payments to the oldest arrearage first.[10]

This made a difference to the totals reached, at least when arrears were due from before July, 1987. Rates before that date were fixed, so changing the arrearage to which a payment was applied altered the calculation. It still was no problem, really, since the uniform policy of the District Attorney's offices throughout Nevada was to conform to any total judgment as found by a district court.

C. Some Politics in Attempted Service to the Poor

After 1987, the original Pro Bono Project had been unhappy with the failure of the Clark County District Attorney's Office to calculate or collect interest on child support arrearages, and made requests that the agency perform its statutory mandate to do so.[11] The Board of Directors of that organization was repeatedly told that the limitations of NOMADS made it impossible for the D.A.'s Office to comply with the law. This stalemate continued for many years.

As detailed in various Nevada Supreme Court opinions, the purpose and function of statutory interest is merely to compensate the claimant for the use of money from the time the cause of action accrues until the time of payment.[12] In other words, even when interest is actually calculated on behalf of

---

[8] *See*, *e.g.*, *LTR Stage Lines v. Gray Line Tours*, 106 Nev. 283, 792 P.2d 386 (1990) (damages prior to the filing of a complaint accrued interest from the date the complaint is filed); *Jones v. Jones*, 86 Nev. 879, 478 P.2d 148 (1970) (when a family law judgment requires payments on a series of future dates, any missed payment immediately "draws interest [from that date]. . . until satisfied").

[9] NOMADS was set up in an archaic programming language apparently not currently in use anywhere. There is apparently no adequate documentation of the previous programming work, and making any change of any kind in the input, workings, or output of the existing patch-work apparently requires lengthy efforts by large numbers of people.

[10] *See Foster v. Marshman*, 96 Nev. 475, 611 P.2d 197 (1980).

[11] *See* NRS 125B.150(3) ("the district attorney and his deputies do not represent the parent . . . or child . . ., but are rendering a public service as representatives of the State"); NRS 125B.140(2)(c) (interest is to be charged).

[12] *See Ramada Inns v. Sharp*, 101 Nev. 824, 711 P.2d 1 (1985) (speaking of NRS 17.130(2)).

an obligee, and the sum is actually collected from an obligor, the person owed the money pretty much only breaks even on the original sum owed.

In 1993, the Nevada Legislature tried to come up with some ***additional*** way of encouraging delinquent child support obligors to pay their back child support sooner rather than later. This ultimately became the "penalties provision," NRS 125B.095.

The Executive Council of the Family Law Section of the Nevada Bar followed and participated in the development of the new statute, but did not actually draft the language, which read:

> The amount of the penalty is 10 percent per annum, or portion thereof, that the installment remains unpaid. Each district attorney or other public agency in this State undertaking to enforce an obligation to pay support for a child shall enforce the provisions of this section.[13]

A two-year deferral period was built into the effective date of the new "penalty" statute (from 1993 to October 15, 1995) – the idea was to give delinquent support obligors that long to catch up on their back support before the penalty began applying to them, and the Welfare Division claimed that it would take another couple of years before they could get NOMADS programmed to calculate or track the penalty.

The private Bar began applying the penalty in late 1995 when it became effective, and the Family Courts uniformly included a penalty assessment per the statute whenever counsel requested (and calculated) it. The calculation was not particularly difficult. The statutory language directed assessing a penalty of "10 percent per annum, or portion thereof, that the installment remains unpaid."

That language on its face required calculation of an ***annual*** penalty, calculated by focusing on each "installment" to see if it had yet been paid and, if not, calculating a penalty at a 10% annual rate from the time that the sum went unpaid until the Court heard the case. The only information needed was whether a particular "installment" of child support "remains unpaid" (i.e., was in arrears), then multiplying the sum by 10% and figuring out how ***long*** the installment remained unpaid.

So if a $500 installment of child support remained totally unpaid for a month, a penalty of $4.17 ($500 x 10% ÷ 12) accrued, calculated on a monthly basis.[14] If it still remained unpaid the next

---

[13] NRS 125B.095(2).

[14] This is the ***less*** accurate way of calculating the penalty, which can be done on a daily, or monthly, cycle. Ten percent per annum is 0.0002739% per day. If daily, multiply by the amount of installments remaining unpaid (here, $500), yielding a penalty of $0.13695 per day. Longer months will yield higher penalties; shorter months will yield lower penalties. In January, for instance, $0.13695 x 31 = $4.24545. If monthly, first determine the average number of days in a month (365 ÷ 12 = 30.416666). Next, determine the equal "monthly" penalty rate by multiplying that average number of days in a month by the daily accruing penalty rate (30.416666 x .0002739% = 0.0083311% per month). That percentage is then applied by the amount of the installments remaining unpaid (here, $500), yielding a penalty of $4.16555 per month. All months accrue the same penalty, and the differential of short and long months essentially

month, another such penalty accrued, and so forth. Throughout the 1990s, such penalty calculations were done by spreadsheet and submitted as exhibits to child support motions.[15] To my knowledge, every judge who ever heard a child support motion where a penalty was so calculated approved the reasoning, methodology, and totals, over all objections that have ever been made.

In the public sector, however, 1995 came and went without the mandatory calculation of penalties – ***or*** the long-awaited calculation and collection of interest – being performed by the Clark County D.A., or apparently anywhere else in Nevada.[16] Meanwhile, the Attorney General's Office, in conjunction with the Welfare Division, began a process of unifying procedures relating to support collection (and other things) in the 1990s. Reportedly, millions of dollars were expended in efforts to get the outdated NOMADS system to correctly perform interest and penalty calculations.

D. Progress . . . of a Sort

Until the year 2000, the Clark County Pro Bono Project existed independently of Clark County Legal Services (CCLS). That year, the former was folded into the latter, and it became far more capable of meeting the needs of the poor.

Periodically, the unhappiness of CCLS with the continuing failure of the D.A. to collect interest and penalties on back child support was raised in communications, leading to several meetings over the years between the CCLS Board of Directors and a variety of representatives from the Welfare Division, District Attorney's Office, and Attorney General's Office. Like the Pro Bono Project before it, CCLS was consistently told that the problem was the NOMADS computer system, which just could not be made to do the calculations in the way that they obviously should be done.

At some unspecified point in the past several years,[17] a rough interest calculator was finally engrafted onto the NOMADS programming. It was made capable of tabulating interest in the "whole month" increments that its batch process allowed.

In other words, if a child support installment came due sometime in January, and was not paid, NOMADS could take the then-applicable interest rate, divide it by 12 to get a monthly percentage, and multiply it by the prior month's unpaid installment. Since NOMADS retained its last-day-of-the-month batch cycle, it remained oblivious to any "odd days" and could see no difference between

---

averages out over a year.

[15] Separate and apart from ***interest*** calculations, which were done by hand, by CPA, or by computer program.

[16] As to interest, the Washoe County D.A. had adopted version 2 of the MLAW calculator, and had been collecting interest the same way the private Bar had been doing it for at least several years, starting about 1991.

[17] I've asked when this happened, but never been given a satisfactory response.

child support obligations due on the first, or the 30th, day of a month, calculating interest on both identically.

III. THE TAIL WAGS THE DOG

A. Bureaucratic Hiney-Covering

The continuing pressure from CCLS for the District Attorneys to comply with the statutes eventually led to the promise from the public agencies to begin collecting interest and penalties for the poor.[18] CCLS was invited to participate in the "public workshop" convened by the Welfare Division on that subject in 2004. Essentially, in addition to calculating rough interest on a monthly basis, Welfare proposed to assess a single lump-sum ten percent penalty on the last day of the first month that a child support payment was due and unpaid, because NOMADS was capable of performing and tracking such a month-end calculation.

The proposed policy Manual contained several mathematical, factual, logical, and other errors.[19] Those attending indicated how and why it would be unfair, unwise, and probably unconstitutional, to assess the same penalty on sums overdue for a week, and sums overdue for a year or longer.

It has since then been made clear that the "workshop" had nothing to do with figuring out what might be mathematically and legally correct, but was the announcement of a "done deal" that Welfare would do what NOMADS was capable of doing, irrespective of logic or consequences. As explained by Deputy District Attorney Edward Ewert in his revision and expansion of the Child Support section of the Nevada Family Law Practice Manual:[20]

> **NOMADS**, like other computers, has its limitations. . . . in the mass production, conveyer-belt case processing world of Nevada's child support enforcement program, the tail wags the dog. To make computerization work for child support enforcement in Nevada, the law and the courts, and most of all, our orders, have to conform to the computer's needs.

Still, the assorted glaring deficiencies of the Welfare methodology could not simply be ignored after being pointed out in public, without fear of potential litigation. So the left and right hands of the Welfare bureaucracy had a conversation, resulting in the 2004 request by Administrator Nancy Ford

---

[18] Deputy Attorney General Donald Winne, whose involvement is discussed below, asserted in a purported "Friend of the Court Brief" in Case D230385, dated July 9, 2008 (at 2), that the 2004 hearings resulted from "directions" from the 2003 Nevada Legislature; he made no citation to any specific legislation making any such "direction," and I have found none in the record.

[19] The Manual as it existed in 2006 was recently circulated – the mathematical errors in the guidance chart identified in 2004 had not been corrected, at least as of that time; even the principal sums outstanding were not correctly tabulated.

[20] 2008 edition, at § 1.165.

of the Welfare Division to the Attorney General's Office, asking "Does the Welfare Division, Child Support Enforcement Program, have authority under NRS 125B.095 to calculate the child support delinquent penalty on a monthly basis as a one-time late fee penalty?"

Essentially, Welfare asked its Deputy A.G. for legal cover to interpret the statute incorrectly, permitting calculations in a manner that ***just happened*** to be what the archaic NOMADS computer system was capable of providing.

So it is not at all surprising that on October 22, 2004, the Welfare Division was able to obtain a letter[21] from Deputy Attorney General Donald W. Winne reaching the conclusion that the statute was sufficiently ambiguous to allow Welfare to interpret it to permit doing the calculations the way that their computer system was capable of calculating.

1. Less is More and More is Less . . . More or Less

The opinion letter had several errors in its own right – such as the conclusion, in the introductory "Background" section, that to follow the "public input" (i.e., the CCLS critique of the Welfare proposal at the "workshop") would "result in significant increases in the amount of child support judgments that obligors would be required to pay." That is just not so, depending on when the matter is determined.

For example, the Welfare method of calculation has an entire ***year's*** penalty coming due on the first day of the first month that a month's support is overdue. Welfare then ignores the penalty forever, failing to calculate ***any*** penalty for the second (or any later) year a sum remains outstanding.

The private Bar, by contrast, calculates the penalty in accordance with how much of a year has passed, so that the penalty imposed on an obligation due in January, is less in February than it is in March, and continues to be assessed for however many years an installment remains outstanding, giving meaning to the statutory phrases "per annum" and "remains unpaid."

We replicated the table of hypothetical sums due and sums paid from the Welfare Division's Manual,[22] at the request of the District Attorney. Over the same one-year time period as the sample in the Manual, the private Bar calculates a total penalty (as of 12/31/04) of $85.90. The Welfare calculation shows $230, grossly ***over***stating the penalties actually owed, in the short term, by immediately assessing *in toto* a penalty that is supposed to be applied "per annum."

---

[21] At least one lawyer has incorrectly referenced Mr. Winne's 2004 opinion letter as a formal Attorney General's Opinion on the subject. There was and is no such published authority, just the letter referenced here.

[22] Section 619-620 of the Division of Welfare and Supportive Services Support Enforcement Manual (MTL 1/06, 1 Jan 06).

The Welfare penalty is three times ***greater*** than the private Bar would claim as due – at least on the one-year hypothetical facts in the Welfare table – so the statement that the private Bar's methodology would "significantly increase" the sum owed is just incorrect as a matter of math.

2. Welfare's Critical Error

The 2004 opinion letter is an exercise in sophistry.[23] It starts with accepted rules of statutory construction, such as that all the words of a statute must be given effect if possible, and then cherry-picks from the legislative history to find a way to disregard nearly all of the actual words in the statute.

Specifically, the opinion letter took the simple phrase "10 percent per annum, or portion thereof, that the installment remains unpaid," and sought to give effect to the modifier "or portion thereof" by reading the words "per annum" ***and*** "that the installment remains unpaid" completely out of the statute. By linguistic backsprings, the letter concludes that since the precise phrasing of NRS 125B.095 appears nowhere else in the NRS, the intent of the drafters must have been to perform a one-time-only penalty assessment, which by miraculous coincidence is the only thing NOMADS is capable of doing.[24]

The legislative intention was stated with overwhelming clarity: to provide an incentive for child support obligors to pay support sooner, rather than later – a purpose that would be entirely frustrated by a calculation that did not get any worse no matter ***how*** much time elapsed from the due date. And there is no known rule of statutory construction that permits three-quarters of the actual words of a statute to be rendered a nullity in order to give effect to a three-word incidental modifier.

An entire calculation methodology based on the phrase "or portion thereof" would eviscerate the obvious and plain meaning of the statute. "Per annum" ***means*** "per annum" – the penalty is to be applied at the rate of 10% ***per year***. And "remains unpaid" also means what it says – the penalty is to be based on all child support that remains outstanding.

3. Welfare's Flawed Analogy

---

[23] "n. A subtle, tricky, superficially plausible, but generally fallacious method of reasoning." Webster's New Universal Unabridged Dictionary (1989) at 1358.

[24] "The tendency of bureaucracy [is] to find purpose in whatever it is doing." John Kenneth Galbraith, *Foreign Policy: The Plain Lessons of a Bad Decade*, in Foreign Policy, Dec. 1970.

At several points, the 2004 opinion letter cited to the legislative intent to analogize the statutory penalty to "a [commercial] late payment fee as a motivator for other bills."[25] That analogy does not support a one-time-only penalty assessment.

Every known explanation of late fees notes that they get worse the longer they are late, as in this example for how credit card late fees work:

> Late Fee
> What is it: a charge for making less than the minimum payment or after the payment due date or both
> Which cards have it: all cards
> How much: $15 - $39 each billing cycle you miss a payment or pay less than the minimum
> How often is it charged: ***once each billing cycle you are late***
> How to avoid it: pay your bills on time or call your creditor ahead of time to make payment arrangements.[26]

In other words, if you owe money to Best Buy, and don't pay on time, they hit you up with a late payment fee. And if you don't pay the bill by the ***next*** month? They charge you again – every time a billing cycle passes without you making the payment you owed originally.

Creating such a continuing incentive for obligors to make payments sooner, rather than later, was what the Legislature said it was trying to do in 1993 – a purpose that would be frustrated by any policy that did not provide a ***continuing*** incentive to actually make up arrears each passing day.[27] The assertion in the 2004 opinion letter that making late fees continue to accrue over time would result in "double interest on total arrearages owed by an obligor" is just wrong as a matter of fact, and ignores the differences between interest and penalties.

The Nevada Supreme Court should have no problem finding that the statute should be interpreted to provide the incentive it was intended to provide:

> A fundamental rule of statutory interpretation is that the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result.[28]

---

[25] Winne letter of Oct. 22, 2004, at 5.

[26] http://credit.about.com/od/creditcardbasics/tp/credit-card-fees.htm (emphasis added).

[27] It is a bit ironic, but the opinion letter notes (at 5) that statutes must be construed "with a view to promoting, rather than defeating, [the] legislative policy behind them." This is correct, but the Welfare methodology is counterproductive, and thus fatally flawed.

[28] *Hughes Properties v. State of Nevada*, 100 Nev. 295, 298, 680 P.2d 970, 971 (1984), *quoting from Sheriff v. Smith*, 91 Nev. 729, 733, 542 P.2d 440, 443 (1975).

No creditor would say "You owe this specific sum in January. If you don't pay, you get assessed a late payment penalty in February. And then you're off the hook – no further late fees in March, April, May, June, July – just pay when you can."

But that is what Welfare wants to do with child support. Such an unreasonable interpretation of a statute – one that does not actually accomplish the stated legislative goal – is to be rejected out of hand.

B. The (Deflected) Attempt to Conform the Law to Error

> The major problem facing bureaucracy is not the struggle for power but the evasion of responsibility; bureaucrats are very reluctant to take action.[29]

Having been informed during the 2004 "public workshop" that the proposed Welfare calculation methodology was counterproductive and not in keeping with the obvious legislative intent of the statute, Welfare did what a bureaucracy does in such circumstances – tried to get the law changed to support what it wanted to do. Specifically, in 2005 Welfare cooked up AB 473, which would have altered the statutory penalty as follows:

> [~~The amount of the penalty is~~] ***If imposed, a*** 10 percent [~~per annum, or portion thereof, that the~~] ***penalty must be applied at the end of each calendar month against the amount of an*** installment ***or portion of an installment that*** remains unpaid [.] ***in the month in which it was due.***

All aspects of the calculation of interest and penalties were discussed at length in the resulting hearings held before the Assembly Judiciary Committee. After hearing and reading everything about why the law was the way it was, why the Welfare Division was trying to change the law to conform to their outdated computer capabilities, and why it would be a really terrible idea to do so, the Legislature left the "how-to-compute-penalties" portion of the statute exactly as it was, knowing how the private Bar had been doing the calculations for 17 years (as to interest) and 10 years (as to penalties).

The same Deputy A.G. who wrote the misguided 2004 opinion letter testified and claimed that the law should be amended to conform to Welfare's view of the legislative history and intent. I testified immediately after, in part as follows:

> Finally, the problem here, with due respect to the district attorneys and the Attorney General's Office, is one of the tail wagging the dog. They are attempting to solve a calculation methodology problem left over from legacy hardware and software . . . NOMADS, that they are trying make do a job that it is not suited to do. They are attempting to conform the law to how their computer works. I would suggest that this is a bad basis for

---

[29] Dean Rusk (1909-1994), *As I Saw It* (1990) at 33.

> altering public policy and altering statutes. I suggest it may be time that they just face up to the fact that they have wasted a huge amount of money on trying to fix something which may or may not ever be fixable. But certainly they should not start amending the law to conform to the problems that we know are built into that hardware system.

Immediately after that session, the Assembly Judiciary Committee deleted from the bill draft any mention of amending the how-to-calculate-the-penalty provision, rejecting the Welfare provision entirely.[30] Most family law lawyers have no idea how close the penalty provision came to being gutted and replaced, requiring everyone in Nevada to adopt the same counterproductive methodology used in NOMADS – and all because Welfare could not update its computer system. It is unknown whether Welfare will try again.

IV. WELFARE'S APPEARANCE IN THE *VAILE* MATTER

A. Background

The Nevada Supreme Court issued a decision in 2002 entitled *Vaile v. District Court*, which provided for the recovery of the kidnapped children, who had been spirited out of Norway to the United States.[31] Mr. Vaile stopped paying child support when he kidnapped the children in 2000, and never started paying again, even after they were recovered, despite his continued receipt (except for a three-year period when he elected to attend law school in Virginia), of a six-figure income and relatively lavish lifestyle.

Well over $100,000 of principal arrearages in child support accrued from 2000 to 2008, and the custodial parent sought to reduce to judgment the principal, interest, and penalties accrued during that time.[32] Mr. Vaile's counsel contacted the Attorney General's office and solicited a "Friend of the Court" brief to buttress his contest of the massive arrears accrued during that time. For reasons commented upon below, the Attorney General's Office agreed.

B. Welfare's "Friend of the Court Brief"

> Bureaucracy defends the status quo long past the time when the quo has lost its status.[33]

---

[30] As detailed below, the bureaucratic response to this rejection was to declare victory and assert that it really constituted an endorsement of the rejected Welfare provision.

[31] *Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002).

[32] *Vaile v. Porsboll (fka Vaile)*, Case No. 98-D-230385-D.

[33] Laurence J. Peter (1919-1990), "Intimate confessions of a quotemonger," San Francisco Sunday Examiner & Chronicle, Jan. 29, 1978.

The brief, dated July 9, 2008, repeats most of the errors and mis-statements discussed above, and makes several new errors. It chose to recast the 2004 request for legal cover as "a legal opinion on the interpretation of NRS 125B.095." It similarly recast the 2005 effort to gut the penalties statute as a proposal to insert "clarifying language," and labeled the rejection of that effort as the Legislature "taking no action."

With logic only a bureaucrat could conceive, the brief opined that because the legislature "allow[ed] CSEP to continue with its regulation and policies" since 2005, the Legislature must have ***really*** meant to endorse the defective Welfare proposal while rejecting it. The fact that the question of approving or criticizing Welfare's methodology was not even before the Committee was not mentioned.

Hypocritically, the brief simultaneously asserted that Legislative inaction to change the statutes, with knowledge of how the Bench and Bar had been doing interest and penalty calculations for many years, was meaningless.

After repeating the inaccurate analogy to late fees by businesses discussed above, the brief tried to set out comparative calculations, asserting as a matter of fact that the private Bar's calculation of penalties for one year of missed $100 per month child support would be $120. In fact, the number is $66.62. Welfare would have blindly assessed annual penalties on the same arrearage of $120 over 12 months.[34]

The brief never even attempted to compare any calculations of the interest and penalties that would actually accrue in the case at hand. It did, however, note that Welfare was not a party to the case, and that the outcome of the case would not affect it in any way, and so warned the Court that "the Court has no ability to set aside CSEP's regulation." Why Welfare would bother to take a stand in a case that did not affect it in any way is discussed below.

C. Actual Calculation Differences

The facts of the Vaile case involved large sums of arrears outstanding and unpaid for a long period of time, with very minimal payments – the District Attorney only managed to start a partial garnishment of support in 2006. So all sides agreed that the principal sum of outstanding child support arrears was some $127,000.

---

[34] The brief also fails as to its assertion of fact about the effect of a second year of payments due but unpaid, incorrectly claiming that the Family Court would charge $360 to Welfare's $240. This is again false; 10% per year on each missed installment for the amount of time it remained outstanding and unpaid results in a total penalty at the end of two years of $213.56. There was no reason for Welfare to make the false assertions of fact – the calculation is easy to do, and the MLAW program was provided to them for free when it was issued, can be run on any PC, and they could have easily run the calculation before misrepresenting what its output would be.

Remarkably, the difference in interest calculations over the eight-year time period between NOMADS and a standard MLAW calculation was only some $44.00. The difference is apparently due to only two factors. First, as to the method of rounding – NOMADS rounds each month's interest to the nearest penny, with everything over 0.005 up to the next whole cent, and everything under 0.005 down. The private Bar – like banks and credit card companies – carries fractional cents forward in a "bit bucket" to eight places after the decimal point.

The second, and much larger difference, is that NOMADS is only able to do an end-of-the-month calculation, making the actual date of any payment invisible and irrelevant if received anywhere within a month. The private Bar has always calculated all arrearages on a ***daily*** basis, so earlier-received payments are credited earlier and the arrears accrue less interest, while later-received payments are credited later and accrue more interest.[35]

The big difference was in the penalties. Since nothing at all was collected from Mr. Vaile between 2000 and 2006, the Welfare methodology assessed a 10% penalty when each payment initially went unpaid, and then ignored those installments for all the remaining years that they remained unpaid. The private Bar methodology, by contrast, continued to accrue penalties, following the statute, at the rate of 10% ***per annum*** for each year that each installment "remained unpaid." The result is that the sum of penalties assessed was really about $50,000, while Welfare's penalty calculation would have yielded some $12,000.[36]

D. The Perversion of Bureaucratic Priorities

> The effort expended by the bureaucracy in defending any error is in direct proportion to the size of the error.[37]

When informed that Mr. Vaile – who by all accounts owed well over $100,000 (just in principal) in back child support while making a six-figure annual income – would be present in a Las Vegas courtroom, one might think that the child support enforcement bureaucracy would initiate a criminal prosecution for felony non-support under Nevada law.[38]

---

[35] Obviously, whether these differences would work for or against any particular party in any particular case depends on the dates of the actual payments. More accurate calculations could provide a larger, or smaller, interest calculation than a less accurate calculation if the facts were changed.

[36] This number, 10% of the principal not paid on the date when due, would remain unchanged no matter ***how*** long the installments remain unpaid.

[37] John Nies (Washington Lawyer), "Nies's Law," in Paul Dickson, comp., *The Official Rules* (1978) at 178.

[38] *See* NRS 201.070(3) (felony non-support threshold is $10,000); *Epp v. State*, 107 Nev. 510, 814 P.2d 1011 (1991); *Sheriff v. Vlasak*, 111 Nev. 59, 888 P.2d 441 (1995).

One would be wrong. Apparently, the child support "enforcement" agencies of Nevada have not initiated a criminal non-support case for over seven years. In short, they don't care.

On information and belief, however, the funding received by the Welfare Division under the federal IV-D program is linked to the ratio they show of collections to overdue support – if less is shown as "due" compared to what they collect, their statistics look better and they get more money; if ***more*** is shown as due compared to their collections, they get less. Thus, Welfare has a perverse incentive to minimize the sums shown as outstanding and uncollected in child support arrears, putting the interests of the bureaucracy, and the poor persons it claim to serve, at odds.[39]

But why on earth would an agency charged with collection of child support – while stating that it has no legitimate interest in any possible outcome of a particular case – expend the resources to inject two District Attorneys and a Deputy Attorney General into that case anyway? And why on the side of the deadbeat who owed over $100,000 in child support?[40]

Because any bureaucracy's first instinct is toward self-perpetuation and growth, and those interests are seen as imperiled if anyone has the temerity to say that "The emperor has no clothes" when they attempt to get the law to match the counterproductive methodology that NOMADS is able to produce. It was obviously seen as ***much*** more important to push Welfare's position on how to calculate penalties than to actually assist in collecting from a deadbeat who owes huge amounts of back child support to assist the children and custodial parent.

V. ACTUAL POLICY-BASED COMPARISON OF CALCULATIONS

A. Interest Calculations

There really can be no legitimate question that the holdings of the Nevada Supreme Court have discussed precise dates as the start or end calculation triggers for interest, so interest should be calculated on the precise number of days that an arrearage remains unpaid.

The Welfare computer uses "months," disregarding the extra days within a month that an arrearage remains due, and thus treats an arrearage due on the first of the month, and on the 30th, exactly the same. That's not how banks calculate interest. It's not how corporations do it. It's not how the private Bar does it. But it is the only way that NOMADS can do it.

---

[39] The bureaucratic euphemism for minimizing the amount of outstanding child support arrears is "setting out 'realistic' arrearage sums to encourage compliance."

[40] In fairness, there is a distinction between why the District Attorneys were present, and why the Attorney General's Office filed a brief. The D.A.s were there at the specific invitation of the Court, having been requested to explain what procedures their office actually followed, and why. The officious intermeddling of the Attorney General's office in this child support arrearage case was entirely voluntary and without legitimate purpose.

Although the total differential in the majority of cases is likely to be pretty small, that error is being made every day in every case that Welfare processes. And Welfare apparently will never do anything about any of the interest it should have collected since 1987, but failed to collect. Those obligees who relied on Welfare to collect what was due under law are just out of luck, and if those who were short-changed by Welfare's non-collection become public charges at taxpayer expense, we are just out of luck as well.

B. Penalty Calculations

1. The Question of Whether the Statute is Ambiguous

In my personal opinion the statute is not ambiguous. "10 percent per annum, or portion thereof, that the installment remains unpaid" does not truly seem susceptible to alternative good faith interpretations.

Still, Welfare has come up with a plausible, although illogical, alternative interpretation of the words used. And if a statute is ambiguous, a number of rules of statutory construction come into play. Statutory interpretation should avoid meaningless or unreasonable results. When construing a specific portion of a statute, the statute should be read as a whole, and, where possible, the statute should be read to give meaning to all of its parts. Statutes with a protective purpose should be liberally construed in order to effectuate the intended benefits.[41]

In short, statutes are to be interpreted in a manner consistent with the intent of the Legislature. Since the Welfare methodology provides no continuing incentive for deadbeats to actually pay child support sooner rather than later, it fails at the first instance. The way the Family Courts have been calculating and applying interest (since 1987) and penalties (since 1995) ***does*** provide a continuing incentive for payment sooner rather than later, and therefore is the more reasonable construction.

The assertion of ambiguity of the penalties statute in the A.G.'s 2004 opinion letter gave the Welfare Division legal "wiggle room" to do the calculations in the manner that their outdated computer system can perform, but it certainly did not, and does not, mean that their approach is legally or logically "correct."[42]

---

[41] *Petition of Phillip A.C.*, 122 Nev. ___, 149 P.3d 51 (Adv. Opn. No. 109, Dec. 28, 2006).

[42] For the record, because Mr. Winne has insinuated that my motivations might be suspect, it is worth pointing out that I have no personal dog in the fight as to how the math ***should*** be done, beyond my personal knowledge of what was intended, and my familiarity with the logic and law involved. It would be a simple matter to reprogram MLAW to perform the calculations like Welfare does them – if there was any legitimate reason to do so. In the unlikely event that the Legislature or courts deem it proper to perform either interest or penalty calculations in the less accurate and counterproductive method advocated by the Welfare Division, we will alter MLAW to produce those calculations.

For the various reasons set out at the "public workshop" in 2004, and in this article, the opposite is true. The Welfare Division's approach is inaccurate, sloppy, partially counterproductive, and ***not*** what was intended when the provision was drafted in 1993. Whether or not Welfare is held accountable for its bungling of the issue, it is unconscionable for them to try to get the Family Courts to follow suit.

2. Constitutional Concerns

One final difference of perspective merits explicit mention. The A.G.'s "Friend of the Court" brief in *Vaile* raised the question of an "equal protection" issue raised by the fact that in cases such as that of Mr. Vaile, Welfare would assert a much lower penalty sum than the private Bar tabulates. On that basis, Welfare asserted that the Family Law Bench and Bar should adopt the NOMADS methodology so that the low income persons typically involved in Welfare cases are not treated any differently than they would be in Family Court.

This tail-wags-the-dog argument is both wrong and backward. It is wrong because the clumsy and counterproductive front-loading of penalty calculations by NOMADS actually makes the penalties it applies much ***higher*** than they should be – at least for the first few years that arrearages accrue. So Welfare's position that the private Bar has "higher" penalties is wrong, at least much of the time.

Welfare's position is backward because the "impose-and-forget-about-it" approach to penalties built into NOMADS provides no continuing incentive to actually pay overdue support, and is contrary to the legislative intent of the statute. There is no legitimate reason for Welfare to ask the Bench and Bar to adopt its error.

The ***actual*** "equal protection" problems are not addressed anywhere in Welfare's submissions. As noted in 2004, properly construing the phrase "per annum, or portion thereof" requires assessing the penalty ***every year***. As a basic matter of equal protection, any law that would treat identically being late for a day, and being late for a year – or 10 years – or 100 years – is highly suspect and probably constitutionally infirm. It would not take much effort to put together an equal protection challenge to Welfare's assessment of the same penalty on arrears owed for greatly disparate periods of time.

On the larger scale is Welfare's failure to comply at all with the Nevada statutes governing collection of interest (since 1987) and penalties (since 1995) through about 2005. It is hard to conceive of a larger equal protection problem than the fact that poor people relying on the State instead of private counsel to collect child support arrears simply did not get what the law required them to get.

VI. CONCLUSION

If the Nevada Supreme Court rules that the penalty statute is sufficiently ambiguous to permit more than one reasonable construction, then reasonable minds (if fully informed) could differ on what that construction should be.

But the Welfare view of how the statute should be construed has already been rejected by the Nevada Legislature within the past two years, would be counterproductive and illogical in application, and would be poor public policy if implemented. It simply makes no sense to read the words "per annum" and "remains unpaid" out of a statute intended to assess penalties at 10% per annum on the sum of arrears that remains outstanding. Calculation of both interest and penalties in accordance with the length of time installments of support remain outstanding is logically and legally correct, and serves the purpose for which the statutory provisions were implemented.

And only a bureaucrat could say that going to the Legislature, asking to amend a statute to match how Welfare's computer is able to do calculations, and having that amendment ***rejected***, somehow constitutes an endorsement just because the Legislature did not also publicly chastise the Welfare Division.

It is perhaps reasonable that the bureaucracy wants to find legal cover for the vast sums of money it has spent not managing to upgrade its computer capabilities, and the equally vast sums it failed to assess and collect against deadbeats who disregard their financial obligations to their children for the past 20 years. The Welfare bureaucracy continues to fail to correctly assess and collect those sums today.

It is even understandable, if repellant, that the bureaucracy prioritizes protection of its federal funding over actually serving the needs of those who are owed support. But they should not seek to protect the interest of the bureaucracy at the expense of custodial parents, and the children in their custody, who are owed the full measure of interest and penalties in accordance with law.

Those responsible for the decades of delay and millions of dollars of wasted expenditure on NOMADS should be identified and publicly censured. And the Nevada Legislature should direct Welfare to actually collect correctly calculated interest ***and*** penalties on child support judgments, neither front-loading, nor later ignoring, statutory penalties. Welfare should be discouraged from continuing the gamesmanship of looking for legal cover with which to paper over its deficiencies, and discouraged from trying to amend the law to match their inaccurate and backward approach.

A lawsuit on behalf of those cheated out of the (correctly-calculated) interest, and penalties, that should have been collected since (respectively) 1987 and 1995 should probably be pursued.[43] One way or another, it is time for the dog to re-assert control over the tail.

[43] "Somebody has to do something, and it's just incredibly pathetic that it has to be us." Jerry Garcia.