NFLR NEVADA FAMILY LAW REPORT

Volume 12, Number 2 Spring, 1997

The lost factors of NRS 125B.080(9): Deviating from Child Support Guidelines

Bruce I. Shapiro, Las Vegas, Nevada

Introduction

The Child Support Enforcement Amendments of 1984 required all states to develop advisory mathematical guidelines to calculate child support awards by October 1, 1987.[1] As a result, the Nevada legislature enacted NRS 125B.070 and 125B.080 in 1987, which statutes were modeled after Wisconsin's percentage of income formula.[2]

The Family Support Act of 1988[3] created a rebuttable presumption that guideline amounts represent the proper child support award and that deviation from the guidelines would be allowed only upon written findings that application of the guidelines would result in an unjust or inappropriate mathematical award.[4] These federal laws recognized the need for more realistic and equitable child support awards which provide children with a standard of living comparable to that of their noncustodial parent.[5]

These child support guidelines were developed because the child support awards being made prior to enactment of the formulas were found to be severely deficient when compared to the actual economic costs of rearing children. Judicial discretion, unassisted by the presumptive guidelines, often resulted in severely deficient child support awards.[6] The congressional mandate for development of guidelines was intended to address several deficiencies in the traditional case-by-case method of setting amounts for child support orders. These deficiencies were:

1. A shortfall in the adequacy of child support orders when compared with the true costs of rearing children, as measured by economic studies;

2. Inconsistent orders causing inequitable treatment of parties in similarly situated cases; and

3. Inefficient adjudication of child support awards in the absence of uniform standards.[7]

NRS 125B.070 provides a formula based on a percentage of gross monthly income that the nonprimary parent shall pay for child support.[8] NRS 125B.080(9) provides that the trial court may consider the following factors when deviating from the child support award called for by NRS 125B.070:

(a) The cost of health insurance;

(b) The cost of child care;

(c) Any special educational needs of the child;

(d) The age of the child;

(e) The responsibility of the parents for the support of others;

(f) The value of services contributed by either parent;

(g) Any public assistance paid to support the child;

(h) Any expenses reasonably related to

con't page 3

IN THIS ISSUE

The Lost Factors of NRS 125B.080(9) 1
Tonopah Update 2
Case Summaries 11

Editor
Mary Rose Zingale
Editor Emeritus
Marshal Willick
Managing Editor
Christine Cendagorta

Family Law Section
Executive Council
Marshal Willick, Chair
Rhonda Mushkin, Vice-Chair
Cassandra Campbell, Secretary
Mary Anne Decaria, Reno
Hon. Fran Fine, Las Vegas
Thomas L. Leeds, Las Vegas
Dara Marias, Las Vegas
Ann Price McCarthy, Carson City
Shawn Meador, Reno
Lamond Mills, Las Vegas
Muriel Skelly, Reno
Kathyrn Stryker, Las Vegas
Todd L. Torvinen, Reno
Roger Wirth, Las Vegas

NEVADA FAMILY LAW REPORT is a quarterly publication of the Family Law Section of the State Bar of Nevada.
Subscription price for non-section members is $35 payable in advance annually from January 1 to December 31. There are no prorations.
The *NEVADA FAMILY LAW REPORT* is intended to provide family law related material and information to the bench and bar with the understanding that neither the State Bar of Nevada, Family Law Section editorial staff nor the authors intend that its content constitutes legal advice. Services of a lawyer should be obtained if assistance is required. Opinions expressed are not necessarily those of the State Bar of Nevada or the editorial staff.
This publication may be cited as Nev. Fam. L. Rep, Spring, 1997 at ____.
Nevada Family Law Report is supported by the Family Law Section of the State Bar of Nevada and NFLR subscriptions.

FAMILY LAW March 20-22 in Tonopah

by Mary Ane Decaria,
Silverman & Decaria, Chtd.
Reno, Nevada

This year, a total of fourteen hours of CLE is being offered. Many malpractice insurance companies give a premium discount to those attending three or more hours of ethics CLE per year. Therefore, we have on tap three hours of ethics CLE, which will be taught by James Fox Miller, the most entertaining (and ethical) lawyer in Florida, and Rob Bare, the funniest bar counsel this side of the Pequops (just kidding, Rob).

Highlights!

PETER WALZER, a family law attorney from Los Angeles, California will tell us everything we need to know but were afraid to ask about working with and cross examining a psychologist.

Our very own JANET CHUBB, in conjunction with a surprise guest, will walk us through the intricacies of bankruptcy and divorce.

MARSHA ELSER, a former president of the American Academy of Matrimonial Lawyers and former chair of the Florida Bar Family Law Section will join Gary Silverman to help us understand the plethora of information to be culled from a tax return.

Alimony will be the hot topic this year. There is much talk of an alimony formula and likely legislation to codify an alimony statute. ROGER WIRTH will give a brief overview of the current state of alimony law in Nevada and a review of the proposed alimony statute. He will then moderate a debate between LYNN Z. GOLD-BIKEN, former chair of the ABA Family Law Section and BRUCE KAUFMAN, President Elect of the ABA Family Law Section, on the benefits and detriments of an alimony formula. Arbiters of the debate will be members of the judiciary. This controversial question will be open to the audience for discussion and a straw poll will be taken to determine whether the family practitioners of this state favor or oppose an alimony formula.

Our experts and out of town guests will conduct a "Hot Tips From the Experts' Roundtable. Other Roundtable topics will include: pension valuation; the connection between financial statements and tax returns; UIFSA and recent welfare legislation; and other scintillating subjects.

To enable new practitioners to participate in the Tonopah seminar, a specially reduced tuition for the entire seminar will be offered to all newly admitted attorneys. Tuition waivers will be granted to Supreme Court Law Clerks, Family Court Law Clerks and Rural District Court Law Clerks.

There will be several vacancies on the Family Law Section Executive Council. I urge anyone who is interested to throw his or her hat in the ring and run for a seat on the council. New faces and ideas are needed to keep the section vital and ensure its continued growth and excellence. Get involved. You will receive as much from the experience as you give.

Judge McGee will again host a picnic at his ranch. If you have never been, plan to return to Reno on Saturday, March 22, 1997 via the McGee Homestead. The food, scenery and generosity of Judge McGee ar well worth the slight detour.

If you have never attended the family law seminar in Tonopah, find out this year what over 200 lawyers and judges from around the state discovered last year. The quality of CLE cannot be beat. Tonopah is fun, educational and relaxing. (Have you ever seen anyone in Tonopah wearing a three-piece suit or carrying a cell phone?) Judges and lawyers from around the state socialize and interact in a friendly, informal setting conducive to camaraderie, not competition. There is much to learn and much to gain from the "Tonopah" experience. Don't miss it.

Lost Factors con't

the mother's pregnancy and confinement;

(i) The cost of transportation of the child to and from visitation if the custodial parent moved with the child from the jurisdiction of the court which ordered the support and the noncustodial parent remained;

(j) The amount of time the child spends with each parent;

(k) Any other necessary expenses for the benefit of the child; and

(l) The relative income of both parents.[9]

NRS 125B.080 provides, in part, that when the amount of support deviates from the statutory presumption, the court "*shall*" state how much the support award would be under the statutory guidelines and set forth the specific basis for the deviation from the formula. NRS 125B.080(6).[10] Few of these factors, however, have been litigated and there is little guidance from the Nevada Supreme Court, or in the legislative history, on when or how these factors should be utilized in arguing for a deviation.

Articles, Case Summaries Wanted for NFLR

The Nevada Family Law Report seeks to provide interesting and substantive family law material to educate both the bench and the bar. NFLR needs articles for upcoming issues. If you are interested in writing critiques of pertinent cases, reports/opinions of family law legislation or discussions of family law trends and issues, please request authors guidelines from Editor Mary Rose Zingale, 528 Commercial St., Elko, NV 89801.

Articles published in the NFLR are eligible for continuing legal education credits. Contact the MCLE Board, 329-4443, for applications.

The Section's publication needs your input and contributions. Please contact an editor to discuss any article topic, critique or book review.

The fact is, litigants are now limited to arguing for deviations on the specific factors of 125B.080(9). At the present, any equitable adjustments to the child support formula must "be tied to the factors in NRS 125B.080(9). . . Equitable principles alone are simply insufficient." *Khaldy v. Khaldy*.[11] From *Barbagallo*[12] to *Lewis v. Hicks*[13] to *Khaldy*, the clear trend of the Nevada Supreme Court has been to limit the lower court's discretion in deviating from the guidelines.[14] The wisdom of this trend, however, depends on one's faith in the district court to set a fair and consistent child support award. After all, the purpose behind statutory guidelines was to limit the lower court's discretion in setting child support.[15]

In the recent case of *Khaldy v. Khaldy*, the supreme court expressly stated that "NRS 125B.080(9) limits the factors a court may consider when it deviates from the formula.[16] "The district court may use equitable principles in considering a deviation, as long as the deviation is *based* on one of the factors enumerated in NRS 125B.080(9)."[17] Many of those enumerated factors, however, have not been utilized. This article was therefore written for the purpose of discussing how and when these factors may be utilized by attorneys and judges in deviating from the statutory amount of support.

The Factors

A. The cost of health insurance.[18] Both parents are responsible for the health care needs of their children.[19] Virtually every case involving minor children includes controversy over the cost of health insurance as it relates to the child support obligation. There is, however, no provision in NRS 125B specifically requiring either parent to provide or pay for health insurance. So it appears only fair that neither party should be required to bear the entire expense of maintaining health insurance for the minor children, and that the cost should be divided. The question then becomes whether this expense should be divided equally, or proportionately based on the parties' respective incomes.[20]

NRS 125B.080(7) provides that expenses for health care which are not reimbursed by insurance "must be borne equally by both parents in the absence of extraordinary circumstances." Depending on the income levels of each parent, it would seem fair that, in most circumstances, the parents should equally divide the cost of health insurance for the minor children. If the custodial parent is providing the insurance, one-half of the cost should be added to the noncustodial parent's child support obligation; if the noncustodial parent is maintaining the insurance, one-half of the cost should be deducted from the noncustodial parent's child support obligation. In district courts of Southern Nevada, this has been a general practice.

B. The cost of child care.[21] Unlike medical expenses, there is no statutory presumption with regard to the treatment of child care expenses. Other states handle this issue in different ways. The states that use the income sharing method to calculate child support apportion this cost based upon the parties' respective incomes. The Wisconsin formula, which Nevada's child support statutes are modeled after, arguably assumes that the cost of child care is considered in the statutory percentage.[22] It may also be noted, however, that the guidelines were based on studies made between 1950 and 1980. During that study period, child care was statistically a very small expense in most households. The nature of child care in America has radically changed since that time and most states today consider the cost of child care in some other way.[23]

Child care costs have substantially risen in recent years and often the custodial parent's day care expense exceeds the child support award.[24] Child care expenses average ten percent of annual income, coming in fourth behind only housing, food and taxes. In the summer months, the cost can be as much as 22%. The percentage is substantially more for parents with incomes of less than $15,000.00 per year.[25]

The courts, including those in Nevada, have been slow in reacting to the increase in child care expenses and have not uniformly increased support based on this factor alone. If it is argued that child care is included in the statutory presumption, then why was it included as an enumerated factor in 125B.080(9)? The State Bar of Nevada Child Support Review Committee Report recommended that

child care expenses "be awarded in addition to the formula amount and allocated between the parents in proportion to their relative incomes."[26] This, however, ignores the reality that child care was factored into the formula to some degree and noncustodial parents could be overpaying if they are paying child care in addition to the statutory formula. The legislature clearly needs to address this area.

C. Any special educational needs of the child.[27] This is one of the many factors that have not been addressed by the supreme court. This factor, however, should not create much controversy because if a child needs special assistance, both parents should contribute. Again, the question becomes how should the court calculate the parents' respective contributions? Should the parents contribute equally or pay proportionate to their income? Wisconsin law provides that the court may allocate a portion of the child support award to be placed in "a separate fund or trust for the support, education and welfare" of the child.[28]

D. The age of the child.[29] There can be little argument that the cost of supporting a child varies with the child's age. Raising an infant brings higher expenses which are associated with birthing, formula, diapers, etc. A toddler through preteen, however, may involve less expense. But when a child reaches the teens, the costs rise again. Some states have different child support awards for different ages. This, however, has not generally been litigated on a significant basis.

If a child's parent's divorce while the child is young, the child support received on behalf of the child may average out over life of child, but parents get divorced when their children are different ages. There is also an obvious relationship between this factor and day care expenses. Our legislature may wish to consider adopting a modified child support formula taking into consideration the specific age of the child.

E. The responsibility of the parents for the support of others.[30] This factor does not limit the court's discretion to base a deviation from the formula solely upon a parent's responsibility for the support of other children; the court may consider parents, siblings or step-children. Thus far, however, serious consideration has only been given for prior or subsequent children of the obligor parent. For example, New Hampshire specifically provides that the court "shall" take into account any step-children for which the party is responsible.[31]

This is one of the more controversial factors for deviation from the formula and has been addressed by the Nevada Supreme Court on several occasions. *Hoover* appeared to some to indicate that, despite NRS 125B.080(9)(e), other children would not be a basis for deviation from the formula. The supreme court in *Hoover*, however, technically only objected to the lower court's formalistic approach outside the guidelines of NRS 125B. In *Scott*, the court found that a deviation from the statutory formula, which reduced support payments of $793.43 per month for two children to $600.00 per month, was proper based on the payor's responsibility for the support for others. One should keep in mind the supreme court's warning in *Lewis v. Hicks*, however, that NRS 125B.080(9)(e) should be applied "cautiously" and deviations "should be the exception rather than the rule."[32]

This particular factor will most likely come into play in situations such as the following: An obligor parent, who is getting divorced from a second spouse, now has two families to support. Should the second family receive child support based on the payor's full gross monthly income, or should the support be based on the payor's full monthly income less the previously existing child support award? There are two major approaches being used to resolve this question: the "first mortgage" approach and the "equal treatment" approach. These competing theories will likely be debated forever, and an in depth review is beyond the scope of this article.[33]

The "first mortgage approach" argues that the second family already had the burden of paying the first child support award and therefore enjoyed a standard of living based on less income. Using this approach, the first family should not have to endure a lower child support award because the payor decided to have more children with a spouse who was aware of the existing child support obligation. In other words, a payor parent should not be able to decrease his or her support obligation to an existing family by undertaking the obligation of having a subsequent family.[34] By contrast, the "equal treatment" approach simply promotes the policy that all children should be treated the same and each should receive the same proportionate share of support.[35]

The guidelines were intended "to provide a uniform predictable measure of child support, not a variant method where a child's support can be reduced or increased by subsequent changes outside his or her family."[36] "Although both earlier and subsequently born children are innocent and have no control over their situation, the parent who brings children into the world knowing the existing prior obligation should not be entitled to an automatic reduction in child support."[37] Arkansas' child support guidelines specifically provide that any existing child support obligations should be deducted from the income of the payor spouse.[38]

The following are hypothetical situations which illustrate how this factor has been applied in the district courts in Clark County. When necessary, the parties in the following hypothetical situations will be designated as either P1 (the custodial parent) or P2 (the noncustodial parent).

1. In a current divorce action, P2 has one child and is obligated for the support of two children from a prior marriage; P2 earns $2,000 per month. With a preexisting support obligation of $500.00 for the two children from the prior marriage (25% of $2,000.00), P2 now has an adjusted gross monthly income of $1,500.00 which yields a child support obligation to the "second family" of $270.00 (18% of $1,500.00).

2. The divorcing parents of four children have agreed that Wife shall maintain custody of three children while Husband shall maintain custody of one child; Wife's gross monthly income is $1,000.00; Husband's gross monthly income is $2,000.00. In situations, such as this, varying methods for determining child support obligation(s) may be used by the court. Results may vary depending upon the split-custody calculation method used by the court.

By one method, the court follows the child support formula in determining the child support obligation of each parent as

if the child in the custody of the other was the only child at issue. The court then offsets the sums each would owe the other. Applying this method to the above situation, Husband would be obligated to pay Wife child support in the amount of $580.00 (29% of $2,000.00) and Wife would be obligated to pay Husband child support in the amount of $180.00 (18% of $1,000.00). The net result is that Husband would be obligated to pay Wife child support in the amount of $400.00 ($580.00 - $180.00).

By another method, the court determines for each parent the total percentage amount of child support that would be due if all of the children were residing with the other parent, divides this percentage amount by the number of children at issue to determine the percentage of income to be paid per child, multiplies this percentage by the number of children being supported by the other parent, assigns the results to the respective parents according to the number of children each maintains, and then offsets the sums each would owe the other. Applying this method to the above situation, Husband would be obligated to pay 21_% (_ of 29%) of his monthly income [which calculates to $435.00 in this situation] to Wife, and Wife would be obligated to pay 7_% (_ of 29%) of her income [which calculates to $72.50 in this situation] to Husband. The net result is that Husband would be obligated to pay Wife child support in the amount of $362.50 ($435.00 - $72.50).

By yet another method, the court determines for each parent the total formula amount of child support that would be due if all children were residing with the other parent, divides this amount by the number of children at issue to determine the amount of support to be paid per child, multiplies this amount by the number of children being supported by the other parent, assigns the results to the respective parents, and then offsets the sums each would owe the other. Applying this method to the above situation, Husband would be obligated to pay Wife $145.00 per month per child (29% of $2,000.00 = $580.00; $580.00 _ 4 = $145.00) for a total of $435.00 per month ($145.00 x 3), and Wife would be obligated to pay Husband $72.50 per month per child (29% of $1,000.00 = $290.00; $290.00 _ 4 = $72.50) for a total of $72.50 per month ($72.50 x 1). The net result is that Husband would be obligated to pay Wife child support in the amount of $362.50 ($435.00 - $72.50).

One must keep in mind, however, that the Nevada Supreme Court has prohibited the district courts from devising their own formulas. *See Hoover* and *Lewis*.

F. The value of services contributed by either parent:[39] This is a rather broad, vague factor which, although it could be used in many ways, has not been addressed by the supreme court or the legislature and has probably not been addressed much at the trial level. The question of whether the services that the custodial parent provides should be considered in calculating a child support award was presented in *Lewis v. Hicks*, but the supreme court declined to address it.

The custodial parent's income is only indirectly reflected in the statutory formula, but the guidelines should not overlook the value of the custodial parent's own child care services and should encourage the desirability that the custodial parent remain in the home as a full-time parent. It is inconsistent to reimburse a custodial parent in whole or in part for the expense of paid child care while denying any financial recognition for the value of the care provided. This inconsistency could be resolved by dividing the cost of full-time day care between the parents in all cases and allowing the custodial parent to spend this allotment any way that parent desires.[40] Of course, it then follows that if the noncustodial parent exercised greater than average visitation or provides "day care services," then that parent, too, should be provided consideration.

Rearing children requires expenditures of both time and money. Less tangible, but no less important, is the income the custodial parent forgoes by working less and spending more time with the child. These "opportunity costs" borne by the custodial parent may be measured in terms of reduced working hours, greater time away from work, limits on after hours commitments, and being forced to accept lower paying and less challenging jobs, in order to be nearer and more available to the children and to accommodate their school schedules. Because of the additional demands that go along with being the primary parent, the custodial parent also enjoys less leisure time.

Although the Nevada Supreme Court declined to address the issue, in Wisconsin the statute provides that the court should consider the desirability that the custodian remain in the home as a full-time parent.[41] It also provides that the court should consider the value of custodial services performed by the custodian if the custodian remains in the home.[42] And in Arkansas, an unemployed spouse will be counted as two dependents for the purpose of calculating support.[43]

G. Any public assistance paid to support the child:[44] It is unclear how this factor should be considered in a child support obligation. Obviously, if a child is receiving public assistance, the court will order the parent or parents to pay the appropriate support. If, however, a child is receiving disability payments due to the noncustodial parent's disability, should the child receive that disability payment plus an additional sum based on the parent's disability income?[45] In Arkansas, as in most states, if the payor parent is receiving Social Security Disability, "the court should consider the amount of any separate awards made" to the children.[46]

H. Any expenses reasonably related to the mother's pregnancy and confinement:[47] At first glance this may appear similar to the NRS 125B.080(7) requirement for parents to share unreimbursed medical expenses of their minor children, but it has the potential to be far broader. The language for this factor was taken from the paternity statute and dates back to 1923.[48] Although it has never been interpreted by the supreme court, it appears that it could be read to include lost wages and other incidental expenses of a mother while pregnant.

I. The cost of transportation of the child to and from visitation if the custodial parent moved with the child from the jurisdiction of the court which ordered the support and the noncustodial parent remained:[49] This factor is perhaps the most abused by litigants, attorneys and judges alike. This factor

should become much more prominent with the recent significant liberalization of NRS 125.350.[50] It should, however, be one of the easiest to utilize and, hopefully, will be examined before a request for relocation is granted.

Oftentimes in cases involving a transportation expense, courts would merely use the expense as an arbitrary factor upon which to base an "equitable" deviation from the child support award. There would often be no relationship between the amount of the expense incurred for travel and the amount of the deviation awarded. Further, the deviation would often be awarded without consideration as to whether or not the noncustodial parent actually utilized the visitation or incurred the expense.

The court should first carefully examine the cost of the noncustodial parent's exercising visitation over the period of an entire year. Next, the court should take that cost and divide it by twelve to calculate an average monthly transportation expense. The court should then apply the transportation as a monthly offset and specifically provide that, if the visitation is not utilized, or if the expense related to the transportation is not incurred, then the offset may not be taken.

On a related note, a question often arises as to whether this expense should be divided or should it become the burden of the parent who left the jurisdiction where the child resides?[51] Equity would seem to dictate that the parent who left the jurisdiction where the child resided and therefore caused the expense to arise should be responsible for the entire expense. On the other hand, however, it does not seem fair that the noncustodial parent, who would suffer the loss of being distanced from his or her children, should also bear the entire burden of transportation. If the noncustodial parent cannot afford it, this will result in the parent being unable to see his or her children. Of course if both parties move from the jurisdiction, it may be fair to have the parents equally divide the expense. The court, therefore, must look at the parties' respective incomes and the frequency of visitation before ordering such. Hopefully the visitation by the noncustodial parent will be determined to be feasible before the move is granted.

A recent Nevada Supreme Court case addressed, for the first time, the interplay between the presumed level of support and the manner in which a deviation should be calculated. Should a court provide the noncustodial parent an offset before or after applying the presumptive maximum support level of $500.00?[52] In affirming the trial court, the supreme court found that once child support is established under the statutory guidelines, the court may then consider deviating from the child support award based on the travel expenses.[53] In a footnote, however, the court implied that its decision could be different in a case where the noncustodial parent's income exceeded the presumptive $500.00 per month by more than a nominal sum.[54]

J. The amount of time the child spends with each parent:[55] This is another difficult factor because it presents the question, "How much time should the noncustodial parent have the child before he or she receives an abatement in his child support obligation?" Only one-half of this country's children live in a "traditional nuclear" family.[56] As more children live in split homes, this issue will continue to emerge. It generally emerges as a means of obtaining a reduction in the noncustodial parent's child support.

The Nevada Supreme Court in *Barbagallo*[57] stated that an abatement should not be granted unless an "injustice" would occur. This decision applied to weekly visitation. Although the statute presumes that there will be a certain amount of visitation by the noncustodial parent, how much is not clear.

This factor has generally been litigated on how much time does the noncustodial parent have with the child before the court will order an abatement. Should the court look at the decreased financial burden of the custodial parent or the increased financial burden of noncustodial parent? Custodial parents still have fixed expenses, such as rent and utilities, which will not be eliminated when the noncustodial parent has visitation or extended custody. Other expenses of the custodial parent, however, decrease, such as food, entertainment and perhaps clothing. Further, it must be considered that the noncustodial parent may have an increased rent and utilities expense in order to accommodate substantial visitation with his or her children. Additionally, the noncustodial parent will surely have increased food and entertainment expenses while caring for the child.[58]

Barbagallo presents difficult questions, such as how much time, and what kind of time, is appropriate for a court to consider when deviating from the statutory formula. Which parent receives credit for the child during school hours or during the night? It is not an easy question to determine when a noncustodial parent should receive an abatement in his or her child support obligation.

Conversely, because the statute presumes that the noncustodial parent receives some level of basic visitation, if the noncustodial parent does not exercise any visitation, should this be a factor in increasing support based on the fact that the custodial parent has a greater burden? An Arkansas court held that "assessing economic penalty for not exercising visitation would be an indirect means of ordering visitation."[59] The dissent, however, opined that the guidelines contemplate visitation with the noncustodial parent every other weekend for two days. If this visitation is not exercised, this could mean an additional 66-82 days of care that the custodial parent must provide and finance.[60] Arkansas provides for an abatement for visitations in excess of 7 consecutive days.[61]

The Nevada legislature was aware of the problem relating to the formula, but took no action. The original bill provided that the presumptive level of support would apply if the noncustodial parent had physical custody for less than 147 days per year, which is approximately 40 percent of the time. If that time share was exceeded, the guideline amount would be multiplied by the custodial parent's fractional time and that was the amount payable.[62] Arkansas' guidelines presume that the noncustodial parent will have visitation of alternating weekends and several weeks during the summer. If the noncustodial parent spends in excess of 14 consecutive days with the child, the court should consider whether an adjustment is necessary, giving consideration to the fixed obligations of the custodial parent which are attributable to the child,

ATTORNEYS SHOULD BE MORE CREATIVE IN ATTEMPTING TO UTILIZE THE FACTORS OF NRS 125B.080(9) AND THE COURTS SHOULD BE MORE OPEN TO REASONABLE DEVIATIONS.

and to the increased costs of the noncustodial parent attributed to the child's visits. The court may award an abatement up to fifty percent of the child support award.[63]

A separate issue that frequently arises is that of an abatement for extended visitation, such as summer vacation. Many of the judges in Clark County provide noncustodial parents with extended visitation (generally for one month or more), and along with the visitation, award noncustodial parents a one-half abatement in their child support obligations during the period in which those parents have the child. This seems a reasonable compromise regarding periods such as summer visitation. It is generally in the child's best interest to spend as much time with each parent as possible. It therefore appears equitable that each parent bear a part of the burden and that the burden should not always fall solely on the noncustodial parent.

Either the legislature or the supreme court should address these issues so that there can be some level of uniformity in treating these common issues. In any event, abatements should be granted only "after the fact" in cases where the noncustodial parent actually exercises the visitation.[64] In other cases, the custodial parent should have the burden of seeking reimbursement for an unearned offset.

The usual application of a child support guideline is with a traditional custodial arrangement in which one parent has primary custody of the child or children and the other parent has limited visitation. In recent years, however, shared physical custody arrangements have become more common.[65]

Shared custody situations have also given rise to the use of mathematical formulas for calculating child support. Although such formulas have not been adopted by the legislature or by the supreme court, and although the lower courts may not explicitly use such formulas for fear of being reversed by the supreme court, the lower courts have nevertheless done so.

The Nevada Supreme Court and the legislature have yet to address the manner in which a district court should set child support in a shared custody situation. In a shared custody arrangement, the cost for each parent does not decrease proportionately. More likely, there is an increase in the total expenditures on behalf of the child.[66] The courts, however, must balance the equities between the parents and the impact it will have on the children's standard of living while in each parent's respective custody. The district courts desperately need guidance in this area.

An equal physical custody arrangement does not necessarily mean that there should not be child support paid by one of the parents.[67] Even if one parent has substantial visitation or shared custody, he or she should not be excused from paying child support if the circumstances justify such.[68] In some cases, the parties may attempt to posture themselves during the litigation in order to minimize or maximize their child support award.[69]

"Under the most common approach, each parent theoretically owes support to the other, based on the proportion of time the child spends with the *other* parent. The theoretical support amounts thus calculated are then offset ('cross-credited'), with the parent owing the higher amount paying a net obligation."[70] There is authority in Nevada's legislative history that supports this type of calculation. Although the legislature did not act with regard to adopting a formula in a joint custody situation, it was contemplated.[71]

The problem with these methods, however, is that they often result in child support awards that are "too low" and do not provide "adequate compensation to the lower income parent for actual child rearing expenditures."[72] Such adjustments fail to consider that some expenses in a shared physical custody arrangement are being duplicated.[73]

To resolve this problem, the court or legislature may wish to find that for the purpose of calculating child support in an equal shared custody situation, the court should consider the parent with the lesser income the primary physical custodian. The court should begin with the statutory presumption and use the factors set forth in NRS 125B.080 to consider any deviation based on the enumerated factors. There is an equal duty of both parents to contribute toward the support of their children in proportion to their respective incomes. NRS 125B.020(1). The needs of the child are in part determined by the income level of the parents and the ability of each parent to contribute support in proportion to his or her share of that income level. After all, the percentage of income approach reflects a public policy that, after a family separation, parents should spend on their children the approximate percentage of income that they would have had the family stayed together.[74] The statutory sum considers the child's need as well as the income that each parent should contribute to the financial responsibility of his or her child. The guidelines, in part, are based on the benefit a child will receive by receiving a fair portion of each parent's income. The statutory formula is a means of calculating child support so as to maintain the standard of living that the child would have enjoyed if his parents had not divorced.[75] Considering this purpose, the fact that there is a joint physical custodial arrangement should not alter the manner in which the court calculates child support.

K. Any other necessary expenses for the benefit of the child:[76] In *Scott*,[77] the supreme court stated that "any other necessary expenses for the benefit of the child" could justify a deviation. In *Scott* these other necessary expenses appeared to be for the special educational needs of an adult child. The court could have used 125B.080(9)(c) or 125B.110 to justify the support award in *Scott*, and its citation

of 125B.080(9)(k) appears to have had no special significance.

L. The relative income of both parents:[78] The percentage of income formulas generally do not consider the income of the custodial parent. It presumes that the custodial parent will spend the same percentage of income directly on the child as the noncustodial parent has been assessed for child support.[79]

Herz[80] and *Chambers*[81] clearly stand for the proposition that the income of the payor parent may be considered in deviating from the statutory formula. But if the noncustodial parent earns $20,000.00 per year and the custodial parent earns $200,000.00 per year, should the noncustodial parent still be required to pay 18% of his or her gross monthly income for child support? NRS 125B.020 states that both parents have an obligation to support their children. Conversely, if the custodial parent is on food stamps and the noncustodial parent earns $250,000.00, should the noncustodial parent be allowed to pay only the statutory formula amount? *Herz* clearly implies that a purpose of the child support statute is to permit a child to share in the wealth and standard of living of the noncustodial parent.

In *Rodgers v. Rodgers*,[82] the supreme court held that "under appropriate circumstances, a noncustodial parent's community interest may be taken into account pursuant to NRS 125B.080."[83] In the recent case of *Jackson v. Jackson*,[84] the supreme court held that an obligor's cohabitant's income may also be considered. These two cases, however, conflict with *Lewis v. Hicks* in one aspect. In *Lewis v. Hicks*, the supreme court said that spousal income may not be used "directly" in setting child support.[85] A court, however, may consider spousal income "where they have a significant impact on recognized statutory factors."[86] In a footnote of *Lewis v. Hicks*, the supreme court noted that with the repeal of NRS 125B.060,[87] "the courts no longer have explicit authorization to consider the parents' standard of living or their financial means other than from income." In fact, the court noted that Nevada's statutory scheme "does not authorize consideration of spousal income" and in fact noted that the Nevada legislature specifically rejected such a use.[88]

Nevertheless, *Rodgers* and *Jackson* may be read in harmony with *Lewis*. *Lewis v. Hicks* addressed the importance of the income of the custodial parent's spouse and stated that a court may consider a spouse's contribution if it has a "significant impact on recognized factors, such as the parents' standards of living or their relative financial means."[89] Nevada, however, "does not authorize using spousal income directly."[90] *Rodgers* and *Jackson* address the issue of the noncustodial/obligor spouse's income. These cases confirm the finding in *Lewis* that only the obligor's actual monthly income should be used in calculating the presumptive amount of support pursuant to NRS 125B.070. In setting child support, however, the court may consider, for the purpose of deviating from the presumptive level, the income of the obligor parent, his spouse or any other relevant factor to insure that he is providing the child with an appropriate level of support. Support may be found in this case law that the court should not consider the income of the custodial parent's spouse because this factor is irrelevant to the obligor's obligation to his child.

As stated above, the implementation of the guidelines as a rebuttable presumption requires a court to apply the guidelines unless the result would be inequitable to the parties or children, in which instance, reasons for the deviation must be stated on the record.[91] NRS 125B.080(6) requires the court to set forth specific findings of fact as to the basis for a deviation from the formula. The basis for the deviation must be found in unfairness or injustice that would result from application of the formula.[92] Equity alone is not sufficient to justify a deviation; a deviation must be based on the nine factors.[93] The legislature found this condition so essential that, even in cases where the parties stipulate to an award of child support which is not in conformance with the statutory guidelines, it requires the parties to provide sufficient facts which justify the deviation.[94] In fact, the original draft of NRS 125B.080 required a court to set forth written findings if the award deviated by five percent either higher or lower than the formula's presumptive amount.[95] The five percent provision was deleted from the final version, however, symbolizing the legislature's conviction that *any* deviation should be justified.

The intent of the statutory presumption was to make the presumptive amount binding absent a judicial finding of "exceptional circumstances."[96] Specific findings of fact are, in part, required so that the parties may understand the "justice" of the support award thereby leading to fewer appeals.

The Future of NRS 125B.080(9)

Although the supreme court in *Khaldy* stated that a deviation must be based on one of the nine factors, and that general principles of equity are insufficient causes for deviation, the list of factors in NRS 125B.080(9) is by no means exhaustive. The legislature chose nine factors it believed to be most important in determining whether a deviation from the statutory guidelines is appropriate. Other states, however, have considered factors not yet addressed by our supreme court or legislature. As family structures and economic conditions evolve, this state may find it appropriate to begin considering additional factors in setting a child support obligation. For example, Wisconsin has a statute that allows the court to consider the financial resources of the child;[97] and Arkansas permits consideration of factors such as what award would be in the best interest of the child, the cost of food, shelter, utilities, clothing, recreation and life insurance.[98]

Despite this possibility for the addition of further factors for consideration, however, certain factors will likely always be considered inappropriate. In addition to general equity, the supreme court has ruled that certain factors *may not* be considered in deviating from the statutory formula. Most notable of these excluded factors is the parents' other expenses.

The adoption of the guidelines shifted the determination of child support awards away from an expense-based process and toward an income-based process.[99] In *Lewis v. Hicks* the supreme court stated that "[t]he legislature's purpose in using 'gross monthly income' [as a basis for setting child support] was to avoid judicial examination of the minutiae of a

parent's finances."[100] The problems with the expense-based approach are obvious:

1. Expenses are within the control of the parties;

2. Expenses are easily manipulated;

3. Child support awards would be based solely on arbitrary decisions regarding the propriety of expenses;

4. Either party may seek a modification every time there is a change in expenses;

5. It is also difficult to separate an expense from parent to child. Most expenses of child rearing are commingled with expenditures benefitting the entire household. How is a court expected to determine the child's proportionate share of a three-bedroom-house, transportation of the child to and from school, the child's food, or other expenses?[101]

"The expense-based approach requires a court to investigate the reasonableness of a parent's expenses, and it also encourages a parent to increase his expenses prior to a court hearing."[102] "Neither judicial economy nor the best interest of the parties are served by a formula which requires that the parties litigate $77 dry cleaning bills.[103]

Another factor which will likely always be deemed inappropriate is the notion that the income of the custodial parent's spouse should be considered in calculating the noncustodial parent's child support obligation.[104] There is a long history of American Jurisprudence which rejects any attempt to hold a stepparent or cohabitant even jointly liable for the support of their partner's children.[105] It is an established public policy that marriage should not be discouraged by imposing costs upon it which are not equally imposed upon nonmarital partnerships.[106]

More importantly, a proposed amendment to consider spousal income was reviewed by the Nevada legislature, but ultimately rejected.[107] In addition to the fact that the noncustodial parent still has an obligation to provide his child with support despite the subsequent remarriage of the custodial spouse, the custodial parent's income, or that of her spouse's contribution, is implicitly included in the formula because the noncustodial parent must still contribute a fair portion toward the child. *Lewis* held that the statutory scheme does not authorize consideration of spousal income, unless it has a significant impact on the parties' standard of living.[108] Presumably, a "significant impact" could exist if the income of the parent's subsequent spouse was substantial enough to enable the parent to discontinue his or her employment.

Yet another factor that will likely always be deemed inappropriate is the relationship between the withholding of visitation and the withholding of child support. In *Westgate v. Westgate*,[109] the court held that failure to provide visitation is not a proper basis to reduce child support. "Child support under Nevada guidelines cannot be reduced to punish one spouse for refusing to allow visitation. . . . NRS 125B.080 does not list punishment for failure to provide visitation as a reason to cut child support."[110]

Conclusion

Attorneys should be more creative in attempting to utilize the factors of NRS 125B.080(9) and the courts should be more open to reasonable deviations. The amount of the deviations, however, should have a direct correlation to the factors being relied upon and should not be arbitrary amounts that the courts deem equitable.

Notes

[1]Pub. L. No. 98-38, section 18, 98 Stat. 1305.

[2]*See* Nevada Child Support Enforcement Commission Minutes, June 23, 24, 1986, page 3.

[3]Pub. L. No. 100-485, 102 Stat.

[4]*Id.*

[5]*Id.*

[6]*See* Williams, *Guidelines For Setting Levels of Child Support Orders*, 21 Fam. Law Quart. 281, 283 (1987); *Child Support Guidelines: Formula To Protect Our Children From Poverty and the Economic Hardships of Divorce*, 23 Creighton 835 (1990); Goldfarb, *Child Support Guidelines: A Model For Fair Allocation of Child Care, Medical, And Educational Expenses*, 21 Fam. Law Quart. 335 (1987); U.S. Department Of Health And Human Services, Administration For Children and Families, Office Of Child Support Enforcement, The Treatment of Multiple Family Cases Under State Child Support Guidelines, July, 1991 pages 1-4 (hereinafter "Treatment") citing U.S. Bureau of the Census, U.S. Dept. of Commerce, Divorce, Custody and Child Support, Current Population Reports, Series P-23, No. 84 (1979), Bureau of the Census, U.S. Dept. of Commerce, Child Support and Alimony - 1983, Current Population Reports, Series P-23 No. 141 (1985); Bureau of the Census, U.S. Dept. of Commerce, Child Support and Alimony: 1985 (Supplemental Report), Current Population Report, Series P-23, No. 154 (1989).

[7]*See* Williams, *Guidelines For Setting Levels of Child Support Orders*, 21 Fam. Law Quart. 281, 282, 326 (1987). *See also* Advisory Panel On Child Support Guidelines, Development Of Guidelines For Child Support Enforcement, National Center For State Courts 1-3, 4 (1987) (hereinafter "Advisory Panel").

[8]NRS 125B.070 provides as follows:

Definitions.

1. As used in this section and NRS 125B.080, unless the context otherwise requires:

(a) "Gross monthly income" means the total amount of income from any source of a wage-earning employee or the gross income from any source of a self-employed person, after deduction of all legitimate business expenses, but without deduction for personal income taxes, contributions for retirement benefits, contributions to a pension or for any other personal expenses.

(b) "Obligation for support" means the amount determined according to the following schedule:

(1) For one child, 18 percent;

(2) For two children, 25 percent;

(3) For three children, 29 percent;

(4) For four children, 31 percent; and

(5) For each additional child, an additional 2 percent,

of a parent's gross monthly income, but not more than $500 per month per child for an obligation for support determined pursuant to subparagraphs (1) to (4), inclusive, unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080.

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

[9]NRS 125B.080(9).

[10]A.B. 502, 1993 amended NRS 125B.080 to require the actual support amount, before deviation, be included in the order. Further if the parties stipulate to an amount of child support, the parties must certify that the amount of support is consistent with the statutory formula. If the amount deviates from the formula, the parties must stipulate specific facts pursuant to NRS 125B.080(9) to justify the deviation. NRS 125B.080(2).

[11]111 Nev. 374, 892 P.2d 584 (1995).

[12]105 Nev. 546, 779 P.2d 532, 786 P.2d 673 (1991).

[13]108 Nev 1107, 111, 843 P.2d 828 (1992).

[14]*See also Westgate v. Westgate*, 110 Nev. 1377, 887 P.2d 737 (1994).

[15]*Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992); *Scott v. Scott*, 107 Nev. 837, 822 P.2d 654 (1991); *Hoover v. Hoover*, 106 Nev. 388, 793 P.2d 1329 (1990).

[16]111 Nev. 374, 376, 892 P.2d 584 (1995).
[17]111 Nev. 374, 377, 892 P.2d 584 (1995). [Emphasis original.]
[18]NRS 125B.080(9)(a).
[19]*See* NRS 125B.020; NRS 125B.080(7); NRS 125.450(1).
[20]*See generally* State Bar of Nevada Child Support Review Committee Report, August 1, 1992 at page 24-25.
[21]NRS 125B.080(9)(b).
[22]*See* Dodson, *A Guide to the Guidelines: New Child Support Rules Are Helping Custodial Parents Bridge the Financial Gap*, Spring, 1988 Family Advocate 4 (American Bar Association), at 9.
[23]Child Support Abuse of Discretion Reviews (National Center For State Courts, Pre-Publication Draft Tables, 1991), Table 7. *See also* State Bar of Nevada Child Support Review Committee Report, August 1, 1992.
[24]"Summer Child-Care Expenses Have Big Economic Impact," Las Vegas Review Journal, July 19, 1993.
[25]*Id. See also* Dodson, A Guide to the Guidelines; New child support rules are helping custodial parents bridge the financial gap, Spring, 1988 Family Advocate 4 (American Bar Association), at 9; Child Support Review Committee Report, State Bar of Nevada, Family Law Section (August 1, 1992) at 20-23.
[26]Child Support Statute Review Committee Report, State Bar of Nevada, August 1, 1992.
[27]NRS 125B.080(9)(c).
[28]Wis. Stat. 767.25(2).
[29]NRS 125B.080(9)(d).
[30]NRS 125B.080(9)(e).
[31]NH 458-C:4 (III). *See also* 458-C:5.
[32]108 Nev. 1107, 1116, 843 P.2d 828 (1992).
[33]*See generally* Child Support Statute Review Committee Report, State Bar of Nevada, Family Law Section, August 1, 1992, pages 26-32.
[34]*See Brown v. Brown*, 503 N.W.2d 280, 283 (Wis. App. 1993).
[35]*See* Note, *Second Children Second Best? Equal Protection for Successive Families Under State Child Support Guidelines*, 18 Hasting Const. L.Q. 881 (1991).
[36]*Brown* at 283.
[37]*Brown* at 283.
[38]*In re Guidelines For Child Support*, 863 S.W.2d 291, 294 (Ark. 1993).
[39]NRS 125B.080(9)(f).
[40]*See* Goldfarb, *supra*, at 339, *citing* Office of Child Support Enforcement, U.S. Department of Health and Human Services, Review of Literature and Statutory Provisions Relating to the Establishment and Updating of Child Support Awards 29 (1984).
[41]Wis. Stat. 767.25(1)(d).
[42]Wis. Stat. 767.25(1)(e).
[43]*In re Guidelines For Child Support*, 863 S.W.2d 291, 295 (Ark. 1993).
[44]NRS 125B.080(9)(g).
[45]*See i.e., Matter of the Marriage of Beacham*, 867 P.2d 1071 (Kan. App. 1994).
[46]*In re Guidelines For Child Support*, 863 S.W.2d 291, 294 (Ark. 1993).
[47]NRS 125B.080(9)(h).
[48]NRS 126.241 was the paternity statute containing this language. It was subsequently moved to NRS 125B.020. The language of this statute was adopted in AB 17, Chpt. 87, 1923.
[49]NRS 125B.080(9)(i).
[50]*See, e.g., Cook v. Cook*, 111 Nev. 822, 898 P.2d 702 (1995); *Gandee v. Gandee* and its companion case *Montelione v. Montelione*, 111 Nev. 754, 895 P.2d 1285 (1995); *Trent v. Trent*, 111 Nev. 309, 890 P.2d 1309 (1995); and *Porter v. Jones*, 110 Nev. 1253, 885 P.2d 563 (1994).
[51]*See Trent v. Trent*, 111 Nev. 309, 890 P.2d 1309 (1995).
[52]*Garrett v. Garrett*, 111 Nev. 972, 899 P.2d 1112 (1995).
[53]*Id.*
[54]In *Garrett*, the noncustodial parent's gross monthly income was approximately $5,416.64 based on the fact that 25% of his income would have yielded a child support obligation of $1,354.16, only $354.16 more than the presumptive maximum amount of support for two children. In footnotes one and two of the decision, the court stated that in this particular case, it would not make a substantial difference because of the noncustodial parent's income. The court could have started at the amount of $1,354.16 and could still have arrived at the same net child support of $700.00 per month. If, however, the case involved a noncustodial parent whose income was in excess of $10,000.00 per month, meaning 25% of his gross monthly income would be $2,500.00, this factor could be a distinguishing factor as far as the manner in which the travel costs could be calculated.
[55]NRS 125B.080(9)(j).
[56]USA Today, "More Kids Live In Changing Family," August 30, 1994.
[57]*Barbagallo vs. Barbagallo*, 105 Nev. 546, 779 P.2d 532, 786 P.2d 673 (1991).
[58]*See Sjolund v. Carlson*, 511 N.W. 2d 818, 822 (S.D. 1994).
[59]*Carlton v. Carlton*, 873 P.2d 801, 803 (Ark. 1994).
[60]*See id.* Dissent at 804.
[61]Ark. 9-14-106
[62]*See* 1987 Legislative History of A.B. 424 at 2. *See also* Child Support Statute Review Committee Report, State Bar of Nevada Family Law Section, August 1, 1992 at 36, note 72 and accompanying text; Springer, *Some Thoughts On Child Support and Community Property Division*, State Bar of Nevada, Third Annual Family Law Spring Showcase, Tonopah, Nevada, April 3-4, 1992, at page 2.
[63]*In Re Guidelines For Child Support*, 863 S.W.2d 291 (Ark. 1993).
[64]*Sjolund v. Carlson*, 511 N.W.2d 818, 822 (S.D. 1994).
[65]Development of Guidelines For Child Support Orders, U.S. Department Of Health and Human Services, II-54.
[66]*See supra*, note 6.
[67]*Downey v. Rogers*, 847 S.W.2d 63 (Kent. App. 1993).
[68]*Lara v. Lara*, 495 N.W.2d 719 (Iowa 1993).
[69]*Barbagallo vs. Barbagallo*, 105 Nev. 546, 779 P.2d 532, 549, 786 P.2d 673 (1991).
[70]*Id.* at II-57. In at least one Clark County Family Court Department, the court would use the referenced formula, but based on the fact that each parent has the child one-half of the time, each parent would be obligated to pay 9% of his or her income to the other parent (_ of 18%), rather than 18%. This approach, however, results in extremely decreased child support awards that are unfair not only to the parent with the lesser income, but also to the children.
[71]Nevada Child Support Enforcement Commission Minutes, June 23, 24, 1986, City Hall, Reno, Nevada.
[72]*Id.* at II-58.
[73]*Id.* II-59.
[74]*See* Treatment, *supra* note 2.
[75]*See* Advisory Panel, I-3, *supra*, note 2.
[76]NRS 125B.080(9)(k).
[77]107 Nev. 837, 822 P.2d 654 (1991).
[78]NRS 125B.080(9)(l).
[79]*See* Shapiro, *Herz v. Gabler-Herz: Wealth As A Proper Consideration in Setting Child Support Award*, NFLR Fall 1993, 1, 3.
[80]*Herz v. Gabler-Herz*, 107 Nev. 117, 808 P.2d 1 (1991).
[81]*Chambers v. Sanderson*, 107 Nev. 846, 822 P.2d 657 (1991).
[82]*Rodgers vs. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).
[83]*Rodgers* at 1373.
[84]111 Nev. 1551, 907 P.2d. 990 (1995).
[85]108 Nev. 1107, 1112, 843 P.2d 828 (1992).
[86]*Id.*
[87]NRS 125B.060 was repealed by the Acts of 1989, Chpt. 4055, section 16, page 861. NRS 125B.060 provided as follows:

Any court establishing or enforcing an order for the support of a child, in determining the amount to be paid, shall consider the:

1. Needs of the child including needs for medical care.
2. Standard of living and circumstances of the parents.
3. Relative financial means of the parents.
4. Earning ability of the parents.
5. Need and capacity of the child for education.
6. Age of the child.
7. Financial resources and the earning ability of the child.
8. Responsibility of the parents for the support of others.
9. Value of services contributed by the custodial parent.
10. Assistance paid by public agencies to support the child.
11. Reasonably related expenses of the mother's pregnancy and confinement.
12. Formula adopted by regulation of the welfare division of the department of human resources.

[88]*Lewis* at 1112 *citing* A.B. 424, 64th Leg. Sess. of 1987, Legislative History, *Child Support*, 1987 at 76 (1987).
[89]*Lewis* at 1112.
[90]*Id.*
[91]*See Barbagallo* at 552; *Lewis* at 1111.
[92]*See also* Advisory Panel *supra* at I-7, 13.
[93]*Khaldy* at 376-77.
[94]*See* NRS 125B.080(2).
[95]*See* Nevada Legislative History, 87-9, A.B. 424 of the 64th Session, Child Support at 77.
[96]*Barbagallo*, 105 Nev. 546, 779 P.2d 532, 786 P.2d 673 (1989); Advisory Panel, *supra* I-7.

[97]Wis. Stat. 765.25(a).
[98]*In Re Guidelines For Child Support*, 863 S.W.2d 291, 295 (Ark. 1993).
[99]*See* Williams, Guidelines For Setting Levels of Child Support Orders, 21 Fam. Law Quart. 281, 322 (1987).
[100]*Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992).
[101]*Id.*
[102]*Id.*
[103]*Id.*, fn. 2.
[104]*Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992). *But see* NRS 123.130, 123.220, 123.225; *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994); *Jackson vs. Jackson*, 111 Nev. 1551, 907 P.2d 990 (1995).
[105]*See* "Stepparent's Post Divorce Duty To Support Stepchild," 44 ALR 4th 520 (1986); Mahoney, "Support, and Custody Aspects of the Stepparent - Child Relationship," 70 Cornell L. Rev. 38 (1984).
[106]See Treatment, *supra*, note 6; Advisory Panel, P-3, 4, *supra*.
[107]Legislative History 87-9, A.B. 424 of the 64th Session, Child Support, page 76.
[108]*Lewis v. Hicks*, 108 Nev. 1107, 1112, 843 P.2d 828 (1992).
[109]*Westgate v. Westgate*, 110 Nev. 1377, 887 P.2d 737 (1994).
[110]*Id*

Case Summaries

Consent Stipulation for Support Does NOT Bar Child from Later Seeking Determination of Paternity, nor State nor Mother from Seeking Increase in Child Support

Willerton v. Bassham, 111 Nev. _P.2d _ (Adv. Opn. No. 2, Jan. 24, 1995) 1981 paternity action by Mother, Sonoma County, and child (through his guardian ad litem, the state welfare division) sued putative father seeking recovery of welfare payments. In July, 1982, the matter settled under NRS 126.14 1 (1)(b) compromise, with no determination of paternity. Support was set up at $150.00 per month, and the file was sealed. Father filed a motion in 1991 to make the orders a formal judgment, which was granted. Four months later, Mother and child sued in California, seeking a finding of paternity and support. On the Father's motion, the Mother's action was dismissed without prejudice. Father moved in Nevada court for an order declaring the judgment binding and non-modifiable under res judicata. The court refused, finding no paternity determination on record, and that support could be modified under NRS 126.191.

On appeal, the Court examined NRS 126.011 et seq., and NRS 125B.010 et seq.. The question is whether the stipulated compromise agreement precludes any action to modify support.

The Court concluded that the "policies and purposes" behind the statutes "requires a departure from the otherwise appropriate application of the bar and merger principles of res judicata to preclude an action" by the child to determine paternity, or the state to modify support. While the mother is barred from seeking paternity or support, the child is not, and either the child or the state may seek to modify the compromise settlement. Nothing in the parentage act bars the child or an appropriate public agency from seeking to compel additional support in a later action elsewhere.

Generally, a consent stipulation or settlement is a judgment barring a later action on the same claim or cause of action, like any other judgment. While the same claim is thus barred, the same issue is open to relitigation (i.e., no collateral estoppel). Citing *Geissel v. Galbraith*, 105 Nev. 101, 769 P.2d 1294 (1989), the Court noted that consent judgment do have res judicata effect on the parties to them; the rule of law from that case is modified to stated that there is res judicata (claim preclusion) from such a stipulated judgment, but not collateral estoppel (issue preclusion).

There is a public policy exception to application of res judicata principles here; such will be found when "important public policies" are contravened, and "especially" when underlying judgment was on stipulation or settlement. Noting the "finality" and "stability" aspects of res judicata, which thus inspires "confidence in our civil justice system," as well as avoiding vexations and costly piecemeal litigation, the Court notes that the Uniform Parentage Act and Nevada's enactment of it also had "compelling social policies" behind them.

The Court is not convinced that the compromise provision of the act was intended to let a Mother obtain benefits from an alleged father when they would not otherwise be able to do so because of weak evidence. The stated purpose of the pre-trial hearing procedures is to minimize inconvenience and embarrassment.

The Mother has no good reason not to be precluded from re-litigating paternity, so long as stipulated right to support is modifiable, since that is really her only interest in the paternity question. The child, however, may have good reasons such as wrongful death claims, or inheritance, and so should not be barred from litigating the paternity issue. The Court also cites to the child's "dignitary and psychological interest" in ascertaining his "heritage and lineage."

That there was a guardian ad litem does not change the result. Also, the record shows a routine" approval of the settlement, rather than a judicial determination that a declaration of the relationship would not be in the child's best interest; the Court also notes a complete disregard of the child's best interest as an issue on appeal. The Court also noted the deletion of a section of the model act that might have implied that compromises are binding was deleted from the Nevada enactment of the UPA.

The clash of policies leads the Court to believe that the amount of support determined should be modifiable, despite the Father's argument that such a stipulation would give potential fathers no incentive to compromise prior to trial. The language of NRS 125B. 145 does not lead the Court to find otherwise; "defined economic obligation" can mean the same thing as "support," and "when the meaning of a word in a statute is not plain, clear and unambiguous its meaning may be sought by examining the context and policy of the law and the statute should be construed so as to avoid absurd results."

Finally, Father's reliance on terms of NRS 125B.010 (it applies to "all parents of all children") misplaced; while the compromise does not render him a "parent" by adjudication, such a result would be absurd.

Justice Rose, concurring and dissenting, notes that 20 years ago when the act was proposed, test results were less certain and the compromise procedure was set up to allow mothers and children to get something, even if lesser rights than

others. Present public policy should not allow the statute to be re-interpreted, although he concurs that the child support statute does permit the modification of the voluntary obligation undertaken by the alleged father, if the modification "takes into account the policy reasons that permitted such a compromise."

District Court Cannot Lower Non-Custodian's Child Support Obligation After Change of Custody to Compensate for Other Spouse's Failure to Voluntarily Pay More Than Was Court Ordered When Wife Was Paying Support

Khaldy v. Khaldy, 111 Nev. P.2d (Adv. Opn. No. 26, Mar. 30, 1995) An original divorce decree ordered $200.00 per month child support by Father to Mother. When Mother turned child over to Father, he filed an action to formalize the de facto change of custody, and for support. The district court (Fine) awarded custody but awarded him only $200.00 per month support, although NRS 125B.070(b) indicated she should pay $395.00 per month, and further ordered that no support was due for a year.

The lower court's reasoning was that the Father had not voluntarily increased his support payments to the mother while she had the child, and his salary had increased.

The Supreme Court reversed and remanded. Under NRS 125B.080(6), specific findings of fact are required for district court deviation from the child support formula. The list of factors in NRS 125B.080(9) limits the factors that may be considered by the lower court in deviating from the guidelines.

The lower court's stated reliance on *Scott v. Scott*, 107 Nev. 837, 822 P.2d 654 (1991) is unclear, since Scott requires reference to the statutory factors. "Equitable principles alone are simply insufficient. The district court may use equitable principles in considering a deviation, as long as the deviation is based on one of the factors enumerated in NRS 125B.080(9). "

The Supreme Court accepts the Father's argument that the lower court's relief of the Mother from a year of future support, and lower payments than required by statute, constitutes a prohibited retroactive modification of the Father's prior support obligation. "Payments once accrued for either alimony or support of children become vested rights and cannot thereafter by modified or voided." *Day v. Day*, 82 Nev. 317, 417 P. 2d 914 (1966); *Ramacciotti v. Ramacciotti*, 106 Nev. 529, 795 P.2d 988 (1990). While it is desirable for an obligor to voluntarily increase child support payments, it is "unrealistic to expect such behavior and unfair to penalize the obligor for failing to live up to this ideal." Court notes in passing that the Mother could have moved for an increase in support based on the changed circumstances of the Father's increased income.

Court's Use of Average of Valuations of Personal Property Upheld Since "Within the Range of the Possible"; Rehabilitative Alimony After Seven Year Marriage for Blackjack Dealer Married to Contractor was Discretionary

Alba v. Alba, 111 Nev. P.2d (Adv. Opn. No. 34, Mar. 30, 1995) District court judge (Jordan) used average of parties' valuations of personal property, and awarded rehabilitative spousal support of $1,000.00 for three years in deciding divorce after a seven year marriage. Husband appealed.

Supreme Court ruled that, in keeping with consensus of other states, valuation is not an abuse of discretion "so long as the value placed on the property falls within a range of possible values demonstrated by competent evidence." Here, the trial judge's valuation was by definition within the range of possible values, and so was affirmed; any error in basing the valuation on that average was harmless.

Rehabilitative alimony under NRS 125.150(8) was ordered to allow the Wife to obtain an education in graphic arts. The statute permits lower court reference to "any other factors the court considers relevant," so court's determination that earning potential of Wife should be enhanced where, at divorce, she was a blackjack dealer and he was a general contractor, was affirmed.

Nevada Family Law Report
State Bar of Nevada Family Law Section
1325 Airmotive Way, Ste. 140
Reno, NV 89502