WHAT – ALMOST – HAPPENED TO CHILD SUPPORT IN NEVADA, AND WHY WE STILL HAVE TO FIX IT

By Marshal Willick, Esq.

I. THE 2007 PROBLEM

Nevada's modern child support statutes were enacted in 1987, and included a "presumptive maximum" of child support (often erroneously thought of as a "cap") of a flat $500 per month per child, requiring a court finding of "the basis for a different amount" for upward deviation, per NRS 125B.080. Little known is that such a "maximum" provision is ***not*** part of the framework of a "Wisconsin Guideline" statute (such as Nevada has) – it was added to the 1987 bill by a legislator apparently trying to limit his own personal liability for support, and slid through conference committee with the rest of the statute. It is also the genesis of the entire problem discussed in this article.

In 2001, the presumptive maximum was changed to a sliding scale, arranged in income brackets, starting with those who made up to $50,000 per year. The original legislation would have adjusted the original $500 to what inflation would have made equivalent from 1987 to 2001 – to $785. Fearing opposition, that number was reduced to $500, increasing at the rate of $50 for each $25,000 of additional income, to the top bracket, of those who earned more than $750,000 (for whom it was $800). The statute (NRS 125B.070) provided that the presumptive maximums would be "adjusted" from those amounts each year based on "the percentage of increase or decrease in the Consumer Price Index" ("CPI") for the prior year, with the calculations to be performed by the Office of Court Administrator ("AOC").

When April, 2002, rolled around, the AOC looked at the CPI from December, 2000, to December, 2001, and multiplied that increase by the each number making up the income brackets, and by each of the presumptive maximums. The new numbers took effect in July, 2002. Of course, by then, inflation had marched on for another six months; because the December-to-December figure was only calculated for the ***prior*** year's CPI each April, and put into effect three months later in July, child support was always a year "behind" the inflation curve.

In any event, the same thing was done in 2003 – all numbers in the chart were increased by the CPI again. The 2003 Legislature, however, altered the statute to freeze the ***income brackets***, while still adjusting the presumptive maximums, to prevent people with relatively consistent salaries from "jumping brackets" in reverse (which would have lowered their presumptive maximum payments). New presumptive maximum charts were issued by the AOC each year. As of July 1, 2006, the lowest bracket yielded a presumptive maximum of $566.

In April, 2007, AOC staff concluded that the personnel previously doing the calculations had erred, for every year since the first calculation, because multiplying the prior year's number by the annual CPI effectively "compounded" the CPI adjustment. By use of some recalculation that does not seem immediately obvious, the AOC posted a chart to go into effect as of July 1, 2007, that would have ***lowered*** child support for every bracket, even though there has been inflation for every year since

2001. The lowest bracket was reduced to $513. The AOC also concluded that the original statutory language had an "absolute maximum" of $800 for the top, "no limit," bracket, and therefore reduced the presumptive maximum for that bracket from $907 to $800.

The new charts were circulated to the bench and Bar. There was much confusion, and at least some support orders were set in accordance with the new, reduced chart.

Members of the Bar inquired, and on April 26, 2007, the Legislative Counsel Bureau ("LCB") issued an opinion letter stating that the underlying statute is ambiguous. The letter noted that "thousands of recipients of child support have relied upon" the modest annual increases in support previously calculated, and found that the previous "compounding" methodology employed by the AOC had been impliedly ratified by legislative inaction for the past five years, and could not now be changed without legislative direction to do so.

Examining the legislative history, the LCB noted that since presumptive maximums only applied to "higher wage earners," the reason for the 2001 amendment had been the equal protection problem presented by a system in which "higher wage earners had not had an increase in their child support obligations since 1987 . . . while the obligation of the lower wage earners increased steadily with an increase in wages." Unfortunately (for reasons discussed below), the LCB letter added that the previous, compounding methodology was not only consistent with legislative intent in the 2001 enactments, but also with "every other calculation of adjustments based on the Consumer Price Index contained in the Nevada Revised Statutes, and is consistent with the use of the Consumer Price Index generally to measure inflation."

The AOC promptly posted a new chart, using the prior methodology – the lowest bracket amount increased to $580, and increasing in each bracket – those making $750,000 to "no limit" per year had a new presumptive maximum of $930.

II. WHAT NEVADA'S CHILD SUPPORT LAW IS *SUPPOSED* TO ACCOMPLISH, AND WHY THIS PROBLEM HAPPENED – BIG PICTURE

To comply with federal guidelines requiring States to review their guidelines from time to time, NRS 125B.070 ***used*** to provide that the Family Law Section of the Nevada Bar should perform a quadrennial review to see if the statute was functioning adequately. It did so in 1992 and 1996 (the reports are posted at http://willicklawgroup.com/page.asp?id=13).

The original 1992 Committee exhaustively reviewed the legislative history leading up to the adoption of the Nevada child support guidelines, and noted:

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

Indeed, the Nevada Supreme Court has echoed that purpose in a long series of cases. *See Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992). But commentators from that day to this have expressed great suspicion of actually having the percentage child support guidelines apply to the wealthy as they apply to the average worker, complaining that doing so would constitute "hidden alimony" or a "transfer of wealth" under the guise of maintaining the child's standard of living in both homes. *See* Ron Logar, *Wealth, A Substitute For Need*, 57 *Inter Alia*, April, 1992, at 8; Eric Pulver, *Child Support in Wealthy Families,* 19 Nev. Fam. L. Rep., Fall, 2006, at 1 (both articles are posted at http://www.nvbar.org/sections/Sections_Family_Law.htm).

The value judgment that preventing "hidden alimony" to custodial parents is more important than allowing children to fairly enjoy a standard of living reflecting that of both their parents is one about which reasonable minds could differ. It is intellectually dishonest, however, to even pretend that Nevada's child support law intends to "be calculated according to the obligor's means" so long as the contrived and arbitrary "presumptive maximums" remain in place.

To illustrate, Joe Sixpack, earning $3,500 per month, has a theoretical child support obligation of 18% of monthly gross income – $630 (for one child). As noted in the 1992 Committee Report, the theoretical child support obligation of 18% is ***already*** on the average to low side nationally. But the "presumptive maximum" lowers that sum to $580, even if Joe's income goes up by another twenty percent!

As income increases, any pretense of adjustment according to the parent's "means" disappears. A $50,000 per year wage-earner should pay 18% of that income – $750 per month – in child support, but the "presumptive maximum" lowers that to $580 next year – less than 14%. At $75,000 per year, an obligor pays a presumptive maximum of $638 per month – about 10% of gross income. At $100,000? Eight percent. And so on through the brackets, to where a non-custodial parent making $250,000 per year pays about ***four*** percent of monthly income – $930 – on a child. Most folks in that income bracket have ***far*** larger monthly car payments (unless they such pay cash for such toys, as they can).

Theoretically, lawyers can note the absurdity of such support figures, and judges can vary upward from them. The crush of the docket and the inherent ease of resting on defaults, however, makes variance rare even when non-custodial parents make several hundreds of thousands of dollars per year. In my experience, when variance ***is*** granted, the dollar sum of the change is often niggling, as judges require proof that "its needed" rather than staying focused on the means of the obligor.

In one case I litigated a couple of years ago, the noncustodian spent twice as much each month on ***cigars*** as on child support. The trial court was unmoved – since the child support set seven years earlier was already a few dollars above the "presumptive maximum," the court refused to adjust it an iota despite inflation over that period.

The point is that as soon as an obligor makes more than a basic wage, Nevada child support has very, very little to do with "the means of the obligor." Support as ***actually*** awarded in Nevada is the doling out of a relatively trivial sum by wealthy obligors (compared to the sum that would be spent on the same child in an intact household), having been reduced to that level to guard against any

possibility that the custodial parent might derive some side benefit from the funds paid for the support of the child. The problem is with the hypocrisy of pretending that our child support statute actually awards support based rationally on the means of the noncustodian.

The way that ***other*** "Wisconsin Guideline" States deal with the problem is to say that ***all*** parents within broad income ranges pay the same ***percentage*** of their income for the support of their children, subject to the discretion of the Court to ***lower*** that amount if it is found somehow improper. Only here is the burden placed on the ***custodial*** parent to make the case to apply the percentage guideline to the obligor's income in the first place.

In other words, in other places, those making $1,000 per month, or ***$100,000*** per month, would be presumed to contribute a percentage of income to their child – in this example, $180 or $1,800 – a support level "varying in accordance with their ***means***." And a party who sought to vary from that "equal protection of the laws" would have the burden of going forward and proving some reason why the law should not apply equally. But not in Nevada.

When the 2001 amendments were proposed, the proponents backed off of adjusting the presumptive maximum to reflect actual inflation – from $500 to $758, out of fear that it would be "a very emotional and controversial issue. . . Some would no doubt see such a jump as too much and too sudden." Ed Ewert, *2001 Legislative Changes to Nevada's Child Support Laws*, Nev. Lawyer, Aug., 2001, at 12.

Some of us protested the trade-off of eliminating 1987's $500 presumptive maximum, resetting it ***back*** to $500, in ***2001 dollars***, in exchange for getting some small increases in presumptive maximums at higher incomes. We considered it a terrible deal, and a disaster for the children of all middle (and above) income parents in this State. Recapping that debate, I noted in a 2006 article that "the 2001 statute effectively reduced the support provided . . . by a third, making child support as calculated in Nevada virtually a joke." Marshal Willick, *Nevada Has Effectively Lowered Child Support Across the Board*, 19 Nev. Fam. L. Rep., Spr. 2006, at 10, posted at http://www.nvbar.org/sections/Sections_Family_Law.htm.

The "political realists" won that internal debate, setting in motion the sequence of events that brought us to the down-and-up AOC guideline calculations discussed above. As demonstrated below, however, the entire brouhaha was apparently the result of simple calculation errors.

III. SOME DEVILS IN THE DETAILS

First, and most importantly, the "compounding" methodology really is ***not*** "consistent with the use of the Consumer Price Index generally to measure inflation," at least not precisely. The federal Department of Labor ("DOL") website includes the DOL's suggestion of how to do the math for escalator clauses (posted under the heading "How to Use the Consumer Price Index For Escalation," at http://www.bls.gov/cpi/cpi1998d.htm). The chart itself is posted at ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.

Doing it the way the DOL suggests does not yield the sum in the child support charts put out by the AOC, either at the beginning of April, ***or*** currently. The instructions from the DOL are pretty straightforward:

> Escalation agreements using the CPI usually involve changing the base payment by the percent change in the level of the CPI between the reference period and a subsequent time period. This is calculated by first determining the index point change between the two periods and then the percent change. The following example illustrates the computation of percent change:
>
> CPI for current period 136.0
> Less CPI for previous period 129.9
> Equals index point change 6.1
> Divided by previous period CPI 129.9
> Equals 0.047
> Result multiplied by 100: 0.047 x 100
> Equals percent change 4.7

The December, 2001, CPI was 176.7. As of December, 2006, it was 201.8. Following the DOL instructions above:

201.8 - 176.7 = 25.1
25.1 divided by 176.7 = .1420486
multiplied by 100 = 14.20486% inflation.

So, $500 x 1.1420486 = $571.02. Rounds to $571.

But the chart AOC put up at the beginning of April had the number for the first bracket at $513, and the chart now up is at $580. That was reached because last year's number was $566, and the CPI for December-to-December from 2005 to 2006 was 2.5%. So what the LCB directed was: $566 x 1.025 = $580.15, rounding to $580.

In other words, the effects of the "compounding" that the AOC apparently wanted to avoid, but the LCB directed, are ***actually*** pretty small – nine dollars from 2001 to 2007. And that entire difference ***could*** be explained by rounding (or rounding errors) in prior years. Doing the calculations for the rest of the brackets shows the same pattern – the final chart is higher than the number that would be yielded by the DOL method in an amount increasing by about an extra dollar each bracket, so in the "no limit" bracket, the DOL method yields $913.64 (rounding to $914), while "compounding" from last year's number yields $929.68 (rounding to $930, the number published in the final chart). That difference, the highest on the chart, is $16.

The second "detail" is that there are a few rounding errors in the final chart as published by the AOC. They rounded down on two numbers where they should have rounded up: for example, in the second bracket, last year's number was $623. Multiplying it by 1.025% yields $638.58, which ***should*** have rounded to $639, but was rounded to $638. The AOC ***did*** correctly round up on the "no limit" bracket (from $929.68 to $930), so the errors were not the result of any methodological confusion).

These errors are small – just a dollar one way or the other, but of course the cumulative effect of rounding errors is significant over time, magnified with every CPI adjustment, indefinitely. This may have happened in prior years, as well, but it would not take a tremendous effort to go back, check, and fix them for next year's chart, and the AOC should probably do so.

Finally, the AOC was just wrong in its position at the beginning of April that the $800 set out in the "no limit" bracket in 2001 was never expected to change. Like all the other numbers specified in section two of NRS 125B.070, it was to be adjusted annually per section three, as it has been in the final chart.

IV. SOLUTION TO THE PROBLEM

All of the details discussed in the preceding section, of course, are just that – details. They ignore the theoretical problem that the "presumptive maximum" (both the original $500 number and the CPI-adjusted brackets grossly reduced from inflation in 2001), ***contradict*** the basic purpose of the Wisconsin guideline method of figuring support.

What ***other*** Wisconsin Guideline States do is set out broadly applicable percentages and require the party seeking to vary from them to justify the variance. For example, in Wisconsin itself, the percentage of income is applied to ***all*** obligors earning up to $7,000 per month ($84,000 per year). A slightly ***smaller*** percentage ***may*** be applied to all income between $7,000 and $12,500 per month, and a yet smaller percentage ***may*** be applied to all income in excess of $12,500 per month ($150,000 per year). Wis. Dept. of Workforce Development § 40.03(1), 40.04(5)(c), 40.04(5)(d) (posted at http://www.dwd.state.wi.us/bcs/chapter.htm).

The 1996 Family Law Section Committee stated its belief that there was:

> an appreciable portion of the public that would want to keep some form of presumptive maximum to a potential child support obligation, even though it was philosophically inconsistent with the rest of the child support guideline, and that therefore no improvements were likely unless some realistic alternative limiting mechanism was proposed in place of the existing presumptive ceiling.

The Committee was also concerned with the "distortion" created by the fact that presumptive maximums in Nevada applied to obligors with different numbers of children at different income levels. It therefore suggested that the Nevada Legislature take a tack similar to that of Wisconsin, applying the percentage guidelines to ***all*** income within broad limits, for the equal protection and philosophical consistency reasons stated above. Specifically, the Committee recommended applying the percentage guidelines to all gross monthly income up to $10,000 per month, and permitting courts the discretion to apply them to income above that amount. Since that report was written, inflation has made $10,000 equal to about $13,000 per month today.

V. CONCLUSIONS

At least nothing happened in the 2007 resetting of the presumptive maximums that made matters worse for children receiving support. But the entire episode provides an opportunity to think through why we do things the way we do things.

The "political realists" who pushed through the 2001 changes were well-intentioned, but it was an error to reset the first bracket to $500 from the $750 inflation should have made it, even if having a "presumptive maximum" made sense in the first place – and it doesn't. The realistic cost of raising children, and theory that non-custodial parents should contribute to children in accordance with "their means," requires someone in the Legislature to have the courage to suggest that $930 per month is an obscenely low child support figure for a non-custodial parent earning $150,000 or $200,000 per year.

At the very ***minimum***, the presumptive maximum should be reset to its inflation-adjusted equivalency from when the child support statute was first passed. As of March, 2007, the equivalent of $500 in 1987 dollars was $905. ***If*** the 1987 statute was to be given any credence, ***that*** would be the first "presumptive maximum" looked at. That is not any kind of "jump" – it is only undoing the ***decrease*** that was imposed in 2001.

The "presumptive maximum" never did make theoretical sense, and artificially reducing child support so that children ***don't*** share in the income of both their parents violates the principle on which our child support statute is based. The entire "presumptive maximum" structure should be tossed. In its place, Nevada should enact a Wisconsin-like universal application of a ***percentage*** of income to ***everyone*** (up to an income level high enough to encompass most of the population), with a permissive percentage application above that threshold for the relatively few extraordinary-income earners.

.....

Marshal S. Willick is the principal of the Willick Law Group, a Family Law firm in Las Vegas. The firm web site is www.willicklawgroup.com.