CHILD SUPPORT IN HIGH INCOME CASES

by

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I. BACKGROUND, INTRODUCTION, AND HISTORY

The United States has been collectively experimenting with child support regulation and formulas for several decades. Along the way, various fault lines have appeared; one of these has been in treatment of child support in high income families.

Federal attention to the subject of child support could be traced back to at least 1974 Social Services Amendments to the Social Security Act of 1935. Section IV-D of the new Amendments conditioned states' receipt of federal funding on their providing specific "child enforcement" services.[1]

A decade later, Congress enacted the "Child Support Enforcement Amendments of 1984"[2] which required the creation of state guidelines based on "specific descriptive and numeric criteria" but did not actually require judges to follow them.

The first work of importance in Nevada was the 1985 report of the Nevada Commission on Child Support Enforcement, which was given to then-Governor Richard H. Bryan in October, 1985. It included a recommendation for the "establishment of child support guidelines," and recommended adoption of the philosophy embodied in the Washington and Income Shares formulae, with some modifications.

Fairly early in the 1987 legislative session, AB 424 was introduced, ultimately following a Wisconsin Percentage-of-Income model, although many terms mirrored those of the Governor's Commission recommendations. In May, the Assembly Judiciary Committee met to review proposed amendments and discuss objections to the bill. One member requested a provision that ultimately became the statutory "ceiling" provision (called a "cap" in this part of the legislative history), explaining that support beyond that level would be possible, but discretionary and not based on the formula.[3]

When the Senate Judiciary Committee examined the revised bill, there was a consensus that the ceiling should be removed.[4] The committee further refused to change the gross income based formula to a net-based system. In conference committee, the ceiling was retained but modified with the caveat that the ceiling was not to apply if "the court sets forth findings of fact as to the basis for

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[1] *See*, *e.g.*, Ashish Prasad, *Rights Without Remedies: Section 1983 Enforcement of Title IV-D of the Social Security Act*, 60 U. CHI. L. REV. 197 (1993).

[2] Child Support Enforcement Amendments of 1984; Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at 42 U.S.C. § 667(a)(1988)).

[3] *See* 1987 Legislative History of A.B. 424 at 72-73. Anecdotal reports are that the multi-decade conniptions about the "cap" are attributable to this one legislator trying to reduce his own personal child support obligation.

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

a different amount pursuant to subsection 5 of section 3 of this act."[5] The report of the conference committee was accepted by both chambers and the amended bill was signed by the Governor on June 27, 1987.

Congress passed the "Family Support Act of 1988," which basically prodded the states into creation of the child support formulas now existing by passing further requirements limiting judicial discretion and requiring states to establish specific minimum guidelines, which evolved into "rebuttable presumptions" for support awards.[6]

In Nevada in 1989, a backlash against the statute was felt, much of which is irrelevant to this subject. During the session, the Attorney General's office was requested to, and did, submit a report on the statutory ceiling. The report concluded that the ceiling "does not establish a limit on the amount a parent may be ordered to pay for child support. It does, however, establish a statutory formula to determine the obligation of support and allows deviation from that formula by the judge only upon a finding of fact to support the deviation."[7]

Nationally, while some states, such as California, have marched to the beat of their own harmonicas[8] and produced child support systems of varying complexity generously labeled "hybrid systems," most states have produced child support regulations generally falling into one of three basic guideline models: Income Shares; Percentage-of-Income; or "Melson-Delaware."

Far and away, the majority of states (about 39) have decided upon an "income shares" model, the theoretical underpinning of which is that children should receive the same proportion of parental income that they would have received if the family had remained intact, and that the cost to the parents should be apportioned between them based on their means.

While there are slightly different, state-specific Income Shares models, parents generally contribute their portion of the support in proportion to their respective percentage of the parties' combined income. The calculation involves: 1) adding the gross or net income of the parents to determine their percentage share of total income; 2) applying the total income to the relevant support table to determine the cost; and 3) prorating the support obligation between the parents based on their proportionate shares of income.

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

[6] Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended at 42 U.S.C. § 667(a)(1988)).

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

[8] Apologies to Matshona Dhliwayo.

Some commentators believe that the Income Shares model is more adaptable to situations of shared custody, and note that eight states switched from Percentage-of-Income to Income-Shares models between 2005 and 2016.[9]

A much smaller number of states, including Nevada, adopted and have retained the Percentage-of-Income model, which is a much simpler calculation that establishes a support award based on a statutorily specified percentage of the non-custodial obligor's income. The underlying theory is that a custodial parent will automatically support a child, and it is only necessary to obtain a contribution from a non-custodian to ensure children's needs will be met.

Three states adopted the "Melson-Delaware model," the most complex child support scheme due to its three separate calculations required to determine the award. First, the court subtracts a "self-support" allowance from a parent's income. Second, the court determines the "children's primary support needs." Finally, the court adds an additional "standard of living" allowance to the primary support amount to determine the total support obligation.

All of the primary child support models had some kind of mechanism for dealing with high-income cases, formally or otherwise, but there is a remarkable diversity among their assumptions, thresholds, and approaches.[10]

II. NEVADA TREATMENT OF HIGH-INCOME CASES

The child support statutes were hotly debated over the years, largely at the behest of various pressure groups, and the statutes were tinkered with and amended from time to time, until the core of them were repealed as of February, 2020, in favor of regulations set out at chapter 425 of the Nevada Administrative Code ("NAC").[11]

Nevada's prior child support core statutes (NRS 125.070-.080) were framed to treat one parent as a physical custodian, and the other as a "parent without physical custody."[12] As noted, similar conceptual difficulties have apparently caused other states to switch child support models, but in the

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[9] Charles Meyer, Justin Soulen, & Ellen Weiner, *Child Support Determinations in High Income Families – A Survey of the Fifty States*, 28 J. AM. ACAD. MATRIM. LAW. 483 (2016) ("Meyer") at 487.

[10] *See*, *e.g.*, Laura Raatjes, *High-Income Child Support Guidelines: Harmonizing the Need for Limits with the Best Interests of the Child*, 86 CHI.-KENT. L. REV. 320, 320-21 (2011) ("Raatjes").

[11] *See* Jane Venohr, REVIEW OF THE NEVADA CHILD SUPPORT GUIDELINES 78-82 (2016), https://www.leg.state.nv.us/Session/79th2017/Exhibits/Senate/JUS/SJUD144D.pdf ("Venohr").

[12] *See* NRS 125B.030.

transition to the current regulations, Nevada elected to continue with a Percentage-of-Income model, and expressly adapt it to shared and split custody situations.[13]

Not yet completely known is the extent to which pre-regulation case law will continue to inform future decisions under the regulations.

A. Prior Support Statutes and Caselaw

In 1989, when the Nevada Supreme Court decided *Barbagallo*,[14] the statutory scheme set out at NRS 125.070-.080 included a presumptive maximum for child support (sometimes called a "cap"), originally set at $500 and later indexed for inflation.[15] It effectively ignored all income over $2,778 per month,[16] even if the obligor's income was many times that amount.

The prior statutes dealt with the "cap" by providing a "deviation factor" for "the relative income of both parents."[17] That factor was addressed by the Court twice in 1991. First, in *Herz*,[18] the Court rejected the obligor's complaint that statutory child support could only be deviated upward upon proof of the specific need of the child at issue, holding that an increase was proper under the deviation factors because of "the vastly different incomes and financial resources of the plaintiff and defendant, and the amount of time the children will spend with each parent as a result of this decree."[19]

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[13] *See* Marshal Willick, "The Impact of Custodial Schedules on Child Support," in *Advanced Family Law* (State Bar of Nevada CLE), Las Vegas, Nevada, 2021, posted at https://www.willicklawgroup.com/cle-materials/.

[14] *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989).

[15] For a detailed discussion of the history of that provision, see Ed Ewert, *2001 Legislative Changes to Nevada's Child Support Laws*, Nev. Lawyer, Aug., 2001, at 12; Marshal Willick, *Nevada Has Effectively Lowered Child Support Across the Board*, 19 Nev. Fam. L. Rep., Spr. 2006, at 10; Marshal Willick, *What Almost Happened to Child Support in Nevada, and Why We Still Have to Fix It*, Nev. Lawyer, June, 2007, at 36.

[16] $2,778 x 18% = $500.04.

[17] Prior NRS 125B.080(9)(l).

[18] *Herz v. Gabler-Herz*, 107 Nev. 117, 808 P.2d 1 (1991).

[19] A separate deviation factor, 125B.080(9)(j), permitted deviation for "the amount of time the child spends with each parent," essentially allowing increased child support when a non-custodian exercised little time with a child and therefore made little direct contribution toward the child's expenses.

The Court re-affirmed the *Herz* holding in *Chambers*,[20] and again in 1998 in *Love*,[21] without much further exposition as to the basis beyond the explicit terms of the statute itself. The intended goal was to encourage courts to exercise their discretion within the bounds of the statutory framework, as the Court explained in *Lewis*[22]:

> the legislature has shifted the focus of the courts from a general inquiry into the best interests of the child to a specific inquiry of whether the noncustodial parent is satisfying the statutory support obligation. Where no special circumstances exist, courts must focus exclusively upon the noncustodial parent's duty to pay a fixed percentage of income.

Some commentators criticized the *Herz* holding that support could be predicated on income differentials between the parties as opposed to the specific needs of the child at issue, arguing that doing so constituted "hidden alimony" or a "transfer of wealth" under the guise of maintaining the child's standard of living in both homes.[23]

The prior child support statutes had no mechanism for addressing joint custody cases. As the Court noted in *Rivero*,[24] it has been sometimes required to fill "gaps in the law" by setting out definitions and mechanisms not specified by the Nevada Legislature.

It did so in *Wright v. Osburn*,[25] a week-on, week-off joint custody case in which it provided an explicit means of adjusting child support for such cases by calculating child support for each parent, subtracting one from the other, and requiring the parent with the higher income to pay the parent with the lower income that difference.

Criticizing and tempering its own prior holding in *Barbagallo*, the Court in *Wright* held in part: "Still, maintaining the lifestyle of the child between the parties' households is the goal of the *Wright* formula, and the financial circumstances of the parties remain the most important factors under NRS 125B.080(9)."

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[20] *Chambers ex rel. Cochran v. Sanderson*, 107 Nev. 846, 822 P.2d 657 (1991).

[21] *Love v. Love*, 115 Nev. 572, 959 P.2d 523 (1998).

[22] *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992).

[23] *See* Ron Logar, *Wealth, A Substitute For Need*, 57 *Inter Alia*, April, 1992, ("Logar") at 8; Eric Pulver, *Child Support in Wealthy Families*, 19 Nev. Fam. L. Rep., Fall, 2006, at 1.

[24] *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

[25] *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998).

All of that statutory, case law, and commentary history was analyzed and summarized for the Commission formed to revise Nevada's child support laws in the form of regulations.[26]

B. Current Support Regulations and Caselaw

The new regulations were adopted effective February 1, 2020,[27] codifying and modifying case law addressing both income disparity between parties and application to joint custody cases.

The regulations abandoned the presumptive maximums set out in the prior child support statutes, adopting a table in which ***all*** income is used for calculating child support, starting at (for one child) 16% of the first $6,000 of monthly income, 8% of the next $4,000, and 4% of all income more than that.[28]

Because all income was addressed, the prior statute's "relative income of both parents" deviation factor was deleted, replaced by an adjustment factor of the "relative income of both households, so long as the adjustment does not exceed the total obligation of the other party,"[29] and explicitly requiring that any upward adjustment be "in accordance with the specific needs of the child."[30]

The regulations expressly adopted the *Wright* offset formula for joint custody cases as part of the guideline schedule,[31] eliminating the "gap in the law" to be addressed by case law.

The current regulations provide a revised list of "adjustment factors" that courts may use in altering the child support produced by the guideline formula:

> NAC 425.150 Adjustment of child support obligation in accordance with specific needs of child and economic circumstances of parties. (NRS 425.620)
>
> 1. Any child support obligation may be adjusted by the court in accordance with the specific needs of the child and the economic circumstances of the parties based upon the following factors and specific findings of fact:
>
> (a) Any special educational needs of the child;

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[26] Venohr, *supra*.

[27] AB 278, sec. 7, 2017 Nev. Stat. 2287-2288.

[28] NAC 425.140.

[29] NAC 425.150(1)(f).

[30] NAC 425.150(1).

[31] NAC 425.115(3).

(b) The legal responsibility of the parties for the support of others;

(c) The value of services contributed by either party;

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

(e) The cost of transportation of the child to and from visitation;

(f) The relative income of both households, so long as the adjustment does not exceed the total obligation of the other party;

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

(h) The obligor's ability to pay.

2. The court may include benefits received by a child pursuant to 42 U.S.C. § 402(d) based on a parent's entitlement to federal disability or old-age insurance benefits pursuant to 42 U.S.C. §§ 401 to 433, inclusive, in the parent's gross income and adjust an obligor's child support obligation by subtracting the amount of the child's benefit. In no case may this adjustment require an obligee to reimburse an obligor for any portion of the child's benefit.

To date there appears to be only one case involving high-income child support obligors in Nevada since the new regulations went into effect. In *Matkulak v. Davis*,[32] the parties (Tony & Kourtney) had never married but shared joint legal and physical custody of their two year old child, born during their two-year relationship.

Tony made about $38,000 per month; Kourtney about $5,000. Tony had been voluntarily paying Kourtney some $1,850 per month. Application of the child support formula under the regulations produced an obligation from Tony to Kourtney of about $2,415, and of Kourtney to Tony of about $823, yielding an offset obligation of about $1,600.

Kourtney admitted that all the child's needs were met and that she not only had enough money to cover all of the child's needs but also to save money every month for her retirement, but she wanted "more"—a lot more—based solely on the income disparity of the parties.

As recounted by the appellate court, Kourtney "argued that additional child support would allow her to move into a house with a larger yard and a security system, eat out more often, work less, increase her retirement savings and financial security, and reduce her stress levels —all things that would ultimately benefit" the child.

[32] *Matkulak v. Davis*, 138 Nev. ___, 516 P.3d 667 (Adv. Opn. No. 61, Sep. 1, 2022).

The briefs reveal that she also argued that she should have as nice a car and house as the child's father, and be able to work less and get a full time maid, all as "child support" because Tony had more money than she had.

The trial court bought the argument and ordered Tony to pay 100% of the childcare and medical expenses, 75% of his extracurricular expenses, and then pay Kourtney $3,500 per month in child support, about $2,000 per month over the formula. It rationalized the order based on its "finding that factors f, g, and h weighed in favor of an upward deviation. Specifically, the court concluded that under factor f [Tony] makes 7.46 times the amount per month that [Kourtney] makes from working two jobs; that under factor g [the child] has additional expenses for childcare, extracurricular activities, and health insurance; and that under factor h [Tony] has the ability to pay additional child support."

But the appellate court found most of those grounds inapplicable. Because the trial court ordered Tony to pay all childcare and most everything else, "other expenses" under g were irrelevant, and factor h is actually a factor allowing a ***downward*** deviation when a party is unable to pay guideline support.

That left factor f, "The relative income of both households, so long as the adjustment does not exceed the total obligation of the other party." The appellate court found the language clear and unambiguous, noted that Kourtney's support obligation to Tony was $823, and held any increase under that factor to be limited to that amount.

Without ever mentioning the name of the cases, the Court ignored Tony's request to find that *Herz* and *Cochrane* have been overruled by the requirement of finding a specific need for an upward adjustment. Instead, the appellate court found that the language used in the regulations permits a court to make increases "based upon" the listed factors, so a child's "specific needs" are not a *limitation* to an increase from guideline child support, but just "provide a prism through which the court must view the requested child support deviation to determine whether it is appropriate."

Ultimately, the Court reversed and remanded with instructions to limit any increase of Tony's guideline child support to no more than Kourtney's guideline obligation to him.

The Court's interpretation of the regulation language is straightforward, but those creating the regulations may not have thought through the practical effects of that language, because it leads to just about the same result whether the lesser-earning parent is working or not.

In this case, Tony ended up owing Kourtney the *Wright*-offset net of $1,600, plus an increased sum equal to Kourtney's obligation to him ($823), for a total of $2,423 per month.

If Kourtney had been earning ***double*** what she was actually making, the *Wright* offset net would have reduced Tony's guideline support obligation to $1,200, but the district court apparently could have

ordered Tony to pay her the entire $1,280 of her *Wright* offset, totaling $2,480—virtually the same number as if she was making half as much.

But if Kourtney had not been working at all and had an income of zero, Tony's total obligation would have been $2,316 – an amount that is a bit ***lower*** than the result when she was working at either her actual income or double that amount.

It seems counter-intuitive to permit a higher support amount to a working joint custodian than one who has no income at all, based on the same income from the higher-earning obligor. Perhaps a better discretionary adjustment would be to permit a court to examine the lifestyle of a lower-earning joint custodian and adjust the sum to be paid by the other joint custodian obligor up to the sum that would be payable with no *Wright* offset at all.

III. OTHER APPROACHES TO HIGH-INCOME CHILD SUPPORT CALCULATIONS

Commentators have noted that whenever the income of one party exceeds the guideline for that jurisdiction, variability among similarly-situated parties increases enormously.[33]

Even what counts as "income" varies widely. Nevada is in the majority on this question, since about 30 states use some definition of "gross income," with the remainder using some form of "net."[34] Distinctions that could be important include variation in whether to count gains, gifts, inheritances, overtime, and other sums that might, or might not, be considered "income" for a child support calculation.[35] As new and more complex forms of income, such as stock options and other deferred assets of various types become more common, results in such cases will continue to vary widely.

A question common across the country, but with widely diverging answers, is what to do when whatever the high-end threshold is in that place is exceeded. Even that number varies enormously, from $60,000[36] to $1,200,000.[37] Since most jurisdictions are Income-Shares states, those table maximums reflect the income of ***both*** parties. Obviously, the lower the threshold used, the greater the number of cases with variable results will occur as whatever level of discretion set out in the state's law is applied.

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[33] Meyer, *supra*, at 487.

[34] Meyer, *supra*, at 488.

[35] *See*, *e.g.*, *Crawford v. Schulte*, 829 N.W.2d 155 (S.D. 2013) (rejecting consideration of a large inheritance for income purposes).

[36] Arkansas; ARK. SUP. CT. R. ADMIN. ORDER 10.

[37] Utah; UTAH CODE ANN. § 78B-12-301 (West 2015).

Some states permit "extrapolation" from the maximums of their state guidelines; some expressly prohibit it and require judges to make individual determinations.[38] Where judges are directed to use "discretion" once a threshold is reached, some statutory schemes set the guideline chart limit as the presumptive maximum sum to be ordered,[39] and some as the minimum sum to be ordered.[40]

Apparently, some 29 jurisdictions grant judges some form of discretion, as opposed to mathematical projections, whenever income chart limits are reached, which could be further categorized as "pure discretion," or "discretion with a recommended formula," or "deviation factor" states.[41] The others are "pure formula" jurisdictions, with those challenging the formula burdened with some standard of proof for varying from that amount, usually against some printed list of factors.[42]

Most states with statutory guidelines for application of discretion use a fairly common core of factors in order to determine an appropriate award, usually including the "needs of the child in excess of the amount allotted for support"; the "pre-divorce standard of living enjoyed by the child and parents"; and the "best interests of the parties." Most such lists give very little "guidance" at all, but are more of a checklist of things for a district court to recite that it "considered."

Courts can pretty much rationalize any kind of result under the rubric of the "best interests of the child," increasing or decreasing sums otherwise payable.[43] Nevada could be said to be one such jurisdiction, as the Nevada Supreme Court said in *Fernandez*[44] that "neither our statutes nor public policy supports the argument that more court-ordered child support is always better for the child than less. The formula and guideline statutes are not designed to produce the highest award possible but rather a child support order that is adequate to the child's needs, fair to both parents, and set at levels that can be met without impoverishing the obligor parent or requiring that enforcement machinery be deployed."

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[38] *See*, *e.g.*, *Walton v. Visgil*, 591 A. 2d 1018 (N.J. App. Divorce. 1991).

[39] *See*, *e.g.*, *Milnovich v. Womack*, 343 P.3d 924 (Ariz. Ct. App. 2015).

[40] *See*, *e.g.*, *Longo v. Longo*, Nos. 2008-G-2874, 2009-G-2901, 2010 WL 2636843 *2 (June 30, 2010).

[41] Meyer, *supra*, at 499-507.

[42] *See*, *e.g.*, WIS. ADMIN. CODE D.C.F. § 150.04(5); Meyer at 507.

[43] *See*, *e.g.*, *Fladger v. Fladger*, 765 S.E.2d 354 (Ga. 2014 (doubling guideline support based on the obligor's high income).

[44] *Fernandez v. Fernandez*, 126 Nev. 28, 222 P.3d 1031 (2010).

The "parties' historical standard of living" seems a questionable basis given the modern realities in which very large numbers of parents never lived together at all, or did so very briefly.[45] As a matter of equal protection, it seems inappropriate to gauge child support differently for children of divorce from long-term marriages versus those that are the products of a one night stand. And as discussed in the next section, the "needs of the child" factor is often just rubric covering a wealth transfer between parents.

The point is that any time one or both parties has income beyond the norm of whatever chart is in use in a particular state, the variability of awards, and the amount of "lawyering" in reaching a result, increase enormously. All of these variations cut directly against the "consistency and predictability" goals by which child support guidelines were enacted in the first place.[46]

IV. SPECIAL CIRCUMSTANCES AND ISSUES

A. Shared Custody Considerations

As noted in the above discussion of the *Matkulak* case, and explored in detail in last year's seminar paper on the impact of custodial schedules on child support,[47] in Nevada child support cases, a huge "cliff effect" is seen to child support payable for a change in designation from primary to joint custody.

This primarily affects those at the lower income ranges, however, and effectively disappears by the time an obligor is making $100,000 per month, when the variations in monthly support largely disappear no matter whether the recipient has primary or joint custody, and whether or not the recipient has any income at all.[48]

B. The "Hidden Alimony" Dilemma

Child support is "a flow of funds from one parent of a child to the other for the purpose of meeting the child's needs," whereas alimony is "financial support paid from one spouse to the other for a

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[45] *See* Marshal Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law*, 19 NEV. LAW. 6 (May, 2011)

[46] *See* 1992 and 1996 Reports of the Child Support Statute Review Committee ("1992 Report" and "1996 Report"), posted at https://www.willicklawgroup.com/child-support/.

[47] *See* Marshal Willick, "The Impact of Custodial Schedules on Child Support," in *Advanced Family Law* (State Bar of Nevada CLE), Las Vegas, Nevada, 2021, posted at https://www.willicklawgroup.com/cle-materials/.

[48] *See* Table One: Presumptive Child Support at Increasing Income Levels.

specified period of time, or in a lump sum, following a divorce."[49] Where parties were never married, alimony is not an issue.

The facts in *Matkulak* provide a good template for examination of these issues. The appellate court *Opinion* obliquely recited that Kourtney "supports herself and the record does not indicate she is struggling financially." The briefs, however, established that Kourtney's ***total*** expenses for her rental home, food, and transportation were $1,950, $550, and $303 respectively, totaling $2,803 per month. Before the order, Kourtney's direct child expenses were $787, but once the district court required Tony to pay all child care, all medical expenses, and 75% of extracurriculars, her monthly expenses for the child dropped to $292.50.

Kourtney had her house before the child was born, and the three-year old consumed a tiny fraction of Kourtney's fixed expenses. The district court's ordered "child support" of $3,500 plus $1,286 in other expenses actually paid the ***entirety*** of both the child's and Kourtney's food, housing, transportation, *and* child-related expenses, plus a couple thousand dollars per month more. In fact, the sum of "child support" ordered was greater than Kourtney's declared ***total*** monthly expenses, *including* her savings for retirement, by nearly $1,500 per month.

The district court never identified any "specific needs" of the child that were not met by the guideline schedule child support, but found that the term "specific needs" was "subject to the socio-economic position of the child's parents." In other words, the district court reasoned that if Tony had more money than Kourtney, the child's "specific needs" were *automatically* greater.

There is academic literature indicating that larger child support awards may be justified to avoid situations in which a child alternates between opulence and deprivation,[50] but here the parties both testified that prior to the district court's order they spent about the same amount of money on the child, lived frugally, and that all of *the child's* needs were met in both households.[51] Some commentators have insisted that wherever that is the case, "child support" above the sum produced by guidelines is not warranted.[52]

Using income differential alone to increase child support is exactly what Ron Logar warned about 30 years ago in criticizing the 1991 *Herz* decision in *Wealth: A Substitute for Need*,[53] and was

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[49] *See* Jennifer Abrams, *The Relationship Between Alimony and Child Support*, in *Advanced Family Law* (State Bar of Nevada CLE), Las Vegas, Nevada, 2021, at 1-2, posted at https://dwss.nv.gov/Support/cs_meeting_agenda_materials/, quoting from *Kogod v. Cioffi-Kogod*, 135 Nev. ___, 439 P.3d 397 (Adv. Opn. No. 9, Apr. 25, 2019).

[50] Raatjes, *supra*.

[51] VII AA 986, 1040.

[52] *See*, *e.g.*, Raatjes, *supra*, at 345-346.

[53] Logar, *supra*.

apparently part of the reason for elimination of the prior deviation factor for "the relative income of both parents" in the current regulations.

On appeal, Tony argued that when parents share joint physical custody, they both have an obligation to support their child.[54] The guideline schedule sum is the amount of child support that is to be ordered absent "evidence proving that the needs of a particular child are not met or are exceeded by such a child support obligation."[55]

His primary argument was that for a court to order massive additional sums of "child support" without identifying any *specific need of the child* to support that award, as the district court did in that case, would render the words "specific needs" and "particular child" meaningless, and to enter an award of such size from one parent that the other parent contributes nothing would violate the statutory direction that *both* parents are to contribute to the support of that child.

However, the Supreme Court rejected Tony's suggested reading of the child support regulations as requiring any child support ordered be tied to some specific need of the child at issue. If finding some specific need for an increase is the intended application of the regulations, as the structure indicates, then the Child Support Commission will need to tighten up the language to make that requirement clear.

If the sum paid to Kourtney was in excess of any actual need relating to the child, however, then could it actually be termed "child support"? And, if not, what was it? Such payments—especially between parties who were never married—have been labeled "hidden alimony" and derided by the commentators[56] and courts[57] that have stated that doing such a thing would be a mis-use of "child support."

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[54] *See* NRS 125B.020; NAC 425.015, 425.037.

[55] NAC 425.100(2).

[56] *See* Ron Logar, *Wealth, A Substitute For Need*, 57 *Inter Alia*, April, 1992, ("Logar") at 8; Eric Pulver, *Child Support in Wealthy Families*, 19 Nev. Fam. L. Rep., Fall, 2006, at 1; *see also* Venohr, *supra*; Raatjes, *supra* (generally advocating amendment of guidelines to directly address the entirety of income of a potential obligor, and offering potential mechanisms to avoid the "hidden alimony" problem); Kathleen Hogan, *Child Support in High Income Cases*, 17 J. AM. ACAD. MATRIM. LAW. 349, 352 (2001) ("Hogan").

[57] *See*, *e.g.*, *In re Marriage of Lee*, 615 N.E.2d 1314, 1326 (Ill. App. Ct. 1993) ("In fixing the child support obligation of a high-income parent, the trial court must balance competing concerns. On one hand, [it] should not limit the amount of child support to the child's 'shown needs,' because a child is not expected to live at a minimal level of comfort while the noncustodial parent is living a life of luxury. . . . On the other hand, child support payments are not intended to be windfalls, but rather adequate support payments for the upbringing of the children."); *Downing v. Downing*, 45 S.W.3d 449, 451 (Ky. Ct. App. 2001) ("Beyond a certain point, additional child support serves no purpose but to provide extravagance and an unwarranted transfer of wealth. While to some degree children have a right to share in each parent's standard of living, child support must be set in an amount which is reasonably and rationally related to the realistic needs of the children").

Some courts nationally have stressed that the focus of regulatory schemes like that of Nevada should stay focused on the child.[58] Where expenses relating to the child are modest and comparable in both homes, there may be no valid theoretical reason to exceed the guideline schedule sum of support.

It does appear that the current regulations, even more than the prior statutes, were designed to reflect the policy decision that "where no special circumstances exist, courts must focus exclusively upon the noncustodial parent's duty to pay a fixed percentage of income."[59]

One commentator succinctly described the problem: "High-income situations pose a challenge for courts, which must carefully fashion an award that provides for the actual needs of a child, while avoiding an excessive award that would essentially amount to a wealth transfer between parents."[60]

In *Matkulak*, Kourtney openly admitted her desire for "child support" sufficient to provide her a bigger house, nicer car, more retirement savings, time off from work, and a maid. She made it clear that from her point of view, having a child with Tony entitled her to the same house, car, and retirement accounts that Tony had—regardless of anything having anything to do with their child.

It is clear that some would-be recipients of such awards have no theoretical or other problem with such wealth transfers. If those in charge of drafting our child support regulations wish to avoid such results, it is pretty clear from the published case law to date that they will have to amend the regulations to make their policy objectives a lot more clear.

C. Ultra-High-Income Scenarios

The Nevada child support formula has no upper limit, which largely eliminates the problems described above with discretionary or semi-discretionary variability when an award "exceeds the chart." However, it gives rise to the opposite problem: is there really no upper limit at all on how much "child support" can awarded?

Meyers, *supra*, decrying the range of variability around the country in high-income cases, showed the range of guideline support and potential modification in five select states for a hypothetical obligor making $26,000,000 per year, where the obligee makes nothing and has primary custody[61]:

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[58] *See*, *e.g.*, *Smith v. Smith*, 67 P.3d 351, 354 (Okla. Civ. App. 2002) ("[A]t least some consideration should be given to the child's actual needs, which may include consideration of the child's lifestyle"); *In re Marriage of Lee*, 615 N.E.2d 1314, 1325–26 (Ill. App. Ct. 1993) ("The trial court must consider the standard of living the child would have enjoyed absent parental separation and dissolution.").

[59] *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992).

[60] Meyers, *supra*, at 513, citing Hogan, *supra*.

[61] Meyers, *supra*, at 499.

Illinois	$243,000 per month, presumptive amount, subject to deviation
California	$134,142 per month, and the guideline is presumptively correct
Pennsylvania	$102,526 per month, presumptive amount, subject to deviation
Connecticut	$2,089 per month, presumptive amount, subject to deviation
Texas	$1,710 per month, subject to a finding of proven needs above the guideline amount

In Nevada, those facts would yield a child support obligation of $87,546 per month. Here, it would take about three times as much income—some $72 Million per year—to reach the kind of child support numbers produced by the Illinois formula.

The existing adjustment factors in Nevada do not encompass the kind of "deviation" or "required findings" of the formulas compared above. The factors listed in NAC 425.150 would apparently provide no adjustments at all, and the sum payable each month simply increases by $4,000 for each extra $100,000 income an obligor earns.[62]

As a matter of public policy, the matter may boil down to the classic formulation of the Kansas Court of Appeals: "no child, no matter how wealthy the parents, needs to be provided more than three ponies."[63] The Three Pony Rule applies to more extreme high-income cases where the support required under the guideline is far beyond the needs of the child. And *most* states with provisions addressing the situation at all permit downward deviation when formulas produce "unnecessarily high child support awards."[64]

Some might say that it is not worth the time to make any rule changes at all for persons making millions of dollars per month, but given the fact that there ***are*** ultra-wealthy potential obligors in Nevada, it might be a good idea to provide some kind of mechanism for dealing with such extraordinary situations, if for no other reason than to avoid a challenge to the validity of the regulations entirely should such a situation occur.

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[62] *See* Table One: Presumptive Child Support at Increasing Income Levels. The "steps" are much larger in the lowest income brackets. For an obligor earning only $2,000 pre month, child support is $320, and if income increases $1,000 to $3,000 per month, support increases to $480 – a difference of $160 per month. The steps drop to $80 per month of increased support for each $1,000 of additional income once income reaches $7,000 per month, and to $40 per month once income reaches $10,000 per month.

[63] *In re Marriage of Patterson*, 920 P.2d 450, 455 (Kan. Ct. App. 1996). *See also* Raatjes, *supra*.

[64] *See* Laura W. Morgan, *Child Support in High-Income Cases: A State-by-State Survey*, FAM. L. CONSULTING, http://www.supportguidelines.com/articles/art200302.html; Raatjes, *supra*, at 331.

V. CONCLUSIONS

Cases involving at least one party with a high income present unique challenges when statutes designed for the bulk of more normal earners are applied to them, resulting in a heightened possibility of a range of apparently unintended consequences. The transition in Nevada from our prior statutes to our current regulations resolved some long-standing problems, but left others unaddressed to date.

The national experience in such cases reveals a range of possible approaches, but no silver bullet. Creating inflexible mandatory results permits injustice if the facts are not what was envisioned when the rules were created. However, suggested guidelines, or partial or full judicial discretion, invites exactly the kind of extended and intense litigation that guidelines were intended to reduce.

Yet the public policy problem of creating scenarios of "hidden alimony"—even when the people involved had never been married—is real and should be expressly faced, considered, and addressed in the regulatory scheme by some conscious weighing of pros and cons for each policy choice and practical consequence that can be anticipated.

At all times, the fact that custody can and does change should be included in the design of Nevada's child support regulations, and implemented in such a way that the expected result in most cases is in line with the intentions underlying the statutory scheme. "Outlier" scenarios should be provided some kind of potential resolution mechanism, to try to prevent accidental injustice.

TABLE ONE: PRESUMPTIVE CHILD SUPPORT AT INCREASING INCOME LEVELS

Parent 1's Monthly Income	Parent 2 (Primary)	Parent 2 (Joint) Monthly Income = 0	Parent 2 (Joint) Monthly Income = $4,166 [$50k/year]
$10,000	$1,280.00	$1,196.00	$613.44
$20,000	$1,680.00	$1,596.00	$1,013.44
$30,000	$2,080.00	$1,996.00	$1,413.44
$40,000	$2,480.00	$2,396.00	$1,813.44
$50,000	$2,880.00	$2,796.00	$2,213.44
$60,000	$3,280.00	$3,196.00	$2,613.44
$70,000	$3,680.00	$3,596.00	$3,013.44
$80,000	$4,080.00	$3,996.00	$3,413.44
$90,000	$4,480.00	$4,396.00	$3,813.44
$100,000	$4,880.00	$4,796.00	$4,213.44
$1,000,000	$40,880.00	$40,796.00	$40,213.44
$2,000,000	$80,880.00	$80,796.00	$80,213.44
$3,000,000	$120,880.00	$120,796.00	$120,213.44
$4,000,000	$160,880.00	$160,796.00	$160,213.44
$5,000,000	$200,880.00	$200,796.00	$200,213.44
$6,000,000	$240,880.00	$240,796.00	$240,213.44
$7,000,000	$280,880.00	$280,796.00	$280,213.44
$8,000,000	$320,880.00	$320,796.00	$320,213.44
$9,000,000	$360,880.00	$360,796.00	$360,213.44