**THE KOGOD AFFAIR(S)**

*By Therese Shanks, Esq.*

This is a story of three women, two of whom were married to the same man, and one who was just dating him. In *Kogod v. Cioffi-Kogod*, 135 Nev. Adv. Op. 9, 439 P.3d 397 (2019), the Nevada Supreme Court examined the purpose and validity of alimony awards and the unequal distribution of marital assets in light of the husband’s colorful extramarital activities.

When I began writing this article, I thought the practical import of it to practitioners would be found in each holding of the Nevada Supreme Court. But, when the *Kogod* opinion is read as a whole, it becomes clear that there is one holding of which family law practitioners need to be aware: when the marital community estate ends.

**Mistresses, Wives, and Girlfriends, Oh My!**

Gabrielle Cioffi-Kogod married Dennis in 1991.1 Nadya married Dennis in 2004 in Mexico, but then later learned he was still married to Gabrielle.2 Despite this knowledge, Nadya remained with Dennis and conceived twin girls through in vitro fertilization in 2007.3

While Nadya was cool with Dennis being married to Gabrielle, Nadya was not okay with Dennis having a girlfriend (the “other-Other-Woman”) and she left him in 2015 upon that discovery.4

Gabrielle was not aware of Nadya or of the other-Other-Woman.5

According to Dennis, he and Gabrielle began living separate lives in 2004. According to Gabrielle, they were very much married and spoke every day while Dennis was travelling for work. According to the facts of this case, it appears both were correct. They were married. They probably did speak every day. And Dennis was, in fact, living a separate life.

It all came to a head when Gabrielle filed the divorce action underlying the *Kogod* opinion in December 2013 and discovered Dennis’s extracurricular activities during the trial.

Faced with the couple’s $47 million marital estate, the district court awarded each their separate property (about $6 million), and it unequally divided the remaining community estate. This was due to the district court finding that Dennis spent over $4 million on things like a second family, other extramarital affairs, and “gifts” to family members during the divorce proceedings.6

This resulted in Gabrielle receiving almost $21 million, mostly in cash assets, and Dennis receiving just under $14 million, mostly in real property.7

The district court also awarded Gabrielle a lump sum of $1,630,292 to compensate her for the financial losses she suffered during the marriage and sanctioned Dennis for violating a joint preliminary injunction by awarding Gabrielle the expert witness fees she incurred for a forensic accounting firm to review her and Dennis’s financial records.8

Dennis appealed, and Gabrielle cross-appealed the district court’s determination that the community terminated at the oral pronouncement of divorce, which was six months before the entry of the final divorce decree.9

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THE KOGOD AFFAIR(S)
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The End of the Community

The Kogod opinion (including its dissent) is an extremely well-written opinion analyzing and discussing Nevada law on alimony and community property distributions, but it does little to change or clarify the existing law in that area. There is a practical reason for this; No marriage is the same, and there can never be a bright line rule regarding when alimony is appropriate or how community property should be distributed. Instead, there are only guidelines, and the Kogod opinion spends a considerable amount of time taking those guidelines and applying them to the facts of the case before it.

Now, Kogod might be beneficial if you have a client who also has multiple wives, or perhaps owns a few secret yachts. Kogod also has moments of pure entertainment, such as when Dennis actually argued that he made so much money that his spending a million dollars of community property here or there on his second family and mistresses did not harm the community estate. The Court, obviously, rejected this argument.

But Kogod’s true impact is its clarification on when the community estate actually ends. In Kogod, the Court confirmed that the marital community does not end until the written divorce decree is entered. The Court noted that an oral pronouncement of divorce is not a valid judgment and, therefore, cannot terminate the community. Therefore, a court must consider what marital waste occurs between the date of oral pronouncement and the date of the divorce decree. Furthermore, the court must consider what community property has been acquired during that time period.

The holding in Kogod not only impacts litigants, but the courts as well. Because the court must now take into consideration what community property is acquired (or wasted) between the date of the oral pronouncement and the date of the written decree, the courts will have a strong incentive to get written orders out faster. And spouses like Dennis will have a strong incentive to refrain from gifting yachts until that written decree is entered.

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439 P.3d at 399.
4Id. at 400.
4Id.
4Id.
4Id.
4Id.
4Id.
4Id. at 409.
4Id.
4Id.
**CHILD SUPPORT CALCULATIONS IN NEVADA — WHAT IS CHANGING AND WHY**

*By Scott H. Husbands, Esq.*

In the Summer 2018 edition of this publication, I wrote about the potential upcoming changes in calculating child support obligations in Nevada. At that time, a set of new proposed guidelines had been prepared. Currently, those guidelines are now in the form of a proposed regulation that if adopted will be found in Chapter 425 of the Nevada Administrative Code. The current proposed guidelines and regulation can be accessed here: [https://dwss.nv.gov/uploadedFiles/dwssnvgov/content/Home/Features/August%202020%202019%20Hearing%20for%20Adoption%20of%20Regulations.pdf](https://dwss.nv.gov/uploadedFiles/dwssnvgov/content/Home/Features/August%202020%202019%20Hearing%20for%20Adoption%20of%20Regulations.pdf). In addition to accessing the guidelines, practitioners can also access meeting minutes and videos of the Child Support Commission hearings. Those items can be accessed here: Meeting Minutes and Recordings.

As the possible adoption of the proposed regulations nears, this article focuses on a summary of what is changing from the current statutory approach and why the changes are being made.

**Why the Rules Are Changing**

The last comprehensive changes to child support rules and regulations were done in the 1980s. The current changes are the result of enforcement issues identified under federal law and disparate impacts on obligors and obligees when compared to federal poverty levels, costs of living and the costs of child rearing. One of the most harmful aspects of the existing rules was the impact of the $100 minimum per child amount on low income obligors. This minimum amount, as discussed below, has been eliminated.

The new guidelines have been modeled in a way that closely ties them to current standards under federal poverty levels, costs of living and costs of child rearing. As explained below, the rules have also been changed to allow for greater adaptability moving forward as economic indicators change.

**Expected Timeline**

The short answer to this question is that there is no firm answer as to when the new child support guidelines will be effective. Most estimates, including those from the March 2019 Family Law Conference, are that the new rules will become effective in the fourth quarter of 2019. Because these new rules will soon become effective, it is important for practitioners to review potential child support obligations under the current rule and the new rules, and provide advice to clients under both sets of rules. In some circumstances, it may be in a client’s best interest to delay entry into an agreement that impacts child support. In other circumstances, it may be in the client’s best interest to have the support obligation calculated under the current rules before the new rules become effective. This is a case-by-case analysis that cannot be determined unless the attorney undertakes a comparative analysis. This comparative analysis takes very little time and the cost pales in comparison to the cost of defending against a claim by a client that an attorney did not provide proper advice.

**More Efficient Mechanism for Changes to Guidelines**

Currently, because the existing rules are part of the Nevada Revised Statutes, any changes must be made through the Nevada Legislature. Since the Legislature only meets on a biennial schedule, the practical ability to change the current rules is greatly limited. In addition, any proposed changes would need to be considered along with the myriad other legislative actions taken up on a biennial basis. This is a cumbersome process that has been eliminated under the current guidelines. Going forward, any changes that need to be made will be proposed to the Child Support Commission, which will consider the changes and implement those through the administrative rulemaking process.

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1 This issue is important in light of the fact that the proposed rules and guidelines except the adoption of the new rules and guidelines from the definition of changed circumstances that would allow for a child support modification. In other words, if a party’s obligation dramatically increases or decreases under the new rules, that party cannot seek a modification of child support for that reason alone. Likewise, a party cannot seek modification of a support obligation if the guidelines as adopted are later revised.

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Spring/Summer 2019

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Transition to a Detailed Definition of Income

Income under the current statute is defined by reference to a party’s gross monthly income (GMI). GMI is defined as the “total amount of income received each month from any source of a person who is not self-employed 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.” NRS 125B.080(1)(a). This is a very general definition that is refined by a constantly evolving body of legal authority. This results in practitioners having to research these authorities whenever they are presented with something other than ordinary W-2 income.

The new guidelines define income with a great deal of specificity in the actual guidelines themselves, instead of relying on a general definition that is supplemented by legal precedent. In addition to more precisely defining what is income, the new proposed guidelines also define what is not income. As a practical matter, this alone should result in more uniform determinations from courts which, in turn, may result in less objections or appeals.

Gross income is defined under the new guidelines to include the following:

1. Salary and wages, including, without limitation, money earned from overtime pay if such overtime pay is substantial, consistent and can be accurately determined
2. Interest and investment income not including the principal
3. Social Security disability and old-age insurance benefits under Federal Law
4. Any periodic payment from a pension, retirement plan or annuity that is considered remuneration for employment
5. Net proceeds resulting from workers’ compensation or other personal injury awards intended to replace income
6. Unemployment insurance
7. Income continuation benefits
8. Voluntary contributions to a deferred compensation plan, employee contributions to an employee benefit or profit-sharing plan, and voluntary employee contributions to any pension or retirement account, regardless of whether the account provides for tax deferral or avoidance
9. Military allowances and veterans’ benefits
10. Compensation for lost wages
11. Undistributed income of a business entity in which a party has an ownership interest sufficient to individually exercise control over or access the earnings of the business, unless the income is included as an asset for the purposes of imputing income pursuant to a

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separate section of the proposed guidelines. As used in this paragraph:

a. A “reasonable allowance for economic depreciation” means the amount of depreciation on assets computed using the straight-line method and useful lives as determined under federal income tax laws and regulations.

b. “Undistributed income” means federal taxable income of a business entity plus depreciation claimed on the entity’s federal income tax return less a reasonable allowance for economic depreciation.

12. Child care subsidy payments if a party is a child care provider

13. Alimony

14. All other income of a party, regardless of whether such income is taxable

Gross income under the new guidelines does not include the following:

1. Child support received.

2. Foster care or kinship care payments.

3. Benefits received under the federal Supplemental Nutrition Assistance Program.

4. Cash benefits paid by a county.

5. Supplemental security income benefits and state supplemental payments.

6. Except as otherwise provided in the guidelines, payments made for social services or any other public assistance benefits.

7. Compensation for losses, including, without limitation, both general and special damages, from personal injury awards not intended to replace income.

Practitioners should review for themselves to understand the specifics. Most practitioners will recognize many of the included or excluded income types as having been already addressed by Nevada cases. The inclusion of undistributed income merits particular comment. This type of income is best known as retained earnings. Individual practitioners likely have their own experiences with arguing about inclusion of retained earnings under the current definition of income. Because retained earnings are specifically mentioned as being included, this arguably expands what could be considered by a court in determining a party’s income for purposes of calculating child support.

The guidelines as currently written include alimony received in determining a party’s gross monthly income. However, the issue of how to treat alimony paid by an obligor is left unaddressed by the new proposed guidelines. As the current statute is written, and oftentimes interpreted, alimony paid is not deducted from an obligor’s gross monthly income before calculating a child support obligation. In some circumstances, after payment and receipt of alimony and child support, this can leave the parties on unequal financial footing to the detriment of the obligor. This to some may seem unfair. It may be viewed as particularly unfair by parties who enjoy joint physical custody.

Transition from Static Percentages With Caps to Declining Percentages and No Caps

The current rules as set forth in the Nevada Revised Statutes determine a party’s child support obligation by reference to a set percentage of a party’s gross monthly income. The percentages do not change based on a party’s gross monthly income. The percentages do increase as the number of children involved increase. These are not limitless obligations. Based on the range of a party’s gross monthly income, a party’s obligation is presumptively capped. These presumptive caps change annually as of July 1 based on changes in the U.S. Consumer Price Index.

The new proposed guidelines are based on percentages of a party’s gross monthly income but with a slightly different approach. The new proposed guidelines determine a party’s support obligation by reference to a schedule with declining percentages, per child, that decline in stages as a party’s income increases. Unlike the current model, there are no limitations on a party’s obligation as there are under the current rules. As a result of eliminating the presumptive maximums, it will be easier for high income earners to be

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subjected to large child support obligations. It should be noted that under the current statutory scheme, high income earners still have the potential to be exposed to a large obligation as one of the deviating factors allows for an upward adjustment based on the relative income of the parties. However, such an upward deviation requires a specific factual finding by the Court and would be subject to objection and change by the reviewing district court judge. The new guidelines will result in more consistent obligations for high income earners. The following is a breakdown of the percentages and income groups that vary depending on the number of children involved.

(1) For one child, the sum of
a. 16 percent of the first $6,000 of a parent’s gross monthly income, plus
b. 8 percent of the portion of the parent’s gross monthly income for any gross monthly income from $6,001 to $10,000, plus
c. 4 percent of the portion of the parent’s gross monthly income for any gross monthly income in excess of $10,000.

(2) For two children, the sum of
a. 22 percent of the first $6,000 of a parent’s gross monthly income, plus
b. 11 percent of the portion of the parent’s gross monthly income for any gross monthly income from $6,001 to $10,000, plus
c. 6 percent of the portion of the parent’s gross monthly income for any gross monthly income in excess of $10,000.

(3) For three children, the sum of
a. 26 percent of the first $6,000 of a parent’s gross monthly income, plus
b. 13 percent of the portion of the parent’s gross monthly income for any gross monthly income from $6,001 to $10,000, plus
c. 6 percent of the portion of the parent’s gross monthly income for any gross monthly income in excess of $10,000.

(4) For four children, the sum of
a. 28 percent of the first $6,000 of a parent’s gross monthly income, plus
b. 14 percent of the portion of the parent’s gross monthly income for any gross monthly income from $6,001 to $10,000, plus
c. 7 percent of the portion of the parent’s gross monthly income for any gross monthly income in excess of $10,000.

(5) For each child in excess of 4 children, the sum of
a. An additional 2 percent of the first $6,000 of a parent’s gross monthly income, plus
b. An additional 1 percent of the portion of the parent’s gross monthly income for any gross monthly income from $6,001 to $10,000, plus

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c. An additional 0.5 percent of the portion of the parent’s
gross monthly income for any gross monthly income in
excess of $10,000.

This schedule does not apply in every case. The court must
first assess whether the obligor can afford to pay the amounts
calculated pursuant to the schedule. If so, then the court will
calculate the obligation pursuant to the schedule. If the court
determines that the obligor cannot afford to pay the amount
determined by the schedule, then the obligation will be
determined by a separate annual schedule based on current
federal poverty guidelines.

Stipulations Regarding Child Support

The new guidelines set forth an express mechanism by which
parties can enter into stipulations regarding child support
including a stipulation to an amount that does not comply
with the guidelines. To be binding, the stipulation must be in
writing and must include or provide the following:

1. The current gross monthly income of each party.
2. The child support obligation or calculation under the
guidelines.
3. Notice that if either party seeks a review of the
stipulated child support amount for any authorized
reason, that the court will calculate the obligation
according to the guidelines in effect at the time of the
review.
4. A certification by the obligee that he or she is not
currently receiving public assistance and has not
applied for public assistance.
5. A certification that the basic needs of the child are
met or exceeded by the stipulated child support
obligation.

Any stipulation under the guidelines must also be approved or
adopted as an order of the court.

Treatment of Custodial Arrangements

The new guidelines treat custodial arrangements in the same
way as the current statutes and case law. For the sake of clarity,
the guidelines provide the benefit of a simple mechanism for
addressing situations where the parties have both joint and
primary custody over their children.

Primary Custody: Where a party has primary custody of the
parties’ only child or all of the parties’ children, the obligor’s
child support obligation will be calculated and paid to the
obligee.

Joint Custody: Where the parties have joint physical custody
over their only child or all of their children, an obligation will
be determined for each. The obligations will be offset so that
the party with the higher obligation will pay the difference
between the two obligations to the party with the lower
obligation.

Split Custody: This arrangement applies where the parties
have two or more children with joint custody of some
children and primary custody of other children. Here, the
total child support obligation of each party must be
determined based on the number of children to whom each
party owes a child support obligation. Once the total
obligations of each party are determined, the obligations will
be offset in the same way as obligations under joint physical
custody.

The current guidelines do not have any provision for what are
termed “serial parents.” Serial parents are parents who have
multiple children with more than one person. Under these
guidelines, the only mechanism to address this issue would be
an adjustment by the court as discussed below.

Imputation of Income

The new guidelines change the manner in which a court can
impute income to a party. Currently, a court can only impute
income if the court makes a finding that the party is
underemployed for the purpose of avoiding a child support
obligation. The new guidelines allow a court to impute income
if the court determines that an obligor is underemployed or
unemployed without good cause. This appears to be a lower
burden than the burden to prove that the obligor is
underemployed for the purpose of avoiding a child support
obligation.

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In imputing income, the court must take into account the specific circumstances of the obligor, including without limitation the following factors:

1. The obligor’s:
   a. Assets
   b. Residence
   c. Employment earnings history
   d. Job skills
   e. Educational attainment
   f. Literacy
   g. Age
   h. Health
   i. Criminal record and other employment barriers
   j. Record of seeking work
2. The local job market
3. Availability of employers willing to hire the obligor
4. The prevailing earnings level in the local community
5. Any other relevant background factors in the case

Equitable Division of Child Care Costs

The new guidelines propose that a court calculating a child support obligation must consider the reasonable costs of child care paid by either or both parties and specifically requires an equitable division of those costs. This approach is different than the current approach, which includes child care costs as a potential deviation under NRS 125B.080(9).

Adjustments to Support Amounts

Under the current statutes, specifically, NRS 125B.080, a court may deviate from the statutory obligation based on a number of deviation factors. The new guidelines take this same basic approach with some modifications. Under the new guidelines, a court may adjust a child support obligation 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:

1. Any special educational needs of the child (identical to item (c) of NRS 125B.080(9))
2. The legal responsibility of the parties to provide for the support of others (identical to item (e) of NRS 125B.080(9))
3. The value of services contributed by either party (identical to item (f) of NRS 125B.080(9))
4. Any public assistance paid to support the child (identical to item (g) of NRS 125B.080(9))
5. The cost of transportation of the child to and from visitation (slightly modified version of item (i) of NRS 125B.080, which only allowed for such an adjustment if the custodial parent moved with the child from the jurisdiction of the court and the noncustodial parent remained)
6. The relative income of both households so long as any adjustment does not exceed the total obligation of the other party (slightly modified version of item (l) of NRS 125B.080 to the extent it broadens income to be from the household and not simply the parent)
7. Any other necessary expenses for the benefit of the child (identical to item (k) of NRS125B.080(9))
8. The obligor’s ability to pay (this is a new adjustment factor not expressly included in NRS125B.080(9))

As discussed elsewhere in this article, health insurance and child care costs are separately provided for in the new guidelines. The new guidelines do not allow for adjustment based on the following deviating factors as they currently exist in NRS 125B.080(9): age of child, expenses reasonably related to the mother’s pregnancy and confinement, and the amount of time the child spends with each parent.

Removal of Health Insurance Costs from Deviating Factors

The proposed guidelines remove the cost of providing health insurance from the list of deviating factors or adjustments to support amounts. The guidelines create an entirely separate stand-alone section on “medical support” that is defined to include, without limitation, the payment of a premium for accessible medical, vision, or dental coverage under a plan of insurance that is reasonable in cost. The guidelines specifically define what is “accessible” and “reasonable in cost.” A cost is reasonable if the cost to each party responsible for providing medical support is not more than 5 percent of the gross

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monthly income of that party or if the cost of adding a dependent to any existing plan is not more than 5 percent of the gross monthly income of the party. The court must assess the plan of insurance, including copayments, deductible and maximum out-of-pocket costs, and determine that the plan is reasonable in cost.

Every order issued or modified in Nevada must include a provision specifying that medical support is required to be provided for the child and must include in the order any details relating to that requirement.
ESTABLISHING AND DEVELOPING A NEW
FAMILY LAW PRACTICE
PART 5: THE OWNER-MENTALITY V. THE EMPLOYEE-MENTALITY

By Bruce I. Shapiro, Esq.

Every business is comprised of two general types of mentalities: The owner-mentality and the employee-mentality. Every business needs both to operate in the short-term and prosper in the long-term. Not every employee has an “employee-mentality” and not every owner has an “owner-mentality.” A business will thrive when employees have an owner-mentality. With the inverse, a business will generally not succeed when the owners have an employee-mentality. So, what’s the difference? If you don’t know, you probably have the employee-mentality, even if you think you have an owner-mentality.

The difference may be best described as the difference between a startup and an established business. Do you have an IBM-mentality (employee) or a startup-mentality (owner)? At an established business, such as IBM, every owner and employee knows they are going to receive a paycheck every week no matter how the business performs. At a startup, however, neither an owner nor an employee knows when their next check may come. At IBM, account executives may not even return the call of a potential client they deem “small” and not worth their time. At a startup, you will return every call, even if it won’t immediately add to your bottom line. Further, every potential contact for a startup is important because you never know how that contact will help your business in the long-term.

As an owner, how do you identify the differences in the mentality of your employees? The employee plans his or her week; the owner plans the next five years. The employee-mentality worries about what s/he will earn in the current year; the owner-mentality plans for retirement. The employee is on vacation splashing around at the beach without a care in the world; the owner is explaining to his or her spouse why s/he must provide exceptional customer service even though s/he is on a vacation or it is a holiday.

One who has an owner-mentality freely assists colleagues, knowing that any business is only as good as its weakest link. The employee-mentality is territorial and fears being replaced if s/he teaches someone his or her skills. The employee complains there are no paper clips; the owner goes and gets them. The employee identifies problems; the owner seeks solutions.

The employee-mentality believes it makes sense to leave at 4 p.m. to beat 5 p.m. traffic; the owner-mentality works another two hours and waits until 6 p.m. after traffic. The employee-mentality does not look at how s/he may save the business money or avoid unnecessary expenses. The owner-mentality treats the company’s funds as his or her own.

Even if there isn’t any work to do, the owner-mentality is still at the office over the weekend, reading articles and scouring the internet for ideas to grow the business; the employee-mentality is sitting at the pool struggling to decide whether to have a daiquiri or margarita.

In sum, the owner-mentality wrote this article, and the employee-mentality is wondering—why?

BRUCE I. SHAPIRO attended the University of Nevada, Las Vegas, and received his bachelor’s degree in 1984 and his master’s degree in 1986. He graduated from Whittier College School of Law in 1990, magna cum laude. He has practiced in family law since 1990 and has served as a Domestic Violence Commissioner, pro tempore; URESA/Paternity Hearing Master, Alternate; Municipal Court Judge, Alternate; and Judicial Referee, Las Vegas Justice Court, Small Claims. Shapiro has written several articles in the area of family law and has served on the Nevada Children’s Justice Task Force; Clark County Family Court Bench-Bar Committee; the State Bar of Nevada, Child Support Review Committee; the State Bar of Nevada, Southern Nevada Disciplinary Board; the State Bar of Nevada, Standing Committee on Judicial Ethics and Election Practices; and the Continuing Legal Education Committee. Shapiro also served on the Board of Governors for the State Bar of Nevada from 2003-2005 and 2008-2010.