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Willful Underemployment Under NRS 125B.080(8)

By Bruce I. Shapiro

The parents of a child have a duty to financially support their child.[1] Child support is set pursuant to the statutory presumptions contained in NRS 125B.070.[2] NRS 125B.080(4) provides that the formulas in 125B.070 notwithstanding, "the minimum amount of support that may be awarded by a court in any case is $100.00 per month per child, unless the court makes a written finding that the obligor is unable to pay the minimum amount." NRS 125B.080(4) goes on to provide that "[w]illful underemployment or unemployment is not a sufficient cause to deviate from the awarding of at least the minimum amount." NRS 125B.080(8) provides that, if an obligor is willfully underemployed or unemployed "*to avoid an obligation for support of a child*, that obligation must be based upon the parent's true potential earning capacity." [Emphasis added].

There are only two Nevada cases directly discussing willful underemployment and both are relatively consistent with the case law in other states. The first, *Rosenbaum v. Rosenbaum*,[3] was decided before the adoption of NRS

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CIVILITY IN THE PRACTICE

By Harold C. Albright

Shawn Meador's article *From The Chair* in the fall *NFLR* prompted this article. His comments regarding his relationship with opposing counsel really struck home. I have more and more recently thought that my opposing counsel are becoming less and less civil. Consequently cases are becoming harder to handle and much more expensive. Whereas a phone call used to suffice, it now takes at least one letter, if not a proper notice, and often even a motion. Recently I was told to "shut up" while in a deposition.

In doing some research for this article it is apparent that in truth and in fact incivility is becoming more of a factor pervading the administration of justice not only in Reno, but throughout the country.

The Seventh Circuit Court of Appeals in 1989 created a task force to study the matter of civility in the profession. The

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FROM THE CHAIR

by Shawn Meadow, Chair

Once again Mary Rose Zingale is waiting on me to get a Chair's column completed so that she can get this issue of the NFLR published and distributed. Once again, my apologies to her and to all of you for the delay. We have committed to getting the NFLR out regularly and timely. As in my practice, deadlines without penalties are often difficult for me to meet!

Recently, I have had several conversations with Tom Leeds, the URESA Master (now UIFSA I suppose) in Las Vegas. Tom is also a hard-working member of the Executive Council of the Family Law Section. Tom questions what the role of the Family Law Section is and what it should be. As noted in my first column, the current Executive Council is made up of many new members, the longest serving having been on the Council for less than three years. With all of this "new blood" it may be a good time to evaluate just what it is we do and whether there should be any changes.

As a starting point, the By-Laws of the Family Law Section state the purpose as follows:

> The general purposes of the Section shall be the promotion of the objects of the State Bar of Nevada (State Bar) within the particular fields designated by the name of this Section. To that end, it shall be the purpose of the Section to further the knowledge of the members of the Section, the Bar and Judiciary in all aspects of Family Law; establish and administer seminars (subject to prior approval of the State Bar CLE Director); provide for and distribute Family Law publications; and assist the Board of Governors in the implementation of programs, policies, standardization and guidelines in the field.

The annual Tonopah "Spring Fling" clearly is within the stated goal of furthering the knowledge of members and judiciary and of providing what I believe is quality and often entertaining CLE. The NFLR also meets those goals through publication of interesting and timely articles. It is my belief that we should continue both, and I suspect there would be little true opposition to the Section doing so (with the exception of certain friends of mine who keep trying to convince me that Napa would be more fun than Tonopah).

Of perhaps greater potential dispute, however, is whether the Section should limit itself to educating members and the judiciary and providing a forum for discussion of issues, or whether the Section itself should advocate change. For example, as you all know, the Section is presently evaluating the need for and appropriateness of an alimony formula in order to reduce the perceived inequities in alimony awards among the different courts.

Should the Section limit itself to identifying and studying issues and providing a forum for the discussion of those issues, or, should the Section go the next step and, within the Rules and By-Laws of the Section and State Bar, advocate for a change in the law? Both approaches have some merit. There is certainly value to having a vehicle or mechanism for the identification, study and debate of various Family Law issues. If the Section's purpose is limited to that role, it could foster intelligent and open debate, without fear or concern that views discussed would be represented as the unanimous view of all members. I certainly cannot recall a single issue on which we had unanimous consent, or anything close to it, and I am aware of members who had very serious concerns with positions taken or perceived to have been taken by the Section.

On the other hand, if we as a Section are

not willing to take on the additional role of advocate, who will promote the changes we may believe are appropriate and warranted? There is no other group that has the knowledge, experience and interest in Family Law in Nevada that the Section and its members have. If we as a Section firmly believe that changes need to be made, perhaps we have an obligation to try to do something about it.

I am not convinced that there is any one right answer to this question. I would certainly like to hear from any of you who have strong feelings about this issue. We could arrange for a point, counterpoint type article for the NFLR or even letters to the editor. I would appreciate it if you would think about this issue between now and March and come to Tonopah prepared to let us, the Executive Council, know how you feel about what we should be doing as a Section.

In the meantime, my best wishes to you and your families for health, happiness and prosperity in the New Year.

ARTICLES, CASE SUMMARIES WANTED FOR NFLR

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

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

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

Civility con't

results of the task force's survey of District of Columbia Bar were summarized and reported in 1992. The task force surveyed both the general District of Columbia Bar and a subgroup identified as "litigators". Of both groups, 69% believed that lack of civility was a very important or somewhat important problem in the legal profession.

Of the judges and commissioners of the District of Columbia Superior Court who responded to the survey, 76% believed that there was a general problem of incivility in the legal community.

Of the judges and magistrates in the U.S. District Court for the District of Columbia, 75% of those responding believed that there was a general problem of incivility in the legal profession.

The task force also sent a survey to several law school faculties in the District of Columbia. Of the 107 professors who responded, over one-half thought that incivility was a significant or increasing problem in the profession.

The surveys listed four causes of the problem. Those causes were: (1) pressure to attract or keep business; (2) pressure from clients; (3) inexperience in the practice; and (4) failure of senior attorneys to transmit a tradition of civility.

The task force then put forth the *D.C. Bar Standards for Civility in Professional Conduct* which states in excess of 50 positions organized under a Preamble, Principals of General Applicability: Lawyers' Duties to Other Counsel, Parties and the Judiciary, Principals Particularly Applicable to Litigation: Lawyers' Duties to the Court, Judges' Duties to Lawyers and Judges' Duties to Each Other, and Principals Particularly Applicable to Representations Involving Business Transactions and Other Negotiations.

This report has acted as a springboard with some 26 state bar associations and 24 county bar associations in 37 states adopting similar civility codes or standards. Ultimately a document entitled *Guidelines for Conduct of the Section of Litigation of the American Bar Association* was also put forth by the American Bar Association.

Most notably the Young Lawyers Section of the State Bar of Nevada published a *Lawyer's Pledge of Professionalism* which contains 23 points arranged in categories relating to: (1) duties an attorney owes to the client; (2) duties an attorney owes to other counsel; (3) duties an attorney owes to the court; and (4) duties an attorney owes to the public.

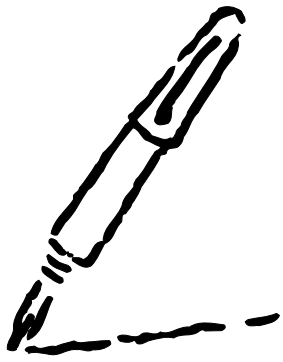
Debate has raged as to whether or not such guidelines are appropriate. It has been extremely difficult for each of the various task force entities to define what civility is. The working definition developed by the District of Columbia Task Force was "treating others in a professional manner and with courtesy and respect." The task force noted that civility was adhering to the "Golden Rule", i.e., treat others in the manner you would like to them to treat you if you were in their shoes and they were in yours.

The second major area where debate has raged is whether or not the civility codes are to be voluntary or aspirational, and whether violating them can be the basis for disciplinary action. It has been

Mark Your Calendar

March 19-21

Tonopah



Civility con't

generally the position of bars that have enacted such guidelines that the guidelines are merely "aspirational" and are not to be used in disciplinary actions. The guidelines are generally not a supplement to the Codes of Professional Conduct of the various states. Unfortunately it appears that many attorneys equate zealous advocacy of their client with incivility. The bar associations have gone on at great length to enunciate that just because one is advocating a position, they do not have to do so in an uncivilized manner. Simply because another person does not agree with your position or the facts of a case, does not mean that they are incorrect. What it means is that particular issue has to be properly developed and presented to the judge to make a decision. Referring to opposing counsel as "a jerk" and to opposing parties as "scumbags" doesn't help frame the issues.

In any event, the thrust of the aspirational guidelines is to encourage attorneys to be more courteous and professional and to provide a framework that can be used to promote discussions of this topic in law schools and bar associations, and among practitioners as a whole.

As anyone who has practiced domestic law will readily recognize, we deal with the parties' most emotional and basic problems. We are dealing with their livelihoods, property and children. Our conduct can do a great deal to help minimize or aggravate the trauma involved with a divorce. Civilized professional conduct toward the other party, opposing counsel and the court will help the parties through the process and will help the court make just and fair decisions based upon well presented cases. If the parties' legal issues are properly framed, not only will the attorneys know better what is going on, but they can help the court make better decisions which are based on reality and not on mistakes.

I truly believe much of the acrimony that occurs in divorces would dissipate if everyone tried to behave in a more civilized manner. I also firmly believe that decisions would be easier for judges and clients alike because they would be based on the true state of evidence in the case. The ultimate termination of the marriage would then be based on reality and the parties would be able to live with the decisions and would have a feeling that the process met their needs.

I urge members of the Bar to review the *Lawyer's Pledge of Professionalism* from the Young Lawyers Section of the State Bar of Nevada printed on page 12 of this issue and to make an effort to practice more civility.

I look forward to working in this practice for the next several years, and I certainly hope that it can be done with less stress and a higher quality of product ultimately because we can interact in a civilized manner and understand each other better.

Willful Employment con't

125B.080(8) in 1987. *Rosenbaum* involved an obligor who quit his job as an air traffic controller earning $19,000.00 per year in Missouri and moved to Las Vegas where he became employed by a bank earning $4,800.00 per year.[4]

The obligor admitted to quitting his job, but claimed he left due to his wife's misconduct and could not find a similar position in Las Vegas.[5] The lower court refused to consider evidence concerning the husband's prior income or his income potential finding "such evidence was speculation and not relevant to the issues."[6] The Nevada Supreme Court, however, held that a trial court "should be allowed, but not required, in fixing the amount of alimony or child support to consider what a husband or father could in good faith earn if he so desired."[7] The key is good faith. If one "intentionally holds a job below his reasonable level of skill or purposefully earns less than his reasonable capabilities," this should be considered in setting the financial awards. If, however, "through circumstances beyond his control, [one] cannot in good faith obtain a job commensurate with his skills . . . the award should be in keeping with his ability to pay, having regard for all other factors which bear upon the issue."[8]

The second case, *Minnear v. Minnear*,[9] involved an obligor who was a doctor, who had a stated income of $1,200.00 per month plus a net income of $18.31 on "numerous rental properties." The court found "deliberate avoidance" on the part of the obligor. The Nevada Supreme Court noted that the statute required a finding that the willful underemployment was "for the purpose of avoiding an obligation for support of a child." The court, however, interpreted the statute as where "evidence of willful underemployment preponderates, a presumption will arise that such underemployment is for the purpose of avoiding support. Once this presumption arises, the burden of proving willful underemployment for reasons other than avoidance of a support obligation will shift to the supporting parent."

The purpose of this article is to briefly explore several scenarios and analyze under which circumstances it may be appropriate for a trial court to impute income to an obligor parent for the purpose of calculating a child support obligation if that parent is willfully unemployed or underemployed (hereinafter collectively referred to as "willfully underemployed"). This issue typically arises in the following scenarios:

1. The obligor parent is terminated from his or her employment;
2. The obligor parent chooses a change in employment;
3. The obligor parent ceases employment to pursue an education;
4. The obligor parent has been incarcerated; and
5. The obligor parent ceases employment due to a marriage or to stay home with minor children.

TERMINATION OF EMPLOYMENT

In reviewing termination cases, the courts have focused on the "voluntariness" of the termination, that is, whether the obligor lost his employment for a good faith reason. An obligor whose employment is terminated, through no fault of his own, from a job which he had held for

many years, who subsequently conducts an exhaustive job search and depletes all of his assets should receive a reduction in his child support obligation.[10] Similarly, if an obligor is subjected to a "forced" buy-out from his employer, the obligor may be entitled to a reduction. The obligor, however, will have the burden of showing that there was a "substantial likelihood" that the obligor's job would not continue. Under these circumstances, the court in *Ms. B v. Mr. K.*,[11] found that the obligor made a reasonable decision in quitting his job and was entitled to a reduction in his child support obligation.[12]

A court may properly impute income to a party upon a showing that the party has the ability to earn more by use of his or her best efforts to gain employment equal to his or her capabilities.[13] A court, however, should not impute income based upon a party's prior extraordinary efforts, but rather upon reasonable efforts over an extended period of time.[14] In *Haas v. Haas*,[15] the husband had started a business in which he worked excessively long hours and earned a salary of $31,500, while the business earned an additional profit of $38,000 per year. Subsequent to the divorce being initiated, the husband claimed exhaustion. The husband did not sell the business, but rather went to work for another company earning $25,000.00 per year.[16] The court ruled that child support should not be calculated on his prior "extraordinary efforts," but rather his "reasonable employment potential."[17]

In *Carey v. Carey*,[18] the obligor, after his initial divorce, remarried and quit his job to "devote time to his two businesses and household duties." The court found that the businesses did not contribute "materially" to his support.[19] The obligor was for all practical purposes being supported by his spouse in "exchange for the [obligor's] household duties." The court found that the obligor "intentionally terminated his employment thereby substantially reducing or eliminating his actual earnings."[20] The law is clear that, "if an obligor, acting in bad faith, voluntarily worsens his financial position so that he cannot meet his obligations, he cannot obtain a modification of support."[21]

In *Winfrey v. Winfrey*,[22] an obligor parent was terminated from his truck driving position ten days prior to trial. He was terminated because he refused to take an assignment that he believed to be dangerous and unlawful. The trial court found that although the obligor was terminated due to his own conduct, the court could consider the reason for his termination.[23] If an obligor's employment situation changes because of circumstances beyond his control, or is reasonable in light of all the circumstances, then it would be unfair to find the obligor voluntarily underemployed. There must then be a finding of a bad faith.[24]

The case of *In Re Marriage of Blum*[25] related to an obligor parent who lost his job after fifteen years when the plant where he was employed closed.[26] The obligor found a lower paying job and requested a reduction in his child support obligation. The obligee conceded that the obligor lost his job through no fault of his own, but argued that the obligor could relocate to find a similar paying job. The court found that the obligor had valid reasons for not moving and his support should be based on his current employment, which was "not a self-inflicted or a voluntary reduction in salary."[27] The Iowa court recognized the importance of the children's relationship to the obligor parent and did not find it reasonable to require the obligor parent to relocate.[28]

By contrast, *In Re Marriage of Imlay*[29] dealt with a traveling salesman who was terminated from his employment as a result of a conviction for driving under the influence. The court found that obligor's loss of employment was the "result of deliberate conduct on [the obligor's] part which jeopardized his children's interests."[30] The obligor argued that the loss of his employment was not as a result of an intent to evade his child support obligation, but as a result of a poor performance. The court held that the obligor's loss of employment was a foreseeable consequence of the obligor's drunk driving and subsequent driving under the influence conviction.[31] The court found that a party who changes his employment status has the burden of showing that the change was made in good faith.[32] Further, many courts find that the obligor has duty to "mitigate" his loss of income by demonstrating a good faith effort in finding new employment.[33]

CHANGE IN EMPLOYMENT

A trial court may appropriately consider any substantial economic reversal resulting from a change in employment.[34] The change to a lower paying job, however, will always be suspect.[35] The party petitioning for modification based on a reduced earning capacity must carry the burden of showing his changed employment status was made in good faith.[36]

When considering a temporary reduction in child support due to a change in employment, the court must also look at numerous factors, primarily whether the obligor parent's motives are good. The court must look at the age of the child to determine whether the child will actually receive a benefit from a future greater earnings capacity. The court should also look at the obligor's payment history to help determine the obligor's motives.

In *McKinney v. McKinney*,[37] the obligor was earning $13.45 per hour before he was laid off. Nine weeks later, the obligor found employment in a different city earning only $11.50 per hour. Several months later, the obligor was offered his original employment. The obligor, however, refused to return because he had become settled in a new city and believed the new job to be more secure. The appellate court affirmed the trial court's determination that the obligor did not "deliberately and willfully leave" his initial employment and refused to find that he was willfully underemployed. The appellate court found that although the Kentucky statute did not specify a "bad faith" requirement in order to find willful unemployment, "such a requirement must be implied."[38]

A party may not avoid his obligation of support by an act of voluntary retirement or by giving up his profession to pursue a career in an unrelated field.[39] A reduction in ability to pay child support brought about through a voluntary change in circumstances is not, in itself, sufficient to mandate a modification of support. But at the same time, the position that self-imposed changes should never be the basis of a modification is too extreme. A balancing approach is required.[40] The

timing of the change is crucial in such a situation. This circumstance is particularly fact specific. A divorce decree should not freeze a parent paying child support into his or her existing employment. One acting in good faith should be able to make an occupational change even though that change may temporarily reduce his ability to meet his financial obligations to his children. Ordinarily, one makes a change in his occupation with the hope of improving his prospects for the future. When parents are living together, the standard of living of the children rises and falls with the changes in the parents' fortunes. This readjustment should not be any different because of a divorce.[41] A noncustodial parent should be allowed a reasonable "choice of a means of livelihood and the chance to pursue what he or she honestly feels are the best opportunities even though the financial returns may, for the present, be less."[42]

EDUCATION

Cases involving a parent who would like to quit his or her existing employment in an attempt to continue an education or become reeducated are amongst the most difficult for courts. *Jones v. Jones*,[43] dealt with a situation in which an obligor quit his employment so that he could attend college. At the time of the divorce, the obligor was a mill worker. Shortly after the divorce, the obligor's union, and consequently the obligor, went on strike. After returning to work subsequent to the strike, the obligor's wages were reduced. As a result, the obligor decided that he wanted to return to college in order to pursue a career in psychology.[44] The obligor then quit his job, enrolled as a full-time student and obtained two part-time jobs. The district court's subsequent refusal to decrease the obligor's child support was upheld by the appellate court. The court did not find that the obligor's action was in bad faith, but based partially on the fact that the obligor failed to consult the obligee, that he gave no warning about his decision, and that he had a poor payment history, the appellate court did not find sufficient cause to decrease his child support.[45]

In *Massingill v. Massingill*,[46] however, the obligor, who was a doctor, left his practice as an internist to reenter medical school for the purpose of becoming board certified in a specialty.[47] The obligor's reasons for leaving his practice were the influx of physicians in his field, fewer available patients and Medicare restraints. He testified that by becoming certified in a specialty he would be able to earn twice his present income.[48] The trial court reduced the obligor's child support and alimony obligations, finding that a parent whose "change of circumstances is due to his voluntary termination of employment can obtain a reduction in child support payments while engaged in further education pursuits."[49] The court held that the obligor must demonstrate that there has been a change in circumstances, that the change is reasonable and justified, that the change is being made in good faith and not attempting to avoid a support obligation, and that a reduction will not deprive the child of reasonable support.[50]

In Marriage of Nordahl,[51] the parties had been married twenty-one years. At the time of the divorce, the wife was 39, had custody of the parties' minor child, was unemployed, attending college full-time with a 3.5 grade point average, and expected to obtain an undergraduate degree so that she could become self-supporting. For the purposes of setting the husband's child support and alimony obligations, the court imputed the sum of $1,000.00 per month to the wife as income. The appellate court found that it was unfair to impute income to the wife and penalize her effort to become self-supporting.[52]

In *Pattee v. Pattee*,[53] the court found that the obligor did willfully quit his employment to take a lesser paying job. The obligor, however, did not take a lesser paying job with the intention of paying less support for his children, but rather to enhance his future earning capacity which will also benefit the children. The Alaska Supreme Court remanded the case back to the trial court to determine why the obligor became a student, how long he would be a student and what were his career goals.[54] The result in the above-referenced cases may appear harsh, but some courts opine that the children of the parties should not be forced to finance the noncustodial parent's career change.[55]

INCARCERATION

With regard to incarcerations, the underlying policy is obvious, a "person who has a support obligation should not profit from his criminal conduct, particularly at his children's expense."[56] Why should a convicted criminal be relieved from his or her child support obligations when an obligor who voluntarily quits or reduces his income is not afforded relief? Courts have handled the issue of whether incarceration is a change in circumstances warranting modification of a child support obligation in different ways.[57] Some courts deny modification of a support obligation if the incarcerated parent possesses other assets which could be used to satisfy the obligation.[58] Other courts have determined that incarceration does not justify reduction or suspension of child support obligation whether other assets are available or not.[59] A few courts have held that a parent incarcerated for a crime other than nonsupport is not liable for child support while incarcerated unless it can be affirmatively shown that the parent has assets from which to make payments.[60]

Most courts, however, have found that criminal conduct "of any nature cannot excuse the obligation to pay support."[61] Courts have also held that an incarcerated parent cannot be found in contempt for not paying while in prison, but the obligation nevertheless continues.[62] These courts additionally find, however, that post-incarceration collection of arrears "must be flexible and consider the parent's post-release financial circumstances."[63]

Pursuant to NRS 125B.020, all parents have a duty to support their children. This obligation should not change because a parent has become incarcerated. A similar analysis may be used for a obligor parent in drug rehabilitation, although courts generally find that drug rehabilitation is not a proper basis to modify a support award.[64] This trend is supported by the belief that a parent who stops working as a result of criminal conduct should nevertheless continue to be responsible for the support of his or her children. "Although incarceration is not itself a voluntary situation, it is the foreseeable consequence of behavior that is voluntary and intentional."[65] Additional

factors to consider in an incarceration are:

1. The length of the incarceration;
2. The earning potential of the parent following release;
3. The amount of the current child support award; and
4. The amount of arrears that will accrue during the incarceration.[66]

MARRIAGE

If an obligor parent ceases employment due to the fact that he or she has married and no longer needs to work, should that parent be relieved of his or her child support obligation? What about those cases where an obligor parent chooses not to work in favor of taking care of children of a subsequent marriage?

Few would take the position that remarriage should absolve the obligation of support, but how should child support be calculated in such cases?[67] Should the obligor parent's income be considered, based on community property interest, as one-half of the new spouse's income?[68] No Nevada statute or case law provides for imputing wages to a noncustodial parent who marries and chooses not to work outside the home.[69] Generally it would make the most sense to base the obligor's child support obligation on the obligor's previous income and to maintain the previous obligation.

In states utilizing the income-share method of calculating child support, the custodial parent's income is a major factor in calculating a support obligation. In *Canning v. Juskalian*,[70] the custodial parent stayed home with her two-year-old child of a subsequent marriage. The court found that it was proper to impute the custodial parent's income based on earning capacity and rental income.[71]

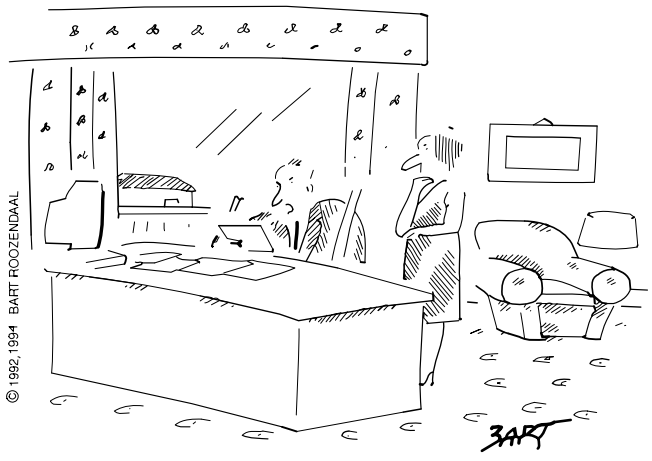
Between the parties' separation *In re Marriage of Noel*,[72] and the date of their divorce, the mother had two children and was expecting a third. The father was awarded custody of the of two of the parties' three children and the father agreed that mother would pay no child support. The lower court, however, refused to approve the agreement and imputed the mother's income at minimum wage. The Montana Supreme Court found that it must "apply its discretion in a realistic manner, taking into account the actual situation of the parties."[73] The Montana Supreme Court found that if the mother was going to work, the court must take into consideration the cost of the mother's day care expense for the children of her subsequent relationship.

The mother *In Re Marriage of Pote*[74] was only able to work 20 hours per week while caring for a child with Down's Syndrome from a subsequent marriage. The court found that the mother's reduced income was "involuntary" and income should not have been imputed.[75] Similarly, in *Rojas v. Rojas*,[76] the wife filed for divorce after a twelve-year marriage. The parties six-year-old child was then diagnosed with leukemia. The parties agreed that the wife would take off six months from work to care for the child. It was expected that the child's leukemia would go into remission by that time, thus enabling the mother to resume her employment as a receptionist. The lower court found that it was 'necessary' for the mother to stay home part-time to care for the needs of the child and therefore no income should be imputed to the her. The appellate court opined that the mother had a legitimate reason for staying at home with the child, but since the needs of the child only would allow her to work part-time, a part-time income should have been imputed.[77]

There are many factors to be considered when a court is faced with imputing income to a parent who wishes to stay at home to raise minor children. Courts should avoid creating economic "disincentives" that would prevent a parent from remarrying and remaining at home to raise children.[78] The court must consider the age, maturity, health and number of children in the home as well as the availability and cost of appropriate child care providers. The court must also consider the custodial parent's employment history, including recency of employment, earnings and other financial resources.[79]

CONCLUSION

Several trends have emerged in willful under- and unemployment cases. First, many courts are reluctant to reduce child support obligations. Although a temporary decrease in child support may benefit a child in the long run, many courts believe that the child should not have to financially suffer in the short term. The courts are also paying more attention to the obligor's long-term earning ability,



"Bad news—our consultant says living outside our means is no longer tax-deductible."

rather than short-term earnings. Lastly, "any voluntariness" in a parent's diminished earning capacity is a substantial impediment to obtaining a downward modification in a support obligation.[80] The Nevada Supreme Court's decision in *Minnear* may be consistent with the national trend, but the presumption of "willfulness" to any reduction in income is not consistent with the plain language of NRS 125B.080(8).

Although courts should be reluctant to decrease a child support obligation to the immediate detriment of the child, the courts should be become more receptive to temporary reductions in obligations that will allow the obligor parent to increase his or her earnings potential and ultimately provide the child with additional support. Initially, the court should look at the intent of the obligor and his or her payment history. If the obligor has quit or reduced earnings for a good faith reason, the court should then review other factors. The court should especially consider whether the reduction in support would create a financial hardship for the custodial parent and children and whether the children are young enough to realize the benefit of a future increased child support payment.

In sum, courts should be open and flexible for reductions in child support based on good faith reasons that will result in an enhanced child support award in the future. After all, the plain reading of the statute states that willful underemployment exists when done "to avoid an obligation for support of a child."

Notes

[1] NRS 125B.020.

[2] NRS 125B.070 provides as follows: Definitions.1. As used in this section and NRS 125B.080, unless the context otherwise requires: (a) "Gross monthly income" means the total amount of income from any source of a wage-earning employee or the gross income from any source of a self-employed person, after deduction of all legitimate business expenses, but without deduction for personal income taxes, contributions for retirement benefits, contributions to a pension or for any other personal expenses. (b) "Obligation for support" means the amount determined according to the following schedule: (1) For one child, 18 percent; (2) For two children, 25 percent; (3) For three children, 29 percent; (4) For four children, 31 percent; and (5) For each additional child, an additional 2 percent, of a parent's gross monthly income, but not more than $500 per month per child for an obligation for support determined pursuant to subparagraphs (1) to (4), inclusive, unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 5 of NRS 125B.080.

[3] 86 Nev. 550, 471 P.2d 254 (1970).

[4] *Id*. at 551-2.

[5] *Id*. at 552.

[6] *Id*.

[7] *Id*. at 554.

[8] *Id*.

[9] 107 Nev. 495, 814 P.2d 85 (1991).

[10] *Ronan v. Ronan*, 621 S.2d 518 (Flor. Dist. App. 1993).

[11] 601 N.Y.Supp.2d 980, 1598 Misc.2d 817 (1993).

[12] *Id*. at 982.

[13] *Haas v. Haas*, 552 So.2d 221, 224 (Fla. App. 1989).

[14] *Id*.

[15] *Id*.

[16] *Id*. at 222.

[17] *Id*. at 224.

[18] 615 A.2d 516 (Conn. App. 1992).

[19] *Id*. at 517.

[20] *Id*. at 518.

[21] *Willis v. Willis*, 820 P.2d 858, 859 (Ore. App. 1991).

[22] 602 So.2d 904 (Ala. App. 1992).

[23] *Id*. at 905.

[24] *Keplinger v. Keplinger*, 839 S.W.2d 566, 538 (Ky. App. 1992), *citing McKinney, v. McKinney*, 813 S.W.2d 828, 829 (Ky. App. 1991).

[25] 526 N.W.2d 164 (Iowa App. 1994).

[26] *Id*. at 165.

[27] *Id*. at 166. *See also Cohn v. Cohn*, 461 N.E.2d 1028 (Ill. App. 1993).

[28] *Blum* at 166.

[29] 621 N.E.2d 992 (Ill.App. 1993).

[30] *Id*. at 993.

[31] *Id*. at 994.

[32] *Id*. at 995.

[33] *See In Re Marriage of Seanor*, 876 P.2d 44, 48 (Colo.App. 1993).

[34] *In re Marriage of Imlay*, 621 N.E.2d 992, 994 (Ill. App. 1993).

[35] *Matter of Marriage of Case*, 879 P.2d 632 (Kan.App. 1994).

[36] *Imlay* at 995.

[37] 813 S.W.2d 828, 828-29 (Ky.App. 1991).

[38] *Id*. at 829.

[39] *Villano v. Villano*, 414 N.Y.S.2d 625, 629 (1979).

[40] *In re Rome*, 621 P.2d 1090, 1092 (1981).

[41] *Sabatka v. Sabatka*, 511 N.W. 107, 110 (Neb. 1994).

[42] *Wallen v. Wallen*, 407 N.W.2d (Wis.App. 1987).

[43] 806 P.2d 1170, 1172 (Ore. App. 1991).

[44] *Id*. at 1171.

[45] *Id*. at 1172.

[46] 564 So.2d 770 (La.App. 1990).

[47] *Id*. at 772.

[48] *Id*.

[49] *Id*. at 773.

[50] *Id*.

[51] 834 P.2d 838 (Colo.App. 1992).

[52] *Id*.

[53] 744 P.2d 658 (Alaska 1987).

[54] *Id*. at 662.

[55] *Id*.

[56] *Willis* at 860.

[57] *See generally Oberg v. Oberg*, 869 S.W.2d 235 (Mo. App. W.D. 1993) at 236-238.

[58] *Noddin v. Noddin*, 455 A.2d 1051 (Miss. 1993); *Proctor v. Proctor*, 773 P.2d 1389 (Utah App. 1989).

[59] *In re Marriage of Phillips*, 493 N.W.2d 872 (Iowa App. 1992); *Ohler v. Ohler*, 369 N.W.2d 615 (1985); *Cole v. Cole*, 590 N.E.2d 862 (1990).

[60] *Lewis v. Lewis*, 637 A.2d 70, 73 (D.C.App. 1994); *Clemans v. Collins*, 679 P.2d 1041 (Alas. 1994); *Commissioner of Human Resources v. Bridgeforth*, 604 A.2d 836 (1992); *Nab v. Nab*, 757 P.2d 1231 (Ind. App. 1988); *Meyer v. Nein*, 568 N.E.2d 436 (Ill. 1991); *Pierce v. Pierce*, 412 N.W.2d 291 (Mich. 1987); *Glen v. Glen*, 848 P.2d 819 (Wyo. 1993).

[61] *Willis*, *supra*.

[62] *Lewis v. Lewis*, 637 A.2d 70, 72 (D.C.App. 1994); *Oberg* at 237.

[63] *Davis v. Vance*, 574 N.E.2d 330 (Ind. App. 1991); *Mooney v. Brennan*, 848 P.2d 1020 (Mont. 1993); *Koch v. Williams*, 456 N.W.2d 299 (N.D. 1990); *Parker v. Parker*, 447 N.W.2d 64 (Wis. 1989).

[64] *Dept. of Health & Rehab. Serv. v. Schwass*, 622 S.2d 578, 579 (Fla. Dist app. 1993).

[65] *Oberg* at 238.

[66] *Oberg* at 238.

[67] *See* Note, "Devaluing Caregiving in Child Support Calculations: Imputing Income to Custodial Parents Who Stay Home With Children," 61 Missouri L.Rev. 429 (1996).

[68] *See Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994); *Jackson v. Jackson*, 111 Nev. 1551, 907 P.2d 990 (1995). Compare to *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992).

[69] *See Lewis v. Hicks*.

[70] 597 N.E.2d 1074 (Mass.App.Ct. 1992).

[71] *Id*. at 1079.

[72] 875 P.2d 358 (Mont. 1994).

[73] *Id*.

[74] 847 P.2d 246 (Colo. App. 1993).

[75] *Id*. at 248. *See also Rojas v. Rojas*, 656 So.2d 563 (Fla. App. 1995).

[76] 656 So.2d 563 (Fla. App. 1995).

[77] *Id*. at 564-65.

[78] *Stanton v. Abbey*, 874 S.W.2d 493, 499 (Mo.App. 1994).

[79] *Id*.

[80] *Oberg* at 238.

THINGS TO KNOW ABOUT SOCIAL SECURITY

By Barbara K. Finley

Most of us are only vaguely aware of the benefits avail able from Social Security. While almost everyone who works and has earnings is aware that a percentage of those earnings is withheld for the Social Security and Medicare programs, few understand the many categories of benefits available. The program involves much more than just retirement benefits. While it would be impossible to present a comprehensive explanation in the space available, it might he helpful to be aware of some aspects of the program, especially as they relate to practitioners of family law.

As an overview, the primary objectives of the Social Security Act and related laws are to provide for the material needs of individuals and families, when earnings have been curtailed because of retirement, disability or death of a worker. While hospital and medical insurance and other programs administered by Social Security also provide benefits, this article will deal primarily with cash benefits available based on contributions a worker has made to the program. This differentiates Social Security benefits from SSI (supplemental security income) and other public assistance and welfare services. in order to qualify for Social Security benefits, the primary worker must have paid into the system for a requisite number of years in order to become "insured". The exact number of years varies with the type of benefit payable, and the age at which a worker became disabled or died.

Monthly Social Security benefits can be paid to:

A. A disabled insured worker under age 65.

B. A retired insured worker at age 62 or over.

C. The spouse of a retired or disabled worker entitled to benefits who (1) is age 62 or over; or (2) has in care a child under age 16 or over age 16 and disabled, who is entitled to benefits on the worker's Social Security record.

D. The divorced spouse of a retired or disabled worker entitled to benefits if age 62 or over and married to the worker for at least 10 years.

E. The divorced spouse of a fully insured worker who has not yet filed a claim for benefits if both are age 62 or over, were married for at least 10 years, and have been finally divorced for at least two continuous years.

F. The dependent, unmarried child of a retired or disabled worker entitled to benefits, or of a deceased insured worker if the child is (1) under age 18; or (2) under age 19 and a fill-time elementary or secondary school student: or (3) age 18 or over but under a disability which began before age 22.

G. The surviving spouse (including a surviving divorced spouse) of a deceased insured worker if the widow(er) is age 60 or over.

H. The disabled surviving spouse (including a surviving divorced spouse in some cases) of a deceased insured worker if the widow(er) is age 50-59 and becomes disabled within a specific period generally seven years after the death).

I. The surviving spouse (including a surviving divorced spouse) of a deceased insured worker, regardless of age, if caring for an entitled child of the deceased who is either under age 16 or disabled before age 22.

J. The dependent parents of a deceased insured worker at age 62 or over.

In addition to monthly survivors benefits, a lump sum death payment of $255 *may* be payable to a qualifying surviving spouse or dependent children.

Along with knowing the general categories of persons who may be entitled to Social Security benefits, it is helpful to have an understanding of the very specific definitions of terms used by Social Security and also of some of the limitations or factors that can entitlement of Social Security benefits. When a person is entitled to benefits based on a "disability," that means generally that he or she is totally unable to work at any type of job and that the condition has lasted or is expected to last at that level for at least a 12-month period.

Qualification as a "child" or "spouse" of a worker is generally dependent on state law. In addition to qualifying on the record of a natural parent, a child can also qualify on the record of a stepparent, if the child was living in the household of the stepparent at the of his or her death, retirement, or disability. While it is possible for a beneficiary to qualify on more than one worker's record, the beneficiary will not receive full benefits based ore than one record. The beneficiary will only be paid the highest benefit for which he or she qualifies.

In order to qualify for divorced or surviving spousal benefits, the person must also be unmarried. Marriage after entitlement to such benefits is cause for termination, 'unless the marriage occurred after the beneficiary was age 60. An interesting aspect of divorced spouse's benefits is that they have no effect on any other dependents' benefits paid on that record. In all other cases, there is a family maximum payable on a worker's record, so that each additional dependent beneficiary reduces the other benefits payable to dependents so that the overall amount payable to dependents remains roughly the same. Benefits payable to a worker are not affected by the number of dependent beneficiaries receiving on the worker's record.

If there is a change in any of the qualifying factors for entitlement, it should be immediately reported to Social Security. Generally. such a change will result in a termination of benefits and any delay in reporting will increase the resulting overpayment to someone who continues to receive benefits after they should have been terminated. Additionally, there are many factors that affect a person's eligi-

bility for benefits or the amount of those benefits. Some of these include imprisonment following conviction of a felony, receipt of a governmental pension or annuity or a change in the amount received, working outside the United States for more than 45 hours in a calendar month. All of these events should be immediately reported by a Social Security beneficiary.

Another frequent cause of overpayment is when a beneficiary (other than a disabled person) works and earns more than the yearly exempt amount. As an example, in 1997, a nondisabled beneficiary under age 65 is allowed to earn $8,640 with no effect on their benefits. Any earnings over that amount will result in a loss of $1.00 in benefits for every $2.00 earned over the exempt amount. While a worker's earnings will affect benefits for everyone receiving on his record, a dependent or auxiliary beneficiary's earnings affect only that beneficiary's benefit. This "earnings test" applies to children's benefit amounts and it is important that a child's representative payee is aware of these limitations.

A representative payee is the person or organization that receives benefits for a beneficiary who is legally or actually incapable of handling his or her own benefits. This generally includes all minor beneficiaries unless they have been legally emancipated or Social Security determines it would be in the minor's best interest to pay benefits to him or her directly. It is not necessary to be appointed as a legal guardian by the court in order to be someone's representative payee. In the case of a child's benefits, the preferred representative payee is usually a parent with custody of the child. Representative payees are accountable for their use of the funds and also for reporting any events or changes in status that are required to be reported to Social Security.

The programs administered by Social Security are too varied and complex to be given more than a cursory outline in this article. If a situation develops that raises questions with regard to Social Security eligibility or entitlement, the best advice is generally to refer a client to the local Social Security District Office for further information. In some cases, a client may need the assistance of a lawyer who is familiar with the Social Security programs, but that is relatively uncommon for most questions that arise. The most effective use of a lawyer is to assist in appealing disability denials and in certain cases where benefits have been withheld because of "questionable retirement."

AB 401 — WELFARE REFORM AND THE DOMESTIC BAR

By Thomas L. Leeds

If men are from Mars and women from Venus, child support profes sionals (collectively known as "IV-D"[1]) reside on Mercury and family lawyers on Pluto, seemingly opposite poles of the universe. IV-D is dedicated to the welfare of children and families yet its attorneys have little contact with the Family Division of District Court. Similarly, many private attorneys with years of experience in domestic relations feel like one traveling to the dark side of the moon if a case brings them to URESA/child support court.[2]

Like the mutual, independent gravitational pull of huge planets, however, child support and domestic relations practitioners are being inexorably drawn together even as the unfamiliarity of each discipline repels contact from the other. Congress passed and the President signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), commonly known as Welfare reform.[3] The 1997 Nevada Legislature, in AB 401, implemented PRWORA with 132 pages of new laws which concern paternity and child support order establishment along with far reaching tools to enforce and modify existing orders. These laws will force integration of the private family law bar and the IV-D community in the following particulars.

NRS Chapter 31A — the wage withholding scheme of which all divorce litigants are noticed in divorce decrees — is substantially amended to broaden the powers of the IV-D agency (the Child Support Division of Nevada State Welfare, or the local District Attorney, Family Support Division).[4] The IV-D agency may send out an income withholding order to an employer without providing advance notice to the employee/obligor if the person or entity owed support states the obligor is delinquent. A party who contests a withholding order can request a hearing which will take place while the income withholding is ongoing. The IV-D agency is authorized to add an arrears payment of 25% of the current support order without giving advance notice to the obligor even if the court order being enforced does not contain an arrears payment, again, subject only to a post-attachment right to hearing,

NRS Chapter 125 is amended significantly though not substantively. Divorce decrees must include social security numbers of the parties and Family Courts are expressly required to comply with 28 U.S.C. §1738B, the Full Faith and Credit

for Child Support Orders Act (FFCCSOA). FFCCSOA requires courts to recognize child support orders from other states which involve the same parties,[5] limits the powers of courts in other states to modify such orders,[6] and specifies a method for determining which single order, among competing support orders from different states is entitled to prospective enforcement.[7]

NRS Chapter 125B is amended, however, the most impactive requirements only become effective after October 1, 1998. All child support orders entered thereafter — whether or not obtained by a child support enforcement agency — will have to be registered in a single centralized state registry. Beginning the same date, **all** income withholding for payment of child support will be collected and disbursed through the state's disbursement unit, effectively eliminating income withholding being sent directly to the custodial parent through private action.

As required by PRWORA, sections 196-276 of AB 401 contain the Uniform Interstate Family Support Act (UIFSA) which will be in NRS Chapter 130. UIFSA specifically allows private attorneys to represent litigants[8] and specifically allows the tribunal hearing support cases to grant attorney's fees under certain circumstances.[9] UIFSA allows direct enforcement across state lines, that is, Nevada employers must comply with income withholding orders issued by, and received from other states; Nevada obligees, through the IV-D agency, can send income withholding orders to the obligor's employer in another state and the employers in other states will have to honor and return child support directly back to Nevada. An obligor who contests the validity of the underlying order can contest withholding in the court where the obligor resides (and where the income withholding is done).[10]

UIFSA and FFCCSOA have definite choice of law rules which apply to the defenses to a request for support enforcement.[11] The *Parkinson* defense, for example, will not be applicable to an action in Nevada child support court if another state's order is being enforced. FFCCSOA and UIFSA both provide that the law of the state which issued the support order is applied.[12]

Finally, §325 of PRWORA requires states to enact expedited procedures which grant extraordinary powers to state IV-D agencies. Included is the power to order genetic testing and/or enter default orders to establish paternity; subpoena financial information from banks and utility companies concerning obligors; seize assets, and change the payee of child support payments, all without the necessity of obtaining a court order.[13]

These new laws strongly suggest that family law attorneys would profit from knowledge of the child support enforcement process. Similarly, the child support enforcement community cannot shut its eyes to the impact other aspects of family law have on child support enforcement. Besides the Nevada Supreme Court decisions of which all IV-D attorneys must be aware, §391 of PRWORA appropriates funding for child access issues in recognition of the fact that noncustodial parents who spend time with their AB children pay more support more often. Clark and Washoe Counties received grants for mediation programs as a part of the future IV-D enforcement process.

In sum, IV-D has become an efficient program collecting huge sums in child support — $40 million per year in Nevada alone. As a result, the IV-D community is an important force in national politics and far reaching laws have been passed which will impact the practice of local family law. IV-D attorneys and the family bar would do well to recognize the legitimacy, importance and impact of each upon the other. Trading expertise and experience, attorneys in each area can further mutual goals while advancing the interests of children.

Notes

[1] IV-D refers to Title IV-D of the Social Security Act, 42 U.S.C. §651 et seq.

[2] Uniform Reciprocal Enforcement of Support Act (URESA), NRS Chapter 130. The URESA provisions of NRS Chapter 130 were repealed by the 1997 Legislature in AB 401.

[3] Pub. L. No. 104-193, 110 Stat. 2105 (1996). For an overview of PRWORA, see Paul K. Legler, The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act, 30 Fam. Law Quarterly 519 (Fall 1996).

[4] AB 401, §§125-149.

[5] 28 U.S.C. sec. 1738B(a)(1).

[6] 28 U.S.C. sec. 1738B(a)(2).

[7] 28 U.S.C. sec.1738B(f).

[8] UIFSA, §309; AB 401 sec. 241.

[9] UIFSA §313 (AB 401 sec. 245) provides that attorney's fees may be awarded an obligee's attorney, but not attorneys representing obligors, "except as otherwise allowed by other law."

[10] UIFSA sec. 506; AB 40 sec. 258.

[11] 28 U.S.C. sec. 1738B(h); UIFSA sec.604; AB 401 sec. 263.

[12] *Id.*

[13] AB 401 sec. 70 et seq.; 277

"Better than fresh, madam—everything is irradiated."

Lawyer's Pledge of Professionalism

In my role as a counselor, advocate and officer of the court, I aspire to a standard of conduct that warrants the term "professional." I seek to earn a reputation for honor, trustworthiness and professionalism among my clients, the legal community and the community at large.

As a lawyer dedicated to the professional and ethical practice of law, I will conduct myself in accordance with the following Pledge of Professionalism:

I. To a Client a lawyer owes undivided allegiance, the full application of the lawyer's abilities and the employment of all appropriate legal means to protect the client's legitimate rights.

1. I will achieve my client's lawful objectives as expeditiously and economically as possible, and I will advise my client against pursuing any matter that is without merit;

2. I will counsel my client with respect to mediation, arbitration, and other alternative methods of resolving disputes;

3. I will counsel my client that a willingness to engage in settlement discussions is consistent with effective representation;

4. I will advise ny client that civility and courtesy are expected of all participants in the legal system, and that such qualities are not a sign of weakness; and

5. I will not permit my commitment to my client's cause to interfere with my ability to provide my client with objective advice.

II. To Other Counsel, Their Client's and Office Staff a lawyer owes courtesy, candor, and cooperation in all respects not inconsistent with his or her client's interest, and scrupulous observance of all mutual agreements and understandings.

1. I will be courteous and civil to other counsel, their clients and office staff, and my word is my bond;

2. I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate substantive interests of my client will not be adversely affected;

3. I will cooperate with other counsel when scheduling depositions and meetings;

4. I will refrain from using litigation, delaying tactics, abusive discovery, or any other conduct to harass another party;

5. I will serve motions and pleadings in a timely manner to allow the other party a fair opportunity to respond;

6. I will concentrate on matters of substance and content, and not quarrel over matters of form; and

7. I will identify for other counsel or parties all changes I make in documents submitted to me.

III. To the Court and Other Tribunals a lawyer owes respect, diligence, candor, and punctuality.

1. I will conduct myself in a professional manner and demonstrate respect for the court, other tribunals, and the law;

2. I will always be candid with the court and other tribunals;

3. I will be punctual in attending all matters before the court and other tribunals;

4. I will communicate with other counsel in an effort to resolve disputes;

5. I will refrain from filing frivolous pleadings, papers or motions, and will voluntarily withdraw claims or defenses when it becomes apparent they do not have merit;

6. I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and a plan for discovery; and

7. I will advise my clients of the behavior expected of them before the court and other tribunals.

IV. To the Public a lawyer owes the highest degree of professionalism and integrity.

1. I will conduct myself in a manner that will encourage trust of the legal profession by members of the public;

2. I recognize and will abide by the principle that the legal profession is devoted to public service, improvement of the administration of justice, and the uncompensated assistance to persons who cannot afford representation;

3. I will treat my office staff with courtesy and respect, and will encourage them to treat others in the same manner; and

4. I recognize my conduct is governed by standards of fundamental decency and courtesy, in addition to the Nevada Rules of Professional Conduct.

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