NFLR
NEVADA FAMILY LAW REPORT

Volume 29, Issue 2 Spring 2016

Unreimbursed Medical Expenses And Enforcement under IV-D

By Hon. Mathew Harter

I. INTRODUCTION

This article is unashamedly a rebuttal/commentary to the cover story of the last edition of *NFLR* (Winter 2015) written by Chief Deputy District Attorney (DDA) Ewert. This author has the utmost respect for Mr. Ewert, however, the readers of this publication should have full disclosure of the facts, history and applicable laws on this issue.

I begin by reiterating what DDA Ewert appropriately conceded. That the *sole issue* at hand is *enforcement of UMEs*. I feel compelled to disclose that this has been a long-standing, behind-the-scenes issue. It is unfortunate that what should be an administrative issue has been twisted into a public controversy. I approached a senior judge about the issue during my first year on the bench. I was informed by that judge she believed there were federal laws on the issue; however, she would simply cite to **NRS 3.405 (3)(f)** (a Child Support Master "*[h]as any other power or duty contained in the order of reference issued by the court*") in her orders and never received any backlash.[1] This was most likely attributed to her established position. This author did *not* want the reputation of using this authoritarian/"nuclear option" approach. Therefore, the applicable federal laws (discussed below) were thoroughly researched and then subsequently cited in *every* order thereafter that referred any UME issue back to a Child Support Master (*hereinafter* "CSM") in the Child Support "R" cases. As it was an ongoing issue, it was truly hoped that one of these orders would be appealed and we could all receive clarification from on high.

However, this has never come to fruition. Therefore, this author has decided to address and answer the issues in reverse order of the Ewert article, by beginning with the *policy* based reasons and then addressing the *applicable laws*.

II. POLICY

Justice Hardesty was the acting Chief Justice during my first year on the bench. At my first judicial seminar, he informed us new district court judges that likely the most important rule in our judicial system is **NRCP 1** ("***They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.***") (*emphasis added*). He further opined that it was *not* a coincidence that it is the *first* rule and should be applied to all that we do.

DDA Ewert concedes that District Attorney Family Support (DAFS) does not have a problem with handling the issues of child support, arrears and medical premiums in the "R" cases. However, when it comes to the *sole issue* of

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A Note from the Co-Editor

By Margaret E. Pickard, Esq.

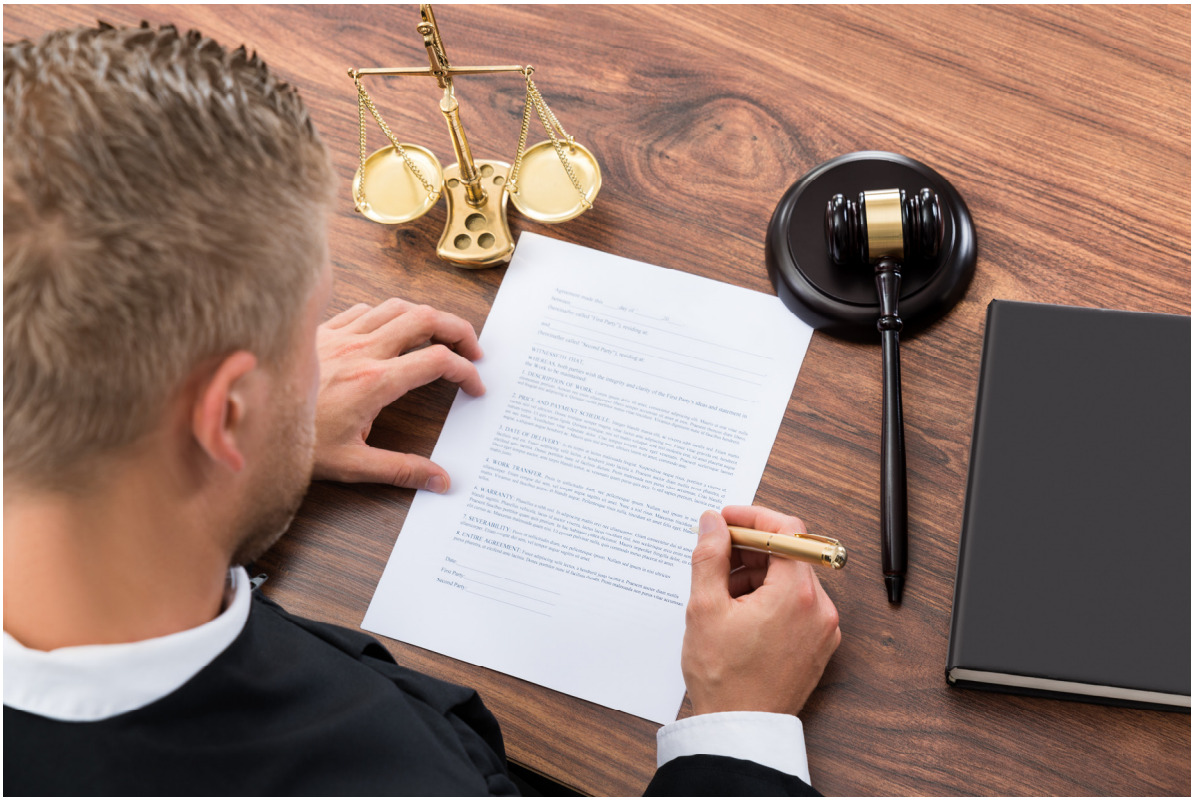
The Nevada Family Law Review offers a forum for family law practitioners to learn about issues that impact their practice. Whether articles focus on the basics of setting up a law practice (Fall 2015), taking a deposition (upcoming Summer 2016), child support collection and enforcement (Winter 2016), or the dynamics of high conflict custody cases (Summer 2015), each issue offers legal professionals insights and tips to enhance their practice.

This month, we continue the long-standing discussion of the proper forum for the resolution of unreimbursed medical expenses. In the Winter 2016 NFLR edition, Chief Deputy DA Ed Ewert of the Clark County District Attorney's Office, Family Support Division, discussed the problem that Clark County family court litigants face as they lack a forum to address unreimbursed medical expenses. DDA Ewert maintained that assigning these issues to IV-D Court Child Support Hearing Masters jeopardizes IV-D Court's funding source and program performance. The Honorable Matthew Harter (Eighth Judicial District) responds to this position in our first article, *Unreimbursed Medical Expenses and Enforcement Under IV-D.* Judge Harter argues that the enforcement of UMEs is squarely within the duties of IV-D Courts and the principles of judicial economy mandate that IV-D Courts resolve these issues. Make sure to review both articles to determine how to properly represent your clients.

A highlight of this edition is the Honorable Egan Walker's (Second Judicial District) article, *When Gaming is Marital Waste in Nevada*. Judge Walker analyzes whether the fiduciary duty owed between spouses is breached when one party expends joint resources on gaming and provides specific guidance to practitioners preparing claims and/or defenses in marital waste cases based on gaming.

Finally, we hear from Chief Deputy DA Ed Ewert on proposals for improving child support collection. This article offers practical tips to ensure that child support orders are properly drafted to ensure enforcement by the Clark County D.A.'s Office, Family Support Division. Be sure to note his advice to avoid malpractice traps when preparing child support orders.

You can find many more informative articles like these in prior NFLR editions. The NFLR is an important forum for all things family law related. We encourage Family Law Section members to contribute articles that enlighten and enhance the practice of family law for family law practitioners. Please consider how you can become a contributing member of the Family Law Section by sharing your thoughts, ideas and practice tips with your colleagues. Looking forward to hearing from all of you.



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UMEs, it is *his* opinion that a litigant *must* return back to his or her custody "D" case to obtain *any* relief. Admittedly, child support cases seemed much simpler before DAFS physically relocated over to the Greystone Building. Prior to the relocation, this court recalls several instances wherein a litigating attorney would just have a DAFS representative simply walk across the Family Court campus and present the most recent printout of payments, arrears owed, *etc*. I submit the following four policy based reasons why CSMs should be handling UMEs.

First, let me cite an example from one of my recent cases for a moment of plain, *logistical* sense. It was undisputed in this case that the father ended up owing the mother approximately $2,800.00 in child support arrearages. The father alleged that the actual reason why he allowed the arrearages to accrue was he had forewarned the mother for several months prior that he was going to withhold his monthly child support payment if she would not reimburse him for $2,800.00 that she owed him for the child's orthodontia work (a UME). He eventually acted as promised and ended up summoned in the "R" case to address contempt.

Yes, his self-help was improper. However, rather than take a *common sense* approach and address all of the child support related issues at the same time (which would have ended up as a simple equalization), the CSM reduced the child support arrears to judgment and informed the father that he would need to return to the "D" case to obtain *his* relief.

At this point, I feel compelled to cite just a portion of the applicable laws that address this issue and were not cited in the DDA Ewert's article . **42 U.S.C.A. § 652** (the federal plan is explained in more detail below) states: "***[T]he term 'medical support' . . . (includ[es] payment of* costs of premiums, *co-payments, and deductibles) and payment for medical expenses incurred on behalf of a child.***" Child support statutes for Nevada are contained in NRS Ch. 125B. **NRS 125B.020(1)** includes "***health care***" as part of the definition of child support. Very similar to **42 U.S.C.A. § 652, NRS 125B.085(2)** clarifies that: "'***[M]edical support' includes . . . without limitation, the payment of any* premium, *copayment or deductible and the payment of medical expenses.***" Finally, under **NRS 425.382(2)(b)(6)** a CME's duties[2] in Nevada include: "Determine the amount of *any arrearages* and specify a method of payment."

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Second, I would like to address the issue of the *Trojan Horse* stratagem. I submit another example. A father files a motion against the mother in the "D" case to obtain about $200.00 in UMEs owed to him by the mother after being informed that he *must* do so by a CME. He decides to add some irrelevant, personal digs.

In retribution, the mother files a scathing opposition/countermotion that includes outlandish allegations against the father and his significant other, so she requests that custody be changed. The father then feels compelled to up "the game" to include allegations that the kids *may* now being molested by the mother's new boyfriend. Welcome to Family Court! This escalated situation *might* have never occurred if the father had been allowed to simply address his nominal UMEs in the "R" case. [3]

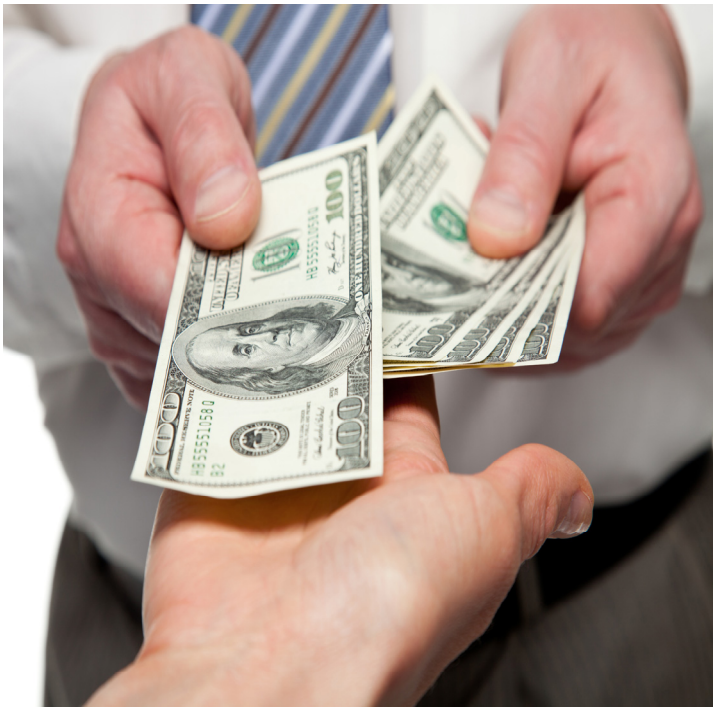
Third, CSMs are granted more avenues of collection/enforcement with the Title IV-D Program than state district court judges. The CSMs have the ability to withhold passports, suspend driver's licenses, intercept tax returns, *etc*. These additional avenues of enforcement only benefit a parent that is owed a large amount of UMEs when enforced under the Title IV-D Program.

Fourth, this author was a bit shocked that DDA Ewert referred to the handling of UMEs (multiple times) as a "task." Simple math is far from pleasurable for many of us and is why most of us went to law school. However, it can hardly be labelled a "task."

I would like to clarify that the district court judges are certainly not referring every one of their cases involving a UME issue to the CSMs. I would conservatively estimate[4] that perhaps maybe one in every 15-20 "D" cases have an associated "R" case. I further estimate that less than 5% of those cases referred back to the "R" case involve a UME issue.

The district court judges are addressing all of their own UME issues within their "D" cases that do not have an associated "R" case. Further, since DDA Ewert and DAFS are the ones that handle the UME issues, his reporting *may* be a bit biased and/or over-exaggerated.

Finally, it is curious that an DDA (executive branch) would feel compelled to express concern about the method and manner of how our CMEs (judicial branch) are compensated.



III. LAW (more than you will *ever* want to know about IV-D)

The child support enforcement agency is funded and governed by **42 U.S.C.A. § 651** *et. seq*., commonly known as the Title "IV-D" Program since it is subsection "IV-D" of the Social Security Act. Federal funds are provided to the states "[f]or the purpose of enforcing the support obligations owed by noncustodial parents to their children and the spouse (or former spouse) with whom such children are living, locating noncustodial parents, establishing paternity, obtaining child and spousal support, and *assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for assistance under a state program funded under part A of this subchapter) for whom such assistance is requested*." **42 U.S.C.A. § 651**.

I would like to reiterate the relevant portions: "***assuring*** that ***assistance*** in obtaining ***support*** [defined above and below as including UMEs] . . . ***whether or not eligible for assistance under a state program . . . for whom assistance is request.***" *Id*.

While the Title IV-D Program focuses on child support collection, there is also reference to establishment and enforcement of medical support orders. The Title IV-D Program authorizes the secretary to issue regulations

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requiring states to enforce medical support included as part of a child support order if health care coverage is available to either parent at a reasonable cost. The regulations were also established to facilitate information exchange between the state child support agencies and the state Medicaid programs. The regulations pertaining to child support enforcement are found at **45 C.F.R. § 301** *et. seq*. Each state must submit a federally approved plan for child support enforcement in order to qualify for quarterly federal payments.[5] **45 C.F.R. § 301.15**. Each state's plan *must require* the state's IV-D agency to collect medical support information and establish and enforce medical support obligations. **45 C.F.R. § 302.80(b)**. The standards for a state's plan to *enforce* medical support obligations is contained in **45 C.F.R. § 303.31**. *Cash medical support* is defined as "an amount ordered to be paid toward the cost of health insurance . . . *or for other medical costs not covered by insurance*." **45 C.F.R. § 303.31(a)(1)**.

DDA Ewert's legal quotations in his article are contained in the ***CHILD SUPPORT ENFORCEMENT MANUAL from the DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF WELFARE SUPPORTIVE SERVICES.***[6] DDA Ewert quoted from Section 200, which is entitled "Case Processing Section."

This author believes that the more relevant area of the manual to address the issue at debate would be contained in ***Section 600*** (entitled "***Enforcement of Obligations***"). As DDA Ewert quoted verbatim from the manual, so shall I:

> **45 CFR § 303.31** ***requires*** the IV-D Program to secure and ***enforce medical support obligations*** for all individuals receiving IV-D services.
>
> Every child support order issued or modified in Nevada after June 2, 2007, must include a provision specifying that one or both parents are required to provide medical support for the child(ren). ***Medical support includes*** health insurance, the payment of any premium, *co-payments or deductibles and the payment of medical expenses*.[7]

DDA Ewert touted how valuable DAFS' services are to "the community and Family Court." This is *not* disputed. However, it should be noted the language contained in DDA Ewert's citations include the verbiage "*only required to*" and "*not a required IV-D function.*" Thus, even if DDA Ewert's citations were the controlling law (which they are ***not***, as noted above) those laws do *not* connote a prohibition of DAFS or a CSM from assisting the community as he claims they aspire to do.

IV. CONCLUSION

Most of us learned during our first year of law school to pound the table and argue policy when the law is not on your side. DDA Ewert's article is primarily based on *alleged* policy. I say "*alleged*" because the chances that the Title IV-D Program funding would *ever* be placed in jeopardy are miniscule to *none*!

The Family Court Presiding Judge, Governor's Office, *etc*. would immediately address any deficiencies or issues if the funding were ever to be put at risk of being terminated. As this issue has now become a public debate, *you* can determine for yourself if you believe a CSM is performing his or her IV-D duty or shirking it when avoiding addressing the sole issue of UMEs in "R" cases.

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Judge Harter is a native Nevadan (Bonanza H.S. 1984), married with eight children, and his first grandchild is due in May 2016. He graduated from UNLV with a B.S. in Business Management. He then graduated *Cum Laude* from Western Michigan University, where he was on Law Review, received an *Am Jur Award* for National Moot Court, and served at two indigent legal clinics. Judge Harter then returned home and was a *tortured* law clerk to former Family Court Judge Gerald Hardcastle for 1.5 years. He subsequently went directly into private practice and focused primarily in family law (more than 9,000 cases). He was elected in 2008 and was then *overwhelmingly* re-elected in 2014.

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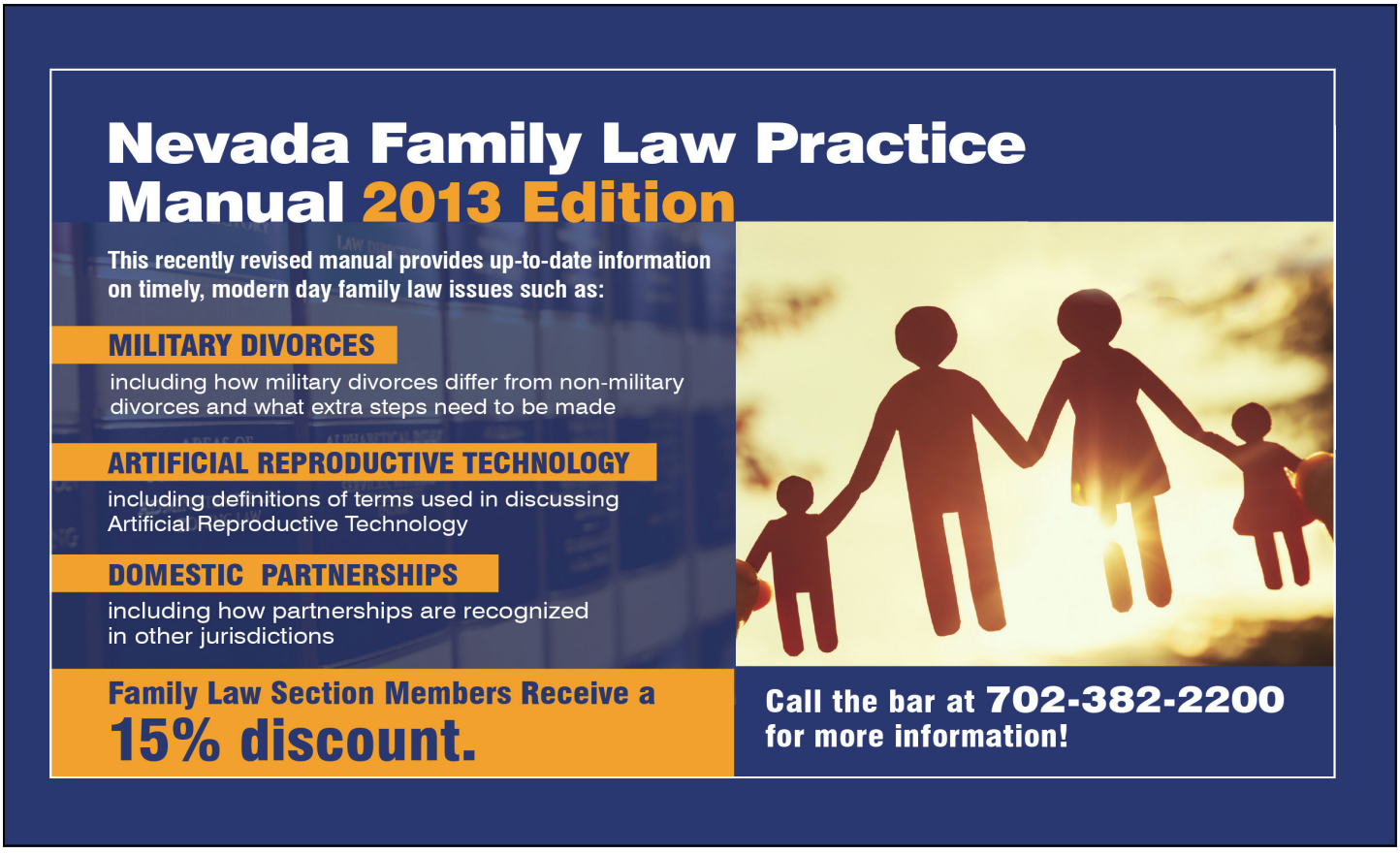
Pretend for a moment that you are a single, struggling, *pro se* litigant. Would you want to be required to pursue UME enforcement in your custody case (file a motion, take another day off of work, get another babysitter, etc.) just to get your co-pays reimbursed when all of your other child support related issues are already being handled in your "R" case? Ridiculous! Both policy and the law in this area are glaringly clear.

Addressing a UME issue falls within the CSM's IV-D duties. Regardless, CSMs are *not* prohibited from addressing the UME issues as alleged; they just simply *choose* to avoid them.

I close with our local rule which is quite similar to the foundational one proposed by Justice Hardesty cited above. "***[R]ules [that] govern the procedure and administration of the Eighth Judicial District Court and all actions or proceedings cognizable therein . . . must be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice.***" **EDCR 1.10** (*emphasis added*).[8]

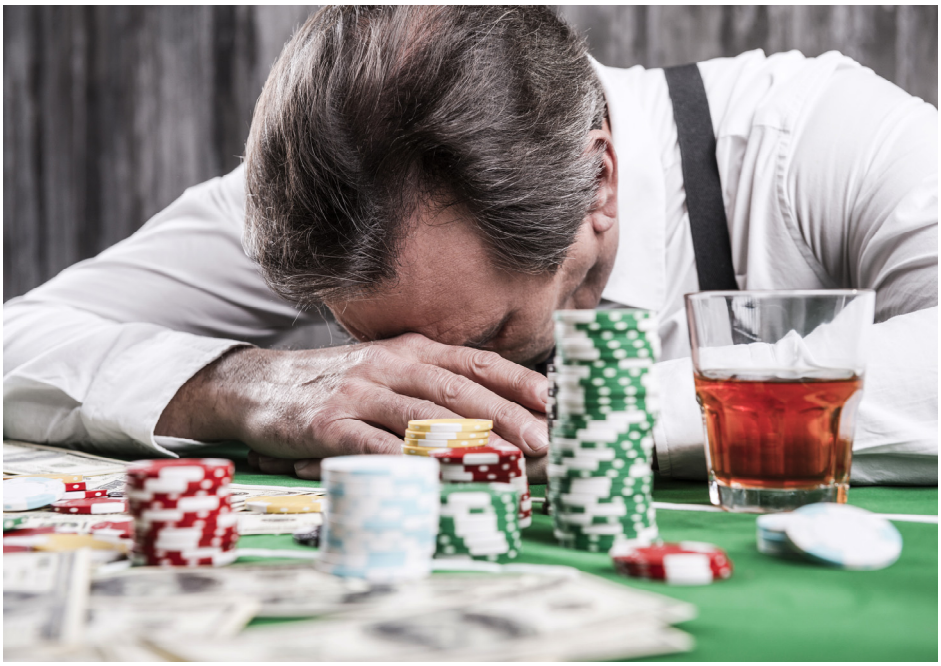
Citations

1. *See also* NRS 425.381(4)("A master serves at the pleasure of the district judges who appointed the master.").
2. NRS 425.382(2)(b)(2) also includes they "[r]equire coverage for health care" and NRS 425.382(2)(b)(16) includes "[g]rant ***any*** other available remedy." NRS Ch. 425 incorporates throughout both NRS Ch. 125 and NRS Ch. 130 (foreign support orders). Under NRS 130.10187: "Support order" means a judgment . . . issued by a tribunal for the benefit of a child, spouse or former spouse, which provides for monetary support, ***health care, arrearages or reimbursement***."
3. The court has always preferred that the issues of custody and support be kept separate. *Westgate v. Westgate*, 110 Nev. 1377, 887 P.2d 737 (1994); *Wheeler v. Upton-Wheeler*, 113 Nev. 1185, 946 P.2d 200 (1997).
4. Actual numbers were unable to be obtained by the time of publication.
5. Nevada's plan is at: https://ocsp.acf.hhs.gov/stateplan/publicivdplansearch.htm
6. *See* **CHILD SUPPORT ENFORCEMENT MANUAL from the *DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF WELFARE SUPPORTIVE SERVICES*** (361 pages) located at: https://dwss.nv.gov/uploadedFiles/dwssnvgov/content/Support/C0600(1).pdf
7. *Id*. at 54.
8. "Child support masters" are included in local rule EDCR 1.40.



When is Gaming Marital Waste?

By Judge Egan Walker



When marriages end by means of a contested divorce, battles over children, china and cheating quickly become the fodder of litigation. Any gaps in the legal precedents that control resolution of those issues, and property issues in particular, create challenges to the parties and courts as they attempt to divide marital estates. One of the most challenging and least well developed areas in the jurisprudence of property distribution relates to chance: In what circumstances and in what amounts does gambling constitute marital waste?

Gaming is an ancient practice in Nevada that has been an economic savior at times, and an export product of the state to the rest of the world more recently.

Despite this history, few commentators have offered guidance on the topic of waste in general, and none have commented on the effect, if any, of gaming as it relates to property and debt distribution at the time of divorce.[1]

What financial duties do spouses owe one another?

a. Fiduciary Duty

The fiduciary duty owed between spouses is described as follows:

> Either husband or wife may enter into any contract, engagement or transaction with the other ... **subject in any contract, engagement or transaction between themselves, to the general rules which control the actions of persons occupying relations of confidence and trust toward each other.** (Emphasis added.)[2]

The nature of the fiduciary relationship between husband and wife is that of partners:

> It is generally recognized that the marital community is a partnership to which both parties contribute...his or her industry in order to further the goals of the marriage.[3]

Husband and wife are partners in a fiduciary relationship with concomitant obligations of labor, candor, honesty and transparency, which continue even during the process of divorce. Counsel, parties, and courts often fail to remember that although the parties' feelings are no longer complementary, their financial duties and responsibilities to one another remain intact throughout the process of divorce.

b. Duty of Support.

i. During the Marriage

Husband and wife have a duty to financially support one another during marriage, even from their separate estates. For example:

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Gaming

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> If the husband neglects to make adequate provision for the support of his wife, any other person may in good faith supply her with articles necessary for her support, and recover the reasonable value thereof from the husband. The separate property of the husband is liable for the cost of such necessities if the community property of the spouses is not sufficient to satisfy such debt.[4]

This duty is reciprocal on spouses:

> The wife must support the husband out of her separate property when he has no separate property and they have no community property and he, from infirmity, is not able or competent to support himself.[5]

Finally, we are told:

> A husband or wife abandoned by his or her spouse is not liable for the support of the abandoning spouse until such spouse offers to return unless the misconduct of the husband or wife justified the abandonment.[6]

One fertile field of examination during divorce litigation might be, therefore, to examine how a spouse's gambling may have negatively impacted his or her duties to the community. While one spouse may gamble and lose $50 or $100 per week without negatively impacting the community, in the same way the other spouse may spend similar amounts on alcohol, hair and grooming products or some other discretionary expense, such spending is not traditionally considered waste.

ii. After a Complaint is Filed

Several statutes codify the obligation of support between spouses, and their continuing fiduciary duty to one another, even in the context of dissolution.[7] For example:

> If, after the filing of the complaint, it is made to appear probable to the court that either party is about to do any act that would defeat or render less effectual any order which the court might ultimately make concerning the property or pecuniary interests, the court shall make such restraining order or other order as appears necessary to prevent the act or conduct and preserve the *status quo* pending final determination of the cause.[8]

In addition:

> Except as otherwise provided in subsection 2, during the pendency of an action brought pursuant to NRS 125.190, the court may, in its discretion, require either spouse to pay any money necessary for the prosecution of the action and for the support and maintenance of the other spouse and their children...[9]

Even during litigation the parties must support one another and maintain their joint property:

> 1.In any suit for divorce the court may, in its discretion, upon application by either party and notice to the other party, require either party to pay moneys necessary to assist the other party in accomplishing one or more of the following:
>
> (a) To provide temporary maintenance for the other party;
>
> (b) To provide temporary support for children of the parties; or
>
> (c) To enable the other party to carry on or defend such suit.
>
> 2.The court may make any order affecting property of the parties, or either of them, which it may deem necessary or desirable to accomplish the purposes of this section. Such orders shall be made by the court only after taking into consideration the

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Gaming

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> financial situation of each of the parties.
> 3.The court may make orders pursuant to this section concurrently with orders pursuant to NRS 125.470.[10]

Where does gaming "fit" into the financial duties owed between spouses?

"Game" or "gambling game" means any game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value.[11] In 1955, the state legislature unequivocally instructed that:

> 1. The Legislature hereby finds, and declares to be the public policy of this state, that:
> **(a) The gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.[12]...**

Can an activity that is 'vitally important' to the general welfare of the inhabitants of the State nonetheless constitute waste? If that is so, how and when it does are neither defined nor discussed in any reported case.

What is waste?

c. *Lofgren, Putterman, Wheeler* and the Doctrine of Waste

i. *Lofgren* – Intentional Financial Misconduct is Bad

In November of 1996, the Nevada Supreme Court decided the case of *Lofgren v. Lofgren*. [13] Mr. Lofgren had, during the pendency of the parties' divorce and after the issuance of a financial restraining order, transferred $96,000 in marital funds to, among other things: improve and furnish a home; loan or give money to his father and to his children; and spent $17,000 "for his own personal use" (apparently apart from his needs for food, shelter and housing). The Supreme Court reinforced that changes to NRS 125.150, made in 1993, require an equal as opposed to an equitable distribution of community property absent "compelling reasons." Nonetheless, when applied to Mr. Lofgren's actions, the Supreme Court upheld the trial court decision to reimburse the community for unauthorized expenditures by adding the funds back into the marital balance equation. The effect for purposes of our discussion was to confirm that "intentional misconduct" in handling a fiduciary responsibility may be a compelling reason for an unequal distribution of a marital estate.

> ...we hold that if community property is lost, expended or destroyed through the intentional misconduct of one spouse, the court may consider such misconduct as a compelling reason...[for unequal distribution][14]

It would appear, as a consequence, that a decision to hide income, (e.g. a failure to report gambling earnings), or to gamble away a paycheck knowing bills would go unpaid, or a savings account, or funds necessary for food, shelter and housing as a matter of spite after imposition of a financial retraining order would clearly constitute waste.

ii. *Putterman* – Negligent Financial Misconduct is Bad

A few months later, in May of 1997, the Nevada Supreme Court decided *Putterman*. [15] In *Putterman,* the trial court had again unequally divided a marital estate upon dissolution. In doing so, the trial court noted that Mr. Putterman had: (1) refused to account to the court concerning earnings and other financial matters over which he had control, and (2) had appropriated to his own use "several thousand dollars" (of credit card purchases) that had to be satisfied by the wife. The trial court chose as a remedy an unequal distribution that gave wife a country club membership and a portion of stock in a closely held corporation principally owned by husband but in which wife was an employee. (The trial court apparently had both a sense of humor and a sense of irony.)

The Nevada Supreme Court appears to have agreed with the trial court and believed that Mr. Putterman's misconduct was at least negligent noting:

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Gaming

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> In *Lofgren*, we defined one species of "compelling reasons" for unequal disposition of community property, namely, financial misconduct in the form of one party's wasting or secreting assets during the divorce process. There are, of course, other possible compelling reasons, such as negligent loss or destruction of community property, unauthorized gifts of community property and even, possibly, compensation for losses occasioned by marriage and its breakup.[16]

The Nevada Supreme Court went on to explain as it examined the district court decision that:

> It should be kept in mind that secreting or wasting of community assets while divorce proceedings are pending is to be distinguished from undercontributing or overconsuming of community assets during the marriage. Obviously, when one party to a marriage contributes less to the community property than the other, this cannot, especially in an equal division state, entitle the other party to a retrospective accounting of expenditures made during the marriage or to entitlement to more than an equal share of the community property. [17]

The message from the Supreme Court again was that Nevada is an equal division state. We know from *Putterman* that retrospective accounting that simply identifies "overconsumption" or "underproduction" is to be discouraged. One clue to the expansion *Putterman* offers over *Lofgren*, nonetheless, must be related to the duty of support spouses owe to one another, especially during divorce. Where one spouse fails, for example, to apply his or her full labor, talents and efforts to provide for the marital estate, such "negligence" may be actionable.

The question still remains, however: Is gambling during marriage, without more, waste and if so how would it be proven without a retrospective accounting? Neither *Putterman* nor *Lofgren* directly answer the question. Even gambling during the process of divorce, absent a financial restraining order, would apparently be difficult to establish as waste. Further, when, then, does an activity that is undertaken in the context of the following syllogisms: (1) gaming is fundamental to the best interests of the citizens of the state, and (2) (the social fable) "they don't build casinos on winners," become waste?

iii. *Wheeler* – Misconduct That Causes Financial Harm to the Community is Bad

Six months after *Putterman*, in October of 1997, the Nevada Supreme Court decided *Wheeler*.[18] In *Wheeler* the trial court had yet again unequally divided a marital estate when the Plaintiff, wife, produced photographic evidence the Defendant, husband, had battered her during the parties' marriage. In admitting the evidence and then unequally dividing the parties' marital estate, the trial judge said:

> The Court finds that a compelling reason exists to make an unequal disposition of the community property. The Court bases this finding on a review of the evidence and finds that an abusive relationship existed between the parties in which the Plaintiff suffered from Defendant's conduct.[19]

In reversing the trial court, the Nevada Supreme Court offered:

> ...[w]e conclude that, except for a consideration of the economic consequences of spousal abuse or marital misconduct, evidence of spousal abuse or marital misconduct does not provide a compelling reason under NRS 125.150(1)(b) for making an unequal disposition of community property. If spousal abuse or marital misconduct of one party has had an adverse economic impact on the other party, it may be considered by the district court in

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Gaming

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> determining whether an unequal division of community property is warranted.

As a consequence, practitioners should focus on how gaming has materially harmed the financial standing of the community, as opposed to a specific focus on fault, and build cases around an analysis of the duties owed between spouses, and any failures to meet those duties reflected in the questioned pattern of gambling. Some simplistic ideas for relevant inquiry are:

> 1) Was the gambling activity, either in terms of winnings or losses, within the actual or constructive knowledge of both spouses?
> 2) Did gambling interfere with employment and therefore earnings of either spouse?
> 3) Did community debts suffer while gambling losses accrued?
> 4) Did any court order preclude gambling activity? Did the parties have any agreement about the limits of gambling activity in their marital community?
> 5) Does either spouse qualify for treatment as a problem gambler?
> 6) Can doctrines of laches or estoppel defeat a claim of waste given the mutual history and conduct of the parties?

Conclusion

Spouses are partners in a legal contract – marriage – and they owe duties of financial fidelity to one another. Gaming as entertainment, gaming as avocation, and pathological gaming are all fertile fields for factual development and legal argument in light of the fiduciary duties owed between spouses. A troika of cases issued in the mid -1990s offer some guidance on the topic, but further refinement is necessary.

Intentional misconduct, negligent misconduct and fault based conduct that causes economic harm, may all give rise to a claim of waste. Practitioners are cautioned to focus on the negative financial effects of the misconduct, as opposed to the more common equitable claims regarding the "relative merits" of the parties, given Nevada's equal division statute.

Gaming is well established in the ancient and recent history of our country and our state. It can and does support the public coffers, employ thousands of Nevadans, and offer entertainment to its participants. In some cases, gaming can undermine the financial stability of a marital estate. In those circumstances, where gambling is contrary to the duties and obligations owed between spouses, it may also be waste.

Citations

1. Two articles which are noteworthy exceptions and commended to interested readers are: "I Spent the Money on Whiskey, Women and Gambling; the Rest I Wasted," Gary Silverman, Esq.; (*Nevada Lawyer*; May 2011); and, "Community Waste in Nevada," Bruce Shapiro, Esq. (*Nevada Family Law Report*, Fall 2010).
2. NRS 123.070.
3. *York v. York*, 102 Nev. 179, 718 P.2d 670 (1986).
4. NRS 123.090.
5. NRS 123.110.
6. NRS 123.100.
7. The examples given here are illustrative and not dispositive of the topic of support between spouses during marriage and/or while in the process of dissolution.
8. NRS 125.050.
9. NRS 125.200.
10. NRS 125.040
11. NRS 463.0152.
12. NRS 463.0129.
13. *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 396 (1996).
14. *Lofgren* at 1283.
15. *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997).
16. *Putterman* at 608.
17. *Putterman* at 609.
18. *Wheeler v. Upton-Wheeler*, 113 Nev. 1185, 946 P.2d 200 (1997).
19. *Wheeler* at 1187.

Judge Walker was appointed to Department 2 of the Second Judicial Court by Governor Brian Sandoval in 2011. He previously worked as a Family Court Master, where he re-worked the child support dockets to increase both the volume of cases heard in court and the total number of cases resolved without a court hearing. He also assisted in the development of the Self Represented Litigant Program, an innovative program designed to manage cases in which at least one of the parties appears without counsel. Prior to serving as a judicial officer, Walker was in private practice, focusing primarily of family law litigation. Judge Walker currently serves on the Board of Directors of the Healthy Families Foundation and is the lead judge on the NCJFCJ's Project ONE located in Reno, whose goal is to provide judges with guidance for supporting the needs of families and children no matter which jurisdictional "door" of the courthouse — family law, child welfare, family violence, juvenile justice, etc. — they enter.

A Deputy D.A.'s Thoughts on Improving Child Support Across the Silver State

By Ed Ewert, Chief Deputy DA, Family Support Division

As a Deputy D.A. who has worked more than two decades almost exclusively with child support here in Las Vegas, I want to share some of my personal ideas about how we can improve our child support orders here in Clark County and statewide. The improvements will help reduce frustration and anger often felt by the parties and can even help reduce litigation over child support issues. That should appeal to our Family Court judges.

Here is a list of the ideas. I will address each one in turn:

- Make sure that the order is for a sum certain dollar amount;
- When obtaining judgments for child support arrears be sure to specify in the judgment the most recent obligation month included in the judgment and the most recent payment (by date and amount) that was factored into the arrears;
- Avoid creating "per child" orders; and
- Consider creating self-adjusting orders that recite a sum certain dollar amount as each child in a multi-child case emancipates.

SUM CERTAINTY – By statute our Nevada child support orders must state the child support obligation as a sum certain dollar amount. This requirement became effective back on July 1, 2002, through passage of then

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Assembly Bill 37. The requirement is clearly stated in NRS 125B.070(1)(b): " 'Obligation for support' means the **sum certain** dollar amount ..." [emphasis added].

Nearly 14 years after this law took effect, many lawyers and some Family Court judges and/or their law clerks seem to simply ignore this requirement. That is unfortunate, because child support orders that are not for a sum certain dollar amount can confuse, frustrate and anger the parties and spur litigation that could have been avoided.

For custodial parents there is an especially important reason to avoid child support orders that are not for a sum certain. Most custodial parents who possess sum uncertain support orders will find that the Clark County D.A.'s Office, Family Support Division (DAFS) cannot enforce their orders. DAFS is a IV-D Program office, which is the government's national child support enforcement program, created in Title IV-D of the Social Security Act of 1975. By possessing such an order, these custodial parents are depriving themselves of the opportunity to have the government enforce their order for them at almost no cost. (For cases not involving public assistance, the Nevada child support enforcement program charges $25 per year provided that it collects at least $500 in support for the custodial parent. If that $500 threshold is not met there is no charge).

DAFS cannot enforce such orders, because DAFS must rely on automation to handle its caseload. As of December 2015, DAFS was responsible for nearly 54,000 cases. DAFS is dependent on automation to enforce such a heavy caseload. DAFS staff must enter into its computer system, in the current support screen, the dollar amount of the current monthly child support. The computer takes over from there, each month automatically accruing the obligation. DAFS does not have enough employees to open up individual cases each month to enter a different current support obligation to help the computer keep up with orders that contemplate a variable current support obligation.

If an order creates a child support obligation that varies periodically, DAFS either will not accept the case, because it cannot, or it will, in rare instances where feasible, accept the case and immediately file a motion to modify the obligation to a sum certain amount.

Lawyers for custodial parents should keep this in mind, because many child support orders they obtain through Family Court end up in DAFS for enforcement. Lawyers who obtain sum uncertain child support orders for their clients are likely doing their clients a great disfavor by depriving them of the powerful tool that is government child support enforcement. Only the CSEP - the government child-support program also known as the "IV-D Program" - has driver's license suspension and passport denial as tools to motivate delinquent child support obligors to start obeying their support orders. Only the CSEP has the ability to intercept tax refunds of delinquent child support obligors. Only the CSEP provides enforcement services at little or no cost for the many parents who cannot afford an attorney to help collect the child support.

Just what are sum uncertain child support orders? They are orders where, looking within the four corners of the document, the reader cannot identify a sum certain dollar amount that is due each month as child support. These culprits come in a variety of forms. Some simply recite a one-child obligation as "18% of gross monthly income." A frequent violator is the "greater of" order. These typically say something like, "[Obligor] shall pay $100 per month per child or 29%, whichever is greater." Still others recite a sum certain obligation on one page of the order but then throw that number into uncertainty by providing some kind of setoff against the child support. Those orders deserve a little more discussion here.

Too often our Family Court divorce decrees recite a sum certain child support obligation but then, somewhere else in the decree, throw that figure into uncertainty by providing an offset against the child support for some kind of financial obligation owed by the custodial parent to the noncustodial parent. The intent behind such orders – fairness and convenience – is a good thing. Still, the confusion it brings and the litigation it can stir up make such orders unappealing. It is cleaner and better to avoid mixing obligations. Avoid doing offsets. Rather, leave in place obligor's sum certain obligation order. If obligee owes a debt to obligor for something else in the divorce, order obligee to make those payments. The minor inconvenience to the parties in requiring both to pay

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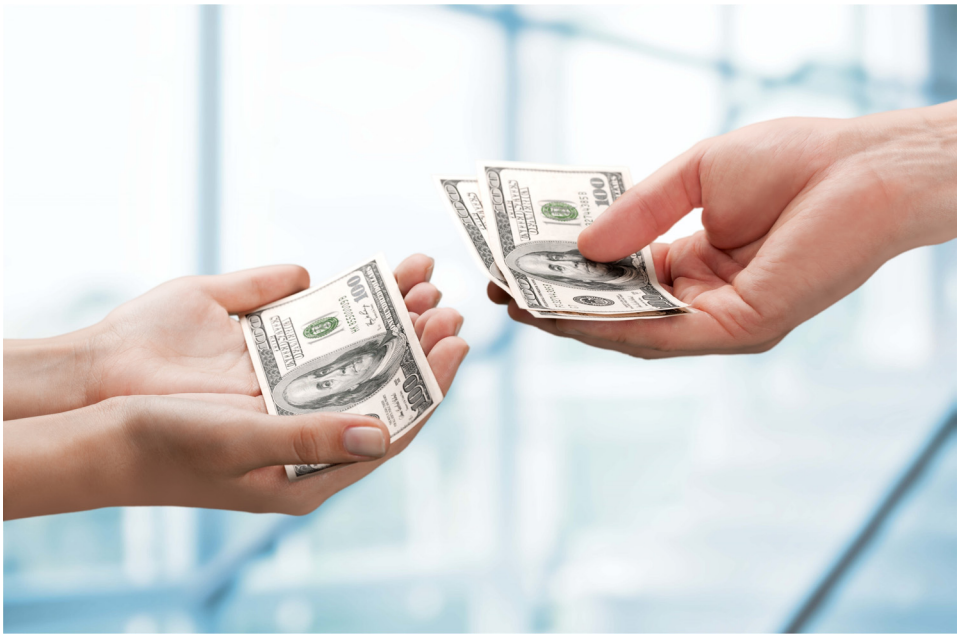

their obligations separately is a small price to pay to keep child support orders certain and to minimize child support litigation.

One common situation that produces sum uncertain orders is where, in a default situation, the custodial parent-obligee does not know the obligor's gross monthly income. How does the obligee get a sum certain child support award if the court doesn't know the obligor's GMI? The usual fallback position in such instances is to simply recite the percentage amount for the number of children involved as the support obligation. The result is a sum uncertain order. One can hardly blame the obligee and his/her attorney in such circumstances for creating a sum uncertain order. Still, being blameless doesn't cure the sum uncertain nature of the order. Perhaps, what is needed for such situations is a legislative fix that provides for a sum certain dollar amount when the obligor's income cannot be ascertained. What form might that take? Nevada's IV-D Program's fix for such situations might inspire a solution.

Nevada's IV-D Program has NRS 425.360(3) to help out in those situations. It says that child support may be set at, *"Nevada average wage, determined by the Employment Security Division of the Department of Employment, Training and Rehabilitation, if the gross income of the responsible parent cannot be otherwise ascertained."* Presently, that wage information can be found online at: http://www.Nevadaworkforce.com/article.asp?ARTICLEID=1537. Although rarely used nowadays by DAFS, this law exists to enable DAFS to obtain a sum certain child support order when the obligor's income cannot be identified.

An obligation that is set using Nevada average wage, however, can result in an excessively high child support order. Some will argue that that's a good thing; that an excessively high order should spur the uncooperative obligor to come to court and provide income information so that the order can be modified downward to reflect the obligor's actual income.

The down side to excessively high child support orders, however, deserves mention. The IV-D Program's experience with excessively high, default-based orders suggests that obligor's who are hit with them are **not** motivated by the order to come to court to seek a reduction. Instead, such orders seem to drive obligors away into the underground economy where they work for cash, avoid wage withholding and, to a large degree, avoid paying their court-ordered child support. *See, e.g.*, "From Deadbeat to Dead Broke: the 'Why' Behind Unpaid Child Support," at NPR online at: http://www.npr.org/2015/11/19/456352554/from-deadbeat-to-dead-broke-the-why-behind-unpaid-child-support.

A possible alternative to setting high, sum certain default orders would be legislation that uses a minimal amount as child support but includes a provision that reserves to the obligee for a reasonable time after establishment of the first order the right to seek additional support, retroactive to the first month of obligation, once the obligor's income is discovered. Example legislation might say something like, "*When the obligor's gross income cannot be ascertained child support shall initially be set at an amount that represents $250 per month, per child, reserving unto the obligee for a period of one year after establishment of the original support order the right to increase the support obligation retroactively to the initial obligation month, in an amount that reflects the appropriate percentage resulting*

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from discovery of the obligor's actual gross monthly income." Such legislation should, ideally, also make it clear that such orders are not to be construed as creating a "per child" order. See discussion of per child orders.

This author does not believe that such a law would violate the ban on retroactive modification of child support orders set forth in NRS 125B.140. That statute informs us that the child support, once it becomes due each month, is a "judgment by operation of law" and that such a judgment may not be retroactively modified. The goal of the prohibition on retroactive modification was to prevent states – courts – from **reducing** child support that had fallen due under court orders. See, e.g., "Final Rule: Prohibition of Retroactive Modification of Child Support Arrearages, AT-89006, from the Federal Office of Child Support Enforcement, ("OCSE"), viewable online at: http://www.acf.hhs.gov/programs/css/resource/final-rule-prohibition-retroactive-modification-of-arrearages.

This alternative to using a high "average wage" for default orders would avoid setting orders excessively high while still providing obligees reasonable time to identify the obligor's income and obtain an order that truly reflects the obligor's income and ability to pay, retroactive, of course, to the original obligation effective date. The IV-D Program could be of help in such situations because the program has resources that are unavailable to private litigants for finding noncustodial parents, their jobs and their incomes. Obligees with these lower-than-average-wage orders could then bring their orders to the IV-D Program for enforcement and for possible modification.

ARREARS JUDGMENTS – This is a simple fix. It only needs the cooperation of attorneys, parties and the courts with a simple rule: When reciting a judgment for child support arrears include in the judgment a recitation of the most recent monthly obligation included in the judgment as well as the most recent payment received, by date and amount, and factored into the judgment.

If a judgment does not recite the most recent obligation month and most recent payment factored into the judgment, it becomes nearly impossible to accurately audit the case to arrive at an updated arrears figure at a later date. Guessing at what that prior judgment factored in when auditing a case for arrears almost guarantees that a dispute will arise and cause litigation that could have been avoided with just a little care in seeking and drafting a judgment for child support arrears. Our judges should insist that an attorney asking for a judgment for child support arrears expressly identify the most recent obligation month factored into the request as well as the most recent payment factored in, by amount and date of receipt.

PER CHILD ORDERS – Under Nevada's child support statutes our courts are not supposed to create "per child" orders. For example, an order for $1,000 per month child support for two children, based on a GMI of $4,000, is not supposed to then recite that the obligation is "$500 per month, per child." Yet, orders phrased as per child obligations continue to emanate from Family Court and stir up controversy. This is a plea to our Family Court judges to refrain from saying anything in court that suggests that an order is "per child" and to reject any proposed child support orders that contain language that suggests a per child obligation.

Our statutory scheme for child support establishment in Nevada is relatively straightforward and simple. Child support is to be set, in the first instance, as a percentage of the obligor's gross monthly income. For example, eighteen percent (18%) of GMI for one child, twenty-five percent (25%) for two and twenty-nine percent (29%) for three. NRS 125B.070. Then, the law permits the judge to adjust the resulting figure up or down according to 12 deviation factors set forth in NRS 125B.080(9). Application of the formula and of any appropriate deviation factors should yield a sum certain dollar amount that is due each month.

An opinion from our Nevada Supreme Court verifies that per child orders are not proper under our statutory scheme. That was the opinion in *Scott v. Scott*, 107 Nev. 837, 822 P.2d 654 (1991)(overruled to extent it suggests modification may proceed without a finding of changed circumstances). In that case the lower court had ordered child support of $600 per month for the two children. It then ordered that when the elder child

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emancipated child support would be $300 per month. On appeal (on several issues), the mother argued it was improper to order child support of $600 to be cut in half when the elder child emancipated. The Nevada Supreme Court agreed, saying that child support should be set at eighteen percent (18%) when the elder child emancipated.

Some may believe that "per child" orders are authorized by our child support statutes where the obligation is set at the minimum permitted by law. This belief apparently stems from the wording of NRS 125B.080(4). It says, "*Notwithstanding the formulas set forth in NRS 125B.070, the minimum amount of support that may be awarded by a court in any case is $100 per month per child, unless the court makes a written finding that the obligor is unable to pay the minimum amount.*"

Thus, a court order for three children, set at $300 per month, that says that the obligation is based upon the minimum of $100 per month, per child, they might argue, creates a "per child" order. Under that kind of order when the eldest of the three children emancipates the obligor's child support obligation would automatically drop to $200 per month for the remaining two children and would automatically drop to $100 per month when only the youngest child remains unemancipated.

Given our statutory scheme and given the opinion in *Scott*, *supra*, the most reasonable conclusion should be that the minimum per child language of NRS 125B.080 (4) is not meant to create per child orders in Nevada even where the child support is set at the minimal amount that is the equivalent of $100 per month, per child. The "per child" language in 125B.080(4) is meant only to signify to the court that even where application of the formula would yield an amount that is lower than $100 per month, per child, the court must not set child support lower than the amount that is the equivalent of $100 per month, per child, unless the court has made express findings that the obligor is unable to pay even the minimal amount. Thus, when the eldest of three children covered by an order for $300 per month under a minimum per child order emancipates, the proper step is to then modify the order to reflect 25 percent for the two remaining minor children.

CREATE SELF-ADJUSTING ORDERS – If anything is clear from this author's two-plus decades of working almost exclusively with child support it is this: Litigants, in general, do not appear to pay much attention to their child support orders. It is a rare litigant who periodically reads his/her child support order and monitors emancipation of the children and seeks modification as each child emancipates.

Many litigants who find themselves in court years after an elder child emancipates ask that their child support order be modified retroactively to the date that an elder child emancipated. They get upset when they are informed that retroactive modification of child support is prohibited. They feel cheated and feel that the legal system is against them. Often, these denials of retroactive modification spur objections or appeals, creating more litigation and increasing the Family Court's workload.

Can we offer some relief to the parties and to the court calendars in such multi-child cases? One idea whose time has come is the concept of the self-adjusting child support order. Such orders would recite what sum certain dollar amount the obligor must pay as each child emancipates. A well-constructed self-adjusting order would make clear that the amounts recited are the amounts that are due if the underlying order is not modified by subsequent court order. In other words, if the parties are satisfied with the amounts stated in the order as the children emancipate the parties can remain quiet and accept the obligations as stated in the order. If at any time they are dissatisfied with the terms of the order they remain free to file a motion to modify the order.

An example order might look like this: *Father's gross monthly income is $3,500.00. He shall pay as child support $1,015.00 per month for the three children. The eldest child, Sam, turns 18 on August 12, 2017. Unless this order is modified by subsequent order, beginning September, 2017, Father shall pay child support of $875 per month for the two remaining minor children. The 2nd eldest child, Joe, turns 18 on May 21, 2019. Unless this order is modified by subsequent order, effective with June, 2019, Father shall pay child support of $630 per month for the one remaining minor child.*

Of course, we must keep in mind that under Nevada

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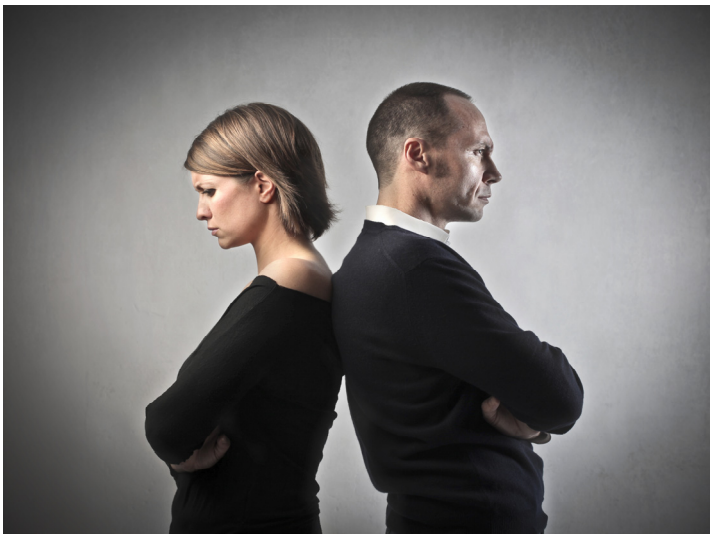
law children could emancipate at age 18 or could emancipate later if they are still in high school. Given that, how does a court decide what month and year the child support changes to a lower amount based on an emancipation date that would not be known with certainty at the time the self-adjusting order is being created?

There is no perfect child support solution for multiple children cases. After all, this kind of order resembles a per child order, something which this author has already argued against, above. Yet, these self-adjusting orders are a different kind of creature than the kind of per child order that we should not create. The self-adjusting order concept adheres to our statutory scheme of requiring payment of a sum certain dollar amount calculated according to the percentage formula required for the number of children involved. Its only real weakness is that it fails to take into account what the obligor's income will be as each child emancipates. That, weakness, however, is easily cured when we recognize that these self-adjusting orders do not preclude a parent from filing for modification of the order as each child emancipates. They simply give the parties an opportunity to accept a court order they already have and to stick with it if they don't feel the need to modify it.

Here is a suggestion: Use a child's 18th birthday month or, actually, the month following attainment of age 18, as the month in which the new, lower child support obligation begins. Add into the order the proviso that the custodial parent should seek modification of the order to extend child support beyond the child's 18th birthday if and when the custodial parent learns that the child will still be in high school beyond the month in which the child turned 18. If this doesn't seem acceptable given the variable nature of a child's emancipation date, consider legislation that changes Nevada's emancipation law from a variable 18-or-later-if-in-high-school to a flat, age 19 emancipation, regardless of high school attendance. Then, craft the age 19 emancipation into the self-adjusting order. Creative minds within our Bar should be able to craft a workable solution that helps everyone.

Let's remember that the beauty of the self-adjusting order is the certainty it provides to the parties about the obligor's financial obligation over the years to come if neither party brings the case back before the court. That certainty of obligation will help reduce disagreement, confusion, anger and resulting litigation. Custodial parents and noncustodial parents who are satisfied with their orders as originally structured can accept the terms of their orders and live their lives without burdening the court system and without incurring legal expenses and fees. Parents who want a new, modified order as children emancipate remain free to file their motions to get a new order that reflects the obligor's then-existing ability to pay. These orders would provide a win-win for the parties and for the courts that are not further burdened with litigation that could have been avoided through well-crafted, forward-looking child support orders.



Some of the suggestions above likely will not find favor with some members of the Bar. It is the hope of this author, however, that by providing these ideas we can stimulate some discussion within the bar and arrive at some great results.

Ed Ewert is a Chief Deputy D.A. in the Family Support Division of the Clark County District Attorney's Office. He earned both his B.A. in journalism and his J.D. from the University of Washington. He joined the D.A.'s Office here in 1990 and has worked in the Family Support Division since 1993. He has presented on interstate child support law and analysis locally, as well as in Chicago, San Diego and Kansas City, Mo. He has authored child support-related articles for *Nevada Lawyer* magazine and the *Communique*. Mr. Ewert is also a contributing author to the state bar's Family Law Practice Manual. He is a co-author of the section on Child Support and author of the sections on Government Involvement in Child Support Enforcement and on Interstate Child Support Enforcement: UIFSA and FFCCSOA.