THE IMPACT OF CUSTODIAL SCHEDULES ON CHILD SUPPORT

by

Marshal S. Willick, Esq.
WILLICK LAW GROUP
3591 East Bonanza Rd., Ste. 200
Las Vegas, NV 89110-2101
Tel: (702) 438-4100
Fax: (702) 438-5311
website: willicklawgroup.com
e-mail: Marshal@willicklawgroup.com

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PRESENTER BIOGRAPHY

Marshal S. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American Academy of Matrimonial Lawyers (AAML) and the International Academy of Family Lawyers (IAML), former Chair of the Nevada Bar Family Law Section and former President of the Nevada chapter of the AAML. He has authored many books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual. He is frequent teacher of continuing legal education classes and is often sought as a lecturer on family law issues.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of divorce and property division. He has chaired several Committees of the American Bar Association Family Law Section, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and
his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years. Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2101. His phone number is (702) 438-4100, extension 103. Fax is (702) 438-5311. E-mail can be directed to Marshal@willicklawgroup.com, and additional information can be obtained from the firm web sites, www.willicklawgroup.com and http://www.qdromasters.com.

I. BACKGROUND, INTRODUCTION, AND HISTORY[1]

At first blush, the concept seems simple: a child custodian who has more time with a child should receive more support. In practice, a host of considerations, conflicting priorities, and possible fact patterns distort that simplicity, sometimes in unintended and illogical ways that can produce counterproductive actions by parties to real-world cases.

These materials are just a pencil sketch of some of the intersections between child support and parenting time, but are intended to provide some background, and perhaps some ideas for negotiating and litigating individual cases, and perhaps improving our child support regulations.

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

Fairly early in the 1987 legislative session, AB 424 was introduced. Its terms largely mirrored those of the Governor's Commission recommendations, including what can now be seen as a prescient setoff for shared custody over a 40% time-share threshold. The original bill included a statement of policy that custody and visitation were entirely separate and distinct from child support,[2] but that policy statement was removed.[3] The bill became law in 1987, effective as to all future contested child support cases or requests to modify child support.

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

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[1] I understand that the theme of this year's conference is alimony, but this audience got my take, approach, analysis, and recommendations regarding alimony last year. For those interested, *see* Marshal Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. Am. Acad. Matrim. Law. 153 (2015); Marshal Willick, *Kogod Contradictions, Practical Problems, and Required Statutory Fixes: Part 1*, 33 Nev. Fam. L. Rep., Fall 2019/Winter 2020, at 1.

[2] *See* 1987 Legislative History of A.B. 424 at 2. Under this policy, visitation problems, for example, would not affect a support obligation.

[3] *See* 1987 Legislative History of A.B. 424 at 79.

II. EXPLICIT RELATION OF CUSTODY AND SUPPORT IN STATUTORY LAW, REGULATIONS, AND CASE LAW

A. Prior Support Statutes and Caselaw

Nevada's prior child support core statutes (NRS 125.070-.080) were framed to treat one parent as a physical custodian, and the other as a "parent without physical custody."[4]

Joint custody existed, of course, when the child support statutes were enacted in 1987, but those statutes did not expressly address joint custody, leaving mechanisms of how to address child support to individual courts in individual cases.

Since 1981, NRS 125.490 has stated that joint custody would be presumed to be in a child's best interest if the parents agreed to it. An explicit "preference" for joint *physical* custody, often treated as a presumption, became law in 2015,[5] adding to a basis for that finding not just an agreement, but that also that "a parent has demonstrated, or has attempted to demonstrate but has had his or her efforts frustrated by the other parent, an intent to establish a meaningful relationship with the minor child."

When the Nevada Supreme Court addressed the question of time share in *Barbagallo*[6] in 1989, it held that the child support formula "is easily applied" to primary or sole custody cases, but "is not so easily applied to shared and joint custody cases." The Court essentially called for a district court determining child support to determine which of two parents was "really" the "primary custodian," indicating that would usually be the parent with the majority time share:

> The party having the majority of custodial time in a joint physical custody situation is presumably, but not unexceptionally, the primary custodian. It is certainly possible that a party entitled to three days physical custody could convince the trial court that he or she was exercising the majority of child rearing responsibilities and financial burdens, but experience probably dictates that the person having physical custody most of the time will probably turn out to be the primary custodian.[7]

The case went on to generally oppose the creation of any "abatement" of child support for the time a child spent in the actual physical custody of the secondary custodian, unless an "injustice" would result. The Court noted that provisions in the original bill draft in 1987 would have provided such

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

[5] NRS 125C.0025.

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

[7] *Barbagallo v. Barbagallo*, 105 Nev. 546, 549 n.1, 779 P.2d 532 (1989).

reductions, but were removed from the statute prior to its passage. Thus, the basis of the Court's ruling was its determination of an implied legislative intent *not* to grant such abatements.

The basis of the Court's reasoning was that child costs were not a "zero sum game" in which additional expenditures by one parent reduced expenses to the other, but that, instead, overall expenses simply increased when both parents spent significant time with a child:

> [W]e must bear in mind that balanced against the need in some cases to relieve the secondary parent from the full formula burden is the reality that the primary custodian is faced with an array of fixed expenses relating to child rearing, costs such as rent, mortgage payments, utilities, car maintenance and medical expenses. These expenses go on and are not usually appreciably diminished as a result of the secondary custodian's sharing of the burdens of child care and maintenance.
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> . . . .
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> Because of the probable increases in overall expenses in joint physical custody cases and because of the danger inherent in reducing child support payments made to a primary custodian, the courts should exercise considerable caution before reducing the formula amounts. As the secondary custodian's child-related expenses increase, the expenses of the primary custodian do not decrease proportionally, and care should be taken that children do not suffer while in the care of the primary custodian by reason of unwarranted reduction in the formula payments being made by the secondary custodian.[8]

There continued to be much wrangling at the trial court level, and much unequal treatment of similarly-situated parties. In 1998, the Court criticized and tempered the *Barbagallo* holding in *Wright v. Osburn*,[9] a week-on, week-off joint custody case. *Wright* provided an explicit means of adjusting child support for joint custody by calculating child support for each parent, subtracting one from the other, and requiring the parent with the higher income to pay the parent with the lower income that difference.

In practice, this case law evolution led to parents fighting about labels as a surrogate arena for determining child support, often with an obligor giving up actual time-share with a child in exchange for a "joint physical custody" label that could then be used as a shield to try to lower a child support obligation.

Some focus to the questions was developed in 2009, when the Nevada Supreme Court provided some definitions in *Rivero*,[10] addressing a case in which parties had described their 5/2 time share as "joint custody." The Court adopted the Family Law Section recommendation (reflecting discussions going back to the 1985 Governor's Commission) that "each parent must have physical custody of the child at least 40 percent of the time to constitute joint physical custody."

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[8] *Id*. at 548-550, 779 P.2d at 535.

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

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

In doing so, the Court attempted to give guidance of how the time share should be calculated, telling courts and attorneys to concentrate on decision-making responsibility rather than the exact number of hours a child was in the immediate physical presence of a parent – which itself set off years of acrimony and conflicting trial court decisions as to how to measure time.[11] The Court's actual direction was:

> The district court should calculate the time during which a party has physical custody of a child over one calendar year. Each parent must have physical custody of the child at least 40 percent of the time, which is 146 days per year. . . . In calculating the time during which a party has physical custody of the child, the district court should look at the number of days during which a party provided supervision of the child, the child resided with the party, and during which the party made the day-to-day decisions regarding the child. The district court should not focus on, for example, the exact number of hours the child was in the care of the parent, whether the child was sleeping, or whether the child was in the care of a third-party caregiver or spent time with a friend or relative during the period of time in question.

The change in definition of "joint physical custody" from "50/50" to "60/40-or-closer" permitted child support, for the first time, to flow "uphill" – from the greater time-share parent to the lesser time-share parent, if the greater-time-share parent had a higher income. The Court recognized this possibility and defended it on the basis that: "Still, maintaining the lifestyle of the child between the parties' households is the goal of the *Wright* formula, and the financial circumstances of the parties remain the most important factors under NRS 125B.080(9)."

Since then, the Court has blurred its 40% bright line test by holding that sometimes a time share can be "close enough" to that line to still constitute joint custody,[12] which holding may (or may not) have been legislatively overruled by the statutory adoption of the 40% test in the revised child custody statutes.[13]

In a widely-criticized decision, the Nevada Supreme Court in 2018 addressed the split-custody situation present where the parents shared joint physical custody of one child but one parent had primary physical custody of the other child.[14]

Essentially adopting an approach that had been used by the district court but explicitly rejected on appeal back in 1989 in *Barbagallo*, the court determined that "the plain language" of the child support statute (NRS 125B.070) and its prior holding in *Wright* required the "obligation of support" for children to be determined without regard to the custody arrangements the parents had with their

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[11] *See* Marshal Willick, *How Many Days are in a Week and the Meaning of the Rivero II Opinion*, 23 Nev. Fam. L. Rep., Fall, 2010, at 15 ("*How Many Days are in a Week*").

[12] *Bluestein v. Bluestein*, 131 Nev. 106, 345 P.3d 1044 (2015).

[13] NRS 125C.003(1)(a).

[14] *Miller v. Miller*, 134 Nev. 120, 412 P.3d 1081 (2018).

children. The Court explicitly rejected the calculations and methodologies used by the district court and those suggested by both parties and by the Nevada Bar Family Law Section *amicus* counsel.

Instead, the Court determined that since the parties had two children, the child support obligation for each parent should start with a 25% calculation. It then divided the parents' respective support obligations by two to determine the amount of support owed "per child," offsetting those sums for the joint-custody child, and simply finding the other per child rate payable to the custodian of the other child. The opinion expressly asked the Child Support Commission working on replacement regulations to consider the situation set out in that case.

B. Current Regulations

As of February, 2020, the core child support statutes were replaced by administrative regulations set out at Nevada Administrative Code section 425.

On some topics those regulations did not so much alter the prior statutory and case law relating to the relationship between custody and child support as attempt to restate it. The regulations made explicit what the prior case law had eventually somewhat stated: "If the parties have joint physical custody of at least one child, each party is an obligor."[15]

The regulations explicitly dealt with the joint custody situation by providing:

> If the parties have joint physical custody of a child, the child support obligation of each party must be determined. After each party's respective child support obligation is determined, the child support obligations must be offset so that the party with the higher child support obligation pays the other party the difference.[16]

The regulations addressed split custody, adopting the approach suggested in the 1992 and 1996 Child Support Statute Review Committee Reports[17] – and overturning the 2018 decision in *Miller* – by adding a section explicitly contemplating a partial-split-custody situation, focusing on the role of each party as an obligor as to the children in the other's primary or joint custody:

> If the parties have two or more children and each party has joint physical custody of at least one, but not all, of the children, the total child support obligation of each party must be determined based on the number of children to whom each party owes a child support obligation. After each party's respective child support obligation is determined, the

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[15] NAC 425.037.

[16] NAC 425.115(3).

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

> child support obligations must be offset so that the party with the higher child support obligation pays the other party the difference.

As of this writing, the Child Support Commission is contemplating revising ***all*** offset calculations by doing away with the simple offset recommended by every prior entity from the 1985 Governor's Commission forward. In its place is a proposal to multiply any such offset by 50%, thus effectively lowering all child support orders in every offset situation.

Cutting the offset in half is a step that should only be taken with much greater caution than is apparently being applied – the mathematics of a cross-obligation offset like that set out in *Wright* is currently in use in 23 states,[18] and before our Child Support Commission tosses that approach, it should examine the investigations and projections applied by all of those states in deciding that a *Wright*-type approach produces the fairest outcomes.

The issue of child care is tightly tied to parenting time – if one parent has a greater time share, that parent must either care for the child directly, or find child care with some third party during work hours, etc. The prior statute listed child care as a possible "deviation factor."

The 1992 and 1996 Child Support Statute Review Committees were sufficiently concerned with the impact of child care expenses on child support determinations that it strongly recommended pulling it out of the list of possible deviation factors and making it an explicit add-on, where relevant, to guideline support.

That suggestion took until creation of the 2020 regulations to accomplish. The prior deviation factor was replaced in the new regulations by explicit direction in a separate provision that "The court must consider the reasonable costs of child care paid by either or both parties and make an equitable division thereof."[19] Left unclear, however, was whether this was a separate add-on to guideline schedule support. The Child Support Commission is still tinkering with how to make that process work.

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[18] *See* JANE VENOHR, ECONOMIC BASIS OF MINNESOTA BASIC SCHEDULE AND PARENTING-TIME EXPENSE ADJUSTMENT (2015), *reprinted in* MINN. DEP'T OF HUM. SERV. CHILD SUPPORT DIVORCE., CHILD SUPPORT WORK GROUP FINAL REPORT APP. E (2016), posted at https://mn.gov/dhs/assets/child_support_work_group_2016_tcm1053-166182.pdf ("Venohr"). Notably, Ms. Venohr was apparently tapped to do the review of the Nevada child support guidelines in the run-up to appointment of the Nevada Child Support Commission and creation of our current regulations. *See* JANE VENOHR, REVIEW OF THE THE NEVADA CHILD SUPPORT GUIDELINES 78-82 (2016), https://www.leg.state.nv.us/Session/79th2017/Exhibits/Senate/JUS/SJUD144D.pdf.

[19] NAC 425.130.

III. THEORY VERSUS PRACTICAL APPLICATIONS

In addition to the non-zero-sum-game observation of the *Barbagallo* court, there are questions of whether there ***should be*** a correlation of any kind between parenting time schedules and child support obligations that deserve some further discussion.

This boils down to the question of whether a certain percentage time share or extent of visitation is *already presumed*. Specifically, the legislative history of the original child support statutes made it clear that the numbers and percentages arrived at were lowered for political purposes because maintaining the level of expenditures expected for a child in an intact household yielded support figures that were deemed to be "too high."

One plausible rationalization for the political lowering of the original figures is that the non-custodial parent would spend a certain amount of time with the child, and expend a certain amount of money for the child's care that would otherwise be payable by the custodial parent. This can be called the "presumed contributions" interpretation. The Wisconsin guidelines, on which the original Nevada statutes were based, expressly claimed to include an (unspecified) downward adjustment to account for the time the child spent with the obligor.[20]

Under this theory, the child support paid might well be too little for the non-custodian's share of a child's complete support, but could be seen as not intended to provide it.[21] The concept is related to the "minimum-contact threshold" in the "cliff effect" discussion below. Some state courts have expressly permitted an ***upward*** deviation in guideline child support when it can be shown that the non-custodial parent exercises little or no actual parenting time, and thus has little to no direct expenditures relating to the child.[22]

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[20] *See* INGRID ROTHE ET AL., INST. FOR RSCH. ON POVERTY, ESTIMATES OF FAMILY EXPENDITURES FOR CHILDREN: A REVIEW OF THE LITERATURE 10 (2001); J. Thomas Oldham & Jane Venohr, *The Relationship Between Child Support and Parenting Time*, 54 FAM. L. Q. 2 (ABA 2020-2021) ("Oldham") at 146.

[21] This helps interpret the decision in *Herz v. Gabler-Herz*, 107 Nev. 117, 808 P.2d 1 (1991). Child support of double the presumptive ceiling was awarded, at least in part on the basis of "the amount of time the children will spend with each parent as a result of this decree." The court made an implied finding that the decree resulted in the obligor spending less than normal time with the children. If child support can be *increased* because of limited or no contact with the non-custodian, then the child support statute must be interpreted as *already factoring in* an adjustment for expenditures expected to be made for the children by the non-custodial parent.

This implied presumption that there will be some expenditures by the non-custodial parent would be partially consistent with the original design of the child support statute. As originally introduced, the full guideline amount applied if the non-custodial parent had physical custody for fewer than 147 days a year (approximately 40% of the time). If that time-share was exceeded, then the guideline child support was to be multiplied by the custodial parent's fractional time and only that sum was payable. *See* 1987 Legislative History of A.B. 424 at 2.

[22] *See*, *e.g.*, *In re Marriage of Krieger*, 199 P.3d 450 (Wash. Ct. App. 2008); *Gray v. Gray*, 909 So. 2d 108 (Miss. Ct. App. 2005); Oldham at 176-177.

Others have rejected this view of the child support statutes, and opined that the prior statutory scheme encompassed a "zero contribution" theory that a non-custodian is not expected to provide anything at all beyond statutory support. Under this analysis, the non-custodian would be positioned to at least request an abatement, or offset, for ***any*** sums directly expended on the child – a contention rejected by the Nevada Supreme Court in *Barbagallo*.

From a litigator's point of view, it is possible to argue that rather than subtract from support payable when a non-custodian *does* have substantial contact with a child, perhaps there should be some supplemental support paid when a non-custodian does *not* have any such contact and thus has no direct expenditures.

The big problem in *any* sort of explicit connection between child support on the one hand, and time share or visitation on the other, is that the determination of visitation becomes a surrogate arena for disputes over the level of child support. Any such possibility should be avoided to the degree possible for the benefit of the children involved, and must be acknowledged as a probable cost of any abatement or offset provision or order.

There may be a distinction between a large time-share percentage on a weekly basis, and extended visitation. A support abatement might be more reasonable as a concept in the extended-visitation context, since for that period the usual non-custodian will have to take responsibility for more of the direct expenses that come with having primary responsibility for a child, such as providing food and child care, and those costs would necessarily not be present in the primary household during such an extended period.

The 1992 and 1996 Child Support Statute Review Committees concluded that support should not be abated in the absence of reasonably reliable data establishing a reduction in expenses to the primary custodian, and that the abatement should not exceed the amount by which the primary custodian's expenses were shown to be actually reduced – which the available data indicated was pretty minimal, even if the secondary custodian's expenses increased a lot.[23]

IV. DEFINITIONS AND DISTORTIONS

During the briefing and argument that led to the decision on rehearing in *Rivero II*, there was much *sturm und drang* swirling around the concept of "how to measure time" – custodial time, specifically. As discussed above, the Nevada Supreme Court eventually chose a "responsibility"

[23] Some state legislatures have expressly incorporated that concept into their child support statutes. *See* N.H. Rev. Stat. Ann. § 458-C:5(1)(h)(2(B) (2020). However, commentators have concluded that in most states today, an obligor does not have to establish that his or her level of access reduces the expenses of the other parent. Oldham at 147-48.

measure, unlike the majority of states, which took easier cop-outs such as overnights, meals, or other criteria.[24]

However, the direction in *Rivero* of what to measure permits identical facts to be labeled by a district court to produce very different child support orders.

Posit the typical situation of two parents with one school-age child, and a 2-2-3 weekly custody schedule.[25] In the real world, each parent will drop the child off at school at 8:00 a.m., with Mom picking up at 3:30 p.m. on Monday and Tuesday, Dad on Wednesday and Thursday, and the parents alternating on Friday pick-up to drop off at school on Monday. This would appear to create a 50/50 parenting time schedule, with each parent having 84 hours per week.

However, if the district court simply deemed Mom to be "responsible" for the child during the school day every Monday, and after she dropped off on Tuesday until Dad picked up at 3:30 on Wednesday, the identical pick-up and drop-off schedule set out above produces a time-share of 99 hours to 69 hours – a 58.93/41.07% time share, which the district court could label either "primary" or "joint" under *Bluestein*.[26]

The definition of "custody" in Nevada has thus produced a situation where similarly-situated parents can end up with enormously disparate child support orders despite having essentially identical schedules, which directly undercuts the "predictability" pillar of the "predictability and adequacy" twin purposes for creation of child support guidelines in the first place.[27] Justice Pickering, dissenting in *Rivero*, anticipated this scenario and warned that the Court's custodial definition could be misused in that way.[28]

The current child support regulations do nothing to affect this reality, as they are concerned with calculation of support after custody has been "determined," and not the custody determination itself.

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[24] *See* Oldham at 149-152; *How Many Days are in a Week*, *supra*.

[25] I.e., Mom has physical custody on Monday and Tuesday, Dad has physical custody on Wednesday and Thursday, and the parents alternate having physical custody Friday through Sunday.

[26] When this is done – and it is done – courts are usually not so obvious, instead framing their orders as stating something like "Dad's custodial time will begin after school on Wednesday . . . ."

[27] *See* 1992 Report at 10.

[28] "Lives change and a child's time is divided, not just between his or her parents, but among friends, school or day care, extended family, sports, and other pursuits. Practical questions seem certain to scuff the bright-line rule—questions like how to count hours the child spends with people besides either parent, or which parent to credit for time the child spends pursuing activities both parents support."

V. CUSTODY, CHILD SUPPORT, AND THE PERILS OF THE "CLIFF EFFECT"[29]

Most jurisdictions have some kind of threshold beyond which there is a modification of the support otherwise payable under a guideline schedule based on the income of the parties.

As detailed above, in Nevada that line is 40% – 146 days per year. As discussed above, it is possible that *Bluestein* blurred that bright line somewhat, but the line is still there. Below the line, the obligee's income is irrelevant, but above it, the obligee's income is calculated as an offset under *Wright*, possibly even reversing child support entirely to flow in the opposite direction, depending on the incomes of the parties.

Other jurisdictions use different criteria, and sometimes have more than one threshold. In the United Kingdom, for example, there are child support modification thresholds at 53, 104, 156, and 175 overnights.[30] Australia uses even thinner time-slices, starting at 14% of overnights.[31] Some jurisdictions use fractions of a day (one-fourth, or one half),[32] but most use the simple shorthand of overnights to mark their threshold reductions.[33]

Whichever measurement is used, the bigger the minimum access required for a change in child support, the bigger the "cliff effect" of reaching that threshold. Commentators have noted that this produces incentives for "surrogate litigation" of child support by intensive litigation of reaching the threshold, or not.[34] Some states, wary of throwing children into poverty, have installed circuit breakers so that there is no modification of support if the obligee is below a certain (usually poverty) level.[35]

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[29] There are analogies to this concept in several family law subjects. In property division law, for example, the most obvious is the situation under the traditional military retirement system where those leaving service after achieving 20 years of creditable service get retirement payments for life, but those leaving service before reaching that mark would receive nothing.

[30] Oldham at 149; see Elke Claessens & Dimitri Mortelmans, *Challenges for Child Support Schemes: Accounting for Shared Care and Complex Families*, 28 EUROPEAN SOC. POL'Y 2, 11 (2018).

[31] Oldham, at 149; Bruce Smyth et al., *Separated Parents' Knowledge of How Changes in Parenting Time Can Affect Child Support Payments and Family Tax Benefit Splitting in Australia: A Pre/Post-Reform Comparison*, 26 AUSTL. J. FAM. L. 1, 183-84 (2012).

[32] *See* VA. CODE ANN. § 20-108.2(G)(3)(c); ARIZ. REV. STAT. ANN. § 25-320(11)(C) (2020).

[33] Oldham at 149.

[34] *See* Oldham at 149-160, citing studies.

[35] *See*, *e.g.*, VA. CODE ANN. § 20-108.2(G)(3)(d) 2020; *Richardson v. Richardson*, 545 S.W.3d 895 (Mo. Ct. App. 2018).

If there are a large number of potential adjustment points, commentators graphing the mathematical effect of the parenting-time adjustments describe this series of small cliffs as a "downward staircase effect."[36]

Nevada fits in the group of jurisdictions with a very large cliff effect – as noted, it can cause child support to reverse entirely. That incentive for time-share litigation could be mitigated by altering our child support formula to produce smaller "cliffs" at a more graduated time-share, but doing so in a Wisconsin-model state like Nevada has its own complexities, and there is an obvious trade-off between keeping a child support formula simple and alleviating cliff effects.

The mathematics of how to offset varies in accordance with the child support formula in use; in income-shares states, the math can be very complex, involving increasing the total by half and then applying derived multipliers,[37] or involving dozens of calculations.[38]

Since we do not have an explicit income-shares formula, further reducing child support for each incremental increase in child time-share could have the effect warned of in *Barbagallo* of reducing child support on the basis of matters which do not actually reduce the necessary expenses of raising a child, and risk depriving the recipient of adequate support to maintain the child in the primary home.

VI. OTHER APPROACHES TO MODIFYING SUPPORT TO REFLECT CUSTODY TIME-SHARES

A few states have grouped child support into various categories, and modify the support payable when the time-share in question impacts the presumed expenses in one of the categories. For example, grouping child expenses as "variable" (which alter with the child's location, such as food), "duplicated" (housing), and "nonduplicated fixed" (e.g., clothing).[39] Under such formulas, the lesser-time parent would receive credit for variable expenses at low levels of time-share, and additional offsets for duplicated fixed expenses as time-share increased to approaching equal time.

These states might have a child support sum due even if the parents had equal parenting time and equal incomes, if the cases varied in who assumed which categories of expenses; this somewhat reflects the reasoning and discussion of the Nevada Supreme Court in *Barbagallo*, which charged district courts with inquiring who bore which expenses in determining who was "really" the "primary parent."

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[36] *See* Oldham at 162, describing the Arizona statutory scheme's 13 parenting-time adjustment intervals.

[37] *See*, *e.g.*, Oldham at 152-159, 170-176.

[38] *See* 2017 MICHIGAN CHILD SUPPORT FORMULA MANUAL § 3.03(A)(2) (2017).

[39] *See* Venohr at 10-11, Oldham at 160-170.

Some half a dozen states have created some form of sliding scale, the components of which appear to be largely arbitrary, which can boil down to a per-diem adjustment downward in support payable for each increment in time-share exercised by the obligor, resulting in a percentage decrease of the otherwise-payable child support scheduled sum.[40]

The academic literature can appear to discuss direct comparisons of how support would actually be calculated across states, but virtually all comparative studies incorporate some simplification measures that may make their data pretty illusory. For example, Oldham compared 12 states' modification formulas on an assumed fact pattern including a 60/40 time-share, deriving child support payments at sums ranging from $272 to $536, but hidden in the data was the false premise of using the Illinois child support guideline for each of them.[41] Each of those 12 states may well have had guideline features that would have moderated, modified, or completely altered the projections.

VII. THE MULTI-FAMILY COMPLEXITY

The entire discussion above concerns the classic situation of two parents, two households, and some schedule of time-share between the households. But it has been observed for decades that this is not the actual norm, since the ***majority*** of cases involve "multiple families":

> multiple family situations are no longer the exception, but the rule. About half of marriages – and an even greater proportion of divorces – involve at least one partner who has been married before. A substantial portion, as well, involve at least one partner with a child or children from that former marriage or another former union.[42]

As that author noted 30 years ago, a lack of adequate consideration of such situations will probably lead to inequitable treatment of custodians, non-custodians, or both.[43]

It is certainly not unusual for parents to have one or more former spouses, or to be custodians of children from one marriage and non-custodians of children from another. And as the definition of

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[40] *See*, *e.g.*, Oldham at 164-166, describing adjustments in Utah, Tennessee, Iowa, Delaware, Kansas, and Pennsylvania.

[41] *See* Oldham at 166-167.

[42] Takas, THE TREATMENT OF MULTIPLE FAMILY CASES UNDER STATE CHILD SUPPORT GUIDELINES at 2 (U.S. Dep't of Health and Human Services 1991), citing V. Fuchs, *How we live; an economic perspective on Americans from birth to death* (1983).

[43] TREATMENT OF MULTIPLE FAMILIES, *supra*, at 3-4.

"family" continues to change, we should expect an ever-increasing amount of complexity among relationships, marital and otherwise, often involving children from those multiple relationships.[44]

For example, presume Dad has a child with Mom 1, and then divorces, remarries, and has another child with Mom 2, who also has another child of a prior relationship. These three children will have a relationship – one that has been given presumptive value in making child custody determinations.[45] The question is how these triangular, rectangular, and even more complicated custodial relationships will be treated for child support purposes.

For example, how exactly should a court take into account that a given child will spend one or two nights a week in a household with a greatly disproportionate standard of living to that of the other two households? How does the time the child spends in a third or fourth household affect either the need for support, or the obligation to pay it?

Nevada case law has barely touched these questions. *Hoover*[46] briefly noted the existence of the "first mortgage" and "equal treatment" approaches to determining the relative rights of first and second families (without so titling them)[47] but did not explore the relative equities in any meaningful way. *Scott*[48] was mainly concerned with reversing any district court decision where the court actually tried to explain how it reached its deviation decision, labeling any such effort an attempt to "create a new child support formula." The net effect was to approve of an application of discretion as long as no reason for its application was provided, which is counter-intuitive.

Our child support formulas, or at least the adjustment factors, should anticipate the existence of cases in which a parent is both paying and receiving child support, or in which the custodial schedule of a child could include multiple households, or any other combination of custody and support relationships among multiple households.

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[44] *See*, *e.g.*, Marshal Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law* (Nevada Lawyer, May 2011).

[45] *See* NRS 125C.0035(i), listing as a best interest factor for a custody order "The ability of the child to maintain a relationship with any sibling." *See also Gandee v. Gandee*, 111 Nev. 754, 895 P.2d 1285 (1995) (relocation granted, after reciting among other things subject child's relationship with step-brothers).

[46] *Hoover v. Hoover*, 106 Nev. 388, 793 P.2d 1329 (1990).

[47] *See* Marshal Willick, Legal Note Vol. 32 — How to Calculate Child Support with Multiple Families, posted at https://www.willicklawgroup.com/vol-32-how-to-calculate-child-support-with-multiple-families/.

[48] *Scott v. Scott*, 107 Nev. 837, 822 P.2d 654 (1991).

VIII. CONCLUSIONS

Family law in the twenty-first century is a dynamic field with many moving parts, in which definitions, references, and norms have changed considerably and should be expected to continue doing so. The references to custodial relationships in child support statutes and cases has lagged reality for years, or decades.

The transition from child support statutes to regulations offers the opportunity for a more nimble adjustment of Nevada's child support laws to attempt to create "fairness" out of that complexity, but it requires a conscious balancing of structure and discretion to adequately serve the twin goals of predictability and adequacy in child support awards. The Child Support Commission must be careful not to impulsively alter widely-recognized mechanisms, like the offset mechanism, without fully thinking through the ramifications of such a decision and seeing ***why*** about half the states in the country have independently made a different choice.

We still do not have much in the way of direction or consensus as to how to measure time, and the existing directions from *Rivero* have produced some gamesmanship by parties, attorneys, and judges, in conflicts between labels and reality. Whether the custody statutes re-imposed the *Rivero* bright-line of 146 days or preserved the *Bluestein* fuzziness of that line remains to be seen. However, the new regulations do a much better job of addressing joint custody, and partial-split-custody, than the predecessor statutes had done.

The concentration by the Child Support Commission on the low end of support cases has caused it to pay little attention to the circumstances in which child support should be adjusted ***upward***, which may include situations in which a non-custodian has little or no contact with a child and thus no notable direct expenditures on that child.

There can be no disputing that Nevada has a huge "cliff effect" built into our 40% custodial threshold for consideration of the recipient's income by offset. Policy decisions can and should be made whether this is a good thing, and whether or not it makes sense to reduce that cliff effect by building in smaller offset thresholds – while not overly-complicating the child support scheme, and while keeping an eye on the adequacy of child support to actually support children.

And at some point, explicit consideration should be given to the modern reality of multi-family custody and support regimes, with serious consideration given to a "first mortgage" approach whereby a previously-existing support obligation reduces the income considered to be available for later support orders, but later obligations cannot be used to reduce those previously-existing obligations.

In sum, the question of how and how much child support should be ordered, and its relationship to parenting time, is a lot more complicated than it at first appears, and deserves a great deal further thought, attention, and sensible regulation.

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PRESENTER BIOGRAPHY

Marshal S. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American Academy of Matrimonial Lawyers (AAML) and the International Academy of Family Lawyers (IAML), former Chair of the Nevada Bar Family Law Section and former President of the Nevada chapter of the AAML. He has authored many books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual. He is frequent teacher of continuing legal education classes and is often sought as a lecturer on family law issues.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of divorce and property division. He has chaired several Committees of the American Bar Association Family Law Section, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2101. His phone number is (702) 438-4100, extension 103. Fax is (702) 438-5311. E-mail can be directed to Marshal@willicklawgroup.com, and additional information can be obtained from the firm web sites, www.willicklawgroup.com and http://www.qdromasters.com.

I. BACKGROUND, INTRODUCTION, AND HISTORY[1]

At first blush, the concept seems simple: a child custodian who has more time with a child should receive more support. In practice, a host of considerations, conflicting priorities, and possible fact patterns distort that simplicity, sometimes in unintended and illogical ways that can produce counter-productive actions by parties to real-world cases.

These materials are just a pencil sketch of some of the intersections between child support and parenting time, but are intended to provide some background, and perhaps some ideas for negotiating and litigating individual cases, and perhaps improving our child support regulations.

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

Fairly early in the 1987 legislative session, AB 424 was introduced. Its terms largely mirrored those of the Governor's Commission recommendations, including what can now be seen as a prescient set-off for shared custody over a 40% time-share threshold. The original bill included a statement of policy that custody and visitation were entirely separate and distinct from child support,[2] but that policy statement was removed.[3] The bill became law in 1987, effective as to all future contested child support cases or requests to modify child support.

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

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[1] I understand that the theme of this year's conference is alimony, but this audience got my take, approach, analysis, and recommendations regarding alimony last year. For those interested, *see* Marshal Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. Am. Acad. Matrim. Law. 153 (2015); Marshal Willick, *Kogod Contradictions, Practical Problems, and Required Statutory Fixes: Part 1*, 33 Nev. Fam. L. Rep., Fall 2019/Winter 2020, at 1.

[2] *See* 1987 Legislative History of A.B. 424 at 2. Under this policy, visitation problems, for example, would not affect a support obligation.

[3] *See* 1987 Legislative History of A.B. 424 at 79.

II. EXPLICIT RELATION OF CUSTODY AND SUPPORT IN STATUTORY LAW, REGULATIONS, AND CASE LAW

A. Prior Support Statutes and Caselaw

Nevada's prior child support core statutes (NRS 125.070-.080) were framed to treat one parent as a physical custodian, and the other as a "parent without physical custody."[4]

Joint custody existed, of course, when the child support statutes were enacted in 1987, but those statutes did not expressly address joint custody, leaving mechanisms of how to address child support to individual courts in individual cases.

Since 1981, NRS 125.490 has stated that joint custody would be presumed to be in a child's best interest if the parents agreed to it. An explicit "preference" for joint *physical* custody, often treated as a presumption, became law in 2015,[5] adding to a basis for that finding not just an agreement, but that also that "a parent has demonstrated, or has attempted to demonstrate but has had his or her efforts frustrated by the other parent, an intent to establish a meaningful relationship with the minor child."

When the Nevada Supreme Court addressed the question of time share in *Barbagallo*[6] in 1989, it held that the child support formula "is easily applied" to primary or sole custody cases, but "is not so easily applied to shared and joint custody cases." The Court essentially called for a district court determining child support to determine which of two parents was "really" the "primary custodian," indicating that would usually be the parent with the majority time share:

> The party having the majority of custodial time in a joint physical custody situation is presumably, but not unexceptionally, the primary custodian. It is certainly possible that a party entitled to three days physical custody could convince the trial court that he or she was exercising the majority of child rearing responsibilities and financial burdens, but experience probably dictates that the person having physical custody most of the time will probably turn out to be the primary custodian.[7]

The case went on to generally oppose the creation of any "abatement" of child support for the time a child spent in the actual physical custody of the secondary custodian, unless an "injustice" would result. The Court noted that provisions in the original bill draft in 1987 would have provided such

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

[5] NRS 125C.0025.

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

[7] *Barbagallo v. Barbagallo*, 105 Nev. 546, 549 n.1, 779 P.2d 532 (1989).

reductions, but were removed from the statute prior to its passage. Thus, the basis of the Court's ruling was its determination of an implied legislative intent *not* to grant such abatements.

The basis of the Court's reasoning was that child costs were not a "zero sum game" in which additional expenditures by one parent reduced expenses to the other, but that, instead, overall expenses simply increased when both parents spent significant time with a child:

> [W]e must bear in mind that balanced against the need in some cases to relieve the secondary parent from the full formula burden is the reality that the primary custodian is faced with an array of fixed expenses relating to child rearing, costs such as rent, mortgage payments, utilities, car maintenance and medical expenses. These expenses go on and are not usually appreciably diminished as a result of the secondary custodian's sharing of the burdens of child care and maintenance.
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> . . . .
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> Because of the probable increases in overall expenses in joint physical custody cases and because of the danger inherent in reducing child support payments made to a primary custodian, the courts should exercise considerable caution before reducing the formula amounts. As the secondary custodian's child-related expenses increase, the expenses of the primary custodian do not decrease proportionally, and care should be taken that children do not suffer while in the care of the primary custodian by reason of unwarranted reduction in the formula payments being made by the secondary custodian.[8]

There continued to be much wrangling at the trial court level, and much unequal treatment of similarly-situated parties. In 1998, the Court criticized and tempered the *Barbagallo* holding in *Wright v. Osburn*,[9] a week-on, week-off joint custody case. *Wright* provided an explicit means of adjusting child support for joint custody by calculating child support for each parent, subtracting one from the other, and requiring the parent with the higher income to pay the parent with the lower income that difference.

In practice, this case law evolution led to parents fighting about labels as a surrogate arena for determining child support, often with an obligor giving up actual time-share with a child in exchange for a "joint physical custody" label that could then be used as a shield to try to lower a child support obligation.

Some focus to the questions was developed in 2009, when the Nevada Supreme Court provided some definitions in *Rivero*,[10] addressing a case in which parties had described their 5/2 time share as "joint custody." The Court adopted the Family Law Section recommendation (reflecting discussions going back to the 1985 Governor's Commission) that "each parent must have physical custody of the child at least 40 percent of the time to constitute joint physical custody."

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[8] *Id*. at 548-550, 779 P.2d at 535.

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

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

In doing so, the Court attempted to give guidance of how the time share should be calculated, telling courts and attorneys to concentrate on decision-making responsibility rather than the exact number of hours a child was in the immediate physical presence of a parent – which itself set off years of acrimony and conflicting trial court decisions as to how to measure time.[11] The Court's actual direction was:

> The district court should calculate the time during which a party has physical custody of a child over one calendar year. Each parent must have physical custody of the child at least 40 percent of the time, which is 146 days per year. . . . In calculating the time during which a party has physical custody of the child, the district court should look at the number of days during which a party provided supervision of the child, the child resided with the party, and during which the party made the day-to-day decisions regarding the child. The district court should not focus on, for example, the exact number of hours the child was in the care of the parent, whether the child was sleeping, or whether the child was in the care of a third-party caregiver or spent time with a friend or relative during the period of time in question.

The change in definition of "joint physical custody" from "50/50" to "60/40-or-closer" permitted child support, for the first time, to flow "uphill" – from the greater time-share parent to the lesser time-share parent, if the greater-time-share parent had a higher income. The Court recognized this possibility and defended it on the basis that: "Still, maintaining the lifestyle of the child between the parties' households is the goal of the *Wright* formula, and the financial circumstances of the parties remain the most important factors under NRS 125B.080(9)."

Since then, the Court has blurred its 40% bright line test by holding that sometimes a time share can be "close enough" to that line to still constitute joint custody,[12] which holding may (or may not) have been legislatively overruled by the statutory adoption of the 40% test in the revised child custody statutes.[13]

In a widely-criticized decision, the Nevada Supreme Court in 2018 addressed the split-custody situation present where the parents shared joint physical custody of one child but one parent had primary physical custody of the other child.[14]

Essentially adopting an approach that had been used by the district court but explicitly rejected on appeal back in 1989 in *Barbagallo*, the court determined that "the plain language" of the child support statute (NRS 125B.070) and its prior holding in *Wright* required the "obligation of support" for children to be determined without regard to the custody arrangements the parents had with their

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[11] *See* Marshal Willick, *How Many Days are in a Week and the Meaning of the Rivero II Opinion*, 23 Nev. Fam. L. Rep., Fall, 2010, at 15 ("*How Many Days are in a Week*").

[12] *Bluestein v. Bluestein*, 131 Nev. 106, 345 P.3d 1044 (2015).

[13] NRS 125C.003(1)(a).

[14] *Miller v. Miller*, 134 Nev. 120, 412 P.3d 1081 (2018).

children. The Court explicitly rejected the calculations and methodologies used by the district court and those suggested by both parties and by the Nevada Bar Family Law Section *amicus* counsel.

Instead, the Court determined that since the parties had two children, the child support obligation for each parent should start with a 25% calculation. It then divided the parents' respective support obligations by two to determine the amount of support owed "per child," offsetting those sums for the joint-custody child, and simply finding the other per child rate payable to the custodian of the other child. The opinion expressly asked the Child Support Commission working on replacement regulations to consider the situation set out in that case.

B. Current Regulations

As of February, 2020, the core child support statutes were replaced by administrative regulations set out at Nevada Administrative Code section 425.

On some topics those regulations did not so much alter the prior statutory and case law relating to the relationship between custody and child support as attempt to restate it. The regulations made explicit what the prior case law had eventually somewhat stated: "If the parties have joint physical custody of at least one child, each party is an obligor."[15]

The regulations explicitly dealt with the joint custody situation by providing:

> If the parties have joint physical custody of a child, the child support obligation of each party must be determined. After each party's respective child support obligation is determined, the child support obligations must be offset so that the party with the higher child support obligation pays the other party the difference.[16]

The regulations addressed split custody, adopting the approach suggested in the 1992 and 1996 Child Support Statute Review Committee Reports[17] – and overturning the 2018 decision in *Miller* – by adding a section explicitly contemplating a partial-split-custody situation, focusing on the role of each party as an obligor as to the children in the other's primary or joint custody:

> If the parties have two or more children and each party has joint physical custody of at least one, but not all, of the children, the total child support obligation of each party must be determined based on the number of children to whom each party owes a child support obligation. After each party's respective child support obligation is determined, the

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[15] NAC 425.037.

[16] NAC 425.115(3).

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

> child support obligations must be offset so that the party with the higher child support obligation pays the other party the difference.

As of this writing, the Child Support Commission is contemplating revising ***all*** offset calculations by doing away with the simple offset recommended by every prior entity from the 1985 Governor's Commission forward. In its place is a proposal to multiply any such offset by 50%, thus effectively lowering all child support orders in every offset situation.

Cutting the offset in half is a step that should only be taken with much greater caution than is apparently being applied – the mathematics of a cross-obligation offset like that set out in *Wright* is currently in use in 23 states,[18] and before our Child Support Commission tosses that approach, it should examine the investigations and projections applied by all of those states in deciding that a *Wright*-type approach produces the fairest outcomes.

The issue of child care is tightly tied to parenting time – if one parent has a greater time share, that parent must either care for the child directly, or find child care with some third party during work hours, etc. The prior statute listed child care as a possible "deviation factor."

The 1992 and 1996 Child Support Statute Review Committees were sufficiently concerned with the impact of child care expenses on child support determinations that it strongly recommended pulling it out of the list of possible deviation factors and making it an explicit add-on, where relevant, to guideline support.

That suggestion took until creation of the 2020 regulations to accomplish. The prior deviation factor was replaced in the new regulations by explicit direction in a separate provision that "The court must consider the reasonable costs of child care paid by either or both parties and make an equitable division thereof."[19] Left unclear, however, was whether this was a separate add-on to guideline schedule support. The Child Support Commission is still tinkering with how to make that process work.

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[18] *See* JANE VENOHR, ECONOMIC BASIS OF MINNESOTA BASIC SCHEDULE AND PARENTING-TIME EXPENSE ADJUSTMENT (2015), *reprinted in* MINN. DEP'T OF HUM. SERV. CHILD SUPPORT DIVORCE., CHILD SUPPORT WORK GROUP FINAL REPORT APP. E (2016), posted at https://mn.gov/dhs/assets/child_support_work_group_2016_tcm1053-166182.pdf ("Venohr"). Notably, Ms. Venohr was apparently tapped to do the review of the Nevada child support guidelines in the run-up to appointment of the Nevada Child Support Commission and creation of our current regulations. *See* JANE VENOHR, REVIEW OF THE THE NEVADA CHILD SUPPORT GUIDELINES 78-82 (2016), https://www.leg.state.nv.us/Session/79th2017/Exhibits/Senate/JUS/SJUD144D.pdf.

[19] NAC 425.130.

III. THEORY VERSUS PRACTICAL APPLICATIONS

In addition to the non-zero-sum-game observation of the *Barbagallo* court, there are questions of whether there ***should be*** a correlation of any kind between parenting time schedules and child support obligations that deserve some further discussion.

This boils down to the question of whether a certain percentage time share or extent of visitation is *already presumed*. Specifically, the legislative history of the original child support statutes made it clear that the numbers and percentages arrived at were lowered for political purposes because maintaining the level of expenditures expected for a child in an intact household yielded support figures that were deemed to be "too high."

One plausible rationalization for the political lowering of the original figures is that the non-custodial parent would spend a certain amount of time with the child, and expend a certain amount of money for the child's care that would otherwise be payable by the custodial parent. This can be called the "presumed contributions" interpretation. The Wisconsin guidelines, on which the original Nevada statutes were based, expressly claimed to include an (unspecified) downward adjustment to account for the time the child spent with the obligor.[20]

Under this theory, the child support paid might well be too little for the non-custodian's share of a child's complete support, but could be seen as not intended to provide it.[21] The concept is related to the "minimum-contact threshold" in the "cliff effect" discussion below. Some state courts have expressly permitted an ***upward*** deviation in guideline child support when it can be shown that the non-custodial parent exercises little or no actual parenting time, and thus has little to no direct expenditures relating to the child.[22]

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[20] *See* INGRID ROTHE ET AL., INST. FOR RSCH. ON POVERTY, ESTIMATES OF FAMILY EXPENDITURES FOR CHILDREN: A REVIEW OF THE LITERATURE 10 (2001); J. Thomas Oldham & Jane Venohr, *The Relationship Between Child Support and Parenting Time*, 54 FAM. L. Q. 2 (ABA 2020-2021) ("Oldham") at 146.

[21] This helps interpret the decision in *Herz v. Gabler-Herz*, 107 Nev. 117, 808 P.2d 1 (1991). Child support of double the presumptive ceiling was awarded, at least in part on the basis of "the amount of time the children will spend with each parent as a result of this decree." The court made an implied finding that the decree resulted in the obligor spending less than normal time with the children. If child support can be *increased* because of limited or no contact with the non-custodian, then the child support statute must be interpreted as *already factoring in* an adjustment for expenditures expected to be made for the children by the non-custodial parent.

This implied presumption that there will be some expenditures by the non-custodial parent would be partially consistent with the original design of the child support statute. As originally introduced, the full guideline amount applied if the non-custodial parent had physical custody for fewer than 147 days a year (approximately 40% of the time). If that time-share was exceeded, then the guideline child support was to be multiplied by the custodial parent's fractional time and only that sum was payable. *See* 1987 Legislative History of A.B. 424 at 2.

[22] *See*, *e.g.*, *In re Marriage of Krieger*, 199 P.3d 450 (Wash. Ct. App. 2008); *Gray v. Gray*, 909 So. 2d 108 (Miss. Ct. App. 2005); Oldham at 176-177.

Others have rejected this view of the child support statutes, and opined that the prior statutory scheme encompassed a "zero contribution" theory that a non-custodian is not expected to provide anything at all beyond statutory support. Under this analysis, the non-custodian would be positioned to at least request an abatement, or offset, for ***any*** sums directly expended on the child – a contention rejected by the Nevada Supreme Court in *Barbagallo*.

From a litigator's point of view, it is possible to argue that rather than subtract from support payable when a non-custodian *does* have substantial contact with a child, perhaps there should be some supplemental support paid when a non-custodian does *not* have any such contact and thus has no direct expenditures.

The big problem in *any* sort of explicit connection between child support on the one hand, and time share or visitation on the other, is that the determination of visitation becomes a surrogate arena for disputes over the level of child support. Any such possibility should be avoided to the degree possible for the benefit of the children involved, and must be acknowledged as a probable cost of any abatement or offset provision or order.

There may be a distinction between a large time-share percentage on a weekly basis, and extended visitation. A support abatement might be more reasonable as a concept in the extended-visitation context, since for that period the usual non-custodian will have to take responsibility for more of the direct expenses that come with having primary responsibility for a child, such as providing food and child care, and those costs would necessarily not be present in the primary household during such an extended period.

The 1992 and 1996 Child Support Statute Review Committees concluded that support should not be abated in the absence of reasonably reliable data establishing a reduction in expenses to the primary custodian, and that the abatement should not exceed the amount by which the primary custodian's expenses were shown to be actually reduced – which the available data indicated was pretty minimal, even if the secondary custodian's expenses increased a lot.[23]

IV. DEFINITIONS AND DISTORTIONS

During the briefing and argument that led to the decision on rehearing in *Rivero II*, there was much *sturm und drang* swirling around the concept of "how to measure time" – custodial time, specifically. As discussed above, the Nevada Supreme Court eventually chose a "responsibility"

[23] Some state legislatures have expressly incorporated that concept into their child support statutes. *See* N.H. Rev. Stat. Ann. § 458-C:5(1)(h)(2(B) (2020). However, commentators have concluded that in most states today, an obligor does not have to establish that his or her level of access reduces the expenses of the other parent. Oldham at 147-48.

measure, unlike the majority of states, which took easier cop-outs such as overnights, meals, or other criteria.[24]

However, the direction in *Rivero* of what to measure permits identical facts to be labeled by a district court to produce very different child support orders.

Posit the typical situation of two parents with one school-age child, and a 2-2-3 weekly custody schedule.[25] In the real world, each parent will drop the child off at school at 8:00 a.m., with Mom picking up at 3:30 p.m. on Monday and Tuesday, Dad on Wednesday and Thursday, and the parents alternating on Friday pick-up to drop off at school on Monday. This would appear to create a 50/50 parenting time schedule, with each parent having 84 hours per week.

However, if the district court simply deemed Mom to be "responsible" for the child during the school day every Monday, and after she dropped off on Tuesday until Dad picked up at 3:30 on Wednesday, the identical pick-up and drop-off schedule set out above produces a time-share of 99 hours to 69 hours – a 58.93/41.07% time share, which the district court could label either "primary" or "joint" under *Bluestein*.[26]

The definition of "custody" in Nevada has thus produced a situation where similarly-situated parents can end up with enormously disparate child support orders despite having essentially identical schedules, which directly undercuts the "predictability" pillar of the "predictability and adequacy" twin purposes for creation of child support guidelines in the first place.[27] Justice Pickering, dissenting in *Rivero*, anticipated this scenario and warned that the Court's custodial definition could be misused in that way.[28]

The current child support regulations do nothing to affect this reality, as they are concerned with calculation of support after custody has been "determined," and not the custody determination itself.

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[24] *See* Oldham at 149-152; *How Many Days are in a Week*, *supra*.

[25] I.e., Mom has physical custody on Monday and Tuesday, Dad has physical custody on Wednesday and Thursday, and the parents alternate having physical custody Friday through Sunday.

[26] When this is done – and it is done – courts are usually not so obvious, instead framing their orders as stating something like "Dad's custodial time will begin after school on Wednesday . . . ."

[27] *See* 1992 Report at 10.

[28] "Lives change and a child's time is divided, not just between his or her parents, but among friends, school or day care, extended family, sports, and other pursuits. Practical questions seem certain to scuff the bright-line rule—questions like how to count hours the child spends with people besides either parent, or which parent to credit for time the child spends pursuing activities both parents support."

V. CUSTODY, CHILD SUPPORT, AND THE PERILS OF THE "CLIFF EFFECT"[29]

Most jurisdictions have some kind of threshold beyond which there is a modification of the support otherwise payable under a guideline schedule based on the income of the parties.

As detailed above, in Nevada that line is 40% – 146 days per year. As discussed above, it is possible that *Bluestein* blurred that bright line somewhat, but the line is still there. Below the line, the obligee's income is irrelevant, but above it, the obligee's income is calculated as an offset under *Wright*, possibly even reversing child support entirely to flow in the opposite direction, depending on the incomes of the parties.

Other jurisdictions use different criteria, and sometimes have more than one threshold. In the United Kingdom, for example, there are child support modification thresholds at 53, 104, 156, and 175 overnights.[30] Australia uses even thinner time-slices, starting at 14% of overnights.[31] Some jurisdictions use fractions of a day (one-fourth, or one half),[32] but most use the simple shorthand of overnights to mark their threshold reductions.[33]

Whichever measurement is used, the bigger the minimum access required for a change in child support, the bigger the "cliff effect" of reaching that threshold. Commentators have noted that this produces incentives for "surrogate litigation" of child support by intensive litigation of reaching the threshold, or not.[34] Some states, wary of throwing children into poverty, have installed circuit breakers so that there is no modification of support if the obligee is below a certain (usually poverty) level.[35]

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[29] There are analogies to this concept in several family law subjects. In property division law, for example, the most obvious is the situation under the traditional military retirement system where those leaving service after achieving 20 years of creditable service get retirement payments for life, but those leaving service before reaching that mark would receive nothing.

[30] Oldham at 149; see Elke Claessens & Dimitri Mortelmans, *Challenges for Child Support Schemes: Accounting for Shared Care and Complex Families*, 28 EUROPEAN SOC. POL'Y 2, 11 (2018).

[31] Oldham, at 149; Bruce Smyth et al., *Separated Parents' Knowledge of How Changes in Parenting Time Can Affect Child Support Payments and Family Tax Benefit Splitting in Australia: A Pre/Post-Reform Comparison*, 26 AUSTL. J. FAM. L. 1, 183-84 (2012).

[32] *See* VA. CODE ANN. § 20-108.2(G)(3)(c); ARIZ. REV. STAT. ANN. § 25-320(11)(C) (2020).

[33] Oldham at 149.

[34] *See* Oldham at 149-160, citing studies.

[35] *See*, *e.g.*, VA. CODE ANN. § 20-108.2(G)(3)(d) 2020; *Richardson v. Richardson*, 545 S.W.3d 895 (Mo. Ct. App. 2018).

If there are a large number of potential adjustment points, commentators graphing the mathematical effect of the parenting-time adjustments describe this series of small cliffs as a "downward staircase effect."[36]

Nevada fits in the group of jurisdictions with a very large cliff effect – as noted, it can cause child support to reverse entirely. That incentive for time-share litigation could be mitigated by altering our child support formula to produce smaller "cliffs" at a more graduated time-share, but doing so in a Wisconsin-model state like Nevada has its own complexities, and there is an obvious trade-off between keeping a child support formula simple and alleviating cliff effects.

The mathematics of how to offset varies in accordance with the child support formula in use; in income-shares states, the math can be very complex, involving increasing the total by half and then applying derived multipliers,[37] or involving dozens of calculations.[38]

Since we do not have an explicit income-shares formula, further reducing child support for each incremental increase in child time-share could have the effect warned of in *Barbagallo* of reducing child support on the basis of matters which do not actually reduce the necessary expenses of raising a child, and risk depriving the recipient of adequate support to maintain the child in the primary home.

VI. OTHER APPROACHES TO MODIFYING SUPPORT TO REFLECT CUSTODY TIME-SHARES

A few states have grouped child support into various categories, and modify the support payable when the time-share in question impacts the presumed expenses in one of the categories. For example, grouping child expenses as "variable" (which alter with the child's location, such as food), "duplicated" (housing), and "nonduplicated fixed" (e.g., clothing).[39] Under such formulas, the lesser-time parent would receive credit for variable expenses at low levels of time-share, and additional offsets for duplicated fixed expenses as time-share increased to approaching equal time.

These states might have a child support sum due even if the parents had equal parenting time and equal incomes, if the cases varied in who assumed which categories of expenses; this somewhat reflects the reasoning and discussion of the Nevada Supreme Court in *Barbagallo*, which charged district courts with inquiring who bore which expenses in determining who was "really" the "primary parent."

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[36] *See* Oldham at 162, describing the Arizona statutory scheme's 13 parenting-time adjustment intervals.

[37] *See*, *e.g.*, Oldham at 152-159, 170-176.

[38] *See* 2017 MICHIGAN CHILD SUPPORT FORMULA MANUAL § 3.03(A)(2) (2017).

[39] *See* Venohr at 10-11, Oldham at 160-170.

Some half a dozen states have created some form of sliding scale, the components of which appear to be largely arbitrary, which can boil down to a per-diem adjustment downward in support payable for each increment in time-share exercised by the obligor, resulting in a percentage decrease of the otherwise-payable child support scheduled sum.[40]

The academic literature can appear to discuss direct comparisons of how support would actually be calculated across states, but virtually all comparative studies incorporate some simplification measures that may make their data pretty illusory. For example, Oldham compared 12 states' modification formulas on an assumed fact pattern including a 60/40 time-share, deriving child support payments at sums ranging from $272 to $536, but hidden in the data was the false premise of using the Illinois child support guideline for each of them.[41] Each of those 12 states may well have had guideline features that would have moderated, modified, or completely altered the projections.

VII. THE MULTI-FAMILY COMPLEXITY

The entire discussion above concerns the classic situation of two parents, two households, and some schedule of time-share between the households. But it has been observed for decades that this is not the actual norm, since the ***majority*** of cases involve "multiple families":

> multiple family situations are no longer the exception, but the rule. About half of marriages – and an even greater proportion of divorces – involve at least one partner who has been married before. A substantial portion, as well, involve at least one partner with a child or children from that former marriage or another former union.[42]

As that author noted 30 years ago, a lack of adequate consideration of such situations will probably lead to inequitable treatment of custodians, non-custodians, or both.[43]

It is certainly not unusual for parents to have one or more former spouses, or to be custodians of children from one marriage and non-custodians of children from another. And as the definition of

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[40] *See*, *e.g.*, Oldham at 164-166, describing adjustments in Utah, Tennessee, Iowa, Delaware, Kansas, and Pennsylvania.

[41] *See* Oldham at 166-167.

[42] Takas, THE TREATMENT OF MULTIPLE FAMILY CASES UNDER STATE CHILD SUPPORT GUIDELINES at 2 (U.S. Dep't of Health and Human Services 1991), citing V. Fuchs, *How we live; an economic perspective on Americans from birth to death* (1983).

[43] TREATMENT OF MULTIPLE FAMILIES, *supra*, at 3-4.

"family" continues to change, we should expect an ever-increasing amount of complexity among relationships, marital and otherwise, often involving children from those multiple relationships.[44]

For example, presume Dad has a child with Mom 1, and then divorces, remarries, and has another child with Mom 2, who also has another child of a prior relationship. These three children will have a relationship – one that has been given presumptive value in making child custody determinations.[45] The question is how these triangular, rectangular, and even more complicated custodial relationships will be treated for child support purposes.

For example, how exactly should a court take into account that a given child will spend one or two nights a week in a household with a greatly disproportionate standard of living to that of the other two households? How does the time the child spends in a third or fourth household affect either the need for support, or the obligation to pay it?

Nevada case law has barely touched these questions. *Hoover*[46] briefly noted the existence of the "first mortgage" and "equal treatment" approaches to determining the relative rights of first and second families (without so titling them)[47] but did not explore the relative equities in any meaningful way. *Scott*[48] was mainly concerned with reversing any district court decision where the court actually tried to explain how it reached its deviation decision, labeling any such effort an attempt to "create a new child support formula." The net effect was to approve of an application of discretion as long as no reason for its application was provided, which is counter-intuitive.

Our child support formulas, or at least the adjustment factors, should anticipate the existence of cases in which a parent is both paying and receiving child support, or in which the custodial schedule of a child could include multiple households, or any other combination of custody and support relationships among multiple households.

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[44] *See*, *e.g.*, Marshal Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law* (Nevada Lawyer, May 2011).

[45] *See* NRS 125C.0035(i), listing as a best interest factor for a custody order "The ability of the child to maintain a relationship with any sibling." *See also Gandee v. Gandee*, 111 Nev. 754, 895 P.2d 1285 (1995) (relocation granted, after reciting among other things subject child's relationship with step-brothers).

[46] *Hoover v. Hoover*, 106 Nev. 388, 793 P.2d 1329 (1990).

[47] *See* Marshal Willick, Legal Note Vol. 32 — How to Calculate Child Support with Multiple Families, posted at https://www.willicklawgroup.com/vol-32-how-to-calculate-child-support-with-multiple-families/.

[48] *Scott v. Scott*, 107 Nev. 837, 822 P.2d 654 (1991).

VIII. CONCLUSIONS

Family law in the twenty-first century is a dynamic field with many moving parts, in which definitions, references, and norms have changed considerably and should be expected to continue doing so. The references to custodial relationships in child support statutes and cases has lagged reality for years, or decades.

The transition from child support statutes to regulations offers the opportunity for a more nimble adjustment of Nevada's child support laws to attempt to create "fairness" out of that complexity, but it requires a conscious balancing of structure and discretion to adequately serve the twin goals of predictability and adequacy in child support awards. The Child Support Commission must be careful not to impulsively alter widely-recognized mechanisms, like the offset mechanism, without fully thinking through the ramifications of such a decision and seeing ***why*** about half the states in the country have independently made a different choice.

We still do not have much in the way of direction or consensus as to how to measure time, and the existing directions from *Rivero* have produced some gamesmanship by parties, attorneys, and judges, in conflicts between labels and reality. Whether the custody statutes re-imposed the *Rivero* bright-line of 146 days or preserved the *Bluestein* fuzziness of that line remains to be seen. However, the new regulations do a much better job of addressing joint custody, and partial-split-custody, than the predecessor statutes had done.

The concentration by the Child Support Commission on the low end of support cases has caused it to pay little attention to the circumstances in which child support should be adjusted ***upward***, which may include situations in which a non-custodian has little or no contact with a child and thus no notable direct expenditures on that child.

There can be no disputing that Nevada has a huge "cliff effect" built into our 40% custodial threshold for consideration of the recipient's income by offset. Policy decisions can and should be made whether this is a good thing, and whether or not it makes sense to reduce that cliff effect by building in smaller offset thresholds – while not overly-complicating the child support scheme, and while keeping an eye on the adequacy of child support to actually support children.

And at some point, explicit consideration should be given to the modern reality of multi-family custody and support regimes, with serious consideration given to a "first mortgage" approach whereby a previously-existing support obligation reduces the income considered to be available for later support orders, but later obligations cannot be used to reduce those previously-existing obligations.

In sum, the question of how and how much child support should be ordered, and its relationship to parenting time, is a lot more complicated than it at first appears, and deserves a great deal further thought, attention, and sensible regulation.

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