IN THE SUPREME COURT OF THE STATE OF NEVADA

Leslie Lynn Miller,	)	
	)	
Appellant,	)	
	)	Supreme Ct. Case No. 69353
vs.	)	District Ct. Case No. **D-15-511973**
	)	
Brett Robert Miller,	)	
	)	
Respondent.	)	
	)	

BRIEF OF AMICUS CURIAE FAMILY LAW SECTION OF NEVADA STATE BAR

STATE BAR OF NEVADA
FAMILY LAW SECTION

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The Family Law Section of the State Bar of Nevada ("FLS") submits its Amicus Curiae brief in accordance with this Court's March 27, 2017 Order.

I. STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY PURSUANT TO NRAP 29(D)(3).

The FLS is a voluntary association of Nevada attorneys and judges from across the State who share a common interest in the field of family law, forming a section of the Nevada State Bar. The purpose of the FLS is to further the knowledge of the members of the Section, the Bar, and the Judiciary in all respects of family law. In its administration, the FLS produces regular family law continuing legal education programs, distributes family law publications, and strives to assist the Board of Governors in the implementation of policies, standardization and guidelines in the field of family law. The FLS has no stake in the merits of the underlying dispute. Rather, the FLS is concerned only with the creation of clear law on the issues before the court, and more generally, the evolution of family law in Nevada via the outcome of this appeal. This position is being presented only on behalf of the FLS of the State Bar of Nevada. This position should not be construed as representing the position of

the Board of Governors or the general membership of the State Bar.

On March 27, 2017, this Court entered an Order in this case inviting the FLS to participate as amicus curiae and file an amicus brief to address whether this court should provide a standard for courts to use in determining child support obligations for situations wherein a parent has primary physical custody of at least one child and shared custody of at least one child.

Accordingly, and in addition to the authority and arguments that have been made by the parties in their briefing, the FLS offers this amicus and reiterates that this court should provide a standard formula for the district courts to use in determining child support obligations for situations wherein a parent has primary physical custody of at least one child and shared custody of at least one child. The FLS opines that the following calculation should be adopted by this court as provided for herein.

II. QUESTION OF IDENTITY.

The court has invited input from the FLS regarding what standard should be used to determine the child support obligation in situations wherein one parent has primary custody of at least one minor child and the parties share physical custody of at least one minor child.

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III. ANALYSIS.

A. INTRODUCTION.

In 1987 the Nevada Legislature enacted the child support guidelines set forth in NRS 125B.070 and NRS 125B.080 which established a percentage-based child support formula subject to per-child presumptive maximum child support amounts, established a minimum per-child child support amount, and vested the district court with authority to deviate from the statutory child support formula and presumptive child support calculations when the needs of particular children are not being met by the established support formula.

Subsequent to the establishment of NRS 125B.070 and NRS 125B.080, this Court has addressed the applicability of such child support guidelines and determined the appropriate allocation of child support when parents share physical custody of their children. *See* Barbagallo v. Barbagallo, 105 Nev. 546, 779 P.2d 532 (1989), Wright v. Osburn, 114 Nev. 1367, 970 P.2d 1071 (1998), Wesley v. Foster, 119 Nev. 110, 65 P.3d 251 (2003) and Rivero v. Rivero, 125 Nev. 410, 216 P.3d 213 (2009).

Under Wright, child support in joint physical custody arrangements is calculated based on the parents' gross incomes. Id. at 1368-69, 970 P.2d at 1072. Each parent is obligated to pay a percentage of their income, according to the number of children, as determined by NRS 125B.070(1)(b). The difference between the two

support amounts is calculated, and the higher-income parent is obligated to pay the lower-income parent the difference. Id. Once that offset is calculated, the district court may adjust the resulting amount of child support using the NRS 125B.080(9) factors. Id. As stated by this court, the purposes of the Wright formula was to adjust child support to equalize the child's standard of living between parents and to provide a formula for consistent decisions in similar cases. Id.

To date, this court has not had the opportunity to address the applicability of the NRS 125B.070 and NRS 125B.080 child support guidelines in the context of what practitioners commonly refer to as a "split custody" arrangement in which one parent has primary physical custody of at least one child and shared custody of at least one child. As such, the district courts have applied ad-hoc analyses that have varied from courtroom to courtroom and case-by-case. Such differing approaches to the calculation of child support in "split custody" situations have led to inconsistent district court rulings and confusion among custody litigants and their attorneys.

As set forth in this brief, the FLS believes that adopting a standardized approach to calculating child support in such "split custody" custodial situations will provide uniformity and predictability in establishing child support orders, and ensure that all litigants are judged on an equal basis before Nevada courts. Litigants with the same income and the same custody situations in Nevada should not have vastly

different child support obligations depending just on the district court judge who happens to be deciding their case.

B. GENERAL PHILOSOPHIES.

This court has previously recognized that the legislative intent of NRS 125B.070 was clearly to provide uniformity and predictability in establishing child support. Further, this court has recognized that NRS 125B.080(9) is intended to provide the district court the option to adjust the amount of the award where appropriate circumstances exist. *See* NRS 125B.080(9).

Throughout its prior decisions involving child support, this court has further made a number of observations regarding the financial realities of raising children which should be considered when adopting a "split custody" child support formula.

One of the financial realities previously recognized by this court is the fact that fixed child-rearing expenses incurred by each parent are usually not appreciably diminished as a result of shared custody. Barbagallo, 779 P.2d at 535. This court has recognized that "the desirable sharing of custody responsibilities by [another] custodian in joint custody situations has the inevitable result of increasing total child-related expenses." Id. Lastly, this court noted that, "[i]t is ironic that joint custody arrangements, which are premised on the theory that an equal sharing of physical and emotional resources is best for the child, would result in added burdens on both

custodians, but this appears to be the case." Id. Recognizing such financial realities associated with shared custody, this court has adopted the general philosophy that the district courts must still attempt to maintain the comparable lifestyle of the child between the parents' respective households despite such challenges. Wright, 970 P.2d at 1072.

In addressing child support in "split custody" situations, it is hopeful that this court will similarly consider the reality that raising two children in the same household does not necessarily double the total costs of raising such children. While that notion is clearly recognized in NRS 125B.070's percentage based support obligations -- which calculate a parent's obligation for one child at 18%, for two children at 25%, for three children at 29%, and for four children at 31% -- similarly reflect the reality that while raising two children increases a parent's household expenses it does not necessarily serve to double a parent's total household expenses related to raising a child. Just as fixed child-rearing expenses incurred by each parent are usually not appreciably diminished as a result of shared custody, such costs are not necessarily exponentially increased as a result of caring for two children.

Ultimately, this court has recognized that "a child's best interest, in the support setting, is tied to the goal of the support statutes generally, which is to provide fair support, as defined in NRS 125B.070 and 125B.080, in keeping with both parents'

relative financial means." Lewis v. Lewis, 108 Nev. at 1114 n. 4, 843 P.2d at 833 n. 4 (citing Barbagallo, 105 Nev. at 551 n. 4, 779 P.2d at 536 n. 4).

C. SPECIFIC FORMULA TO APPLY IN "SPLIT CUSTODY" SITUATIONS.

In establishing a method for calculating child support in "split custody" situations, the FLS encourages this court to adopt a clear, standardized method for calculating child support in "split custody" situations that is fair, balanced, and appropriately recognizes the basic child-rearing expenses that each parent will have as a result of such a split custody timeshare arrangement.

To balance such principles and ensure a fair calculation of child support that appropriately reflects each parent's necessary child-rearing expenses related to raising their children in a split custody arrangement, the FLS suggests that the court consider the following proposal for calculating child support in "split custody" situations, which is just a natural extension of the formula that this court put in place for shared custody arrangements in Wright v. Osburn, 114 Nev. 1367, 970 P.2d 1071 (1998):

1. Step One: Apply Wright v. Osburn formula, but use percentage applicable to number of children each parent owes a child support obligation toward.

The court should first calculate each parent's NRS 125B.070(1)(b) base child support obligations for the number of children each parent is responsible for paying support for. Then, these base obligations should be offset to determine the initial

obligation of the parent with the higher obligation.

For example, in the case at hand, since Dad has a child support obligation for two children, his base child support obligation would be 25% of his gross monthly income ($4,304.97 x 25% = $1,076.24). Since Mom has a child support obligation for only one child, her base child support obligation would be 18% of her gross monthly income ($3,986.66 x 18% = $717.60). These obligations would then be offset against each other resulting in Dad having an initial child support obligation to Mom of $358.64 ($1,076.24 - $717.60 = $358.64).

2. Step Two: Applying the Presumptive Maximum Amounts.

Pursuant to Wesley v.Foster, 119 Nev. 110, 65 P.2d 251 (2003), after the offset set forth in part one, the court should apply the applicable presumptive maximum amount set forth in NRS 125B.070(2). In the event that the paying parent is the parent that has primary physical custody of the children, the presumptive maximum amount should be applied based upon the number of children that they share joint physical custody of to determine their final child support obligation. In the event that the paying parent is the parent that does not have primary physical custody of any children, the presumptive maximum amount should be applied based upon the total number of children to determine their final child support obligation.

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In the case at hand, Dad is the paying parent. He has a child support obligation for two children. Therefore, the presumptive maximum that was applicable to his gross monthly income of $4,304.97 in September 2015 was $748.00 per month, per child, or a total of $1,496 for two (2) children. Therefore, the presumptive maximum would not change Dad's initial child support obligation of $358.64.

3. Step Three: Calculate and apply any deviations pursuant to NRS 125B.080(9).

NRS 125B.080(9) is what allows district courts to provide equity to parents based upon specific individual factors that also affect child-rearing expenses that are not taken into consideration by the percentage of income formula set forth in NRS 125B.070(1)(b). Pursuant to Garrett v Garrett, 111 Nev. 972, 899 P.2d 1112 (1995), these deviation factors, if any, should be applied *after* application of the presumptive maximum.

Through countless experiences shared by section members, the FLS is cognizant of the fact that Nevada's statutory child support formulas can lead to unfair and unjust results. In primary custodial situations, a parent's timeshare can range from 61% of the time with their child(ren) up to 100% of the time while Nevada's statutory child support scheme looks blindly upon the significantly increased expenses that a parent may experience as a result of the additional time allotted to such parent within a primary physical custody arrangement. In a joint physical

custody situation, vast disparities in the incomes of parties can further lead to unjust results where children experience vast disparities in lifestyles between parents' respective homes. In situations where joint physical custodians have similar incomes, the court's prior decision to subtract the higher earning party's obligation from the other parents' obligation, rather that equalizing each parties' obligation, has similarly led to objectively unfair child support obligations.

Based upon such observations, the FLS urges this court to encourage the district courts to liberally consider evidence of such inequities when determining child support in "split custody" and joint physical custody cases. This court has specifically stated that the factors listed in NRS 125B.080(9) "need not be given equal weight" and that "greater weight...must be given to the standard of living and circumstances of each parent, their earning capacities and the relative financial means of parents than to any other factors." Barbagallo, 779 P.2d at 536.

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4. Examples of How Child Support Would Be Calculated.

To give this court other examples of how this formula would work, FLS offers two other factual scenarios:

Scenario 1:

Parties have 3 minor children. Dad has a gross monthly income ("GMI") of $12,000 and Mom has a GMI of $2,000. Dad has primary custody of the oldest child and he and Mom share physical custody of the youngest two children.

Applying the proposed formula to this scenario would result in this calculation:

Step 1: Calculate 25% of Dad's GMI, which is $3,000. Calculate 29% of Mom's GMI, which is $580. Pursuant to Wright, offset Mom's obligation from Dad's obligation which would amount to Dad having an initial child support obligation to Mom of $2,420 per month without factoring any presumptive maximums as required under NRS 125B.070.

Step 2: Apply the proper presumptive maximum. In this scenario, Dad has a child support obligation for only 2 children. Therefore, the presumptive maximum applicable to his GMI is $955 per child x 2 children = $1,910. Dad's initial child support obligation to Mom would therefore be $1,910 per month.

Step 3: The district court would then apply any deviations applicable to this family pursuant to NRS 125B.080(9).

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Scenario 2:

Parties (2 mothers) have 2 minor children. Mom1 has a GMI of $3,500. Mom 2 has a GMI of $10,000. The parents share physical custody of one minor child and Mom 2 has primary custody of 1 child.

Step 1: Calculate 25% of Mom1's GMI, which is $875. Calculate 18% of Mom2's GMI, which is $1,800. Pursuant to Wright, offset Mom 1's obligation from Mom 2's obligation which would amount to Mom 2 having an initial child support obligation to Mom 1 of $925 per month without factoring any presumptive maximum as required by NRS 125B.070.

Step 2: Apply the proper presumptive maximum. In this scenario, Mom 2 has a child support obligation for only one child. Therefore, the presumptive maximum applicable to her GMI is $886 x 1 child. Mom 2's initial child support obligation to Mom 1 is therefore $886 per month.

Step 3: The district court would then apply any deviations applicable to this family pursuant to NRS 125B.080(9).

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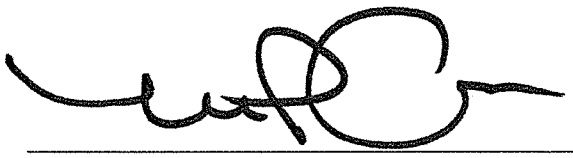
IV. CONCLUSION

The FLS reiterates that the court should provide a standard formula for district courts to use in determining child support obligations for situations wherein a parent has primary physical custody of at least one child and shared custody of at least one child. We concur with the Appellant that this court should provide guidance in the proper method of determining child support in split physical custody arrangements. Adopting a standardized approach to calculating child support in "split custody" custodial situations will provide uniformity and predictability in establishing child support orders, and ensure that all litigants are judged on an equal basis before Nevada courts.

RESPECTFULLY SUBMITTED this 19th day of June, 2017.



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ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X5 in 14-point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) and 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more, and, including footnotes, is less than 15 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter

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relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of June, 2017.

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