Vol. 32 — How to Calculate Child Support with Multiple Families

by Marshal S. Willick | Dec 28, 2010 | Newsletter | 0 comments

Vol. 32 — How to Calculate Child Support with Multiple Families

A legal note from Marshal Willick about how child support is figured when there are multiple children in different custodial households.

This note is a continued reply to responses to legal note No. 29 ("Child Support but not Custody Jurisdiction," posted at https://willicklawgroup.com/newsletters) regarding remaining questions about how to calculate child support in Nevada. The law is pretty uncertain as to what to do when a non-custodial parent is paying support for children located in more than one custodial household.

I. THE QUESTION ASKED

A lawyer wrote in, asking how to correctly calculate child support in a case in which a non-custodian had two children from one previous marriage and one child from another. The lawyer queried whether the total support to be paid should be 29% of gross income (the three-child guidelinepercentage) divided between the two custodial parents 2/3 to 1/3, or 25% (the two-child percentage) to the one, plus 18% to the other.

II. ANALYSIS AND OPTIONS

There is no perfectly clear answer (no statute or specific case that answers this question), but it has been considered, by the Child Support Statute Review Committees of 1992 and 1996, which came up with two different approaches – neither of which has been adopted to date by the Nevada Supreme Court.

A. SIGNS AND PORTENTS IN THE CASE LAW

The Nevada Supreme Court has repeatedly reconfirmed that all adjustments to child support awards, even those made for reasons of "equity," must be based on the statutory list of factors set out in NRS 125B.080(9). Rivero v. Rivero, 125 Nev. ___, 216 P.3d 213 (Adv. Opn. No. 34, Aug. 27, 2009); Khaldy v. Khaldy, 111 Nev. 374, 376-77, 892 P.2d 584, 585 (1995).

Applications of the statute to the situation of minor children in more than one other household, however, have been few. In Hoover v. Hoover, 106 Nev. 388, 793 P.2d 1329 (1990), the court faced a situation in which the non-custodial parent had two more children with a second spouse, and asked for a downward modification from support of the earlier kids on that basis. The trial court rejected his proposal to use the four-child rate and give the former spouse half of that sum.

Affirming, the Supreme Court stated that it was not "blind" to the public policy issues that could be created by several additional children, and that a trial court could, but was not required to, deviate from guideline support under the statutory factor referencing the "responsibility of the parents for the support of others." But the Court also stated that there was "no power in the courts to devise a new formula based on the number of children who happen to have been born to the paying parent."

The Court punted the issue to the Nevada Legislature, which fumbled (has been silent on thequestion for the ensuing 20 years). The next year, the Court decided Scott v. Scott, 107 Nev. 837, 822 P.2d 654 (1991), where, again, the non-custodian had two children in a second marriage after divorce from the custodial parent. This time, the district court granted a downward deviation from guideline support (without explaining the basis for the amount of the deviation).

The Supreme Court affirmed that decision too, and distinguished Hoover on the explicit basis that the lower court did not explain how the deviation was arrived at, other than to recite the facts of the case before announcing the deviation.

The following year, in Lewis v. Hicks, 108 Nev. 1107, 843 P.2d 828 (1992), the Court reversed a trial court downward deviation in which the obligor had remarried and had another child. The lower court had explained the basis of its deviation as having added the surplus income of the noncustodial parent over his expenses to the sum ordered in the prior support order.

Again the Supreme Court rejected the deviation as a "significant departure from the statutory scheme." Somewhat schizophrenically, the Court simultaneously cited with approval studies finding that child support awards should "be easily determined for maximum predictability and judicial economy," and found that it had "consistently found error where the trial court invented its own formula for calculating support awards."

Along the way, the Court noted the existence of the 1992 State Bar Child Support Statute Review Committee Report, but only insofar as that Report had noted the lack of legislative action to resolve the multi-family support situation. Noting that deviation could be based on "prior or subsequent family obligations," the Court urged trial courts to apply the factor "cautiously" so as not to lower child support payable in "most cases," stating that such deviation "should be the exception rather than the rule."

B. ARE "FORMULAS," PER SE, A BAD THING?

The Court has been pretty critical of lower courts attempting to divine a formulaic approach to modifying child support in any way not explicitly called for by the child support statutes. See, e.g., Lewis v. Hicks, 108 Nev. 1107, 843 P.2d 828 (1992) (rejecting lower court's "formula" of adding surplus over expenses to prior support order as a "significant departure from the statutory scheme").

Somewhat ironically, however, that Court has seen fit to create extra-statutory child support application formulas several times. See Wright v. Osburn, 114 Nev. 1367, 970 P.2d 1071 (1998) (creating offset formula for joint custody cases); Rivero v. Rivero, 125 Nev. ___, 216 P.3d 213

(Adv. Opn. No. 34, Aug. 27, 2009) (overruling prior year's complex time-share deviation formula in favor of adoption of Wright offset formula in all joint custody cases).

The Court's thinking in this area seems to have evolved – for the better. As explained in Rivero, the purpose of the decision was to bring consistency and predictability to child custody and supportproceedings. As the Court put it:
District courts can use their discretion to make fair determinations in individual child custody cases. However, this becomes unfair when different parties similarly situated obtain different results. Such unreliable outcomes also make it difficult for attorneys to advise their clients and for parties to settle their disputes. Therefore, the timeshare requirement that this opinion establishes is both necessary to ensure consistent and fair application of the law and proper under this court's precedent.

But the Court's prior case law addressing the multiple family situation runs directly contrary to the goals expressed in Rivero, reversing any court that explained how and why it was deciding as it did (and thus making the process susceptible to being "consistent and predictable") and affirming any result that remain unexplained. This is illogical, but it is the message of the prior cases.

So it is hard to predict whether any formulaic approach to child support deviation in a multiplefamily situation would be affirmed on appeal – it might come down to whether the appellate court considered the formula an acceptable "application" of existing law, or a prohibited "departure" from the child support statutes. The Court's more recent recognition of the importance of predictability and certainty in child support matters as important policy goals would certainly be far better served by creation of a multi-family formulaic approach than by telling judges that they can "consider" the matter but not reveal how they are doing so.

C. PROPOSED FORMULAIC RESOLUTIONS

The sheer number ofsuch cases indicates the importance of guidance for addressing them. As early as 1991, citing even earlier studies, one commentator observed:

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.

Marianne Takas, The Treatment of Multiple Family Cases Under State Child Support Guidelines (U.S. Dep't of Health and Human Services 1991) at 2. Since 1991, that trend has only increased, so that the majority of child support cases involve some consideration of prior orsubsequent family obligations. In this context, there is a clear need for predictability and consistency in such cases.

The 1992 State Bar Child Support Statute Review Committee Report proposed and discussed two possible ways in which the multi-family situation could be approached. Both approaches

have good pedigrees, and in the two decades since then, no one has apparently suggested any improvements.

1. THE FIRST MORTGAGE APPROACH

The 1985 Governor's Commission that proposed what became the Nevada child support statutesincluded in its "Preliminary Statement of Intent" the principle that since later families are a voluntary act, "prior support obligations take precedence over the needs of a new family, and . . . it may be appropriate to give priorityto children from an earlier marriage or relationship in assessing the extent to which children born subsequently may reduce pre-existing child support obligations."

To do so, the Commission suggested subtracting pre-existing child support obligations from income before establishing any new order, which it felt would communicate "a sense of responsibility . . . for initial obligations" so as to discourage "irresponsible treatment of children who are the product(s) of multiple marriages."

For similar reason, a majority of the 1992 Committee advocated adoption of this approach, projecting that it would decreasemodification motions, since noncustodial parents would not be able to unilaterally affect the support payable under an earlier obligation byentering into later obligations or relationships.

One big question is whether the first mortgage approach should work in reverse – whether an earlier obligation can be reduced in consideration of support paid for a later obligation. The Nevada Supreme Court's language in Lewis said without much analysis that support may be reduced for "prior or subsequent family obligations," based on the current wording of the statute, but the 1992 Committee believed it should apply only to protect the earlier family.

Other States are divided. Wisconsin explicitly makes its formula work in either direction, so that not only is a later obligation lowered by the support payable under the earlier obligation, but the reverse also occurs – support under the earlier obligation is lowered by imputed support payable to the children of a later relationship, whether supported in the obligor's home, or by payments to another custodian.

The majority of States apparently take into consideration earlier support orders at the time a later support obligation is determined. A majority of States also deny modification to earlier support obligations on the basis ofthe existence of children later acquired as dependents of an obligor. Some States are quite blunt in explaining why, usually along the lines of the explanation in the 1985 Nevada Governor's Commission Report. The Montana guidelines, for example, refuse any adjustment to an existing child support order based upon subsequent children:

Creation of the new family is a voluntary act and that parent should decide whether or not he or she can meet existing support responsibilities and provide for new ones before taking that step.

2. THE EQUAL PROTECTION APPROACH

On the other hand, some guidelines focus on the children, rather than the choices of the parents who produce them, leading to very different results. The Advisory Panel to the U.S. Department of Health and Human Services, in authoring the Development of Guidelines for Child Support Orders, included in the preface to its final report eight guiding principles. Number four of those was:Each child of a given parent has an equal right to share in that parent's income, subject to factors such as age of the child, income of each parent, income of current spouses, and the presence of other dependents.

Development of Guidelines for Child Support Orders (HHS 1987) at I-4. Some commentators have taken the position that such an approach is a constitutional necessity.

III. CONCLUSIONS

Mechanically, in the absence of special finding, an obligor with two children in the custody of one former spouse, and another child in the custody of another, will pay 25% of gross income to the former, and 18% to the latter (limited by the presumptive maximums). Under our current law, the obligor could and should request deviation under NRS 125B.080(9) for the "legal obligation for the support of others" in both cases.

But this hardly seems adequate. With so much left to discretion, similarly situated people will undoubtedly be treated very differently from one case to another, and from one court to another. Given the number of multiple-family cases, some guidance is called for in the interest of consistency and predictability, since "unreliable outcomes . . . make it difficult for attorneys to advise their clients and for parties to settle their disputes."

Of the various potential resolutions, subtracting the sum of child support paid for an earlier obligation from the "income" that can be used for the basis of a later child support obligation seems to be the optimal means of weighing rights and responsibilities in each dimension. District courts should consider adopting that approach, as the mechanism for applying the statutory deviation factor of NRS 125B.080(9). And, hopefully, when the Nevada Supreme Court next reviews such a case, it will encourage, rather than strike down, a court decision explaining not just the "what" but the "how and why" of its results.

IV. QUOTES OF THE ISSUE

"There are three things which I consider excellent advice. First, don't smoke to excess. Second, don't drink to excess. Third, don't marry to excess."
– Mark Twain

"I found criminal clients easy and matrimonial clients hard. Matrimonial clients hate each other so much and use their children to hurt each other in beastly ways. Murderers have usually killed the one person in the world that was bugging them and they're usually quite peaceful and agreeable."
– John Mortimer (1923-2009)

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