ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

ROBERT SCOTLUND VAILE,

Appellant,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE CHERYL B. MOSS, DISTRICT COURT JUDGE, FAMILY COURT DIVISION,

Respondents,

and

CISILIE A. PORSBOLL, f/k/a CISILIE A. VAILE,

Real Party in Interest.

SC NO: 52244
DC NO: D-98-230385-D

REAL PARTY IN INTEREST'S APPENDIX

Attorney for Real Party In Interest:

MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 002515
WILLICK LAW GROUP
3591 East Bonanza Road, Suite 200
Las Vegas, Nevada 89110-2101
(702) 438-4100

Petitioner In Proper Person:

ROBERT SCOTLUND VAILE
P.O. Box 727
Kenwood, California 95452
(707) 833-2350

08-27025

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

ROBERT SCOTLUND VAILE,

Appellant,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE CHERYL B. MOSS, DISTRICT COURT JUDGE, FAMILY COURT DIVISION,

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and

CISILIE A. PORSBOLL, f/k/a CISILIE A. VAILE,

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APPENDIX INDEX

EXHIBIT	DOCUMENT	FILE STAMP DATE	PAGES
7	Article – Why the Nevada Welfare Division is Calculating Interest and Penalties Incorrectly, and How It Injures Nevada Litigants	07/20/2008	00045 - 00063
1	Ex Parte Motion to Recuse	06/05/2008	0001 - 0006
2	Minute Order	06/11/2008	0006 - 0008
3	Minute Order	07/11/2008	0009
4	Minute Order	07/24/2008	00010 - 00012
5	Minute Order	07/21/2008	00013
6	Motion to Disqualify Marshal Willick and the Willick Law Group as Attorneys of Record Pursuant to Rules of Professional Conduct 3.7	07/21/2008	00014 - 00044

EXHIBIT 1

ORIGINAL

GRETA G. MUIRHEAD, ESQ.
Nevada Bar Number 3957
9811 W. Charleston Blvd.
Ste. 2-242
Las Vegas, Nevada 89117
(702) 434-6004
Attorney for Plaintiff
Unbundled

FILED
JUN 5 5 17 PM '08
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

ROBERT SCOTLUND VAILE,

Plaintiff,

vs.

CISILE A. PORSBOLL, f/n/a CISILE A. VAILE

Defendant.

CASE NO. 98D230385D
DEPT NO: I

DATE OF HEARING: 6/11/08
TIME OF HEARING: 9:00 A.M.

EX-PARTE MOTION TO RECUSE

COMES NOW the Plaintiff, ROBERT SCOTLUND VAILE (hereinafter referred to as "Scotlund"), by and through his attorney, GRETA G. MUIRHEAD, ESQ. appearing in an *unbundled capacity* for the June 11, 2008 hearing ONLY and herein moves for an Order from this Honorable Court recusing herself based upon:

1) The fact that the court is listed as a witness by opposing counsel;

2) proceeding; and

3) The fact that counsel for plaintiff is Judge Cheryl Moss' only opponent in the 2008 Family Court Dept. I race.

This Motion is made and based upon the pleadings and papers on file herein, the foregoing Points and Authorities, Declaration of counsel and any argument that may be adduced at any hearing that may be held.

Dated this 5th day of June, 2008

GRETA G. MUIRHEAD, ESQ.
Nevada Bar No. 3957
9811 W. Charleston Blvd.
Ste. 2-242
Las Vegas, Nevada 89117
(702) 434-6004
Attorney for Plaintiff
Unbundled

POINTS AND AUTHORITIES

NCJC Canon 3E(1) explains when a judge should not sit on a case and provides, in pertinent part as follows:[16]

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Pursuant to NCJC Canon 3E(1)(iv) a Judge shall recuse herself if she is likely to be a material witness in the proceeding. In the instant case, Judge Cheryl Moss is likely to be a material witness not in the proceeding taking place in Nevada, but in a proceeding taking place in U.S. District Court for the Western District of Virginia, Lynchburg Division as Judge Moss is listed on Defendant's Answers to Plaintiff's Interrogatories as a person who is familiar with the facts of the Vaile v. Willick, et. al. case. (see attached Exhibit "1"). Knowing that Defendant might call her as a witness to testify in any court proceeding concerning the subject matter of this litigation, Judge Moss should, respectfully distance herself from these proceedings and recuse. Instead, if Judge Moss, affirms her prior order finding criminal culpability, she is helping to facilitate Willick's defense and crafting her own testimony.

In addition, pursuant to NCJC Canon 3E(1) a Judge should recuse herself in a proceeding where her impartiality might reasonably be questioned. Judge Cheryl Moss' impartiality might reasonably be questioned based upon the fact that counsel for plaintiff is Judge Moss' only opponent in the November 2008 Family Court Dept. I race. On March 10, 2008, the Las Vegas Review Journal reported that the complaint by attorney Randy Rumph had been dismissed by the Nevada Judicial Commission, but that the Commission had taken "appropriate action". Given the fact that some "action" was taken by the Nevada Judicial Commission, one could reasonably assume that the

Commission did find some merit to Mr. Rumph's complaints that Judge Moss is influenced by the identity of the attorneys appearing before her.

Certainly, Scotlund Vaile is not supporting Judge Moss' bid for re-election. It is unknown whether opposing counsel or his staff is.

While plaintiff may have retained counsel hoping for a recusal, neither counsel nor the Court can be sure, particularly in light of the fact that counsel is a seasoned family law attorney who regularly handles the UIFSA calendar and has done so for more than six years. In addition, counsel has been involved in four international abduction cases since October 2002 and was mentored by Hague expert Stephen J. Cullen of Miles & Stockbridge, P.C., Towson, Maryland. Counsel for plaintiff would like to think that these qualifications, along with her straightforwardness merited her being retained by Mr. Vaile.

Dated this 5th day of June, 2008.

Respectfully Submitted,

GRETA G. MUIRHEAD, ESQ.
Nevada Bar No. 3957
9811 W. Charleston Blvd.
Ste. 2-242
Las Vegas, Nevada 89117
(702) 434-6004
Attorney for Plaintiff
Unbundled

GRETA G. MUIRHEAD, ESQ.
Nevada Bar Number 3957
9811 W. Charleston Blvd.
Ste. 2-242
Las Vegas, Nevada 89117
(702) 434-6004
Attorney for Plaintiff
Unbundled

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

ROBERT SCOTLUND VAILE,

Plaintiff,

vs.

CISILE A. PORSBOLL, f/n/a CISILE A. VAILE

Defendant.

CASE NO. 98D230385D
DEPT NO: I

DATE OF HEARING: 6/11/08
TIME OF HEARING: 9:00 A.M.

DECLARATION OF COUNSEL

Under penalty of perjury, GRETA G. MUIRHEAD, ESQ. states the following:

1. I am an attorney duly licensed and authorized to practice law in the State of Nevada and have been so licensed since October 1990.
2. In addition to practicing law, I also regularly serve as an Alternate Child Support/Paternity Hearing Master and have done so since March 2002. I am one of the most frequently requested Alternates in UFISA. I also am the most requested Guardianship Pro Tem Commissioner. In addition, I sometimes handle the TPO calendar.

3. In March 2007 I was appointed to the State Bar of Nevada's Fee Dispute Panel. Because I handle the disputes that I am assigned to, quickly, they keep giving me more. I am used to review billings for the Panel and Estate billings in guardianship.

4. I was only very recently retained by Scotlund Vaile. I watched the tapes from the January and March hearings last Wednesday and reviewed Volume D of the file on Friday, May 30, 2008. I do not have a transcript available to me, but I did pay close attention to the proceedings.

5. I am very cognizant of Rule 11 and take my obligation to only present meritorious arguments to the Court very seriously. I can say that I gave a lot of thought to the arguments that I have set forth in the Opposition that I have filed on behalf of Mr.Vaile. The arguments are not done for an improper purpose, but because I simply believe that this Honorable Court "got some of it wrong". I mean no disrespect to the Court or to Mr. Willick, however mistakes were made and findings that should not have been incorporated were erroneously signed off by the Court.

6. I am hopeful that this pleading will clarify some of these issues.

7. Further I say not.

Greta Muirhead

EXHIBIT 2

REGISTER OF ACTIONS
CASE NO. 98D230385

In the Matter of the Joint Petition for Divorce of: R S Vaile and Cisilie A Vaile, Petitioners. §

Case Type: **Divorce - Joint Petition**
Date Filed: **08/07/1998**
Location: **Department I**
Conversion Case Number: **D230385**

PARTY INFORMATION

		Lead Attorneys
Conversion EFinancial Conversion 98D230385 Removed: 03/23/2007 Converted From Blackstone		
Petitioner	Vaile, Cisilie A *Also Known As* Porsboll, Cisilie NORWAY NV, NV N/A	Willick, Marshal S. *Retained*
Petitioner	Vaile, R S P.O. Box 727 Kentwood, CA 95452	Pro Se *Retained*
Subject MinoVaile, Kaia L	05/30/1991	
Subject MinoVaile, Kamilla J	02/13/1995	

EVENTS & ORDERS OF THE COURT

06/11/2008 **All Pending Motions** (9:00 AM) (Judicial Officer Moss, Cheryl B)

Minutes
06/11/2008 9:00 AM

- EX PARTE MOTION FOR ORDER ALLOWING EXAMINATION OF JUDGMENT DEBTOR...ROBERT VAILE'S MOTION FOR RECONSIDERATION, AMEND ORDER, NEW HEARING, OBJECTIONS, STATY ENFORCEMENT OF 3-3-08 ORDER...DEFT'S OPPOSITION AND COUNTERMOTION FOR RECONSIDERATION AND TO AMEND ORDER POSTING OF BOND AND ATTY FEES Atty Greta Muirhead, Bar#3957, appeared in an Unbundled capacity for Plaintiff. Arguments by Counsel concerning Plaintiff's Ex Parte Motion to Recuse. COURT ORDERED, based on the Virginia proceedings where this Court is listed in the Interrogatories as a potential witness and the fact that Plaintiff's unbundled Counsel is this Court's only Judicial opponent in this year's election, this Court has no objective or subjective bias, therefore, there is no basis to recuse, Plaintiff's Motion is DENIED. Further arguments by Counsel concerning jurisdiction and child support. COURT FINDS: 1. Colorable personal jurisdiction pursuant to 130.201. 2. Plaintiff's submission to personal jurisdiction with this Court to create and establish an initial custody order. 3. Both of Plaintiff's pleadings had child support formulas. 4. The 9th Circuit Court Appeals Decision is recognized. COURT ORDERED the following: 1. Any Proper Person appearances by Plaintiff SHALL be in person, there SHALL be no more telephonic appearances pursuant to Barry vs Lindner. 2. Plaintiff is DIRECTED and REQUIRED to file an Affidavit of Financial Condition forthwith pursuant to EDCR 5.32. 3. Plaintiff's CHILD SUPPORT shall remain at $1,300.00 per month based on the Child Support attachment to the 1998 Decree of Divorce. Court finds it is an enforceable provision and Plaintiff has two (2) years past performance. That neither Party filed or exchanged copies of their tax returns 30 days prior to July 1 of each year. Page 13-16 of the Child Support Provision STANDS, as nobody challenged it. The District Attorney to enforce $1,300.00 per month. 4. A GOAD Order is GRANTED IN PART to Plaintiff, if he files any Motion, it is to be pre-approved through chambers first, filed, then ROC and served to Defendant, with no bond required. 5. The CHILD SUPPORT ARREARS Judgment STANDS, but can be modified pursuant to NRCP 6a. 6. Plaintiff DOES OWE the CHILD SUPPORT for the two (2) years that he had the children pursuant to the Nevada Supreme Court ruling. 7. Counsels requests for Attorney's Fees are DEFERRED to the next hearing. Both Counsel to submit their Billing Statements. 8. Plaintiff to brief Loadstar. 9. Court will notify the District Attorney's Office to appear at the next hearing to testify as to penalties and interest on CHILD SUPPORT ARREARS. 10. An ORDER TO SHOW CAUSE is ISSUED to Plaintiff for failure to follow the Court Order for the Examination of Judgment Debtor. Atty Muirhead will accept service for Plaintiff. Plaintiff is REQUIRED to APPEAR IN PERSON. 11. Defendant's request for a BENCH WARRANT is DEFERRED. 12. Paragraph 15 of the 3-20-08 Order STANDS, as it is just a recitation of the Statute. 13. Plaintiff's willful

knowing and non-payment of CHILD SUPPORT is DEFERRED. 14. Court will acknowledge credit for any CHILD SUPPORT payment that Plaintiff has made, with proof of payments. 15. Return hearing date SET. 16. Plaintiff's Motion and Deft's Opposition and Countermotion scheduled for 7-3-08 is CONTINUED to 7-11-08 at 8:00 a.m. Atty Willick shall prepare the Order from today's hearing, Atty Muirhead to sign as to form and content. 7-11-08 8:00 AM RETURN: CHILD SUPPORT PENALTIES/INTEREST 7-11-08 8:00 AM ROBERT VAILE'S MOTION FOR SANCTIONS 7-11-08 8:0 0AM CISILE VAILE'S OPPOSITION AND COUNTERMOTION FOR A BOND, FEES, SANCTIONS

Parties Present
Return to Register of Actions

EXHIBIT 3

REGISTER OF ACTIONS

CASE NO. 98D230385

In the Matter of the Joint Petition for Divorce of: R S Valle and Cisilie A Valle, Petitioners. §

Case Type: **Divorce - Joint Petition**
Date Filed: **08/07/1998**
Location: **Department I**
Conversion Case Number: **D230385**

PARTY INFORMATION

		Lead Attorneys
Conversion E	**Financial Conversion 98D230385** Removed: 03/23/2007 Converted From Blackstone	
Petitioner	**Valle, Cisilie A** *Also Known As* Porsboll, Cisilie NORWAY NV, NV N/A	Willick, Marshal S. *Retained*
Petitioner	**Valle, R S** P.O. Box 727 Kentwood, CA 95452	Pro Se *Retained*
Subject Minor	**Valle, Kaia L** 05/30/1991	
Subject Minor	**Valle, Kamilla J** 02/13/1995	

EVENTS & ORDERS OF THE COURT

07/11/2008 **All Pending Motions** (8:00 AM) (Judicial Officer Moss, Cheryl B)

Minutes
07/11/2008 8:00 AM
- Courtroom clerk, Connie Kalski, present. RETURN HEARING: CHILD SUPPORT PENALTIES AND INTEREST...PETITIONER ROBERT VAILE'S MOTION FOR SANCTIONS... PETITIONER CISILIE'S OPPOSITION AND COUNTERMOTION FOR A BOND, FEES, SANCTIONS...PETITIONER CISILIE'S MOTION TO STRIKE PETITIONER R.S. VAILE'S EXPARTE REQUEST TO CONTINUE JULY 11, 2008 HEARING AS A FUGITIVE DOCUMENT AND REQUEST FOR SANCTIONS AND FOR ATTORNEY'S FEES Deputy District Attorneys Mr. Robert Teuton, Esq and Mr. Edward Ewart, Esq, present on behalf of the State of Nevada child welfare program. Mr. Leonard Fowler, case manager from Mr. Willick's office present. Ms. Muirhead stated she was present today in an unbundled capacity. Mr. Willick objected and stated Ms. Muirhead has filed many pleadings in this case and for all intense and purposes is counsel of record. Ms. Muirhead objected to proceeding forward on the sanctions issues but was ready to proceed on the interest and penalties. Petitioner Robert Scotlund Vaile's Supplemental Brief FILED IN OPEN COURT. Petitioner Robert Scotlund Vaile's Opposition to Petitioner Cisile's Motion to Strike Petitioner Robert Vaile's Exparte Request to Continue July 11, 2008 Hearing as a Fugitive Document and Request for Sanctions and Attorney's fees and Petitioner Robert Vaile's Countermotion for Sanctions and Attorney's fees against the Willick Law Group FILED IN OPEN COURT Arguments by counsel regarding the process of calculating interest on child support arrears. Statements by Deputy District Attorney, Ed Ewart. Further argument. Court noted a hearing for contempt is reasonable. Mr. Willick's office is to prepare an Order to Show Cause and submit it to the Court for signature. Hearing set. COURT ORDERED, the issue of calculation will be taken under advisement by the Court. This Court will issue a written decision on the matter. Regarding the fees, sanction, and contempt issues, counsel shall prepare briefs and submit them to the Court as stated below. Ms. Muirhead's brief is due by August 1, 2008 by 5:00 p.m.; Mr. Willick's Response is due by August 15, 2008 by 5:00 p.m. The District Attorney and the Attorney General may prepare briefs if they believe it to be necessary. If they choose to prepare briefs, they shall be due by August 29, 2008 by 5:00 p.m. All counsel and all briefs shall provide copies to each other as well as sending courtesy copies to the Court. Matters set for a hearing regarding the Order to Show Cause why Plaintiff should not be held in contempt for failure to pay support. Evidentiary Hearing also set. Defendant lives in the Netherlands and shall be allowed to be present by telephone next court date. Mr. Willick's office shall notify her. There shall be no order necessary for today's hearing. COURT FURTHER ORDERED, there shall be a hearing set to address the Order from the 6/11/08 hearing. CLERK'S NOTE: The Court took the file to chambers for review and decision. 7/11/08 ck

Parties Present
Return to Register of Actions

EXHIBIT 4

98D230385

DISTRICT COURT
CLARK COUNTY, NEVADA

Divorce - Joint Petition **COURT MINUTES** July 24, 2008

98D230385 In the Matter of the Joint Petition for Divorce of:
R S Vaile and Cisilie A Vaile, Petitioners.

July 24, 2008 **1:15 PM** **All Pending Motions**

HEARD BY: Moss, Cheryl B **COURTROOM:** Courtroom 13

PARTIES:

Cisilie Vaile, Petitioner, not present
R Vaile, Petitioner, not present
Richard Crane, Attorney, present
GRETA MUIRHEAD, Attorney, present

COURT CLERK: Rae Packer

JOURNAL ENTRIES

- PLTF'S MOTION TO DISQUALIFY MARSHAL WILLICK AND THE WILLICK LAW GROUP AS ATTORNEY'S OF RECORD...DEFT'S OPPOSITION AND COUNTERMOTION FOR DISQUALIFICATION OF GRETA MUIRHEAD AS ATTORNEY OF RECORD, FEES AND SANCTIONS

Atty Marshal Willick, Bar #2525, also present. Argument on issues. Atty Crane made an Oral Request for a bond to cover ATTORNEY FEES awarded to The Willick Law Group from Plaintiff.

COURT FINDS, Bar proceedings are completely confidential and anything pertaining to those proceedings is to be stricken from the record. Atty Muirhead attached Bar proceeding documents to her pleadings; therefore, those documents are to be stricken.

COURT FURTHER FINDS, there are no rules as to how many times an attorney may appear UNBUNDLED; therefore, Atty Muirhead is recognized as appearing in this capacity.

COURT FURTHER FINDS, this Court does not need to have information on the Virginia case to resolve issues in the Nevada case.

COURT FURTHER FINDS, Atty Willick's statements on the record as to the Marshal Law Program had to do only with the design and function of the software and is completely irrelevant to the Court's decision as to interpretation of the Statute at issue. There was no testimony provided.

Further, The Willick Law Group has been counsel of record on this case for a substantial amount of time.

COURT ORDERED:

1. Exhibit 4 of Atty Muirhead's original Motion, a letter dated 06/16/08 to the State Bar of Nevada from Willick Law Group RE: Bar Complaint Concerning Greta G. Muirhead, Bar #3957, shall be STRICKEN from the record. This document has not been read by the Court.

2. Exhibit 1 of Atty Muirhead's Reply to Deft's Opposition, a copy of a letter dated 07/08/08 to Atty Willick from the State Bar of Nevada referencing Grievance File #08-100-1012/Greta Muirhead, shall be STRICKEN from the record.

3. Exhibit 2 of Atty Muirhead's Reply to Deft's Opposition, a copy of a letter dated 07/07/08 to Phillip J. Pattee, Assistance Bar Counsel, State Bar of Nevada, referencing Grievance File #08-100-1012/Marshal Willick, shall be STRICKEN from the record.

4. Pltf's Motion to Disqualify Marshal Willick and The Willick Law Group is DENIED.

5. Deft's Opposition and Countermotion for Disqualification of Greta Muirhead is DENIED. This shall be CERTIFIED as the FINAL ORDER. Atty Willick may choose to take the issue to disqualify Atty Muirhead to the Supreme court.

6. Under 18.010, The Willick Law Group is entitled to fees as the prevailing party and is, therefore, awarded $2,000.00 ATTORNEY FEES. Said amount is REDUCED TO JUDGEMENT. Atty Crane's request for a BOND is DENIED.

7. Plaintiff is to file the new FINANCIAL DISCLOSURE FORM forthwith.

8. The Request for Sanctions under NRCP 11 and EDCR 7.60 is DEFERRED.

9. Atty Muirhead's request for fees is DEFERRED. She may submit a copy of her billing statement for time in Court at her stated rate of $300.00 per hour for consideration.

Atty Crane shall prepare an Order from these proceedings and submit same to Atty Muirhead for approval as to form and content.

INTERIM CONDITIONS:

FUTURE HEARINGS:

August 15, 2008 8:00 AM Hearing
Moss, Cheryl B
Courtroom 13

August 27, 2008 9:00 AM Motion for Order to Show Cause
Moss, Cheryl B
Courtroom 13

Canceled: September 08, 2008 9:30 AM Motion to Strike

September 18, 2008 8:30 AM Order to Show Cause
Moss, Cheryl B
Courtroom 13

September 18, 2008 1:30 PM Evidentiary Hearing
Moss, Cheryl B
Courtroom 13

September 18, 2008 8:30 AM Order to Show Cause
Moss, Cheryl B
Courtroom 13

EXHIBIT 5

REGISTER OF ACTIONS

CASE NO. 98D230385

In the Matter of the Joint Petition for Divorce of: R S Vaile and Cisilie A Vaile, Petitioners.	§	Case Type: **Divorce - Joint Petition**
	§	Date Filed: **08/07/1998**
	§	Location: **Department I**
	§	Conversion Case Number: **D230385**
	§	
	§	

PARTY INFORMATION

		Lead Attorneys
Conversion EFinancial Conversion 98D230385 Removed: 03/23/2007 Converted From Blackstone		
Petitioner	**Vaile, Cisilie A** *Also Known As* Porsboll, Cisilie NORWAY NV, NV N/A	Willick, Marshal S. *Retained*
Petitioner	**Vaile, R S** P.O. Box 727 Kentwood, CA 95452	Pro Se *Retained*
Subject MinoVaile, Kala L	05/30/1991	
Subject MinoVaile, Kamilla J	02/13/1995	

EVENTS & ORDERS OF THE COURT

07/21/2008 **Hearing** (8:00 AM) (Judicial Officer Moss, Cheryl B)
Argument: Competing Orders (6/11/08)

Minutes
07/21/2008 8:00 AM
- Colloquy between Court and counsel. Both counsel submitted an Order for the 6/11/08 hearing. Today's hearing is for the Court's clarification of the actual Order. With the Court's direction counsel was able to resolve the issues. Clarification's as stated on video record. New Order to be submitted for Court's signature. 1. Pltf was not present as he resides in California but was represented by Greta Muirhead in an unbundled capacity. 2. Denied. 3. Deferred. 4. Denied. 5. Granted in part. No more future filings in proper person unless approved by Chambers. 6. If Pltf doesn't appear on June 11th and provide good reason a warrant for his arrest may be issued by the Court at the July 11th hearing. Deft's request for a Bench Warrant is Deferred. 7. Pltf shall file an AFC before July 11, 2008. 8. Stands. 9. $1,300.00 - DA to enforce. 10. Deft's counsel shall file an updated billing statement. 11. OK 12. OK 13. Fine. 14. Statement is redundant. Leave in. It is further ordered request for stay in child support should be denied. Pltf's request for child support credit when he had custody of the children from May 2000 until April 2002 is DENIED... Ms. Muirhead granted permission to file a Motion to Remove Mr.Willick. Courtesy Copy served on Mr. Crane in open Court. Matter to be heard on Wednesday 7/24/08 at 1:15 p.m. Counsel's request for clarification of March 3, 2008 Order is SET for Hearing on August 15, 2008 at 8:00 a.m. at which time the March 3rd Order is going to be reconsidered.

Parties Present
Return to Register of Actions

EXHIBIT 6

GRETA G. MUIRHEAD, ESQ.
Nevada Bar Number 3957
9811 W. Charleston Blvd.
Ste. 2-242
Las Vegas, Nevada 89117
(702) 434-6004
Attorney for Plaintiff
Unbundled

FILED
Jul 21 9 58 AM '08
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

ROBERT SCOTLUND VAILE,

Plaintiff,

vs.

CISILE A. PORSBOLL, f/n/a CISILE A. VAILE

Defendant.

CASE NO. 98D230385D
DEPT NO: I

DATE OF HEARING:
TIME OF HEARING:

MOTION TO DISQUALIFY MARSHAL WILLICK AND THE WILLICK LAW GROUP AS ATTORNEYS OF RECORD PURSUANT TO RULES OF PROFESSIONAL CONDUCT 3.7

COMES NOW, Robert Scotlund Vaile, by and through his attorney, GRETA G. MUIRHEAD, ESQ. appearing in an *unbundled capacity* herein moves for an Order Disqualifying Marshal Willick and the Willick Law Group as Attorneys of Record for Defendant, Cisile A. Porsboll.

Background:

On June 23, 2008, Counsel for Mr. Vaile sent a letter to Judge Moss asking, on behalf of the Attorney General's Office, for permission for the Attorney General to file a

MC

Friend of the Court Brief concerning how the State of Nevada calculates child support penalties pursuant to NRS 125B.095. (See Exhibit "1").

On June 30, 2008, counsel for Ms Porsboll, Mr. Marshal Willick, responded. On page 8 paragraph 2, line 7 of his June 30th letter, Mr. Willick in discussing Mr. Winne of the Attorney General Office stated that Mr. Winne's "bottom line that the statute [NRS 125B.095}, as phrased is imprecise and arguably ambiguous is probably sound." Mr. Willick 's June 30, 2008 letter dedicates much time testifying as to the legislative intent of NRS 125B.095 and how his Marshal Law computer program works. (Exhibit "2" See page 7, paragraph 6:)

"Those of us that were present when the law was being drafted knew that the **purpose** of the provision was to encourage obligors to make child support payments sooner rather than later-a purpose that would be frustrated by any policy that did not provide a continuing incentive to actually make up arrears each passing day."

Page 7, paragraph 3:

"We replicated the table from the Welfare Division's Manual, at the request of the District Attorney, calculating interest and penalties with Marshal Law for comparison..."

A copy of Judge Moss' July 3, 2008, letter permitting the filing of the Attorney General's Friend of the Court Brief is attached as Exhibit "3".

On July 11, 2008, a hearing was held at 8:00 a.m. in Dept. I. Starting at 9:34 on and continuing at 9:36:36 Mr. Willick stated to Judge Moss, that he "doesn't think that [NRS 125B.095] is ambiguous." Had it been ambiguous, then he would have ".. built in two different ways to calculate child support penalties. "

Mr. Willick provided a firsthand explanation regarding how his computer program, the Marshal Law Program (MLAW) calculates child support interest and penalties. Mr. Willick, although unsworn, provided testimony, presumably as an officer of the Court.

Counsel for Mr. Vaile repeatedly asked the Court to swear Mr. Willick in as he was testifying. Judge Moss declined. Judge Moss stated that Mr. Willick was giving a

"historical perspective." Said "historical perspective" was based upon the fact that Mr. Willick was there (i.e. present during the 2005 Assembly discussions).

Mr. Willick made statements specifically describing how his Marshal Law program works and the "switches" built in. He argued the interpretation of NRS 125B.095 and testified that his program was consistent with his interpretation of NRS 125B.095. Mr. Willick's testimony about how "his" program operates is direct firsthand knowledge being told to the Court—the trier of fact. The intent of the offering of Mr. Willick's statements is for the purpose of establishing a fact that Marshal Law correctly calculates child support penalties and interest and that the penalties and interest calculations performed in this case are accurate figures based upon Mr. Willick's interpretation of the law.

Mr. Willick also testified that he had firsthand experience dealing with the Nevada legislators, including Assemblywoman Barbara Buckley, in his role as a member of the Family Law Section's Executive Council and that the legislators acknowledged that the Marshal Law Program's methodology was correct. (See page 8 of 6/30/08 letter, paragraph 4 and 7/11/08 video record).

Argument:

Since **Mr. Willick** not only is likely to be a necessary witness because he purports to be the authority on the legislative intent of NRS 125B.095 and because of his firsthand knowledge of how his Marshal Law Computer Program works, **HE HAS become a witness in this case.** Mr. Willick's continued involvement and that of his firm's in this case violates Nevada Rules of Professional Conduct, Rule 3.7. Lawyer as Witness and prejudices Mr. Vaile.

Rules of Professional Conduct 3.7. (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(a) (1) The testimony relates to an uncontested issue;
(2) The testimony relates to the nature and value of legal services rendered in the case; or
(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[Added; effective May 1, 2006.]

The American Bar Association Center for Professional Responsibility provides a commentary explaining Rule 3.7. Said commentary provides in pertinent part, as follows:

> *Advocate*
> Rule 3.7 Lawyer As Witness - Comment
>
> [1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.
>
> **Advocate-Witness Rule**
>
> [2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.
>
> [3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.
>
> [4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem....

In the present case, Mr. Willick has wrongly been simultaneously serving as advocate for Ms. Porsboll and necessary witness concerning the legislative intent of NRS 125B.095 and the methodology of the Marshal Law Program.

The Court may be confused or misled by a lawyer serving as both advocate and witness. Mr. Vaile has a proper objection where the combination of roles is prejudicing

his rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Mr. Willick has, in his letter of June 30, 2008, and in his court "explanation" of July 11, 2008, been testifying on the basis of his personal knowledge. Since it is unclear whether the statements made by Mr. Willick , who has clearly become an "advocate-witness" should be taken as proof or as an analysis of proof, his roles have become compromised. Mr. Vaile would submit that Mr. Willick in his statements of June 30, 2008 and July 11, 2008 seeks to have his explanation taken as proof. Any proof presented by Mr. Willick, based upon his firsthand knowledge of the purported legislative intent and the accuracy of the Marshal Law Program to calculate child support penalties has been asserted to convince this judge to accept his statements as evidence of that the Marshal Law Program correctly calculates penalties consistently with NRS 125B.095.

Mr. Vaile's rights in this litigation have been prejudiced by Mr. Willick's dual roles. Mr. Vaile has had no opportunity to cross exam Mr. Willick is his witness role. Mr. Willick flip-flops his position regarding the ambiguity of the statute. On June 30, 2008, he stated that it was ambiguous and on July 11, 2008 he stated that it was not. Mr. Vaile does not know if the flip-flops were made in Mr. Willick's role as a advocate or as a witness.

Conclusion:

This Court must put a stop to this prejudice. Disqualification of Mr. Willick and his law firm is appropriate and warranted.

There IS a contested issue concerning the statutory interpretation of NRS 125B.095. Mr. Willick's testimony does not relate to the nature and value of legal services rendered in this case. Furthermore, Mr. Willick has frequently articulated to both the State Bar of Nevada in his June 16, 2008, Grievance against counsel, Greta Muirhead and to the Court, his opinion that this is a simple child support arrears case. (See Exhibit "4" and June 11, 2008 hearing) There is "nothing unique to Mr. Willick, no special ability or knowledge or expertise" that requires Mr. Willick to remain in this case to serve any legitimate need of Ms. Porsboll. His "qualifications are no more prestigious than a thousand other attorneys in this state." Any of the "thousands of lawyers in this State" can adequately represent Ms. Porsboll but only one, Mr. Willick has intimate knowledge and has provided first hand testimony concerning his namesake, the Marshal Law Program.

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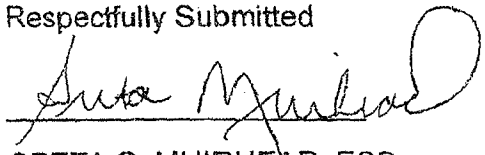
Mr. Vaile respectfully submits that Ms. Porsboll will need to retain one of those thousands.

Dated this 21st day of July, 2008.

Respectfully Submitted



GRETA G. MUIRHEAD, ESQ.
Nevada Bar Number 3957
9811 W. Charleston Blvd.
Ste. 2-242
Las Vegas, Nevada 89117
(702) 434-6004

GRETA G. MUIRHEAD, ESQ.
Nevada Bar Number 3957
9811 W. Charleston Blvd.
Ste. 2-242
Las Vegas, Nevada 89117
(702) 434-6004
Attorney for Plaintiff
Unbundled

DISTRICT COURT

CLARK COUNTY, NEVADA

*****

ROBERT SCOTLUND VAILE, Plaintiff, vs. CISILE A. PORSBOLL, f/n/a CISILE A. VAILE Defendant.	CASE NO. 98D230385D DEPT NO: I DATE OF HEARING: TIME OF HEARING:

DECLARATION OF COUNSEL

I am an attorney duly licensed and authorized to practice law in the State of Nevada.

I have read the Motion to Disqualify Marshal Willick and the Willick Law Group as Attorneys of Record Pursuant to Rules of Professional Conduct 3.7.

My client, Robert Scotlund Vaile, who I am representing in an unbundled capacity lives in California and is unable to sign a supporting declaration.

The contents are true and correct to the best of my knowledge.

This is a meritorious motion and Mr. Willick has become a witness in this case. He and his law firm should be disqualified. My client will continue to be

prejudiced if Mr. Willick and/or the Willick Law Group is allowed to continue to represent Mrs. Porsboll. Mr. Willick has frequently complained that it is "costing him money" every time he appears in Court or responds to a pleading filed by or on behalf of Mr. Vaile.

Mr. Willick's law firm is under no legal obligation to continue to represent Mrs. Porsboll particularly in light of the fact that Mr. Willick has apparently advanced substantial time and costs, according to his own statements on this case.

Mr. Willick has become an advocate-witness. Such a dual role violates the Rules of Professional Conduct. It is surprising that a lawyer as scholarly and who proclaims to possess the highest possible ethical standards would not, on his own, realize that he has placed himself in a serious ethical dilemma.

Because the Court's prior partial GOAD order remains unclear and confusing to me, I am submitting these pleadings to the Court for prior approval. I do believe that this Court has overreached in imposing any sort of filing limitation on me as this Court has previously stated that Mr. Voile's claims have merit. There has been, to my knowledge no finding by the Court that any filings have been frivolous. Mr. Willick and Mr. Crane like to put words in the Court's mouth by manufacturing orders and/or findings that pleadings advanced on Mr. Vaile's behalf have been frivolous and then sneaking those manufactured orders and/or findings in. As an attorney, I am only interested in what the Judge has to say; not what counsel for Mrs. Porsboll would like the Judge to say.

This Declaration is made under penalty of perjury under the laws of the State of Nevada.

Dated this 21st day of July, 2008.

Greta Muirhead

GRETA G. MUIRHEAD
Attorney at Law
9811 W. Charleston Blvd., Ste. 2-242
Las Vegas, Nevada 89117
Phone: 702-434-6004
Fax: 702-434-6033
Gmuirhead2@cox.net

June 23, 2008

Hon. Cheryl Moss
601 No. Pecos Road
Las Vegas, Nevada 89101

Via Facsimile: 384-5129

Re: Vaile v. Porsbol
Case No. 98D230385D
Child Support Penalty Issue

Dear Judge Moss:

In reviewing the legislative history for NRS 125B.095 (the child support penalty provision), I came across an Attorney General Opinion explaining how NRS 125B.095 should be applied to the State.

I contacted the author, Senior Deputy Attorney General Donald W. Winne, Jr. Mr. Winne's office would like to file an Amicus Curie Brief for this Court describing how the State interprets NRS 125B.095 before the Court renders its decision on July 11, 2008. Mr. Winne, acting on behalf of the Attorney General's Office, asked me to obtain permission from the Court to file its brief.

Please advise if I need to file an Ex-Parte Motion for Leave for the State to File Its Brief or a Motion on an Order Shortening Time or if this letter will suffice.

Thank you.

Sincerely,

Greta G. Muirhead, Esq.
Cc: M. Willick, Esq.
D. Winne, Esq.
Robert Scotlund Vaile

Exhibit 1

WILLICK LAW GROUP

A DOMESTIC RELATIONS & FAMILY LAW FIRM
3591 EAST BONANZA ROAD, SUITE 200
LAS VEGAS, NV 89110-2101
PHONE (702) 438-4100 • FAX (702) 438-5311
WWW.WILLICKLAWGROUP.COM

ATTORNEYS

MARSHAL S. WILLICK ‡ ‡ ❖ *
RICHARD L. CRANE
MANDY J. McKELLAR
KARI T. MOLNAR **
JOE W. RICCIO

* ALSO ADMITTED IN CALIFORNIA (INACTIVE)
** ALSO ADMITTED IN FLORIDA
‡ FELLOW, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
‡ FELLOW, INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS
❖ NEVADA BOARD CERTIFIED FAMILY LAW SPECIALIST
* BOARD CERTIFIED FAMILY LAW TRIAL ADVOCATE
BY THE NATIONAL BOARD OF TRIAL ADVOCACY

LEGAL ASSISTANTS

LEONARD H. FOWLER III
FAITH FISH
ELLEN GOODWIN
KARRI J. BROST
TISHA A. WELLS
BRIE E. HO
MEREDITH B. SIMMONS
DAVID L. MANN

FIRM ADMINISTRATOR

SETH WILLICK

E-MAIL ADDRESSES:
[FIRST NAME OF INTENDED RECIPIENT]@WILLICKLAWGROUP.COM

June 30, 2008

Hon. Cheryl Moss
Eighth Judicial District Court
Family Division
601 North Pecos Road
Las Vegas, Nevada 89101-2408

Re: *Vaile v. Porsboll (Vaile)*, Case No. 98D230385D
Response as Requested by Court

Dear Judge Moss:

Leonard Fowler of this office has relayed to me that this Court has requested a response from us to Ms. Muirhead's unsolicited and *ex parte* letter dated June 23, in which she asks the Court to involve not just the District Attorney's Office, but the Attorney General's Office, in her quixotic quest to find some fault with the interest and penalty calculations performed by the Marshal law Arrearage Calculator. Specifically, she asks to have the A.G.'s office "file an Amicus Curie [*sic*] Brief for this Court describing how the State interprets NRS 125B.095."

Frankly, we have no desire to litigate or to readdress a discussion and determination that was made by all concerned agencies and parties years ago – and which found the program flawless. Nevertheless, as you have requested we respond to Ms. Muirhead's letter, we furnish this response, at our own cost (since neither Scotlund nor Ms. Muirhead have – yet – been made to post a bond to secure their waste of our time and money).

Exhibit 2

For the record, we do so under protest, since neither Scotlund nor Ms. Muirhead have achieved *Rooney*[1] grounds of making a prima facie case for believing that they have any idea what they are talking about. And in case the point is too subtle – they don't.

I. A TRIP DOWN MEMORY LANE

Reacting to the hyper-inflation that raged periodically in the 1970s, the Nevada Legislature amended the legal rate of judgment interest statute – NRS 17.130(2) (along with NRS 99.040(1), governing contracts) multiple times, and always "behind the curve" of whatever was happening in the economy, since the Legislature met only every two years.

In 1987, the Legislature decided to have the legal interest rate "float," self-adjusting every six months to the prime rate at the largest bank in Nevada, plus 2%. The legislation was devoid of details as to precisely how such calculations were to be done, some of which were supplied by Nevada Supreme Court decisions before and after the statutory change.

Unfortunately, the cases were not much studied by the Bar or their hired experts. Most lawyers simply ignored interest, and most accountants applied "generally accepted accounting principles" when they were hired to do such calculations – even when such principles directly conflicted with the controlling case law (which, of course, the accountants had never read).

This led to enormous variability in whether, and how much, interest was applied to judgments in Nevada cases. The multiple changes to applicable interest rates also made the calculations technically difficult. My office was about the only one to try to do so consistently, but the supporting spreadsheets grew increasingly difficult to follow within a year or so (pre-July, 1987 arrears had a "fixed" interest rate, while post-July, 1987 arrears "floated," and the number of changes increased every six months, etc.)

By 1989, it was obvious that an automated solution was necessary, and I had begun work on what became the Marshal Law program, hiring computer programmers to actually code the flowcharts I created from the existing statutes and case law, so that any actual words of statutes or cases were reflected in the calculations, and where assumptions or choices were made, switches were built in to permit the user to direct the program to perform the calculations the way the user thought the law did or would require. Each "switch" generates a message at the bottom of the last page indicating how it is set.

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[1] *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993).

For example back in the days when URESA was the controlling interstate law (now replaced by UIFSA), one distinction between the District Attorney's and Family Court's calculation methodologies was the proper first application of an incoming payment, since the IV-D methodology required present support first, but Nevada case law required application of dollars to the oldest arrearage. This made a difference to the totals reached, at least for some time, because the pre-July, 1987 rates were fixed, so altering how the payment applied altered the calculation. For "normal" cases, the default position of the switch was (and is) "Payments are applied to oldest unpaid balance."

In September, 1990, I wrote the first article recapping the state of the law in this subject,[2] explaining both what was known and unknown, and how the problem was being addressed. From that time to this, there has been no published authority of which I am aware criticizing or contradicting any of the positions reached and recited.

Version 1 of the Marshal Law program developed by the undersigned was released in 1991, for DOS. It immediately went into fairly wide use in the Family Courts (and in calculation of personal injury damages in other civil cases). There were some technical issues, leading to bug-fixes. But the program itself included a feature which generated an audit trail, showing each and every calculation made by the program in reaching a conclusion. There were a few challenges to the accuracy of the program in the first few years after it was released, but going over the line-by-line, calculation-by-calculation audit trails it produced, no one in any case ever established that the program did not calculate everything it was supposed to, without error or variance from any statute, rule, or case. Every judge in every case that ever considered the matter made exactly that ruling.

The original Pro Bono Project had been unhappy with the failure of the Clark County District Attorney's Office to calculate or collect interest on child support arrearages in Clark County, and made requests that the agency perform its statutory mandate to do so.[3] I was on the Board of Directors of that organization. We were repeatedly told of the limitations of the Clark County D.A.'s legacy computer system – NOMADS – and were told that they just could not figure out how to comply with the law. In the meantime, the Washoe County D.A.'s Office (and, apparently the rest of the D.A.s of Nevada) adopted, used, and collected interest on support arrears using the Marshal Law program, starting in 1991 or 1992.

As detailed in various Nevada Supreme Court opinions, the function of statutory interest is merely to compensate the claimant for the use of money from the time the cause of action accrues until the

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[2] *A Matter of Interest: Collection of Full Arrearages on Nevada Judgments*, NTLA *Advocate*, September, 1990.

[3] *See* NRS 125B.095(2) ("Each district attorney or other public agency in this State undertaking to enforce an obligation to pay support for a child shall enforce the provisions of this section").

time of payment.[4] In 1993, the Nevada Legislature debated trying to come up with some ***additional*** way of encouraging delinquent child support obligors to pay their back child support.

I was, at the time, a member of the Executive Council of the Family Law Section of the Nevada Bar, and was charged with responsibility for following and participating in the development of what ultimately became NRS 125B.095. In that capacity, I corresponded and spoke with Chairman Bob Sader and others to develop the statutory language now in place (although I did not write the statute itself).

A two-year deferral period was built into the effective date of the new "penalty" statute (from 1993 to October 15, 1995) – the idea was to give delinquent support obligors that long to catch up on their back support before the penalty began applying to them.

Meanwhile, in the political sphere, the Attorney General's Office, in conjunction with the Welfare Department, began a process of unifying procedures relating to support collection (and other things) in the 1990s. At some point, the decision was made to try to get NOMADS to correctly perform interest calculations. I am informed that millions of dollars were expended, and no satisfactory conclusion was ever reached.

Version 2 of Marshal Law, ported to the Windows environment that was by then ubiquitous, issued in 1999. At about that time, I had the programmers attack the penalty calculations (which I had been submitting by hand in spreadsheet form along with the automated interest calculations, once they went into effect in 1995). Again, every judge that ever held a hearing on my hand-performed calculations based concluded that they were done correctly and accurately. Again, the foundation for the automated version was a flow-chart showing how the statute worked, and was intended to work, based on the statutory language. The flowchart and hand calculations were circulated throughout the Family Law community at the time, including lawyers, judges, and (I think) the District Attorney and Attorney General's offices. No criticism to the mechanics of the proposed penalty application was ever received.

Until the year 2000, the Clark County Pro Bono Project existed independently of Clark County Legal Services (CCLS). That year, the former was folded into the latter. As part of the deal, a few members of the Board of Directors of the original Pro Bono Project (including me, Bob Dickerson, and Terry Marren) were added to the Board of Directors of CCLS. I have served on the latter Board since that time.

Periodically, the unhappiness of low-income clients (the people that CCLS serves) with the failure of the D.A. to collect interest and penalties on back child support was raised in communications

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[4] *See Ramada Inns v. Sharp*, 101 Nev. 824, 711 P.2d 1 (1985) (speaking of NRS 17.130(2)).

between the Board and the D.A.'s office, leading to several meetings over the years with a variety of representatives from the Welfare Department, District Attorney's Office, and Attorney General's Office. We were consistently told that the problem was the NOMADS computer system, which just could not be made to do the calculations in the way that they obviously should be done. We were consistently told that they were "working on it" – a response we received to inquiries made over more than ten years.

In 2001, Version 3 of Marshal Law was released, adding a penalties calculator under NRS 125B.095, in accordance with the logic circulated throughout 1999 and 2000. Copies of the program were widely circulated to the Bench, Bar, and all public child support agencies (and provided free to anyone who had ever bought an earlier version of the program), and we asked all concerned to identify and report any issues or concerns with how any part of the program operated, ***especially*** as to the penalty calculations. No such concerns were ever reported from any private or public corner. But the child support agencies still were not doing what the controlling statutes required them to do.

II. The Problem and the Partial Solution Reached

The history, mechanics, and math of determining penalties for child support arrearages were discussed in detail by a committee in early 2004, consisting of Barbara Buckley (Executive Director of CCLS) and me, plus representatives of the District Attorney's Office, the Attorney General's Office, and the Welfare Department.

A complete discussion as to the methodology and calculations for determining penalties was had, and no one at that time or at any time since has found that the methodology or calculations as performed by the program contravene any statutory or case law guidance – the MLAW calculations comport with the applicable statute (NRS 125B.095). The program deals with the lack of guidance as to whether the calculation should be performed monthly or daily by permitting either (a user-selectable switch is built into the program), using as the default my view that the more precise daily method is preferred. The program calculates the penalty from the date due and unpaid, for as long as it remains due and unpaid, whether in whole or partial months, on whatever due date is set by the court order.

Those present and participating agreed – in every meeting I had with them – that the program's output was fully and exactly accurate, but they stated that it was not possible to reprogram their computer system (NOMADS) to do the calculations that precisely; for example, they were limited to doing all calculations only at the last day of the month, thus treating identically obligations due on the first or thirtieth day of each month, while acknowledging that this was legally and logically improper.

The continuing pressure from CCLS for the District Attorneys to comply with the statutes eventually led to the promise from the public agencies to begin collecting interest and penalties for the poor. CCLS was invited to participate in the "public workshop" convened by the Welfare Division on that subject in 2004.

We were quietly briefed on the divisions between the Attorney General and District Attorney Offices, apparently stemming from the political consideration that anything that made the amount of uncollected child support appear to be higher made the statistics of collection look worse, thereby imperiling increased federal funding. We were given a copy of the proposed policy memo and Manual, and noted that the proposed guideline chart contained several mathematical errors making it impossible to even figure out the logic underlying the proposal. A variety of factual, mathematical, logical, and other errors were identified and specified.[5]

That led, in turn, to the 2004 request to the Attorney General's Office by Nancy Ford of the Welfare Division, for an opinion of whether the statute could be interpreted in a manner consistent with the limitations of the NOMADS computer system, so that if they did what their equipment was capable of doing, it could be considered "good enough."

As explained by Deputy District Attorney Edward Ewert in his revisions and expansion of the Child Support section of the Nevada Family Law Practice Manual:[6]

> **NOMADS**, like other computers, has its limitations. . . . in the mass production, conveyer-belt case processing world of Nevada's child support enforcement program, the tail wags the dog. To make computerization work for child support enforcement in Nevada, the law and the courts, and most of all, our orders, have to conform to the computer's needs.

So it is not all surprising that on October 22, 2004, the Welfare Division was able to obtain a letter[7] from Deputy Attorney General Donald W. Winne reaching the conclusion that the statute was sufficiently ambiguous to allow the public agencies to interpret the statute in a way permitting the Welfare division to do the calculations in a way that their computer system was capable of calculating.

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[5] We were recently copied with the Manual as it existed in 2006 – the mathematical errors in their guidance chart that we identified in 2004 were not corrected, at least as of that time.

[6] 2008 edition, at § 1.165.

[7] Ms. Muirhead's letter of June 23, 2008, incorrectly indicates that there was a formal Attorney General's Opinion on the subject. There was no such published authority, just the letter opinion referenced here.

The question actually posed was whether the Welfare Division had authority to "calculate the child support enforcement delinquent payment penalty on a monthly basis as a one-time late fee penalty."

The opinion letter has several errors in its own right – such as the conclusion, in the introductory "Background" section, that following the "public input" (i.e., our critique of the Welfare proposal) would "result in significant increases in the amount of child support judgments that obligors would be required to pay." That is just not so.

For example, the State's method of calculation has an entire ***year's*** penalty coming due on the first day of the first month that a month's support is overdue. MLAW, by contrast, calculates the penalty in accordance with how much of a year has passed, so that the penalty imposed on an obligation due, for example, in January, is less in February than it is in March.

We replicated the table from the Welfare Division's Manual, at the request of the District Attorney, calculating interest and penalties with Marshal Law for comparison. Over the same time period as the sample in the Manual, the program calculates a total penalty (as of 12/31/04) of $85.90. Their calculation shows $230, grossly overstating the penalties actually owed, in the short term, by accelerating to immediately-owed a penalty expressly stated as accruing "per annum."

In other words, there is no distinction in the State's calculations between an unpaid arrearage remaining unpaid for 30 days and one remaining unpaid for 11½ months, which undercuts the public policy purpose for which the statute was passed in the first place. The State's penalty is three times ***greater*** than that calculated by the program – at least as of that date and on the hypothetical facts in their table – so the statement that our methodology increases the sum owed is just incorrect as a matter of math.

As noted in 2004, properly construing the phrase "per annum, or portion thereof" requires assessing the penalty ***every year*** and, as a basic matter of equal protection, any law that would treat identically being late for a day, and being late for a year, is highly suspect and probably constitutionally infirm. Those of us that were present when the law was being drafted knew that the ***purpose*** of the provision was to encourage obligors to make child support payments sooner rather than later – a purpose that would be frustrated by any policy that did not provide a continuing incentive to actually make up arrears each passing day.[8]

In any event, the letter from Mr. Winne observed that the phrase in the penalty provision "or portion thereof" appeared to be unique in Nevada law. His letter correctly recited that, if possible, every

[8] It is a bit ironic, but the opinion letter notes (at 5) that statutes must be construed "with a view to promoting, rather than defeating, [the] legislative policy behind them." This is correct, but with an understanding of the math involved leads to the conclusion that the State's methodology is counterproductive.

word of a statute should be given operative effect under the case law of statutory construction, and observed (at page 5) that "the statue [*sic*] be interpreted to provide that the amount of the penalty is 10 percent of the installment, or portion thereof, that remains unpaid."

Of course, that is ***precisely*** what the Marshal Law program does. Mr. Winne's stated belief (at 6) that doing the calculations as we do them would result in "double interest on total arrearages owed by an obligor" is just wrong as a matter of fact. But his "bottom line" that the statute, as phrased, is imprecise and arguably ambiguous is probably sound.

That conclusion of ambiguity gave him the "wiggle room" to give the Welfare Division permission to perform the calculations in the manner that their outdated computer system could do, but it certainly did not, and does not, mean that their approach is any more "correct" than ours. For the various reasons set out at the "public workshop" in 2004, and in the programming notes to Marshal Law, and in this letter, the opposite is true. The Welfare Division's approach is better than nothing, but it is inaccurate, sloppy, partially counterproductive, and ***not*** what was intended when the provision was drafted in 1993.

All of this was discussed at some length by ***all*** concerned parties in hearings held before the Assembly Judiciary Committee in 2005. The Welfare Department actually asked the Nevada Legislature to amend NRS 125B.095 to ***conform*** to the defective way in which they perform the calculations. After hearing and reading everything about why the law was the way it was, why the Welfare Department was trying to change the law to conform to their outdated computer capabilities, why (from us) that was a really terrible idea, the Legislature left the "how-to-compute-penalties" portion of the statute exactly as it was, knowing how it was interpreted through the MLAW program, and acknowledging that methodology as correct.[9]

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[9] I testified immediately after Mr. Winne at the hearing held April 11, 2005, in part as follows: "Finally, the problem here, with due respect to the district attorneys and the Attorney General's Office, is one of the tail wagging the dog. They are attempting to solve a calculation methodology problem left over from legacy hardware and software which is inadequate to any modern calculation task. It is [not] a particularly difficult calculation problem. We solved it with a microcomputer program for a couple thousand dollars years ago. I have given both the software and the source code to the state repeatedly. They have this legacy software, NOMADS, that they are trying make do a job that it is not suited to do. They are attempting to conform the law to how their computer works. I would suggest that this is a bad basis for altering public policy and altering statutes. I suggest it may be time that they just face up to the fact that they have wasted a huge amount of money on trying to fix something which may or may not ever be fixable. But certainly they should not start amending the law to conform to the problems that we know are built into that hardware system."

III. The Request to Have the Attorney General Present an Amicus Curiae Brief in the Pending Child Support Motion

First, we are unaware of any provision in either the Nevada Rules of Civil Procedure or the Eighth Judicial District Court Rules that ***permits*** a litigant to solicit an amicus brief in a motion proceeding. If there is one, our opponent (who continues making noise and filing requests, while simultaneously claiming to not be counsel of record in the case) has not cited it.

As a general matter, soliciting participation by entirely uninterested third parties in a ***motion hearing*** on child support is ridiculous, and to my knowledge without precedent. To allow our opponent to continue wasting time and money at our expense is without justification.[10] ***Any*** further litigation in this matter should require the advance posting of the full amount of our costs for having to address it – by either Mr. Vaile or his counsel.

So, respectfully, we do not believe that Ms. Muirhead should be permitted to expand these proceedings any further than the grotesquerie they have already been made.

And if the District Attorney, or the Attorney General, or anyone else for that matter, was asked for a second or third opinion as to how the controlling statute should be interpreted, their opinion would be just that – an opinion, not entitled to any particular authority in this Court. If Mr. Winne is correct, and the statute is sufficiently ambiguous to permit more than one reasonable construction, then reasonable minds (if fully informed) could differ on what that construction should be. But his view of how the statute should be construed has already been rejected by the Nevada Legislature within the past two years.

Any actual ***law*** on the subject – that might alter this Court's actions in this case – would be dependent on either changes to the statute, or the question of construction of the current statute being squarely presented to the Nevada Supreme Court. It is perhaps worth noting that we have gone to that Court on half a dozen support arrearage cases involving calculations performed by the Marshal Law program, and we have never heard a peep of negative commentary about the methodology or results of our calculations.

If anyone ever appealed a child support judgment we obtained, and challenged the calculations used, ***then*** they could solicit any amicus briefs they might care to request. But any request that we be made to "justify" the calculations used to determine interest and penalties on child support, which

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[10] Our office has not been paid a dime of the fees awarded, nor has our client been able to pay more than a tiny fraction of a bill which exceeds $156,000. Mr. Vaile has made no effort to ***any*** of the judgments outstanding against him. Why the Court continues to indulge his requests and antics while he stands in an attitude of utter contempt defies reason.

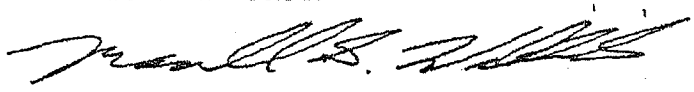
have been in use and practice for over sixteen and seven years (respectively) without first making out a *prima facie* case of error under *Rooney* – which has not and cannot be done – is just nuts.

We ask the Court to remember what is actually going on here. Scotlund has never paid any child support since he kidnapped the kids years ago. The only request made of this Court (and the only thing for which it has jurisdiction) was to state the support due each month in child support as a sum certain, which it has done. This necessarily allows for arrears to be reduced to judgment for collection in accordance with Nevada law.

No further time-wasting indulgence should be given Scotlund, who simply seeks any excuse for evading his legal obligation to support his children, or to his maybe-I'm-a-lawyer-in-this-case-and-maybe-not counsel du jour, Ms. Muirhead, who appears to be far more interested in making noise for personal political purposes than in doing anything having anything to do with the proper support of children, or the correct interpretation of the law.

In short, no "amicus briefs" are warranted, appropriate, or permitted under the applicable rules, and we should end these proceedings with as little additional wasted time, money, and effort as is humanly possible.

Sincerely yours,
WILLICK LAW GROUP



Marshal S. Willick, Esq.

cc: Mrs. Cisilie Porsboll
Greta G. Muirhead, Esq.

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EIGHTH JUDICIAL DISTRICT COURT
FAMILY DIVISION
FAMILY COURTS & SERVICES CENTER
601 NORTH PECOS ROAD
LAS VEGAS, NEVADA 89101-2408

CHERYL B. MOSS
DISTRICT JUDGE

DEPARTMENT I
(702) 455-1867
FAX: (702) 455-2394

July 3, 2008

VIA FACSIMILE

Greta G. Muirhead, Esq.
Attorney for Plaintiff
Facsimile: 434-6033

Marshal S. Willick, Esq.
Richard L. Crane, Esq.
Attorneys for Defendant
Facsimile: 438-5311

Re: R. S. Vaile vs. Cisilie A. Vaile 98-D-230385

Dear Counsel:

I reviewed the video of the last court hearing in this case. This is what transpired:

At 11:10:05 a.m., I requested the District Attorney to confirm that they accept, utilize, or do not object to the Marshal Law Interest and Arrears Calculation Program.

At 11:14:24 a.m., I stated that, to my knowledge, no attorney, litigant, or agency had ever challenged the validity or accuracy of the Marshal Law Program in my courtroom or in any other judge's courtroom.

At 11:15:08 a.m. and 11:25:18 a.m., I specifically requested the District Atorney to appear and be present at the next hearing on July 11, 2008, to confirm that there are no problems with the calculations submitted by Attorney Willick's office.

To clarify, the Court intends to accept the Marshal Law Program at the next hearing unless there is a finding that the program is somehow flawed. I invited the District Attorney to provide input at the next court date.

Exhibit 3

Addressing Attorney Muirhead's request:

As a matter of departmental policy, the attorneys may contact the court on procedural matters such as confirming dates and times of hearing, whether a courtesy copy of a pleading was received, if counsel is running late to court, etc.

However, a letter that may seem to be a procedural request might in fact turn out to be substantive in nature. Consequently, communication by way of letters will not preserve the parties' requests and arguments in the event an appeal is made to the higher court. In other words, both counsel's letters are simply fugitive documents and not part of the court record.

Further, in some situations, I would be faced with the challenge of having to respond immediately to a dispute between counsel while in the midst of handling my heavy caseload, sitting in court all day, attending to my daily duties of signing orders and evaluating OSTs, and taking care of administrative matters in the department. Reading new case files, preparing for court the next day, and writing trial decisions are done on my "spare time" in the evenings, early mornings, and on weekends and holidays.

Given the nature of this case, there will be more disputes anticipated. I have found it appropriate in the past for counsel in any of my cases to file supplemental motions, addendums to one's original motion and countermotion, affidavits, supplemental exhibits, and even oral requests at a hearing to file additional briefs and exhibits.

Opposing counsel obviously has the right to object, to request striking of the document, and to request the Court give no weight.

This would all be conducted and preserved on the record.

Based on the above, to answer Attorney Muirhead's question, she is allowed to file the amicus curiae brief. Attorney Willick points out there are no court rules permitting such, but I believe notwithstanding the non-existence of such a rule, it would be in my discretion. However, I would add that I have the authority to rely on, reject, or strike any such pleadings.

As a final note, the issues in this case are important to all parties involved. Communication by letter correspondence would probably not be advisable if legal issues need to be preserved on the record.

A copy of this letter shall also be forwarded to the District Attorney's Office c/o Attorney Ed Ewert.

Sincerely,

Cheryl B. Moss
District Court Judge

cc: Ed Ewert, Esq. District Attorney's Office

WILLICK LAW GROUP

A DOMESTIC RELATIONS & FAMILY LAW FIRM
3591 EAST BONANZA ROAD, SUITE 200
LAS VEGAS, NV 89110-2101
PHONE (702) 438-4100 • FAX (702) 438-5311
WWW.WILLICKLAWGROUP.COM

ATTORNEYS

MARSHAL S. WILLICK *†‡◆ ®
RICHARD L. CRANE
MANDY J. McKELLAR
KARI T. MOLNAR **
EASTON K. HARRIS

* ALSO ADMITTED IN CALIFORNIA (INACTIVE)
** ALSO ADMITTED IN FLORIDA
† FELLOW, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
‡ FELLOW, INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS
◆ NEVADA BOARD CERTIFIED FAMILY LAW SPECIALIST
® BOARD CERTIFIED FAMILY LAW TRIAL ADVOCATE BY THE NATIONAL BOARD OF TRIAL ADVOCACY

LEGAL ASSISTANTS

LEONARD H. FOWLER III
FAITH FISH
ELLEN GODWIN
KARRI J. BROST
TISHA A. WELLS
BRIE E. HO
MEREDITH B. SIMMONS
DAVID L. MANN

FIRM ADMINISTRATOR

SETH WILLICK

E-MAIL ADDRESSES:
(FIRST NAME OF INTENDED RECIPIENT)@WILLICKLAWGROUP.COM

June 16, 2008

RECEIVED JUN 17 2008

State Bar of Nevada
David A. Clark, Esq.
Assistant Bar Counsel
600 E. Charleston Blvd.
Las Vegas, Nevada 89104

Re: BAR COMPLAINT CONCERNING GRETA G. MUIRHEAD, BAR # 3957

Dear Mr. Clark:

This letter is provided as required by Nevada Rules of Professional Conduct 8.3(a), specifically:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

By way of background, this grievance stems from a hearing held on a "*Motion for Reconsideration and to Amend Order or Alternatively, for a New Hearing and Request to Enter Objections and Motion to Stay Enforcement of the March 3, 2008 Order*" filed by Mr. Robert Scotlund Vaile – in proper person – and an *Order for Examination of Judgment Debtor* filed by us, which were both set for hearing on 9:00 A.M. on June 11, 2008, in Department I, before Judge Cheryl Moss.

On June 5, 2008, at approximately 5:15 P.M., Ms. Muirhead appeared at our office and presented us with a *Ex-Parte Motion to Recuse*,[1] based on Ms. Muirhead's filing for election in opposition to the sitting judge in the case. During this visit, we discussed the matter with her, and advised Ms. Muirhead that it was not proper for her to seek recusal of Judge Moss under those circumstances,

[1] *See* Exhibit 1.

Exhibit 4

especially since her *Motion* specifically identified that she was appearing in the case in an unbundled capacity for one hearing only.[2]

Ms. Muirhead indicated that she did not think Judge Moss would recuse, but still thought it was proper for her to proceed with her challenge. She followed up her visit and our conversation with a letter indicating that she still supported her decision to represent Mr. Vaile, as she thought he had "valid concerns" and she considered herself "more than qualified" to represent him.[3] She did not discuss her professional obligations or the Supreme Court's explicit warnings not to do what she was attempting (discussed below).

At the hearing on June 11, Ms. Muirhead admitted that Mr. Vaile sought her out specifically because she was the only candidate running against Judge Moss in the upcoming judicial election. She also admitted that it was "possible" that Mr. Vaile intentionally hired her just to try to force a recusal.[4] We strongly objected to Ms. Muirhead's assertions that Judge Moss should recuse and pointed out that Ms. Muirhead's actions were in violation of NRPC Rule 8.4. Specifically:

> It is professional misconduct for a lawyer to:
>
> (d) Engage in conduct that is prejudicial to the administration of justice.

While the rule is a bit dry, the Nevada Supreme Court's exposition on its meaning has been *exceedingly* clear. The recent *Opinion* in *Millen v. Dist. Ct.*[5] could not have provided a much better warning to attorneys not to do what Ms. Muirhead has done in this case:

> A lawyer's acceptance of employment solely or primarily for the purpose of disqualifying a judge creates the impression that, for a fee, the lawyer is available for sheer manipulation of the judicial system. It thus creates the appearance of professional impropriety. Moreover, sanctioning such conduct brings the judicial system itself into disrepute. To tolerate such gamesmanship would tarnish the concept of impartial justice. To permit a litigant to blackball a judge merely by invoking a talismanic "right to counsel of my choice" would contribute to skepticism about and mistrust of our judicial system.[6]

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[2] This case has been ongoing for nearly ten years. Judge Moss has had the case since 2003, making Ms. Murihead's demand that Judge Moss recuse based upon her "one-time" appearance even more egregious.

[3] *See* Exhibit 2, letter from Ms. Muirhead.

[4] *See* Exhibit 1, Page 4.

[5] 122 Nev. Adv. Op. No. 105, December 21, 2006.

[6] *See* Exhibit 3, copy of the *Millen* decision.

Unlike the facts in *Millen*, the record here ***does*** show that Mr. Vaile retained Ms. Muirhead for the purpose of trying to disqualify Judge Moss and forcing reassignment. It was not only in Ms. Muirhead's power, but her ***obligation*** to inform Mr. Vaile that his intentions were not proper, that she would not be a part of such a plan, and to refuse representation.

However, Ms. Muirhead took the representation and then actually argued for recusal ***based*** upon her candidacy, and the trumped up assertion that Judge Moss "would not be impartial" to Mr. Vaile in any decision because of that candidacy.[7] For the record, Judge Moss stated that she had no personal opinion or bias of any kind, based on the fact of an election opponent or otherwise, and declined to recuse.

This office did not want to be forced into the position of having to file this Complaint. We told Ms. Muirhead when she came over that what she was doing was just ethically wrong and would have consequences. I suppose she just took our notice as some kind of litigation strategy, since she blew it off, apparently without securing ethics counsel, or independently researching, the point.

At the hearing, we made a last attempt to allow Ms. Muirhead to walk away without committing the breach of ethics identified in this letter. We explained why she should not be demanding recusal of the judge, cited all relevant authority, and asked the Court to allow her to withdraw with no repercussions. Ms. Muirhead refused, apparently missing the actual issue entirely, and claiming that she was "eminently qualified" to represent Mr. Vaile.

Of course, Ms. Muirhead's qualifications do not mitigate her attempt to prejudice the administration of justice. It was her duty as an officer of the court to reject representation of Mr. Vaile once she was aware of the improper motivation for her selection.

For the record, and with respect to Ms. Muirhead, there is nothing unique to the attorney, no special ability or knowledge or expertise that required her to take this child support arrears case to serve any legitimate need of the client – her qualifications are no more prestigious than a thousand other attorneys in this state that could provide competent representation for Mr. Vaile.

Rather, what Ms. Muirhead had was one singular "qualification" – she was specifically selected for this case by Mr. Vaile as the only candidate running against Judge Moss, and Ms. Muirhead admits that she knew from the outset that the reason for his seeking her out was for the purpose of trying to make a case for forcing a recusal. The substance of this grievance was Ms. Muirhead's decision – on notice of the unethical act being requested of her – to refuse to take part in it.

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[7] *See* Exhibit 4, copy of video of hearing held June 11, 2008. The discussion of recusal is all made in the first 40 minutes of that hearing.

What the Nevada Supreme Court has identified as "sheer manipulation of the judicial system" which "creates the appearance of professional impropriety" and "brings the judicial system itself into disrepute" would seem to require mandatory reporting, since the Court added that "to tolerate such gamesmanship would tarnish the concept of impartial justice." The concept of impartial justice is one that we hold dear.

We take no joy in filing this grievance, or asking that the Bar take appropriate disciplinary action because of it. However, the practice of law in Nevada has been under scrutiny for a couple of years now, and found wanting. The actions of our judiciary in particular have specifically been targeted and the country is watching, and often laughing.

It is imperative that we, who are expected to be of the highest ethical standards, ensure that our fellow attorneys maintain that same ethical position. When an attorney – especially one running for the bench – steps out of line, we are obligated to report it. There is no waiver, there is no second chance, and we hope that the days of a wink and a nod toward deliberate unethical behavior are past. Rule 8.3 is exceedingly clear. While we deeply regret being required to make this report, we think we are required to do so – and we think the Bar is required to act on it, for the sake of us all.

Sincerely yours,
WILLICK LAW GROUP

Marshal S. Willick, Esq.

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EXHIBIT 7

Why the Nevada Welfare Division is Calculating Interest and Penalties Incorrectly, and How It Injures Nevada Litigants

by

Marshal S. Willick[1]

July 20, 2008

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[1] Mr. 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 and International Academies of Matrimonial Lawyers, former Chair of the Nevada Bar Family Law Section and current President of the Nevada chapter of the AAML. He has authored several books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual. He is the creator of the "Marshal Law Judgment & Arrearage Interest Calculator," which automates the calculation of interest and penalties under Nevada statutory and case law. Mr. Willick practices at the trial and appellate levels, and has drafted various state and federal statutes. He sometimes represents the ABA in congressional hearings. He has served on many committees, boards, and commissions of the Nevada Bar, American Bar Association, American Academy of Matrimonial Lawyers, International Academy of Matrimonial Lawyers, and other organizations, and sometimes serves as an expert witness. Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown in 1982. Before entering private practice, Mr. Willick served on the Central Legal Staff of the Nevada Supreme Court for two years.

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I. INTRODUCTION

After years of pressure by Clark County Legal Services and other agencies, the Clark County District Attorney's Office finally agreed to start calculating and collecting interest on judgments as of about 2005. In the meantime, political consolidation within the Nevada Welfare bureaucracy brought the District Attorneys of the various counties under the effective control of the State Welfare Division,[2] resulting in a few political games, some unfortunate choices and orders, and some less than forthright assertions as cover.

Having been compelled to comply with the child support laws, the bureaucracy has attempted to subvert both those laws and even public policy to serve its internal limitations and interests. Frustrated in that effort, the bureaucracy has become increasingly strident in its defense of its own errors, to the point of attacking those attempting to serve the public good, and voluntarily assisting those whom it should be prosecuting. It seemed appropriate to bring to the attention of the Bench and Bar what brought us to this point, with the hope that someone in a position of sufficient authority might actually see fit to do something about it.

II. A TRIP DOWN MEMORY LANE

A. Why Our Interest Laws Are What They Are

Unpaid installments in child support or spousal support become judgments as a matter of law as of the date they come due and remain unpaid.[3]

The Nevada legal rate of interest was 7% from 1960 to 1979, 8% from 1979 to 1981, and 12% from 1981 to 1987, altered repeatedly in reaction to the hyper-inflation that raged periodically in that time. The Nevada Legislature had to keep amending the legal rate of judgment interest statute – NRS 17.130(2) (along with NRS 99.040(1), governing contracts) each session, and always "behind the curve" of whatever was happening in the economy, since the Legislature met only every two years.

In 1987, the Legislature decided to have the legal interest rate "float," self-adjusting every six months to the prime rate at the largest bank in Nevada, plus 2%.[4] The legislation itself was devoid

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[2] The bureaucratic euphemism for the process is that the State of Nevada, Division of Welfare and Supportive Services, Child Support Enforcement Program ("CSEP") "contracts with various District Attorneys' Offices to provide child support services as required under [a federal funding program]." In other words, they control the budget, and accordingly ensure no one in the system is willing to say or do anything that might rock the boat, or endanger their own continuing employment.

[3] NRS 125B.140(2)(c) (court orders for child support arrears shall include "interest upon the arrearages at a rate established pursuant to NRS 99.040, from the time each amount became due . . . interest continues to accrue on the amount ordered until it is paid.")

[4] NRS 17.130(2) provides for interest when no rate is provided by contract, or by other statute, or otherwise specified in a judgment:

the judgment draws interest from the time of service of summons and complaint until satisfied, except

of details as to precisely how such calculations were to be done, but some instructions were supplied by Nevada Supreme Court decisions before and after the statutory change.[5]

Unfortunately, the cases were not much studied by the Bar or their hired experts. Most lawyers simply ignored interest, except in the biggest cases. Others (such as my office) either developed the ability to perform the calculations by spreadsheet, or hired a local accountant to do the calculations for them. Most of those accountants, however, applied "generally accepted accounting principles" when they were hired to do such calculations – even when such principles directly conflicted with the controlling case law (which, of course, the accountants had never read).

This led to significant variability in whether, how, and how much, interest was applied to judgments in Nevada cases. The multiple changes to applicable interest rates also made the calculations technically difficult. For example, pre-July, 1987, arrears had a "fixed" interest rate, while post-July, 1987, arrears "floated," and the number of changes increased every six months. Spreadsheets done by hand had to have separate columns tabulating interest for each "class" of arrearage, to determine when each individual dollar of arrears was paid.

To my knowledge, my office was about the only one to try to do so consistently in family law cases, but even with experience the supporting spreadsheets grew increasingly complex and difficult to follow within a year or so of the 1987 amendments.[6]

B. Calculations by the Bar and Agencies Differed a Little

In September, 1990, I wrote the first article recapping Nevada law on this subject,[7] explaining both what was known and unknown, and how the problem was being addressed. From that time to this, there has been no published authority of which I am aware criticizing or contradicting any of the positions reached and recited.

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for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the commissioner of financial institutions, on January 1 or July 1, as the case may be, immediately preceding the date of the judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

[5] The cases are collected and analyzed in the article entitled "A Matter of Interest: Collection of Full Arrearages on Nevada Judgments," first published in the September, 1990, issue of the NTLA *Advocate*, and revised several times since then, most recently as CLE materials at the Twelfth Annual Family Law Showcase (Tonopah, Nevada, 2001). A reworking including an analysis of the Penalties calculation is in draft.

[6] By 1989, it was obvious that an automated solution was necessary, and I began work on what ultimately became the Marshal Law ("MLAW") program.

[7] *A Matter of Interest: Collection of Full Arrearages on Nevada Judgments*, NTLA *Advocate*, September, 1990.

Following the Nevada Supreme Court's directions to calculate interest from and to specific dates,[8] the private Bar has always calculated interest on a daily basis. The Clark County D.A.'s legacy mainframe computer system – NOMADS[9] – was set up originally to operate and report on a monthly batch cycle, and had no provision to calculate or track interest.

There were some variations between what public agencies and private attorneys did that could create differences when interest was being calculated. For example, back in the days when URESA was the controlling interstate law (now replaced by UIFSA), one distinction between the District Attorneys' and Family Courts' methodologies was the proper first application of an incoming payment. The IV-D methodology required application of payments to present support first, but Nevada case law required application of payments to the oldest arrearage first.[10]

This made a difference to the totals reached, at least when arrears were due from before July, 1987. Rates before that date were fixed, so changing the arrearage to which a payment was applied altered the calculation. It still was no problem, really, since the uniform policy of the District Attorney's offices throughout Nevada was to conform to any total judgment as found by a district court.

C. Some Politics in Attempted Service to the Poor

After 1987, the original Pro Bono Project had been unhappy with the failure of the Clark County District Attorney's Office to calculate or collect interest on child support arrearages, and made requests that the agency perform its statutory mandate to do so.[11] The Board of Directors of that organization was repeatedly told that the limitations of NOMADS made it impossible for the D.A.'s Office to comply with the law. This stalemate continued for many years.

As detailed in various Nevada Supreme Court opinions, the purpose and function of statutory interest is merely to compensate the claimant for the use of money from the time the cause of action accrues until the time of payment.[12] In other words, even when interest is actually calculated on behalf of

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[8] *See, e.g., LTR Stage Lines v. Gray Line Tours*, 106 Nev. 283, 792 P.2d 386 (1990) (damages prior to the filing of a complaint accrued interest from the date the complaint is filed); *Jones v. Jones*, 86 Nev. 879, 478 P.2d 148 (1970) (when a family law judgment requires payments on a series of future dates, any missed payment immediately "draws interest [from that date]. . . until satisfied").

[9] NOMADS was set up in an archaic programming language apparently not currently in use anywhere. There is apparently no adequate documentation of the previous programming work, and making any change of any kind in the input, workings, or output of the existing patch-work apparently requires lengthy efforts by large numbers of people.

[10] *See Foster v. Marshman*, 96 Nev. 475, 611 P.2d 197 (1980).

[11] *See* NRS 125B.150(3) ("the district attorney and his deputies do not represent the parent . . . or child . . ., but are rendering a public service as representatives of the State"); NRS 125B.140(2)(c) (interest is to be charged).

[12] *See Ramada Inns v. Sharp*, 101 Nev. 824, 711 P.2d 1 (1985) (speaking of NRS 17.130(2)).

an obligee, and the sum is actually collected from an obligor, the person owed the money pretty much only breaks even on the original sum owed.

In 1993, the Nevada Legislature tried to come up with some ***additional*** way of encouraging delinquent child support obligors to pay their back child support sooner rather than later. This ultimately became the "penalties provision," NRS 125B.095.

The Executive Council of the Family Law Section of the Nevada Bar followed and participated in the development of the new statute, but did not actually draft the language, which read:

> The amount of the penalty is 10 percent per annum, or portion thereof, that the installment remains unpaid. Each district attorney or other public agency in this State undertaking to enforce an obligation to pay support for a child shall enforce the provisions of this section.[13]

A two-year deferral period was built into the effective date of the new "penalty" statute (from 1993 to October 15, 1995) – the idea was to give delinquent support obligors that long to catch up on their back support before the penalty began applying to them, and the Welfare Division claimed that it would take another couple of years before they could get NOMADS programmed to calculate or track the penalty.

The private Bar began applying the penalty in late 1995 when it became effective, and the Family Courts uniformly included a penalty assessment per the statute whenever counsel requested (and calculated) it. The calculation was not particularly difficult. The statutory language directed assessing a penalty of "10 percent per annum, or portion thereof, that the installment remains unpaid."

That language on its face required calculation of an ***annual*** penalty, calculated by focusing on each "installment" to see if it had yet been paid and, if not, calculating a penalty at a 10% annual rate from the time that the sum went unpaid until the Court heard the case. The only information needed was whether a particular "installment" of child support "remains unpaid" (i.e., was in arrears), then multiplying the sum by 10% and figuring out how ***long*** the installment remained unpaid.

So if a $500 installment of child support remained totally unpaid for a month, a penalty of $4.17 ($500 x 10% ÷ 12) accrued, calculated on a monthly basis.[14] If it still remained unpaid the next

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[13] NRS 125B.095(2).

[14] This is the ***less*** accurate way of calculating the penalty, which can be done on a daily, or monthly, cycle. Ten percent per annum is 0.0002739% per day. If daily, multiply by the amount of installments remaining unpaid (here, $500), yielding a penalty of $0.13695 per day. Longer months will yield higher penalties; shorter months will yield lower penalties. In January, for instance, $0.13695 x 31 = $4.24545. If monthly, first determine the average number of days in a month (365 ÷ 12 = 30.416666). Next, determine the equal "monthly" penalty rate by multiplying that average number of days in a month by the daily accruing penalty rate (30.416666 x .0002739% = 0.0083311% per month). That percentage is then applied by the amount of the installments remaining unpaid (here, $500), yielding a penalty of $4.16555 per month. All months accrue the same penalty, and the differential of short and long months essentially

month, another such penalty accrued, and so forth. Throughout the 1990s, such penalty calculations were done by spreadsheet and submitted as exhibits to child support motions.[15] To my knowledge, every judge who ever heard a child support motion where a penalty was so calculated approved the reasoning, methodology, and totals, over all objections that have ever been made.

In the public sector, however, 1995 came and went without the mandatory calculation of penalties – ***or*** the long-awaited calculation and collection of interest – being performed by the Clark County D.A., or apparently anywhere else in Nevada.[16] Meanwhile, the Attorney General's Office, in conjunction with the Welfare Division, began a process of unifying procedures relating to support collection (and other things) in the 1990s. Reportedly, millions of dollars were expended in efforts to get the outdated NOMADS system to correctly perform interest and penalty calculations.

D. Progress . . . of a Sort

Until the year 2000, the Clark County Pro Bono Project existed independently of Clark County Legal Services (CCLS). That year, the former was folded into the latter, and it became far more capable of meeting the needs of the poor.

Periodically, the unhappiness of CCLS with the continuing failure of the D.A. to collect interest and penalties on back child support was raised in communications, leading to several meetings over the years between the CCLS Board of Directors and a variety of representatives from the Welfare Division, District Attorney's Office, and Attorney General's Office. Like the Pro Bono Project before it, CCLS was consistently told that the problem was the NOMADS computer system, which just could not be made to do the calculations in the way that they obviously should be done.

At some unspecified point in the past several years,[17] a rough interest calculator was finally engrafted onto the NOMADS programming. It was made capable of tabulating interest in the "whole month" increments that its batch process allowed.

In other words, if a child support installment came due sometime in January, and was not paid, NOMADS could take the then-applicable interest rate, divide it by 12 to get a monthly percentage, and multiply it by the prior month's unpaid installment. Since NOMADS retained its last-day-of-the-month batch cycle, it remained oblivious to any "odd days" and could see no difference between

---

averages out over a year.

[15] Separate and apart from ***interest*** calculations, which were done by hand, by CPA, or by computer program.

[16] As to interest, the Washoe County D.A. had adopted version 2 of the MLAW calculator, and had been collecting interest the same way the private Bar had been doing it for at least several years, starting about 1991.

[17] I've asked when this happened, but never been given a satisfactory response.

child support obligations due on the first, or the 30th, day of a month, calculating interest on both identically.

III. THE TAIL WAGS THE DOG

A. Bureaucratic Hiney-Covering

The continuing pressure from CCLS for the District Attorneys to comply with the statutes eventually led to the promise from the public agencies to begin collecting interest and penalties for the poor.[18] CCLS was invited to participate in the "public workshop" convened by the Welfare Division on that subject in 2004. Essentially, in addition to calculating rough interest on a monthly basis, Welfare proposed to assess a single lump-sum ten percent penalty on the last day of the first month that a child support payment was due and unpaid, because NOMADS was capable of performing and tracking such a month-end calculation.

The proposed policy Manual contained several mathematical, factual, logical, and other errors.[19] Those attending indicated how and why it would be unfair, unwise, and probably unconstitutional, to assess the same penalty on sums overdue for a week, and sums overdue for a year or longer.

It has since then been made clear that the "workshop" had nothing to do with figuring out what might be mathematically and legally correct, but was the announcement of a "done deal" that Welfare would do what NOMADS was capable of doing, irrespective of logic or consequences. As explained by Deputy District Attorney Edward Ewert in his revision and expansion of the Child Support section of the Nevada Family Law Practice Manual:[20]

> **NOMADS**, like other computers, has its limitations. . . . in the mass production, conveyer-belt case processing world of Nevada's child support enforcement program, the tail wags the dog. To make computerization work for child support enforcement in Nevada, the law and the courts, and most of all, our orders, have to conform to the computer's needs.

Still, the assorted glaring deficiencies of the Welfare methodology could not simply be ignored after being pointed out in public, without fear of potential litigation. So the left and right hands of the Welfare bureaucracy had a conversation, resulting in the 2004 request by Administrator Nancy Ford

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[18] Deputy Attorney General Donald Winne, whose involvement is discussed below, asserted in a purported "Friend of the Court Brief" in Case D230385, dated July 9, 2008 (at 2), that the 2004 hearings resulted from "directions" from the 2003 Nevada Legislature; he made no citation to any specific legislation making any such "direction," and I have found none in the record.

[19] The Manual as it existed in 2006 was recently circulated – the mathematical errors in the guidance chart identified in 2004 had not been corrected, at least as of that time; even the principal sums outstanding were not correctly tabulated.

[20] 2008 edition, at § 1.165.

of the Welfare Division to the Attorney General's Office, asking "Does the Welfare Division, Child Support Enforcement Program, have authority under NRS 125B.095 to calculate the child support delinquent penalty on a monthly basis as a one-time late fee penalty?"

Essentially, Welfare asked its Deputy A.G. for legal cover to interpret the statute incorrectly, permitting calculations in a manner that ***just happened*** to be what the archaic NOMADS computer system was capable of providing.

So it is not at all surprising that on October 22, 2004, the Welfare Division was able to obtain a letter[21] from Deputy Attorney General Donald W. Winne reaching the conclusion that the statute was sufficiently ambiguous to allow Welfare to interpret it to permit doing the calculations the way that their computer system was capable of calculating.

1. Less is More and More is Less . . . More or Less

The opinion letter had several errors in its own right – such as the conclusion, in the introductory "Background" section, that to follow the "public input" (i.e., the CCLS critique of the Welfare proposal at the "workshop") would "result in significant increases in the amount of child support judgments that obligors would be required to pay." That is just not so, depending on when the matter is determined.

For example, the Welfare method of calculation has an entire ***year's*** penalty coming due on the first day of the first month that a month's support is overdue. Welfare then ignores the penalty forever, failing to calculate ***any*** penalty for the second (or any later) year a sum remains outstanding.

The private Bar, by contrast, calculates the penalty in accordance with how much of a year has passed, so that the penalty imposed on an obligation due in January, is less in February than it is in March, and continues to be assessed for however many years an installment remains outstanding, giving meaning to the statutory phrases "per annum" and "remains unpaid."

We replicated the table of hypothetical sums due and sums paid from the Welfare Division's Manual,[22] at the request of the District Attorney. Over the same one-year time period as the sample in the Manual, the private Bar calculates a total penalty (as of 12/31/04) of $85.90. The Welfare calculation shows $230, grossly ***over***stating the penalties actually owed, in the short term, by immediately assessing *in toto* a penalty that is supposed to be applied "per annum."

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[21] At least one lawyer has incorrectly referenced Mr. Winne's 2004 opinion letter as a formal Attorney General's Opinion on the subject. There was and is no such published authority, just the letter referenced here.

[22] Section 619-620 of the Division of Welfare and Supportive Services Support Enforcement Manual (MTL 1/06, 1 Jan 06).

The Welfare penalty is three times ***greater*** than the private Bar would claim as due – at least on the one-year hypothetical facts in the Welfare table – so the statement that the private Bar's methodology would "significantly increase" the sum owed is just incorrect as a matter of math.

2. Welfare's Critical Error

The 2004 opinion letter is an exercise in sophistry.[23] It starts with accepted rules of statutory construction, such as that all the words of a statute must be given effect if possible, and then cherry-picks from the legislative history to find a way to disregard nearly all of the actual words in the statute.

Specifically, the opinion letter took the simple phrase "10 percent per annum, or portion thereof, that the installment remains unpaid," and sought to give effect to the modifier "or portion thereof" by reading the words "per annum" ***and*** "that the installment remains unpaid" completely out of the statute. By linguistic backsprings, the letter concludes that since the precise phrasing of NRS 125B.095 appears nowhere else in the NRS, the intent of the drafters must have been to perform a one-time-only penalty assessment, which by miraculous coincidence is the only thing NOMADS is capable of doing.[24]

The legislative intention was stated with overwhelming clarity: to provide an incentive for child support obligors to pay support sooner, rather than later – a purpose that would be entirely frustrated by a calculation that did not get any worse no matter ***how*** much time elapsed from the due date. And there is no known rule of statutory construction that permits three-quarters of the actual words of a statute to be rendered a nullity in order to give effect to a three-word incidental modifier.

An entire calculation methodology based on the phrase "or portion thereof" would eviscerate the obvious and plain meaning of the statute. "Per annum" ***means*** "per annum" – the penalty is to be applied at the rate of 10% ***per year***. And "remains unpaid" also means what it says – the penalty is to be based on all child support that remains outstanding.

3. Welfare's Flawed Analogy

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[23] "n. A subtle, tricky, superficially plausible, but generally fallacious method of reasoning." Webster's New Universal Unabridged Dictionary (1989) at 1358.

[24] "The tendency of bureaucracy [is] to find purpose in whatever it is doing." John Kenneth Galbraith, *Foreign Policy: The Plain Lessons of a Bad Decade*, in Foreign Policy, Dec. 1970.

At several points, the 2004 opinion letter cited to the legislative intent to analogize the statutory penalty to "a [commercial] late payment fee as a motivator for other bills."[25] That analogy does not support a one-time-only penalty assessment.

Every known explanation of late fees notes that they get worse the longer they are late, as in this example for how credit card late fees work:

> Late Fee
> What is it: a charge for making less than the minimum payment or after the payment due date or both
> Which cards have it: all cards
> How much: $15 - $39 each billing cycle you miss a payment or pay less than the minimum
> How often is it charged: ***once each billing cycle you are late***
> How to avoid it: pay your bills on time or call your creditor ahead of time to make payment arrangements.[26]

In other words, if you owe money to Best Buy, and don't pay on time, they hit you up with a late payment fee. And if you don't pay the bill by the ***next*** month? They charge you again – every time a billing cycle passes without you making the payment you owed originally.

Creating such a continuing incentive for obligors to make payments sooner, rather than later, was what the Legislature said it was trying to do in 1993 – a purpose that would be frustrated by any policy that did not provide a ***continuing*** incentive to actually make up arrears each passing day.[27] The assertion in the 2004 opinion letter that making late fees continue to accrue over time would result in "double interest on total arrearages owed by an obligor" is just wrong as a matter of fact, and ignores the differences between interest and penalties.

The Nevada Supreme Court should have no problem finding that the statute should be interpreted to provide the incentive it was intended to provide:

> A fundamental rule of statutory interpretation is that the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result.[28]

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[25] Winne letter of Oct. 22, 2004, at 5.

[26] http://credit.about.com/od/creditcardbasics/tp/credit-card-fees.htm (emphasis added).

[27] It is a bit ironic, but the opinion letter notes (at 5) that statutes must be construed "with a view to promoting, rather than defeating, [the] legislative policy behind them." This is correct, but the Welfare methodology is counterproductive, and thus fatally flawed.

[28] *Hughes Properties v. State of Nevada*, 100 Nev. 295, 298, 680 P.2d 970, 971 (1984), *quoting from Sheriff v. Smith*, 91 Nev. 729, 733, 542 P.2d 440, 443 (1975).

No creditor would say "You owe this specific sum in January. If you don't pay, you get assessed a late payment penalty in February. And then you're off the hook – no further late fees in March, April, May, June, July – just pay when you can."

But that is what Welfare wants to do with child support. Such an unreasonable interpretation of a statute – one that does not actually accomplish the stated legislative goal – is to be rejected out of hand.

B. The (Deflected) Attempt to Conform the Law to Error

> The major problem facing bureaucracy is not the struggle for power but the evasion of responsibility; bureaucrats are very reluctant to take action.[29]

Having been informed during the 2004 "public workshop" that the proposed Welfare calculation methodology was counterproductive and not in keeping with the obvious legislative intent of the statute, Welfare did what a bureaucracy does in such circumstances – tried to get the law changed to support what it wanted to do. Specifically, in 2005 Welfare cooked up AB 473, which would have altered the statutory penalty as follows:

> [~~The amount of the penalty is~~] ***If imposed, a*** 10 percent [~~per annum, or portion thereof, that the~~] ***penalty must be applied at the end of each calendar month against the amount of an*** installment ***or portion of an installment that*** remains unpaid [.] ***in the month in which it was due.***

All aspects of the calculation of interest and penalties were discussed at length in the resulting hearings held before the Assembly Judiciary Committee. After hearing and reading everything about why the law was the way it was, why the Welfare Division was trying to change the law to conform to their outdated computer capabilities, and why it would be a really terrible idea to do so, the Legislature left the "how-to-compute-penalties" portion of the statute exactly as it was, knowing how the private Bar had been doing the calculations for 17 years (as to interest) and 10 years (as to penalties).

The same Deputy A.G. who wrote the misguided 2004 opinion letter testified and claimed that the law should be amended to conform to Welfare's view of the legislative history and intent. I testified immediately after, in part as follows:

> Finally, the problem here, with due respect to the district attorneys and the Attorney General's Office, is one of the tail wagging the dog. They are attempting to solve a calculation methodology problem left over from legacy hardware and software . . . NOMADS, that they are trying make do a job that it is not suited to do. They are attempting to conform the law to how their computer works. I would suggest that this is a bad basis for

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[29] Dean Rusk (1909-1994), *As I Saw It* (1990) at 33.

> altering public policy and altering statutes. I suggest it may be time that they just face up to the fact that they have wasted a huge amount of money on trying to fix something which may or may not ever be fixable. But certainly they should not start amending the law to conform to the problems that we know are built into that hardware system.

Immediately after that session, the Assembly Judiciary Committee deleted from the bill draft any mention of amending the how-to-calculate-the-penalty provision, rejecting the Welfare provision entirely.[30] Most family law lawyers have no idea how close the penalty provision came to being gutted and replaced, requiring everyone in Nevada to adopt the same counterproductive methodology used in NOMADS – and all because Welfare could not update its computer system. It is unknown whether Welfare will try again.

IV. WELFARE'S APPEARANCE IN THE *VAILE* MATTER

A. Background

The Nevada Supreme Court issued a decision in 2002 entitled *Vaile v. District Court*, which provided for the recovery of the kidnapped children, who had been spirited out of Norway to the United States.[31] Mr. Vaile stopped paying child support when he kidnapped the children in 2000, and never started paying again, even after they were recovered, despite his continued receipt (except for a three-year period when he elected to attend law school in Virginia), of a six-figure income and relatively lavish lifestyle.

Well over $100,000 of principal arrearages in child support accrued from 2000 to 2008, and the custodial parent sought to reduce to judgment the principal, interest, and penalties accrued during that time.[32] Mr. Vaile's counsel contacted the Attorney General's office and solicited a "Friend of the Court" brief to buttress his contest of the massive arrears accrued during that time. For reasons commented upon below, the Attorney General's Office agreed.

B. Welfare's "Friend of the Court Brief"

Bureaucracy defends the status quo long past the time when the quo has lost its status.[33]

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[30] As detailed below, the bureaucratic response to this rejection was to declare victory and assert that it really constituted an endorsement of the rejected Welfare provision.

[31] *Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002).

[32] *Vaile v. Porsboll (fka Vaile)*, Case No. 98-D-230385-D.

[33] Laurence J. Peter (1919-1990), "Intimate confessions of a quotemonger," San Francisco Sunday Examiner & Chronicle, Jan. 29, 1978.

The brief, dated July 9, 2008, repeats most of the errors and mis-statements discussed above, and makes several new errors. It chose to recast the 2004 request for legal cover as "a legal opinion on the interpretation of NRS 125B.095." It similarly recast the 2005 effort to gut the penalties statute as a proposal to insert "clarifying language," and labeled the rejection of that effort as the Legislature "taking no action."

With logic only a bureaucrat could conceive, the brief opined that because the legislature "allow[ed] CSEP to continue with its regulation and policies" since 2005, the Legislature must have ***really*** meant to endorse the defective Welfare proposal while rejecting it. The fact that the question of approving or criticizing Welfare's methodology was not even before the Committee was not mentioned.

Hypocritically, the brief simultaneously asserted that Legislative inaction to change the statutes, with knowledge of how the Bench and Bar had been doing interest and penalty calculations for many years, was meaningless.

After repeating the inaccurate analogy to late fees by businesses discussed above, the brief tried to set out comparative calculations, asserting as a matter of fact that the private Bar's calculation of penalties for one year of missed $100 per month child support would be $120. In fact, the number is $66.62. Welfare would have blindly assessed annual penalties on the same arrearage of $120 over 12 months.[34]

The brief never even attempted to compare any calculations of the interest and penalties that would actually accrue in the case at hand. It did, however, note that Welfare was not a party to the case, and that the outcome of the case would not affect it in any way, and so warned the Court that "the Court has no ability to set aside CSEP's regulation." Why Welfare would bother to take a stand in a case that did not affect it in any way is discussed below.

C. Actual Calculation Differences

The facts of the Vaile case involved large sums of arrears outstanding and unpaid for a long period of time, with very minimal payments – the District Attorney only managed to start a partial garnishment of support in 2006. So all sides agreed that the principal sum of outstanding child support arrears was some $127,000.

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[34] The brief also fails as to its assertion of fact about the effect of a second year of payments due but unpaid, incorrectly claiming that the Family Court would charge $360 to Welfare's $240. This is again false; 10% per year on each missed installment for the amount of time it remained outstanding and unpaid results in a total penalty at the end of two years of $213.56. There was no reason for Welfare to make the false assertions of fact – the calculation is easy to do, and the MLAW program was provided to them for free when it was issued, can be run on any PC, and they could have easily run the calculation before misrepresenting what its output would be.

Remarkably, the difference in interest calculations over the eight-year time period between NOMADS and a standard MLAW calculation was only some $44.00. The difference is apparently due to only two factors. First, as to the method of rounding – NOMADS rounds each month's interest to the nearest penny, with everything over 0.005 up to the next whole cent, and everything under 0.005 down. The private Bar – like banks and credit card companies – carries fractional cents forward in a "bit bucket" to eight places after the decimal point.

The second, and much larger difference, is that NOMADS is only able to do an end-of-the-month calculation, making the actual date of any payment invisible and irrelevant if received anywhere within a month. The private Bar has always calculated all arrearages on a ***daily*** basis, so earlier-received payments are credited earlier and the arrears accrue less interest, while later-received payments are credited later and accrue more interest.[35]

The big difference was in the penalties. Since nothing at all was collected from Mr. Vaile between 2000 and 2006, the Welfare methodology assessed a 10% penalty when each payment initially went unpaid, and then ignored those installments for all the remaining years that they remained unpaid. The private Bar methodology, by contrast, continued to accrue penalties, following the statute, at the rate of 10% ***per annum*** for each year that each installment "remained unpaid." The result is that the sum of penalties assessed was really about $50,000, while Welfare's penalty calculation would have yielded some $12,000.[36]

D. The Perversion of Bureaucratic Priorities

> The effort expended by the bureaucracy in defending any error is in direct proportion to the size of the error.[37]

When informed that Mr. Vaile – who by all accounts owed well over $100,000 (just in principal) in back child support while making a six-figure annual income – would be present in a Las Vegas courtroom, one might think that the child support enforcement bureaucracy would initiate a criminal prosecution for felony non-support under Nevada law.[38]

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[35] Obviously, whether these differences would work for or against any particular party in any particular case depends on the dates of the actual payments. More accurate calculations could provide a larger, or smaller, interest calculation than a less accurate calculation if the facts were changed.

[36] This number, 10% of the principal not paid on the date when due, would remain unchanged no matter ***how*** long the installments remain unpaid.

[37] John Nies (Washington Lawyer), "Nies's Law," in Paul Dickson, comp., *The Official Rules* (1978) at 178.

[38] *See* NRS 201.070(3) (felony non-support threshold is $10,000); *Epp v. State*, 107 Nev. 510, 814 P.2d 1011 (1991); *Sheriff v. Vlasak*, 111 Nev. 59, 888 P.2d 441 (1995).

One would be wrong. Apparently, the child support "enforcement" agencies of Nevada have not initiated a criminal non-support case for over seven years. In short, they don't care.

On information and belief, however, the funding received by the Welfare Division under the federal IV-D program is linked to the ratio they show of collections to overdue support – if less is shown as "due" compared to what they collect, their statistics look better and they get more money; if ***more*** is shown as due compared to their collections, they get less. Thus, Welfare has a perverse incentive to minimize the sums shown as outstanding and uncollected in child support arrears, putting the interests of the bureaucracy, and the poor persons it claim to serve, at odds.[39]

But why on earth would an agency charged with collection of child support – while stating that it has no legitimate interest in any possible outcome of a particular case – expend the resources to inject two District Attorneys and a Deputy Attorney General into that case anyway? And why on the side of the deadbeat who owed over $100,000 in child support?[40]

Because any bureaucracy's first instinct is toward self-perpetuation and growth, and those interests are seen as imperiled if anyone has the temerity to say that "The emperor has no clothes" when they attempt to get the law to match the counterproductive methodology that NOMADS is able to produce. It was obviously seen as ***much*** more important to push Welfare's position on how to calculate penalties than to actually assist in collecting from a deadbeat who owes huge amounts of back child support to assist the children and custodial parent.

V. ACTUAL POLICY-BASED COMPARISON OF CALCULATIONS

A. Interest Calculations

There really can be no legitimate question that the holdings of the Nevada Supreme Court have discussed precise dates as the start or end calculation triggers for interest, so interest should be calculated on the precise number of days that an arrearage remains unpaid.

The Welfare computer uses "months," disregarding the extra days within a month that an arrearage remains due, and thus treats an arrearage due on the first of the month, and on the 30th, exactly the same. That's not how banks calculate interest. It's not how corporations do it. It's not how the private Bar does it. But it is the only way that NOMADS can do it.

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[39] The bureaucratic euphemism for minimizing the amount of outstanding child support arrears is "setting out 'realistic' arrearage sums to encourage compliance."

[40] In fairness, there is a distinction between why the District Attorneys were present, and why the Attorney General's Office filed a brief. The D.A.s were there at the specific invitation of the Court, having been requested to explain what procedures their office actually followed, and why. The officious intermeddling of the Attorney General's office in this child support arrearage case was entirely voluntary and without legitimate purpose.

Although the total differential in the majority of cases is likely to be pretty small, that error is being made every day in every case that Welfare processes. And Welfare apparently will never do anything about any of the interest it should have collected since 1987, but failed to collect. Those obligees who relied on Welfare to collect what was due under law are just out of luck, and if those who were short-changed by Welfare's non-collection become public charges at taxpayer expense, we are just out of luck as well.

B. Penalty Calculations

1. The Question of Whether the Statute is Ambiguous

In my personal opinion the statute is not ambiguous. "10 percent per annum, or portion thereof, that the installment remains unpaid" does not truly seem susceptible to alternative good faith interpretations.

Still, Welfare has come up with a plausible, although illogical, alternative interpretation of the words used. And if a statute is ambiguous, a number of rules of statutory construction come into play. Statutory interpretation should avoid meaningless or unreasonable results. When construing a specific portion of a statute, the statute should be read as a whole, and, where possible, the statute should be read to give meaning to all of its parts. Statutes with a protective purpose should be liberally construed in order to effectuate the intended benefits.[41]

In short, statutes are to be interpreted in a manner consistent with the intent of the Legislature. Since the Welfare methodology provides no continuing incentive for deadbeats to actually pay child support sooner rather than later, it fails at the first instance. The way the Family Courts have been calculating and applying interest (since 1987) and penalties (since 1995) ***does*** provide a continuing incentive for payment sooner rather than later, and therefore is the more reasonable construction.

The assertion of ambiguity of the penalties statute in the A.G.'s 2004 opinion letter gave the Welfare Division legal "wiggle room" to do the calculations in the manner that their outdated computer system can perform, but it certainly did not, and does not, mean that their approach is legally or logically "correct."[42]

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[41] *Petition of Phillip A.C.*, 122 Nev. ___, 149 P.3d 51 (Adv. Opn. No. 109, Dec. 28, 2006).

[42] For the record, because Mr. Winne has insinuated that my motivations might be suspect, it is worth pointing out that I have no personal dog in the fight as to how the math ***should*** be done, beyond my personal knowledge of what was intended, and my familiarity with the logic and law involved. It would be a simple matter to reprogram MLAW to perform the calculations like Welfare does them – if there was any legitimate reason to do so. In the unlikely event that the Legislature or courts deem it proper to perform either interest or penalty calculations in the less accurate and counterproductive method advocated by the Welfare Division, we will alter MLAW to produce those calculations.

For the various reasons set out at the "public workshop" in 2004, and in this article, the opposite is true. The Welfare Division's approach is inaccurate, sloppy, partially counterproductive, and ***not*** what was intended when the provision was drafted in 1993. Whether or not Welfare is held accountable for its bungling of the issue, it is unconscionable for them to try to get the Family Courts to follow suit.

2. Constitutional Concerns

One final difference of perspective merits explicit mention. The A.G.'s "Friend of the Court" brief in *Vaile* raised the question of an "equal protection" issue raised by the fact that in cases such as that of Mr. Vaile, Welfare would assert a much lower penalty sum than the private Bar tabulates. On that basis, Welfare asserted that the Family Law Bench and Bar should adopt the NOMADS methodology so that the low income persons typically involved in Welfare cases are not treated any differently than they would be in Family Court.

This tail-wags-the-dog argument is both wrong and backward. It is wrong because the clumsy and counterproductive front-loading of penalty calculations by NOMADS actually makes the penalties it applies much ***higher*** than they should be – at least for the first few years that arrearages accrue. So Welfare's position that the private Bar has "higher" penalties is wrong, at least much of the time.

Welfare's position is backward because the "impose-and-forget-about-it" approach to penalties built into NOMADS provides no continuing incentive to actually pay overdue support, and is contrary to the legislative intent of the statute. There is no legitimate reason for Welfare to ask the Bench and Bar to adopt its error.

The ***actual*** "equal protection" problems are not addressed anywhere in Welfare's submissions. As noted in 2004, properly construing the phrase "per annum, or portion thereof" requires assessing the penalty ***every year***. As a basic matter of equal protection, any law that would treat identically being late for a day, and being late for a year – or 10 years – or 100 years – is highly suspect and probably constitutionally infirm. It would not take much effort to put together an equal protection challenge to Welfare's assessment of the same penalty on arrears owed for greatly disparate periods of time.

On the larger scale is Welfare's failure to comply at all with the Nevada statutes governing collection of interest (since 1987) and penalties (since 1995) through about 2005. It is hard to conceive of a larger equal protection problem than the fact that poor people relying on the State instead of private counsel to collect child support arrears simply did not get what the law required them to get.

VI. CONCLUSION

If the Nevada Supreme Court rules that the penalty statute is sufficiently ambiguous to permit more than one reasonable construction, then reasonable minds (if fully informed) could differ on what that construction should be.

But the Welfare view of how the statute should be construed has already been rejected by the Nevada Legislature within the past two years, would be counterproductive and illogical in application, and would be poor public policy if implemented. It simply makes no sense to read the words "per annum" and "remains unpaid" out of a statute intended to assess penalties at 10% per annum on the sum of arrears that remains outstanding. Calculation of both interest and penalties in accordance with the length of time installments of support remain outstanding is logically and legally correct, and serves the purpose for which the statutory provisions were implemented.

And only a bureaucrat could say that going to the Legislature, asking to amend a statute to match how Welfare's computer is able to do calculations, and having that amendment ***rejected***, somehow constitutes an endorsement just because the Legislature did not also publicly chastise the Welfare Division.

It is perhaps reasonable that the bureaucracy wants to find legal cover for the vast sums of money it has spent not managing to upgrade its computer capabilities, and the equally vast sums it failed to assess and collect against deadbeats who disregard their financial obligations to their children for the past 20 years. The Welfare bureaucracy continues to fail to correctly assess and collect those sums today.

It is even understandable, if repellant, that the bureaucracy prioritizes protection of its federal funding over actually serving the needs of those who are owed support. But they should not seek to protect the interest of the bureaucracy at the expense of custodial parents, and the children in their custody, who are owed the full measure of interest and penalties in accordance with law.

Those responsible for the decades of delay and millions of dollars of wasted expenditure on NOMADS should be identified and publicly censured. And the Nevada Legislature should direct Welfare to actually collect correctly calculated interest ***and*** penalties on child support judgments, neither front-loading, nor later ignoring, statutory penalties. Welfare should be discouraged from continuing the gamesmanship of looking for legal cover with which to paper over its deficiencies, and discouraged from trying to amend the law to match their inaccurate and backward approach.

A lawsuit on behalf of those cheated out of the (correctly-calculated) interest, and penalties, that should have been collected since (respectively) 1987 and 1995 should probably be pursued.[43] One way or another, it is time for the dog to re-assert control over the tail.

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[43] "Somebody has to do something, and it's just incredibly pathetic that it has to be us." Jerry Garcia.