IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

ROBERT SCOTLUND VAILE,

Respondent.

S.C. NO. 53798

D.C. NO. 998-D-230385-D

AMICUS BRIEF

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TABLE OF CONTENTS

Office of the Attorney General
100 North Carson Street
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TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

INDEX OF EXHIBITS

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

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AMICUS BRIEF

DATED this 30th day of September, 2009.

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INTEREST OF AMICI

The District Court's actions of requesting an Amicus Brief and its final decision highlighted the interests of the State of Nevada, Division of Welfare and Supportive Services, Child Support Enforcement Program (CSEP). CSEP is a federally funded program created under Title IV-D of the Social Security Act and codified in 42 USC § 651 *et. seq.* CSEP is required to meet these requirements to obtain federal funding[1] for both CSEP and the state's Temporary Assistance for Needy Families Program (TANF).[2] CSEP is overseen and audited by the Federal Office of Child Support Enforcement (OCSE) for compliance with these requirements. CSEP has two (2) state offices that provide establishment, enforcement, and collection of child support orders in this state. CSEP also contracts with some of Nevada's District Attorneys' Offices (DAs) to provide similar child support services as required under OCSE.[3] The DAs that provide child support services as part of this program are required by this contract to follow the position of CSEP in the calculation of penalties. OCSE holds CSEP responsible for child support compliance and therefore CSEP controls the program on that basis.

A change in the agency's interpretation of this statue, either prospectively or retroactively, will involve CSEP program changes, temporarily stopping the enforcement of child support judgments, setting hearings to obtain new judgments, require a new audit of all existing and closed child support enforcement cases, and essentially bring to a standstill an already overburdened child support enforcement system that ranks near the bottom on national child support enforcement performance scale among the 54 participating jurisdictions.

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[1] Nevada recently received approximately $23 million to run CSEP and $43.9 million in Temporary Assistance for Needy Families (TANF) monies.

[2] In 1996 welfare reform legislation ended the Aid to Families with Dependent Children ("AFDC") entitlement program and replaced it with the TANF block grant program. *See* Pub. L. No. 104-193, 110 Stat. 2105 (1996) (adding Section 403, codified at 42 U.S.C. § 603).

[3] CSEP has been contracting with various DAs since approximately 1977, not 1999 as stated in appellant's brief. The number of initial participating DAs is believed to be 17 jurisdictions, but today the total number is only 10 with some of those jurisdictions only performing limited services under the program.

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STATEMENT OF FACTS

The 2003 Legislature advised CSEP to implement penalties as part of the collection of child support in connection with CSEP's participation in the federal child support enforcement program. When CSEP started to review the implementation of penalties, it found the language in NRS 125.095 ambiguous and requested a legal opinion on the interpretation of NRS 125B.095. CSEP obtained an opinion from the Attorney General's Office and proceeded to pass regulations on the implementation of penalties as part of the collection of child support. A copy of that opinion is attached and incorporated herein by this reference as Exhibit 1. The opinion includes a full legal analysis of the statutory interpretation of NRS 125B.095. Ms. Porsboll's counsel, Mr. Willick, participated in the workshops for these regulations and expressed his position on NRS 125B.095. Mr. Willick's position ran counter to that of CSEP, legislative history of the statute, and the current emphasis by OCSE on child support arrears management.[4]

In January 2005, CSEP passed regulations based on its interpretation of NRS 125B.095, a copy of regulation 615 is attached hereto and incorporated herein by this reference as Exhibit 2. Mr. Willick offered to share the source code[5] of his program in an effort to persuade CSEP to use it in programming penalties for the program. CSEP's federal requirements for collection and distribution of child support payments contained in 42 USC § 666 *et. seq.* rendered Mr. Willick's program source code useless to CSEP. One example demonstrating the deficiency of Mr. Willick's program is its inability to calculate and track the allocation of Nevada and/or Family share of six different arrearage categories as well as handle the 12 different levels of distribution that the OCSE requires the state to track for purposes of federal program certification.[6]

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[4] OCSE funded studies to ascertain the effectiveness of penalties and interest in the collection and enforcement of child support. See: http://www.acf.hhs.gov/programs/cse/pubs/reports/colorado/bk01.html OCSE developed a resource guide http://www.acf.hhs.gov/programs/cse/pol/DCL/2008/dcl-08-22a.pdf and printed articles relating to the issue of arrears management. *See:* http://www.csdaca.org/resources/1/Research/Arrears/The%20Story%20Behind%20the%20Numbers.pdf

[5] This is the programming computer code that runs the calculations in his Marshal Law computer program.

[6] *See* a recent publication on the details of the collection and distribution of child support payments pursuant to federal regulations: http://www.acf.hhs.gov/programs/cse/pol/AT/2007/at-07-05a.pdf.

Office of the Attorney General
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CSEP worked with a DA to introduce AB473 in the 2005 Legislature to correct the ambiguity of NRS 125B.095 and deal with penalty issues where a late payment was not the fault of the non-custodial parent (NCP). The Legislature heard testimony from all sides, including Mr. Willick. CSEP informed the 2005 Legislature of CSEP's regulation and position on NRS 125B.095. The Legislature ultimately took no action on the clarifying language, but did pass the penalty exception language proposed in the bill. By this action the Legislature left in place the regulations of CSEP that were based on the agency's interpretation of the statute and all the enforcement and collection actions on approximately 102,708[7] cases.

SUMMARY OF ARGUMENT

In summary, NRS 125B.095 is ambiguous. When a statue is ambiguous, case law requires that courts look to the legislative history to resolve the ambiguity in the statute. CSEP's interpretation dropped "per annum" because it did not fit the legislative history or any of the other statutory uses of the phrase "per annum." The application of the "per annum" did not create the immediate incentive for the NCP to timely pay in full the monthly child support payment. A ten percent (10%) penalty on the monthly child support payment will be a proportional penalty that the Legislature intended to get the attention of the NCP on a monthly basis rather than an end-of-year basis. Finally, CSEP's position gives effect to the clear legislative intent of the statute, is correctly linked to implementing the policy of promoting prompt child support payments within the month it is due, and is equally proportional in its application of penalizing low income and high income NCPs based on the amount of their monthly child support payments.

ARGUMENT

I. IS THE STATUTE AMBIGUOUS?

Yes, the statue is imprecise and open to interpretation. Therefore it is subject to interpretation based on legislative history. *See* Exhibit 1 for a complete legal analysis on this point. Mr. Willick admitted this in his June 30, 2008 letter to the District Court on page 8.[8]

[7] The caseload figure increased from the 98,853 number contained in the District Court Friend of Court Brief.
[8] "But his 'bottom line' that the statute, as phrased, is imprecise and arguably ambiguous is probably sound."

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Yet, Mr. Willick's current position is that the statute is not ambiguous and that the language in the statute supports his position. However, if the language is open to interpretation, the law is clear that legislative history controls.

II. DOES THE LEGISLATIVE HISTORY SUPPORT CSEP'S POSITION?

Yes, the legislative history of AB 604[9] from the 1993 Legislature supports the one time penalty on missed monthly payments. Act of June 30, 1993, ch. 344, 1993 Nev. Stat. 1030. The Attorney General's Opinion references in detail that throughout the legislative history there are statements that confirm it was intended as a one time penalty versus an ongoing interest charge as proposed by Mr. Willick. *See* Exhibit 1. To date, Mr. Willick fails to offer any legislative history that supports his position. In the District Court proceedings Mr. Willick attempted to claim that he had some communication with Chairman Sader on this bill. However, Chairman Sader never mentions on the record any contact with Mr. Willick. Chairman Sader also never makes any statements on the record that support Mr. Willick's position on the application of penalties assessed on missed child support payments. Chairman Sader did state he was concerned with charging interest on the late payment of child support since there already was an interest provision in another bill.[10] In fact, based on all the comments contained in the record, the intent of the legislation clearly supports CSEP's position that the NCP is encouraged to pay current monthly payments within the month they are due or a one time late penalty will be charged for failure to pay the current child support obligation in full within the month it is due.

Ms. Porsboll's argument that the legislative history supports her position is essentially a long hypothesis filled with personal attacks but does not provide this Court with any objective evidence or case law to support her position. Ms. Porsboll's counsel, Mr. Willick, attempted to support this hypothesis by contacting Mr. Sader, the former Chairman of Assembly Judiciary Committee in 1993 when the original bill was passed, in an attempt to obtain an unofficial

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[9] The legislative history can be accessed at: http://www.leg.state.nv.us/lcb/research/library/1993/AB604,1993.pdf

[10] *See* Legislative Counsel Bureau's Summary of Legislation on AB 604, page 59 on the discussion between AB 604 and SB 298. Chairman Sader specifically states AB 604 was changed to deal with penalty and the two bills are not inconsistent.

Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

legislative history supporting his position.[11] Mr. Willick also sent a complaint letter to this office regarding the Friend of the Court Brief that was requested by the District Court, all in an effort to find some support for his position.

First, Mr. Willick argues that because the 2005 Legislature failed to adopt the new language proposed by AB473 that it agreed with his position.[12] If that was true why would the Legislature allow CSEP to continue with its regulation and policies which clearly fly in the face of Mr. Willick's position? The only certain supposition that can be drawn from the Legislature's inaction on the corrective language of the bill is that it wanted to maintain the status quo. *Sierra Pac. Power Co. v. Dep't. of Taxation*, 96 Nev. 295, 298, 607 P.2d 1147, 1149 (1980) states: "legislative acquiescence to the agency's reasonable interpretation indicates that the interpretation is consistent with legislative intent." The Legislature specifically knew of CSEP's interpretation of NRS 125B.095 and took no action to change the law or the interpretation.

Second, Mr. Willick argues that his position is correct because no person or court has challenged his position or his program. This is a specious argument. In reality, Mr. Willick's statement only proves that until Mr. Vaile's attorney, Ms. Greta Muirhead, raised the issue, no one to date had been able to connect the dots that in this State there currently exist two methods of calculating penalties for the purposes of child support enforcement. If that argument were to stand then CSEP's position is just as valid because no person or court has challenged CSEP's position or calculation.

Third, Mr. Willick counters that CSEP's position charges the NCP more than his program does based on the "per annum" reference in statute. Yes, the ten percent (10%) penalty as applied on a monthly basis is more than the 8.33% calculation using a "per annum" theory. However, CSEP wants to make the point up front that the NCP needs to pay all of his

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[11] *A-NLV-Cab Co. v. State, Taxicab Auth.*, 108 Nev. 92, 95, 825 P.2d 585, 587 (1992) (Submission of affidavits of state legislators in appellate brief, in effort to establish legislature's intent in enacting particular statute, was improper; legislator's statement of opinion may not be used as means of divining legislative intent).

[12] The legislative history is not online at this point. However, if requested I can file a supplement that would include this history if the Court deems it necessary to the resolution of this issue.

Office of the Attorney General
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Carson City, Nevada 89701-4717

child support on time. When families cannot count on those monthly payments, especially in these hard times, they suffer damaging financial effects. CSEP knows based on the legislative history, that this is what the Legislature intended because it refers to the same one time penalties everyone is subject to when they are late paying their other bills. Therefore, just as a business charges fees for late payments, the late penalty on an overdue child support payment was never intended to be an ongoing interest calculation until the sum is paid.

Mr. Willick's program continues calculating ten percent (10%) percent on the total missed payments just like an additional interest calculation on the total arrears. Therefore, in any given year of 12 months of missed payments, the NCP is charged interest on the missed payments under a NRS 99.040 calculation and a ten percent (10%) interest applied under Mr. Willick's position of NRS 125B.095,[13] and hence, the statement contained in the Opinion regarding double interest. The studies referenced in footnote No. 4 demonstrate that such interest assessments disproportionately impact low income NCPs. This leads to another concern about the unequal treatment of NCPs in this State where, depending on who calculates penalties, NCPs in the same representative class will be treated differently on the penalties they will be required to pay.

III. IS THERE A CALCULATION DIFFERENCE?

Yes, the difference is based not just on a yearly calculation basis but also on OCSE federal program distribution and collection requirements. Ms. Porsboll argues her position does not result in "significant increases in the amount of child support judgments" but she presented proof in District Court with her own exhibits. After the first 23 months the Marshal Law Program (MLP) exceeds the penalties imposed by CSEP. The amount increases based on the yearly interest calculation method and ignores any fully paid monthly payments because of the yearly calculation theory. Mr. Vaile made a full monthly payment in May 2007

[13] In an example of $100/month not paid for one year, Willick's position would require the NCP to pay $120 in penalties. CSEP would require NCP to pay $120. Extend that out again another year and Willick would charge $240 at the end of the second year for a total of $360 and CSEP would charge $120 for a total of $240.

Office of the Attorney General
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Carson City, Nevada 89701-4717

when he was credited with paying $7,920.50, but he was still assessed a penalty by the MLP because of the yearly calculation theory (i.e., Mr. Vaile still failed to make up all the other missed payments from all the previous months and was therefore subject to the yearly penalty calculation). Ms. Porsboll claimed in District Court that CSEP would assess a penalty for May 2007, when in fact under CSEP's position, all current monthly obligations/amounts have been fully paid for the month, within the month, and consequently there is no need for a late penalty in May 2007. However, by this time it is clear that the two positions could not be any farther apart in the application of penalties and completely proves that CSEP's $10,920.00 (without the error) is far less than MLP's $39,442.82, an almost $30,000.00 difference.

The District Court recognized this when it stated this year end calculation theory was "less reasonable and less logical." The result would be magnified by OCSE's requirements of the payment hierarchy. CSEP must distribute the NCP's payments in the following descending order of priority: ongoing child support, ongoing spousal support (if any), ongoing medical cash (insurance premiums), child support arrears, spousal support arrears (if any), medical cash arrears, etc. Therefore, if the MLP calculations were applied to CSEP's program requirements the NCP could pay in full each month his court ordered ongoing child support and arrears payments but still be charged a penalty at the end of the year because of formerly missed child support payments that he is already paying off. Why? The MLP looks at the yearly calculation basis rather than by the month and therefore any months previously missed but not yet paid will be charged a penalty at the end of the year. Doesn't this sound like interest? CSEP already charges interest according to statute on the unpaid arrears balance, so under the MLP the NCP will be charged interest again on the unpaid installment balance even though he is making all his court ordered arrears payments.

This yearly calculation is increasingly draconian on those low income NCPs who previously fell behind or did not make their court ordered child support payments. MLP will continue to assess a penalty even if those NCPs make all their current court ordered ongoing

Office of the Attorney General
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Carson City, Nevada 89701-4717

child support and arrears payments. CSEP, on the other hand, will only charge the NCPs interest on the unpaid balance on arrears and no penalty. Ms. Porsboll's attorney muses that somehow this is a disservice to the custodial parent of the child (CST) for failing to collect all the money owed to the CST. However, this thesis ignores all the empirical evidence from the all the OCSE studies mentioned in footnote No. 4: high arrears balances cause NCPs to merely disengage and disappear often leaving the CST with no payments of child support.

IV. THE DISTRICT COURT WAS NOT MISLEAD.

Ms. Porsboll argues that the District Court was misled by deferring to federal bi-weekly withholding requirements/arguments, by stating there are no requirements. Ms. Porsboll failed to properly conduct legal research on this issue or simply does not understand the intricacies of income withholding law. OCSE requires all employers to comply with the federal income withholding form (IWF)[14] and all those employers' payments must be processed by the state's collection and disbursement unit.[15] This includes all income withholdings sent by CSEP and private income withholdings[16] and employers are not required to vary their payment cycles in order to withhold income for child support payments.[17] The IWF directions are clear that child support payments can be split up between payment periods within the month, especially if they run afoul of the Federal Consumer Credit Protection Act.[18] Therefore, District Court made no legal error on this point.

Ms. Porsboll argues the District Court was also in error because it agreed with CSEP's monthly approach to payments. CSEP is required to look at all the payments within the month because 45 CFR 302.51(a)(1) requires distribution of child support payments within the month be credited to the child support amount due in the month. Therefore, the monthly payment emphasis rather than a date specific emphasis comes from the federal requirement, not a system requirement. This is even more imperative when more than 75% of all CSEP

[14] 42 U.S.C. 666(b)(6)(A)(ii).
[15] 42 U.S.C. 666(b)(5); 42 U.S.C. 666(b)(6)(A)(i).
[16] http://www.acf.hhs.gov/programs/cse/newhire/employer/private/income_withholding.htm; NRS 31.300
[17] 42 U.S.C. 666(b)(6)(C).
[18] http://www.acf.hhs.gov/programs/cse/forms/OMB-0970-0154.pdf; 15 U.S.C. 1673(b); *See also* NRS 31.295 which incorporates into state law the Federal Consumer Credit Protection Act calculation.

Office of the Attorney General
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collections on the 102,708 enforcement cases come from income withholding (IW) and a majority of those are on a biweekly pay period basis. If CSEP took Ms. Porsboll's view of the world it would be penalizing all the obligors on IW who are paid on a biweekly pay period with their employers. CSEP must follow the requirements of OCSE and provide collection of child support on a massive scale. Ms. Porsboll's statements show her lack of comprehension and understanding of the reality of working over 150,000 child support cases every day while complying with the myriad of federal requirements. CSEP has numerous other considerations for basing the collection and disbursing of child support payments on a monthly schedule rather than a date specific calculation, but they are not at issue in these proceedings.

Ms. Porsboll is the one who is committing an error by trying to distinguish between non-welfare cases and welfare cases because CSEP is required to offer services to all those individuals, CSTs and NCPs. CSEP does track what it calls public assistance (PA) cases and non-assistance (NA) cases. At the end of August 2009 CSEP has a total case load of 120,182 cases. 60,209 cases are NA, cases that Ms. Porsboll refers to as "family court in non-welfare cases." These cases are subject to the same OCSE regulations for CSEP services as the 59,973 PA cases.[19]

Ms. Porsboll is again in error by her statement that "Welfare had never done either" when talking about the enforcement of interest and penalties before CSEP introduced AB 473 in the 2005 Legislature. CSEP began collecting interest pursuant to statute and regulation on July 1, 2004 and started collecting penalties in January 2005. The 2005 legislature was fully aware of CSEP's interpretation and of CSEP's regulations on the issue. The 2005 Legislature was aware that without any action those regulations would remain in place. Finally, even after four years of CSEP's collection and enforcement of penalties based on its interpretation of NRS 125B.095, the public notice of the regulation process, and the public notice of a legislative fix, no person or entity either within the Legislature or outside the Legislature challenged CSEP's position. This includes challenges by either direct court action or

[19] These figures do not include the non-IVD cases and former IVD cases which is another 32,727 cases.

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Carson City, Nevada 89701-4717

legislation in the 2007 or 2009 Legislature.

Finally, CSEP is an administrative agency tasked with the establishment, collection, and disbursement of child support under federal and state statutes. CSEP is responsible for promulgating regulations pursuant to NRS 425.365 to carry out the functions stated in the last sentence. NRS 125B.095 specifically mentions enforcement by CSEP and as a result CSEP must attempt to harmonize all OCSE's regulation and policy with the requirements in state statute. CSEP did this by passing the regulation which interprets NRS 125B.095 given all the considerations, both federal and state, that constrain and direct CSEP. Therefore, any regulation passed by CSEP is, by law, given deference in the promulgation and enforcement of those regulations, as well as CSEP's interpretation of the statute. *See Oliver v. Spitz*, 76 Nev. 5, 348 P.2d 158 (1960); and also *Cable v. State ex rel. its Employers Insurance Company of Nevada,* 122 Nev. 120, 126, 127 P.3d 528, 532 (2006) (Further, the statutory interpretation of a coordinate governmental branch or an agency . . . is entitled to deference.) CSEP's regulation that interprets NRS 125B.095 cannot be overturned without a finding of arbitrary or capricious action on the part of CSEP. The ability of anyone to prove this point would be difficult at best given the legislative history already discussed herein. Furthermore, since CSEP is not joined as part of this case and is only appearing as an Amicus to inform this Court of its position, the Court has no ability to set aside CSEP's regulation.

CONCLUSION

NRS 125B.095 is ambiguous. At no time does Ms. Porsboll present any objective verified evidence or case law that states otherwise. When a statute is ambiguous, case law requires that courts look to the legislative history to resolve the ambiguity in the statute. Yes, the "per annum" was dropped in CSEP's interpretation because it did not the fit the legislative history or any of the other statutory uses of the phrase "per annum." The application of the "per annum" did not create the extra incentive for the noncustodial parent (NCP) to timely pay in full the monthly child support obligation. A ten percent (10%) penalty on the monthly child support payment will be a proportional penalty that the Legislature intended to get the

Office of the Attorney General
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attention of the NCP on a monthly basis rather than an end-of-year basis. Finally, CSEP's position gives effect to the clear legislative intent of the statute, is correctly linked to implementing the policy of promoting prompt child support payments within the month each payment is due, and is equally proportional in its application of penalizing low income and high income NCPs based on their child support payments.

Ms. Porsboll's assignment of error is misplaced upon the District Court. Ms. Porsboll is the one in error about federal child support law and the legislative history of this statute. The District Court carefully weighed all the pleadings and papers on file and performed its own independent research on these areas before issuing its order. The District Court did make some misstatements about the actual calculation performed by CSEP. However, CSEP agrees with the District Court's broader decision that CSEP's interpretation of NRS 125B.095 and the promulgation of a regulation on that interpretation was rationally based and upheld by the District Court's decision for purposes of calculating penalties against Mr. Vaile. CSEP also agrees with the District Court's decision regarding CSEP's were based on considerations of federal law and OCSE requirements rather than convenience of administration. Finally, CSEP agrees with the District Court that CSEP provided a balanced approach to legislative interpretation of NRS 125B.095.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this amicus brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30th day of September, 2009.

CATHERINE CORTEZ MASTO
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of September, 2009. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

MARSHAL S. WILLICK, ESQ.
3591 E BONANZA ROAD, SUITE 200
LAS VEGAS, NV 89110-2101

I further certify that I served a copy of this document on the 1st day of October, 2009, by mailing a true and correct copy thereof, postage pre-paid, addressed to:

ROBERT SCOTLUND VIALE
P O BOX 727
KENWOOD CA 95452

/s/ *Mary L. Case-Liebhold*
Mary L. Case-Liebhold

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EXHIBIT 1

EXHIBIT 1

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NEVADA DEPARTMENT OF JUSTICE
100 North Carson Street
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BRIAN SANDOVAL
Attorney General

ANN WILKINSON
Assistant Attorney General

October 22, 2004

Nancy K. Ford
Administrator
Welfare Division
1470 East College Parkway
Carson City, Nevada 89706

Dear Ms. Ford:

You have requested an opinion from this office concerning the authority of the Welfare Division, Child Support Enforcement Program (Welfare) under NRS 125B.095(2) to calculate the child support delinquent payment penalty on a monthly basis.

QUESTION

Does the Welfare Division, Child Support Enforcement Program, have authority under NRS 125B.092(2) to calculate the child support delinquent payment penalty on a monthly basis as a one-time late fee penalty?

BACKGROUND

On April 28, 2004, Welfare held a public workshop on the issue of implementing NRS 125B.095 as part of Welfare's automated computer system for the enforcement and collection of child support (automated system). Welfare previously proposed to program the automated system to charge the non custodial parent/obligor (obligor) a one-time late fee for failing to pay the monthly child support obligation on time. Public input was presented that differed from Welfare's interpretation of NRS 125B.095. The public input wanted to treat the penalty as interest on the unpaid monthly child support which would run concurrent with interest allowed under NRS 125B.140. NRS 125B.140 references the calculation of interest presented in NRS 99.040. Implementation of the interpretation advanced as part of the public input would, in effect, create the application of double interest on any late and unpaid child support amounts. If Welfare adopted this version, as urged by public input, it would result in significant increases in the amount of child support judgments that obligors would be required to pay for late and unpaid amounts of child support.

Welfare's automated system is integrated under federal law with various databases and tools to help enforce the collection of child support. These tools include reporting to the Internal Revenue Service for tax refund offsets, financial institutions to collect money in the obligors' banks accounts, and reporting delinquent amounts to credit reporting agencies. These tools for enforcement and others are based on automated system calculations of the interest and penalties applied to accruing child support obligation balances reported in the automated system. Welfare's balances will be greatly impacted with the implementation of interest and penalties and thus greatly impact the obligors' financial stability and ability to pay off the automated system's balances. The public input position would further increase the financial burdens to the obligors and create unintended results.

ANALYSIS

NRS 125B.095 states:

> 1. Except as otherwise provided in NRS 125B.012, if an installment of an obligation to pay support for a child which arises from the judgment of a court becomes delinquent in the amount owed for 1 month's support, a penalty must be added by operation of this section to the amount of the installment. This penalty must be included in a computation of arrearages by a court of this state and may be so included in a judicial or administrative proceeding of another state.
> 2. 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. [Emphasis added.]

The operative phrase in this statute that must be given effect is: "or portion thereof." Case law clearly requires that all words in the statute must be given meaning, and therefore, Welfare and this Office need to make a determination about how this phrase operationally affects the remainder of the statute. *See Building Constr. Trades v. Public Works,* 108 Nev. 605, 610, 836 P.2d 633, 636 (1992) (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 plain meaning to all of its parts).

The operative phrase's importance can only be measured by reviewing the language that it appears to modify. The phrase "per annum" appears before the operative phrase and is a common financial expression used in place of "per year." The Nevada Revised Statutes (NRS) uses the phrase "per annum" at least 95 times. The phrase's common use is connected to the calculation of interest on a sum of money;

however, there are references in the NRS relating it to water allocations per year. *See* chapter 538 of the NRS. The "per annum" phrase, when used in the financial context throughout Nevada Statutes, stands alone without any modifying phrase, with NRS 125B.095(2) as the only exception. In all these references, except NRS 125B.095(2), there is no subsequent phrase "or portion thereof." Therefore, the "per annum" phrase by itself must be construed differently than "per annum, or portion thereof."

If Welfare were to construe these two different phrases as the same, it would deny the existence of the operative phrase "or portion thereof." *See One 1978 Chevrolet Van v. County of Churchill*, 97 Nev. 510, 512, 634 P.2d 1208, 1209 (1981) (no part of a statute should be rendered nugatory, nor any language turned to mere surplusage); *Orr Ditch & Water Co. v. Justice Court*, 64 Nev. 138, 153, 178 P.2d 558, 565 (1947) (construction which will leave every word operative will be favored over one which leaves some word or provision meaningless); *State ex rel. City of Las Vegas v. County of Clark*, 58 Nev. 469, 481, 83 P.2d 1050, 1054 (1938) (every word and clause in an act must be given effect if possible and none rendered meaningless by over-nice construction); *State v. Carson Valley Bank*, 56 Nev. 133, 145, 47 P.2d 384, 388 (1935) (must give meaning to all words). If Welfare gives effect to the operative phrase "or portion thereof," the question becomes how would "or portion thereof" affect the common usage of "per annum?"

The common usage of "per annum" means "by the year"[1] and in the common application means a fractional interest calculation to be applied to the sum of money. If NRS 125B.095(2) read: "[t]he amount of the penalty is 10 percent per annum that the installment remains unpaid," Welfare would be required to give affect to the plain meaning of "per annum," as it is in the other 92 financial references in the NRS, which is "by the year." *See Worldcorp v. State, Dep't Tax.*, 113 Nev. 1032, 1036, 944 P.2d 824, 826 (1997) (when statutory language is clear on its face, its intention must be deduced from such language); *Arnesano v. State, Dep't Transp.*, 113 Nev. 815, 820, 942 P.2d 139, 142 (1997) (in construing a statute, this court must give effect to literal meaning of its words). However, the modifying operative phrase "or portion thereof," which is only used in NRS 125B.095(2) and must be given effect, demonstrates a different meaning and legislative intent.

The expression "or portion thereof" in the ordinary meaning would refer to "some part of the aforementioned unit." However, as previously stated the common usage of "per annum" already entails the utilization of a fractional interest calculation to determine an annualized per month interest charge on a sum of money. To answer Welfare's request, we must determine what part of what unit is the operative phrase meant to apply to in order to not render "or portion thereof" mere surplusage in the statute. *See One 1978 Chevrolet Van*, 97 Nev. at 512.

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[1] BLACK'S LAW DICTIONARY, ____ (5th ed. 1979); WEBSTER'S ONLINE DICTIONARY (September 8, 2004), at www.webster-dictionary.org.

Does the operative phrase apply to the calculation of the interest rate, which construction would render it surplusage, or the unpaid balance of the monthly child support obligation? Welfare declared in the public hearing that it was unable to discern, with certainty, that the plain reading of the language "or portion thereof" applies to the calculation of the interest rate or the unpaid balance of the monthly child support obligation. This Office agrees based on the foregoing analysis and case law. This ambiguity renders the language vague and requires a review of the legislative history to determine the intent for the operative phrase "or portion thereof." *See Polson v. State*, 108 Nev. 1044, 1047, 843 P.2d 825, 826 (1992) (when a statute is capable of being understood in two or more senses by reasonably informed persons, the statute is ambiguous, and the plain meaning rule has no application. . . . An ambiguous statute can be construed in line with what reason and public policy would indicate the legislature intended).

The legislative history of NRS 125B.095(2) is clear that this provision was intended to be applied as a penalty and not as an additional interest charge on the unpaid sums of child support. During the 1993 Nevada Legislative Session, the Assembly Committee on Judiciary heard and took testimony many times on A.B. 604, the bill that created NRS 125B.095(2). *See* Act of June 30, 1993, ch. 344, §§ 1 – 5, 1993 Nev. Stat. 1030. In the Legislative Counsel Bureau's Summary of Legislation on A.B. 604, Chairman Sader stated "he was concerned with the issue of charging interest . . . He believed this should be a penalty provision in addition to any interest which might be owed." *See Hearing on A.B. 604 Before the Assembly Committee on Judiciary, 1993 Leg., 67th Sess. 17* (June 4, 1993). Chairman Sader's intent was stated as "an intent to create a penalty." *Id.* The Assembly Committee's final hearing on A.B. 604 contained a discussion concerning the deletion of interest and reinstating the original per annum penalty. *See Hearing on A.B. 604 Before the Assembly Committee on Judiciary, 1993 Leg., 67th Sess. 7* (June 5, 1993). A.B. 604 was passed out of committee with the "per annum" change in NRS 125B.095(2).

The "or portion thereof" was present in the bill at the time the Assembly Judiciary Committee passed the bill out of committee. The Assembly then voted on the Committee's amendment and passed the bill out the Assembly to the Senate. *See Journal of the Nevada State Assembly, 1993 Leg., 67th Sess. 1119* (June 11, 1993). The Honorable Assemblyman William A. Petrak, the sponsor of A.B. 604, opened the Senate Committee on Judiciary with testimony by the Nevada Attorney General's Office stating that the number of child support cases that were "current in payments" were only about one out of every four cases. *See Hearing on A.B. 604 Before the Assembly Committee on Judiciary, 1993 Leg., 67th Sess. 16* (June 23, 1993); *see also* Exhibit D to *Hearing on A.B. 604 Before the Assembly Committee on Judiciary, 1993 Leg., 67th Sess.* (June 23, 1993). Chairman Sader then testified the intent of the Assembly Committee was to have A.B. 604 deal with late payments of child support. Chairman Sader stated: "It should be clear in statutes that there is a penalty for not paying on time. You want to motivate somebody to pay on time and have an enforceable penalty

. . . that is what this is about." *Id.* at 17. Chairman Sader continued this idea of a penalty in additional responses to questions. Chairman Sader said "the purpose of the penalty was intended to be 'motivational,' such as **a late payment fee attached to any billing**." *Id.* at 17 (emphasis added). The full text of the comments of Honorable Frankie Sue Del Papa, listed as Exhibit D to *Hearing on A.B. 604 Before the Assembly Committee on Judiciary, 1993 Leg., 67th Sess.* (June 23, 1993), demonstrated the analogy of a late payment fee as a motivator for other bills and therefore should be one for child support. *Id.* The full Senate voted on A.B. 604 with no amendments to change the language of the bill or otherwise change the intent described in the previous testimony.

Therefore it is clear the legislative intent was to create a "late payment fee" that would be proportional to the child support being paid late. The operative phrase "or portion thereof" was meant to apply to obligors who didn't pay their full child support obligation when due and subject them to a penalty. The drafting of this language in the statute is admittedly imprecise, but in order to give effect to the intent of the legislators that voted for this statute, it is clear they intended this to be a monthly late fee applied to late monthly support obligations. *Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 81 P.3d 532, 534 (2003) (if a statute "is ambiguous, the plain meaning rule of statutory construction" is inapplicable, and the drafter's intent "becomes the controlling factor in statutory construction." An ambiguous statutory provision should also be interpreted in accordance "with what reason and public policy would indicate the legislature intended."); *Sandoval v. Bd. of Regents*, 119 Nev. 148, 67 P.3d 902, 905 (2003) (if the statutory language is ambiguous or does not address the issue before us, we must discern the Legislature's intent and construe the statute according to that which "reason and public policy would indicate the legislature intended.") In giving effect to the intent of the Legislature, the statue be interpreted to provide that the amount of the penalty is 10 percent of the installment, or portion thereof, that remains unpaid. To conclude otherwise would be to ignore the uniqueness of the operative phrase "or portion thereof" and ignore the clear intent of those legislators that voted for this bill. *See Universal Electric v. Labor Comm'r*, 109 Nev. 127, 131, 847 P.2d 1372, 1374 (1993) (intent of a statute will prevail over the literal sense of its words); *State Dep't of Mtr Vehicles v. Lovett*, 110 Nev. 473, 477, 874 P.2d 1247, 1250 (1994) (statutes are generally construed with a view to promoting, rather than defeating, legislative policy behind them).

CONCLUSION

NRS 125B.095(2) must be read to give effect to all the language contained in the statute. The operative language "or portion thereof" renders NRS 125B.095(2) subject to at least two or more interpretations concerning what the operative phrase above is attempting to modify in this statute. NRS 125B.095(2) is ambiguous and subject to differing applications of the words contained in that statute. The clear legislative intent was to create a monthly penalty for failing to timely pay the full monthly child support

obligation. The intent and the Legislature's sound public policy of motivating obligors to pay all their current child support obligation in a timely manner must be given effect over the unreasonable and unintended result of double interest on total arrearages owed by an obligor.

Based on all of the foregoing analysis and case law, it is the opinion of this office, Welfare has authority under NRS 125B.092(2) to calculate the penalty on a monthly basis as a one-time late fee penalty.

Sincere regards,

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* The following Nevada Revised Statutes contain the phrase "per annum":

NRS 21.025; NRS 62B.110; NRS 62B.130; NRS 81.020; NRS 81.120; NRS 106.020; NRS 106.025; NRS 107.030; NRS 116.31031; NRS 120A.450; NRS 125B.095; NRS 248.160; NRS 269.110; NRS 269.115; NRS 271.460; NRS 271.487; NRS 280.340; NRS 282.170; NRS 287.180; NRS 318.202; NRS 324.200; NRS 340.160; NRS 355.060; NRS 361.420; NRS 361.425; NRS 361.5648; NRS 361.570; NRS 363A.210; NRS 363B.200; NRS 365.480; NRS 366.680; NRS 368A.310; NRS 372.695; NRS 374.700; NRS 375A.490; NRS 396.890; NRS 397.063; NRS 397.064; NRS 397.0653; NRS 408.357; NRS 423.210; NRS 449.163; NRS 450.420; NRS 463.520; NRS 463.568; NRS 463.5734; NRS 463.605; NRS 463.635; NRS 489.4981; NRS 489.4983; NRS 522.113; NRS 533.115; NRS 548.450; NRS 548.455; NRS 645.848; NRS 681B.120; NRS 681B.130; NRS 688A.060; NRS 688A.190; NRS 688A.220; NRS 688A.240; NRS 688A.250; NRS 688A.320; NRS 688A.325; NRS 688A.330; NRS 688A.340; NRS 688A.363; NRS 690A.200; NRS 690A.210; NRS 690A.220; NRS 693A.180; NRS 705.160;NRS 706.586; NRS 710.159;

EXHIBIT 2

EXHIBIT 2

If the initiating jurisdiction does not wish to have the order registered in Nevada, Nevada will only enforce the foreign support order through wage withholding under NRS 31A.220. Nevada will no longer enter a URESA order mirroring the support obligation for the initiating state.

615 PENALTY AND INTEREST

A. 10% PENALTY PROVISIONS (State Regulation Effective January 19, 2005)

Per NRS 125B.095, if an installment of an obligation to pay support (including payment in lieu of medical insurance) for a child, subject of a Nevada controlling order, becomes delinquent in the amount owed for one month's support, a penalty of 10% will be added to the unpaid installment or portion thereof. The penalty is assessed monthly on the amount of current support due but not received by the agency during the month. The penalty will be assessed from the date the statewide computer system initially assesses the penalty forward. Any office may calculate penalty for a period prior to the date the statewide computer system assesses the penalty according to office procedures.

Pursuant to federal regulations, arrearage calculations will be determined and maintained separately as principal, interest and penalty. Penalties will not be reported to the federal office of child support enforcement as an arrearage or enforced by federal tax offset. Money collected as penalty will be paid to the custodian in compliance with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) distribution rules and state regulation.

1. CALCULATION

NOMADS will calculate the penalty at month end. For instance, if the current child support obligation is $100 and the total arrearages due exceeds $100 per month, if the obligor did not make a payment during the month, the case will be assessed a $10 penalty. If the same obligor then made payments totaling $50 in the next month, the case will be assessed a $5 penalty for the next month. This penalty will be assessed for all unpaid or partially paid installments. When there is no longer an arrearage balance equivalent to a full installment for one month, the penalty shall not be assessed. See chart below.

2. CONTROLLING ORDERS/JURISDICTION

The penalty will be assessed when the Nevada order is the controlling order. If the penalty is the only amount remaining unpaid, and a responding jurisdiction chooses not to enforce the penalty as calculated by the Nevada Child Support Enforcement Program, the case manager may elect to enforce without the assistance from the other state or review to determine if the case meets closure criteria.

3. DISTRIBUTION HIERARCHY

Penalty money will be distributed in accordance with federal and state distribution rules. See Child Support Manual Section 704.2. The entire penalty will be passed through to the custodian. No penalty money will be assigned to the state.