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: 98-D-230385-D

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT[1]

Pursuant to NRS 3.223, the family court in Clark County has original, exclusive jurisdiction in any proceeding brought pursuant various statutory chapters, including NRS ch. 130. Jurisdictionally, this dispute came before a Nevada District Court because Scot chose Nevada in which to file papers calling for the payment of child support.[2]

Pursuant to NRAP 3A(b)(1), appeals may be taken from the final order in a proceeding commenced in District Court. This Court is the sole appellate court for the district courts, and has subject matter jurisdiction to review the final decisions of those courts, including the *Findings of Fact, Conclusions of Law, Final Decision and Order Re: Child Support Penalties NRS 125B.095*, filed April 17, 2009.[3]

Scot filed his *Complaint for Divorce* on August 7, 1998.[4] Summary disposition was granted August 10, 1998, by Judge Steel; the *Decree of Divorce* was filed on August 21, 1998,[5] and *Notice of Entry of Order* was filed and served by mail on August 26, 1998.[6] These parties have been in essentially continuous litigation since the children were recovered in 2002; however, most of the tortuous history after this Court's *Opinion* ordering return of the abducted children is irrelevant here.[7]

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[1] Although the *Notice of Appeal* in this action was filed prior to July 1, 2009, the headings, style, etc. of the brief have been conformed to the new rules.

[2] Under NRS 130.201, there are independent and alternative bases for exercising child support jurisdiction over an obligor, including, per NRS 130.201(2), "Submission by the obligor to the jurisdiction of this State by consent, by entering a general appearance or filing a responsive document having the effect of waiving any contest to personal jurisdiction."

[3] AAP Vol 2, pgs CAV00376-CAV00399.

[4] AAP Vol 1, pgs CAV00001-CAV00027.

[5] AAP Vol 1, pgs CAV00031-CAV00060.

[6] AAP Vol 1, pgs CAV00061-CAV00089.

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

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The *Order* appealed from, containing a N*otice of Entry*, was filed April 17, 2009. The *Notice of Appeal* was filed May 6, 2009, pursuant to NRAP 4(a)(1).

On November 14, 2007, Cisilie filed her *Motion to Reduce Arrears in Child Support to Judgment [etc.]*[8] The first partial *Order* on Cisilie's *Motion* was issued January 15, 2008.[9] After a number of hearings, purported appeals,[10] and various motions, the district court rendered its *Findings of Fact, Conclusions of Law, Final Decision and Order*, addressing most issues on October 9, 2008, but reserving a ruling on the issue of penalties.[11]

On April 17, 2009, the court issued it's *Findings of Fact, Conclusions of Law, Final Decision and Order Re: Child Support Penalties NRS 125B.095*.[12] This was the last order, and disposed of the final matters pending from the time of Cisilie's original motion filing.

STATEMENT OF THE ISSUES

1. Whether the lower court erred in finding NRS 125B.095 to be ambiguous.

2. Whether the lower court erred in finding it more appropriate to use the methodology used by the State Welfare Department, rather than the methodology employed by the private Bar, for calculating penalties on arrears of child support.

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[8] AAP Vol 1, pgs CAV00090-CAV00122.

[9] AAP Vol 1, pgs CAV00134-CAV00124.

[10] This Court has already dismissed virtually all of the spurious "appeals" and writ petitions Scot filed from the district court's various interlocutory orders; the last of those filings are now being considered by this Court for dismissal.

[11] AAP Vol 2, pgs CAV00344-CAV00372.

[12] AAP Vol 2, pgs CAV00376-CAV00399.

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STATEMENT OF THE CASE

Appeal from *Final Decision and Order Re: Child Support Penalties NRS 125B.095*, by the Hon. Cheryl B. Moss filed April 17, 2009, making a determination that NRS 125B.095 is ambiguous and subject to different interpretations, and that penalties on child support arrears should be calculated under the methodology used by the State Welfare system since 2005, rather than that used by the private Bar for the past fifteen years.

This appeal followed.

STATEMENT OF FACTS

A complete recitation of the lengthy procedural history of this case is set out in the district court's orders, *Findings of Fact, Conclusions of Law, Final Decision and Order* filed October 9, 2008,[13] and *Findings of Fact, Conclusions of Law, Final Decision and Order Re: Child Support Penalties NRS 125B.095* filed April 17, 2009.[14] That history is largely irrelevant to the issue of statutory interpretation presented by this appeal.

In the interest of judicial economy, this Statement of Facts will be confined to events commencing with the initial *Motion to Reduce Arrears In Child Support to Judgment* filed November 14, 2007, and the resulting hearings of June 11 and July 11, 2008, which are relevant to the issues before the Court. The additional spurious filings in this case by Scot are the subjects of Supreme Court Case Nos. 51981, 52457, 52244, 52593, and 53687, and are not relevant to this appeal.

On November 14, 2007, Cisilie filed her *Motion to Reduce Arrears In Child Support to Judgment [etc.]*, in an attempt to force collection of long past due child support payments.[15]

On June 11, 2008, a hearing was held on Scotlund's *Motion For Reconsideration and To Amend Order [etc.]*, along with various other of his motions and Cisilie's *Oppositions*. There, for the first time, issues were raised by Scot as to the correct methodology of calculating interest

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[13] AAP Vol 2, pgs CAV00345-CAV00348.

[14] AAP Vol 2, pgs CAV00378-CAV00381.

[15] AAP Vol 1, pgs CAV00090-CAV00122.

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and penalties.[16] The court directed the parties to file supplemental points and authorities on the issue of child support penalties.

On July 9, 2008, the Attorney General for the State of Nevada submitted to the court a *Friend of the Court Brief.*[17]

On August 1, 2008, Scotlund filed his *Supplemental Brief Re: Child Support Principal, Penalties, and Attorney Fees.*[18]

On August 14, 2008, Cisilie filed her *Supplemental Brief on Child Support Principal, Penalties, and Attorney's Fees.*[19]

On September 5, 2008, the Attorney General for the State of Nevada filed a *Supplemental Friend of the Court Brief.*[20]

On October 9, 2008, the district court issued its *Notice of Entry of Findings of Fact, Conclusions of Law, Final Decision and Order.*[21]

On April 17, 2009, the district court issued its *Notice of Entry of Findings of Fact, Conclusions of Law, Final Decision and Order Re: Child Support Penalties NRS 125B.095.*[22]

This appeal followed.

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[16] AAP Vol 2, Excerpts of Transcript, pgs CAV00468-CAV00472.

[17] AAP Vol 1, pgs CAV00154-CAV00170.

[18] AAP Vol 1, pgs CAV00196-CAV00234.

[19] AAP Vol 2, pgs CAV00238-CAV00283.

[20] AAP Vol 2, pgs CAV00284-CAV00338.

[21] AAP Vol 2, pgs CAV00344-CAV00372.

[22] AAP Vol 2, pgs CAV00376-CAV00399.

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ARGUMENT

I. THE STANDARD OF REVIEW

This appeal purely concerns a question of statutory construction. This Court need not defer to the trial court's reading of the statute, but instead considers the question *de novo*.[23]

II. SUMMARY OF ARGUMENT

To encourage child support obligors to actually pay child support, the Nevada Legislature has long imposed statutory interest on child support arrears due but unpaid. In 1993, the Legislature added a "penalties" provision, effective as of 1995, under which an obligor who did not pay child support when due would also owe a penalty of "10 percent per annum, or portion thereof, that the installment remains unpaid."

The private Bar began calculating and the family court has been imposing penalties since 1995. If a penalty is owed for less than a year, only a fraction of the annual penalty was assessed; if outstanding for multiple years, multiple annual penalties were applied for as long as installments remained unpaid.

The district attorneys' offices were divided. The Washoe County D.A. calculated interest the same way the private Bar did, but did not calculate penalties. The Clark County D.A. did not calculate or impose interest ***or*** penalties, despite the statutory mandates to do both. Nevada Welfare consolidated the various D.A. Offices under its effective control.

In 2003, the Nevada Legislature demanded that Welfare begin calculating and collecting interest and penalties per law. 18 years after they were supposed to be collecting interest, and 10 years after they were supposed to be collecting penalties, Welfare got its outdated NOMADS computer system to roughly calculate interest (using months instead of days), and to calculate a non-recurring "penalty" of 10% of an unpaid installment of support in a single lump sum.

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[23] *See Irving v. Irving*, 122 Nev. 494, 134 P.3d 718 (2006); *Carson City District Attorney v. Ryder*, 116 Nev. 502, 998 P.2d 1186 (2000); *State, Dep't Taxation v. McKesson Corp.*, 111 Nev. 810, 896 P.2d 1145 (1995); *Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 877 P.2d 1032 (1994).

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In 2005, Welfare asked the Legislature to amend the law to allow it to impose the full annual penalty in a single lump sum the first month support was overdue, as that is what NOMADS could calculate; the Legislature refused. Welfare implemented its calculation methodology anyway, and began collecting penalties, obtaining a letter from a deputy Attorney General that such was permitted under the "ambiguous" penalties statute.

That same deputy chose to interpose himself in this case, upon request by Scot, writing a "Friend of the Court" brief on Scot's behalf. Based on misinformation supplied by Welfare, and a number of factual and legal errors, the family court ruled that the Welfare method of calculating child support penalties should be used in family court.

III. HOW CHILD SUPPORT PENALTIES ARE CALCULATED

A. History

1. Background and Cast of Characters

Multiple persons, agencies, and entities appear in the record, and in the discussion below. This section is intended to allow the Court to follow more easily who did what, and why.

This Court's 2002 decision in *Vaile*[24] provided for the recovery of two children who had been spirited out of Norway by Scot to the United States. Scot stopped paying child support when he kidnaped 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 lavish lifestyle.[25]

Greta Muirhead, Esq., is Scot's on-again, off-again attorney, who appeared intermittently at some but not all of the family court hearings, claiming each time to be in an "unbundled" capacity, and so appears at some places in the transcripts and this brief.

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

[25] AAP Vol 2, pgs CAV00351, CAV00356.

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Cisilie is the mother of the two kidnaped children, who received no child support from April, 2000, until the District Attorney finally began collecting some money from Scot by wage garnishment in July, 2006.[26]

After enormously protracted proceedings, counsel for Scot finally conceded the principal sum of child support arrearages ($118,369.96),[27] and the interest on that principal ($45,089.27),[28] but the amount of the child support penalty remained in dispute.[29]

Until about ten years ago, the various County District Attorney Offices operated independently, until political consolidation within the Nevada Welfare bureaucracy brought the District Attorneys of the various counties under the effective control of the Welfare Division. Thereafter, the State of Nevada, Division of Welfare and Supportive Services, Child Support Enforcement Program ("CSEP") has contracted with various District Attorneys' Offices to provide child support services as required under Title IV-D.

Ed Ewert, Esq., and Robert Teuton, Esq. (now the Hon. Judge Teuton) were supervisory attorneys in the Clark County District Attorney's Office, invited by Judge Moss to attend a hearing and explain how the D.A. actually calculates child support arrearages.

The original Pro Bono Project was an independent organization of attorneys dedicated to securing legal representation for the poor. In 2000, it was merged into Clark County Legal Services ("CCLS").[30]

The history of how the private Bar and state agencies approached child support arrears, interest, and penalties, is intertwined. Accordingly, while this appeal is solely concerned with penalty calculations, enough of that history to show what happened and why is set out below.

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[26] AAP Vol 2, pg CAV00362.

[27] AAP Vol 2, pgs CAV00364, CAV00467.

[28] AAP Vol 2, pgs CAV00364, CAV00467.

[29] AAP Vol 2, pgs CAV00380-CAV00381.

[30] Now called the Legal Aid Center of Southern Nevada.

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2. Interest Law

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.[31]

The Nevada Legislature amended the legal rate of judgment interest statutes – NRS 17.130(2) and NRS 99.040 – repeatedly in the 1970s and 1980s in reaction to changing inflation. 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 itself was devoid of details as to precisely how such calculations were to be done, but some instructions were supplied by this Court's decisions before and after the statutory change.[32]

Few family law attorneys calculated interest, and those who did either developed spreadsheets, or hired accountants 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.

This led to significant variability in whether, how, and how much interest was applied to judgments in Nevada family law cases. The multiple changes to applicable interest rates also made the calculations technically difficult. Since installments of pre-July, 1987, arrears had a "fixed" interest rate, while post-July, 1987, arrears "floated," the number of changes in every calculation increased every six months.

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[31] 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.")

[32] The cases are collected and analyzed in Marshal Willick, *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); posted at http://www.willicklawgroup.com/published_works.

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Spreadsheets required separate columns tabulating interest for each "class" of arrearage, to determine when each individual dollar of arrears was paid. They grew increasingly complex and difficult to follow after the 1987 amendments.[33]

3. Interest Calculations by the Private Bar and State

Following this Court's directions to calculate interest from and to specific dates,[34] the private Bar has always calculated interest on a daily basis. The Clark County District Attorney's legacy mainframe computer system – NOMADS[35] – was set up originally many years ago to operate and report on a monthly batch cycle, and had ***no*** provision to calculate or track interest.[36]

There were some variations between what public agencies and private attorneys did that could create differences when interest was being calculated. The IV-D program rules required application of payments to present support first, but Nevada case law required application of payments to the oldest arrearage first.[37]

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

[34] *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").

[35] For Nevada Online Multi-Automated Data Systems. NOMADS was set up many years ago in an archaic programming language apparently not currently in use anywhere. There is apparently no adequate documentation of the previous programming work, making any change of any kind in the input, workings, or output of the existing patch-work require lengthy efforts by large numbers of people.

[36] *See* AAP Vol 2, pge CAV00308, at which, in 2003, Assemblywoman Buckley demands that Welfare create an incentive to actually pay child support by calculating and collecting penalties and interest, and Deputy District Attorney Hatch responds that NOMADS just could not do so.

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

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This difference in first application 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 applied altered the total owed.

So even on identical facts, different arrearages would be calculated by the D.A.s than by the private Bar and family courts. 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.

As detailed in various of this Court's opinions, the purpose and function of statutory interest is to compensate the claimant for the use of money from the time the cause of action accrues until the time of payment.[38] In other words, even when interest is actually calculated on behalf of 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.

B. Calculating Penalties

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. Testifying before the Senate Judiciary Committee on AB 604, then-Attorney General Frankie Sue Del Papa summarized the thinking on this proposal:[39]

> The imposition of a 10% penalty for delinquent payments will give teeth to enforcement provisions already in place and will serve as an incentive for parents to remain current on monthly support obligations. It is a disappointing reflection of our society's priorities that other debt obligations – from delinquent power bills to late credit card payments – are assessed late fees and penalties, yet missed child support payments are not, reducing such payments to less of an obligation than paying off a credit card.

The legislation ultimately became the "penalties provision," NRS 125B.095:

> 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

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

[39] AAP Vol 1, page CAV00213.

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> State undertaking to enforce an obligation to pay support for a child shall enforce the provisions of this section.[40]

The scant legislative history of the provision was examined in the hearings below, but it is silent as the precise mechanics of how the penalty calculation should be done, and so that history is not discussed much in this brief.

More problematic below was the persistent quotation of various representatives of the Welfare system from hearings in ***later*** years when they sought to amend the statute to comply with their methodology, and the Legislature refused to do so. First, as the United States Supreme Court has cautioned, "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress."[41] Second, legislative "inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction . . . ."[42]

That is why the A.G.'s 2005 use of the term "one-time penalty" is irrelevant to the meaning of a statute written in 1993; that term does not exist in the legislative history of the actual statute, but was made up later by Welfare as a rationalization. Unfortunately, the court below did not pick up on that fact, which was part of the lower court's confusion leading to error.[43]

The private Bar began applying the penalty in 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 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

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

[41] *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

[42] *United States v. Novak*, 476 F.3d 1041 (9th Cir. 2007) at 1987, quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)).

[43] AAP Vol 2, pgs CAV00382 & CAV00391-CAV00392.

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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 then by the number of years "or portion thereof" the installment had 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. If it still remained unpaid the next month, another such penalty accrued, and so forth. After a year, the penalty assessed would be $50. Throughout the 1990s, such penalty calculations were done by spreadsheet and submitted as exhibits to child support arrears motions.[44] Apparently, every judge in Nevada who ever heard a child support motion where a penalty was so calculated approved the reasoning, methodology, and totals, over all objections that were 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., despite repeated urging year after year by the original Pro Bono Project, and then CCLS, on behalf of the mostly poor people dependent on the D.A. for collection of child support.[45] Despite the statutory mandate to compute and collect penalties and interest, the D.A.'s Office repeatedly stated that it would not do so because NOMADS was incapable of performing the calculation.

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, without any visible result from 1993 to 2003.

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

[45] 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.

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C. Welfare's Calculation Process

The 2003 Legislature "advised" CSEP to implement penalties as part of the collection of child support.[46] CSEP indicated that it found NRS 125B.095 to be ambiguous, and requested a legal opinion on the interpretation from the Attorney General's Office.[47]

What Welfare proposed in 2004 was to assess a single lump-sum 10% 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 one-time, month-end calculation.

Welfare's proposed policy Manual contained several mathematical, factual, logical, and other errors.[48] It became clear that Welfare would do only what NOMADS was capable of doing, irrespective of logic or consequences. As explained by Deputy District Attorney Ed Ewert in his revision and expansion of the Child Support section of the Nevada Family Law Practice Manual:[49]

> **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. So, in 2004 a request was made by Administrator Nancy Ford 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?"

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[46] AAP Vol 1, pg CAV00155 (recounted history by the Attorney General's Office).

[47] AAP Vol 1, pgs CAV00163-CAV00168.

[48] The Manual as it existed in 2006 was circulated – the mathematical errors in the guidance chart that had been identified in 2004 were not corrected, at least as of that time; even the principal sums outstanding were not correctly tabulated (the $1,200 listed for May, 2004, should be $1,100). AAP Vol 2, pg. 267 (Exhibit 1 of Defendant's Supplemental Brief on Child Support Aug. 14, 2008).

[49] 2008 edition, at § 1.165.

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Essentially, Welfare asked the Deputy A.G. for legal cover to interpret the statute to permit calculations in a manner that ***just happened*** to be what the archaic NOMADS computer system was capable of providing. The Welfare methodology had nothing to do with the legislative direction ten years earlier to actually calculate the penalty.

On October 22, 2004, the Welfare Division obtained a letter[50] 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.

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 2004 "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 – at least in the first couple of years an arrearage accrues.

The Welfare method of calculation assesses an entire ***year's*** penalty on the first day of the first month that a 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, has always calculated the penalty in accordance with how much time 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 that are set out in the Welfare Division's Manual.[51] Over the same one-year time period as the sample in the Manual,

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[50] AAP Vol 1, pgs CAV00163-CAV00168. 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.

[51] AAP Vol 2, pg. 267 (Section 619-620 of the Division of Welfare and Supportive Services Support Enforcement Manual (MTL 1/06, 1 Jan 06)).

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the private Bar calculates a total penalty (as of 12/31/04) of $85.90.[52] 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."

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

D. Welfare's Critical Error

The Attorney General's "Friend of the Court" brief[53] is an exercise in sophistry.[54] 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 brief 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 brief and 2004 opinion letter it incorporates concludes that since the precise phrasing of NRS 125B.095 appears nowhere else in the NRS,

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[52] AAP Vol. 2, pgs CAV00238-CAV00283. See page CAV00269, copy of the calculation using the data of page CAV00267. The Arrears Balance Total on the Division of Welfare's table is incorrect and should have been $500, by simple addition. Welfare's "Interest Accrued" is $117.00 – in reality, it is $56.63. The Total due under the Welfare methodology is $947 as opposed to the $642.53 that is ***actually*** due if the basic math is done correctly. The Welfare error in interest is attributing an interest rate of 10 & 12% when, in actuality, the interest rate was actually 6% from July, 2003, to June, 2004, and 6.25% from July 2004 to December 2004. There is no "arguing" on this point – the Welfare example in their manual is just wrong – mathematically and factually. It literally "does not add up." Ironically, this has the effect of disguising their logic errors under their math errors.

[53] AAP Vol 1, pgs CAV00154-CAV00170.

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

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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.

In actuality, and as the lower court found,[55] 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. Rather, this Court has repeatedly held that "no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided."[56]

An entire calculation methodology based on the phrase "or portion thereof" eviscerates 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***.[57] And "remains unpaid" also means what it says – the penalty is to be based on child support arrears that remains outstanding, for the length of time that it ***remains*** outstanding.

E. Welfare's Flawed Analogy

At several points, the 2004 opinion letter, as well as the "Friend of the Court" brief, cited to the legislative intent to analogize the statutory penalty to "a [commercial] late payment fee as a motivator for other bills."[58] That analogy does not support a one-time-only penalty assessment.

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[55] AAP Vol. 2, pgs CAV00389-CAV00390.

[56] *See, e.g., Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).

[57] This point is ***so*** obvious that even Ms. Muirhead was obliged to concede the point that a penalty must be applied annually. AAP Vol. 2, pg CAV00447-CAV00449.

[58] AAP Vol 1, page CAV00167.

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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.[59]

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 just 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.[60] 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.

This Court should find 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.[61]

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

[60] AAP Vol 1, pg CAV00167. 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." The citation is correct, but the Welfare methodology is counterproductive, and thus fatally flawed.

[61] *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).

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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 – should be rejected out of hand.

F. Welfare's Attempt to Conform the Law to Error

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 hearing 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 the prior 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 altering public policy and

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> 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.[62]

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.[63]

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

A. Background

Well over $100,000 of principal arrearages in child support accrued from 2000 to 2008, and Cisilie sought to reduce to judgment the principal, interest, and penalties accrued during that time. Ms. Muirhead contacted the Attorney General's office and solicited a "Friend of the Court" brief to buttress Scot's contesting of the massive arrears accrued during that time. For reasons commented upon below, the Attorney General's Office agreed.

Also, representative of the Clark County District Attorney's Office appeared in court to explain the methodology of the how the D.A. computes penalties.[64]

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

The brief, dated July 9, 2008,[65] repeated most of the errors and mis-statements discussed above, and made several new errors. It recast the 2004 request for legal cover as "a legal opinion on the interpretation of NRS 125B.095."[66] It similarly recast the 2005 effort to gut the penalties

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[62] AAP Vol 2, pgs CAV00324-CAV00325.

[63] 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.

[64] AAP Vol 2, pgs CAV00405-CAV00414.

[65] AAP Vol 1, pgs CAV00154-CAV00170.

[66] AAP Vol 1, pg CAV00155.

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statute as a proposal to insert "clarifying language," and labeled the rejection of that effort as the Legislature "taking no action."[67]

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.[68] The fact that Welfare had never actually assessed or collected a penalty as of 2005, and that the question of approving or criticizing Welfare's methodology was not before the Legislature in 2005, or at any time since, was not mentioned.

Hypocritically, the A.G.'s brief ***simultaneously*** asserted that Legislative inaction to change the statute, having been informed of how the Bench and Bar had been doing interest and penalty calculations for decades, was meaningless.[69]

After repeating the inaccurate analogy to late fees charged 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.[70] In fact, the number is $66.62. Welfare would have blindly assessed annual penalties on the same arrearage of $120 over 12 months.[71]

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[67] AAP Vol 1, pg CAV00156.

[68] AAP Vol 1, pg CAV00156.

[69] AAP Vol 1, pgs CAV00157-CAV00158.

[70] AAP Vol 1, pg CAV00158.

[71] AAP Vol 1, pgs CAV00163-CAV00168. The brief also falsely asserted what the effect of a second year of payments due but unpaid would be, 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.

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The A.G.'s brief never even attempted to compare any calculations of the interest and penalties that would actually accrue in the *Vaile* case. 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."[72]

Why Welfare would bother to take a stand in a case that did not affect it in any way is discussed below. But even a casual reading of the brief reveals that it is not much more than a personal attack on undersigned counsel, for having dared to identify publicly the deficiencies of the Welfare NOMADS calculation methodology.

C. Actual Calculation Differences – the Irony of Arguments Made in Ignorance

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 in excess of $100,000.

Remarkably, the difference in ***interest*** calculations over the eight-year time period, between NOMADS and a standard MLAW calculation, was only some $52.46. 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 batch calculation, making the actual date of any payment invisible and irrelevant if received anywhere within a month. The private Bar – like every other organization doing financial calculations – has always calculated all arrearages on a ***daily*** basis, so earlier-received

[72] AAP Vol 1, pg CAV00159.

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payments are credited earlier and the arrears accrue less interest, while later-received payments are credited later and accrue more interest, as this Court has stated should be done.[73]

In other words, according to this Court's prior holdings, Welfare's method of calculation is simply wrong. This was pointed out below, but was entirely ignored by Scot, the Attorney General's briefs, and by the district court in its decision. We submit that wrong is wrong, and the fact that Welfare's calculations "are just a little wrong" is not a defense of them.

As everyone involved below agreed, the big difference was in the penalties. Since nothing at all was collected from Scot between 2000 and 2006, the Welfare methodology would assess a 10% penalty when each payment initially went unpaid, and then ignore those installments for all the remaining years that they ***remained*** unpaid. The private Bar methodology, by contrast, continued to accrue penalties, following the statutory mandate, 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 yield some $12,000 – exactly 10% of sums not paid.[74]

Scot's counsel below conceded that penalties stated as accruing "per annum" must actually be applied annually.[75] We provided a Calculation Summary showing the actual sum of accrued interest and penalties, the way the private Bar has always done the calculations.[76]

We ***also*** provided a three-way Comparison Table, showing what the D.A. ***actually*** computes, what the private Bar computes, and what the total would be if Ms. Muirhead's in-

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[73] *See, e.g., LTR Stage Lines v. Gray Line Tours*, 106 Nev. 283, 792 P.2d 386 (1990); *Jones v. Jones*, 86 Nev. 879, 478 P.2d 148 (1970). 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.

[74] This number, 10% of the principal not paid, would remain unchanged under the Welfare methodology no matter ***how*** long the installments remain unpaid.

[75] AAP Vol. 2, pg CAV00447-CAV00449.

[76] AAP Vol 2, pgs CAV00273-CAV00278.

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court-admission-method (one-time penalties, annually re-applied) was actually calculated.[77] It shows that if the D.A. actually ***did*** the calculations the way she indicated should be done, the total amount of penalty owed by Scot would have been $14,207 higher than that calculated by the private Bar.

The logic is pretty simple. Front-loading the annual penalty to the first day of the first month that it is unpaid ***necessarily*** increases the sum owed over time, if any payments at all are ever made, because those payments then have no impact on the amount of penalty assessed.

Ms. Muirhead's suggested methodology would impose a full annual penalty the moment an installment goes unpaid, and then charge it again the next year if it is still unpaid. That should not be done, for the same reason that Welfare's defective "assess once and forget it" methodology is nonsense – both ignore the actual words of the statute, which require that the penalty be assessed at the rate of 10% per year on all installments remaining unpaid.

D. The Perversion of Bureaucratic Priorities

On information and belief,[78] the funding received by the Welfare Division under the federal IV-D program is linked to the ratio they show of any collection to any overdue support – if they collect ***any*** money in a case – no matter how much is due – their statistics look better and they get more federal funding. It does not matter if the obligor owes $100,000 or $100: if they collect a single dollar, the statistics will be treated the same. Thus, Welfare has a perverse incentive to collect ***something*** in child support arrears in every case, but no further incentive to

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[77] AAP Vol 2, pgs CAV00280-CAV00283. Notably, no one, in any case known, has ever calculated penalties in the manner suggested by Scot's counsel. Ms. Muirhead's dumping of massive amounts of paper in court without any prior notice, and her assorted arguments with no basis in fact or law, served mainly to confuse the trial court, as discussed below.

[78] This information was provided to prospective Child Support Hearing Masters by the Clark County District Attorney's Office at a training session sponsored by the Eighth Judicial District Court.

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actually pursue full collection of the actual sums owed. This puts the interests of the bureaucracy, and the poor persons it claims to serve, at odds.[79]

But why on earth would an agency charged with collection of child support – while stating that its resources are overtaxed and it has no legitimate interest in any possible outcome of a particular family court 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 obligor who owed over $100,000 in child support?[80]

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 the bureaucracy tries to get the law to match the counterproductive results that NOMADS is able to produce. Welfare sees it as ***much*** more important to push its position on how to (mis-)calculate penalties than to actually assist in collecting from a deadbeat who owes huge arrears of back child support.[81]

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[79] Mr. Ewert admitted as much in open court below in this case. AAP Vol 2, pgs CAV00412. The bureaucratic euphemism for minimizing the amount of outstanding child support arrears is "setting out 'realistic' arrearage sums to encourage compliance."

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

[81] Despite the fact that under ***any*** calculation methodology Scot is in violation of Nevada's criminal non-support statute (NRS 201.020), and been expressly so found to be in violation (AAP Vol 2, pgs CAV00357-CAV00365), the prosecutorial offices of Nevada have refused to prosecute for non-support, just as they did nothing after Justice Young's 2002 request to prosecute Scot for his fraud on the divorce court. *See Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002) (Young, J., dissenting, at n.20).

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V. POLICY-BASED COMPARISON OF CALCULATIONS

A. Interest Calculations

No one could legitimately dispute that the holdings of this Court have discussed precise dates as the start and end points for interest, so interest should be calculated on the precise number of days that an arrearage remains unpaid.

Welfare, however, uses "months," disregarding the days within a month that an arrearage remains due, and thus treats an arrearage due, or paid, 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.

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 even start to compute until 2005. 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, the public is just out of luck as well.

B. Penalty Calculations

1. The Question of Whether the Statute is Ambiguous

In my 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 different – although illogical – 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.[82] 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, with no words rendered

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[82] *Edgington v. Edgington*, 119 Nev. 577, 80 P.3d 1282 (2003).

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nugatory or made surplusage.[83] Statutes with a protective purpose should be liberally construed in order to effectuate the intended benefits.[84]

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 private Bar and 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."[85]

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

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[83] *See, e.g., Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).

[84] *Petition of Phillip A.C.*, 122 Nev.1284, 149 P.3d 51 (2006).

[85] Scot, and the Deputy A.G., insinuated below that my motivations might be suspect; 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 this Court, or the Legislature, deems it proper to perform either interest or penalty calculations in the less accurate and counterproductive way advocated by Welfare, we will alter MLAW to produce those calculations.

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2. Welfare's Approach is Constitutionally Impermissible

One final difference of perspective merits explicit mention. The A.G.'s "Friend of the Court" brief raised the question of an "equal protection" issue, since long-period deadbeats like Scot would have a lower penalty assessed against them by Welfare 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 two years that arrearages accrue. So Welfare is grossly overcharging the large number of child support obligors in its system who are behind but trying, and making late payments, because when those payments are received, the penalty has already been assessed, and the obligors' efforts to make some payment have no impact on Welfare's totals.

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 thus is contrary to the legislative intent of the statute. Once they impose a penalty, it can never get any worse no matter how much time passes – exactly the dis-incentive to actually make payments that Attorney General Frankie Sue Del Papa decried in 1993. There is no legitimate basis for the Bench and Bar to adopt Welfare's error.

There are at least two ***actual*** "equal protection" problems, but they were not addressed anywhere in Scot's or Welfare's submissions to the trial court. Properly construing the phrase "per annum, or portion thereof" requires assessing the penalty ***every year***, and taking into account that a arrearage might only be owed for a ***portion*** of a year.

The way Welfare does it, if an obligor misses a payment, and pays it a month later, he pays exactly the same penalty as an obligor who misses a payment and is not held to account for years. As a basic matter of equal protection, any law that would treat identically being late for a month, and being late for a year – or 10 years – or 100 years – is highly suspect and probably

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constitutionally infirm. People situated differently have a right to have the law treat them differently, just as those similarly situated have a right to have the law apply to them equally.[86]

On the larger scale is Welfare's complete failure to comply ***at all*** with the mandatory Nevada statutes requiring district attorneys to collect interest (since 1987) and penalties (since 1995) through 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 for about 20 years simply did not get what the law required them to get.[87] But that failure on Welfare's part is outside the scope of this case.

VI. THE DISTRICT COURT'S ERRORS

The district court did understand the gist of the dispute – whether the expressions "per annum" and "remains unpaid" should be given effect in interpreting the statute, or whether the statute should be read to ignore those words and permit assessing a one-time penalty and never considering it again.[88] Unfortunately, the district court apparently became confused by the sheer volume of material, and made a handful of errors of both fact and law by which it reached an incorrect conclusion.

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[86] Equal protection requires that "no class of persons shall be denied the same protection of the law which is enjoyed by other classes in like circumstances." *Allen v. State, Pub. Emp. Ret. Bd.*, 100 Nev. 130, 135, 676 P.2d 792, 795 (1984). While a supportable classification between individuals is not unconstitutional, in the field of State action it is necessary that "'all persons similarly situated [are] treated alike.'" *DeRosa v. Dist. Ct.*, 115 Nev. 225, 235, 985 P.2d 157, 164 (1999) (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)); *see generally Willerton v. Bassham*, 111 Nev. 10, 19, 889 P.2d 823, 829 (1995) (illegitimate children have a right to mandated equal legal treatment under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution).

[87] *Allen v. State, Pub. Emp. Ret. Bd., supra*, 100 Nev. 130, 135, 676 P.2d 792, 795 (1984); *DeRosa v. Dist. Ct., supra*, 115 Nev. 225, 235, 985 P.2d 157, 164 (1999).

[88] AAP Vol 2, pgs CAV00385-CAV00386.

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A. Factual Errors

The district court recited that it found A.G.'s treatment of the term "per annum" a "balanced interpretation" because it divides the year into 12 months, and assesses 1/12 of the annual penalty each month.[89] But that is not what Welfare ***does***. As Mr. Ewert explained, the A.G.'s brief is inaccurate – NOMADS assesses 100% of the annual penalty on the first day of the first month an arrearage exists.[90]

Only the private Bar assesses 1/12 of the annual penalty each month. The court explicitly based its decision on the finding that breaking the penalty calculation into 12 monthly portions would properly give "equal weight and consideration" to the statutory terms[91] – but got wrong which calculation actually does that.

Next, the court below appears to have erroneously believed that the private Bar would assess a penalty on an installment that was paid.[92] In actuality, as detailed above, a penalty is assessed by the private Bar methodology during the same ***month*** that a full payment might be made, but the penalty is being assessed on ***installments*** that were previously unpaid and "remained outstanding." So the lower court's finding that assessment of a penalty during such a month is "less reasonable and less logical" seems to be just confusion on the court's part.

The court seemed to be under the impression that NOMADS has calculated interest and penalties "since 1995."[93] As detailed above, the capacity to do the crude calculation that NOMADS is now capable of was not engrafted onto the legacy system until 2005.

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[89] AAP Vol 2, pgs CAV00385 & CAV00390.

[90] AAP Vol 2, pgs CAV00410-CAV00412.

[91] AAP Vol 2, pgs CAV00390-CAV00391.

[92] AAP Vol 2, pg CAV00391.

[93] AAP Vol 2, pg CAV00393.

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B. Legal Errors

The lower court found that there was agreement that the statute was ambiguous.[94] As detailed above, that was not and is not our position.

As noted above, the court confused a deputy A.G.'s comments at a committee hearing a decade after the statute was enacted with "legislative history" somehow having an effect on how the statute should be interpreted.[95]

The lower court seemed to think that Welfare's typical bi-weekly wage withholding had something to do with "federal regulation," to which deference had to be given.[96] There is no such regulation; Welfare intercepts paychecks every two weeks because most people are paid every two weeks, and no federal law has any impact on the due date for support set by State courts. In any event, only the private Bar's calculation takes into account the actual due date for support set by courts when calculating interest and penalties.

C. Combined Legal/Factual Errors

The lower court opined that "the technical implementation of assessing the 10% penalty MUST comport with the Federal Child Support Enforcement Program."[97] This single sentence contains ***both*** an error of fact, and an error of law.

The factual error was in apparently believing that there is any federal regulation on the point at all. There isn't. And even if there ***was*** some federal regulation requiring Welfare to do something in particular, it would have no effect on how the Nevada statute is applied in Nevada family court in non-Welfare cases.

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[94] AAP Vol 2, pg CAV00389.

[95] AAP Vol 2, pg CAV00392.

[96] AAP Vol 2, pgs CAV00393-CAV00394.

[97] AAP Vol 2, pg CAV00390.

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The legal error was confusion of the meaning of the federal law discussed in the quotation in the court's decision.[98] As detailed above, the IV-D regulations speak only of applying support paid first to a current month's support obligation in Welfare cases (directly contrary to this Court's direction to apply all payments to the oldest arrearage first, in all other cases) – it has nothing whatsoever to do with the penalty calculations.

So the lower court's reference to "federal preemption and deference" are just meaningless in the context of this case, and the lower court's basing its decision on that "important public policy concern" was wholly misplaced.

Next, the court below seemed to think there was legal significance in the 2005 Legislature's failure to "take any action to change the status quo of how CSEP assesses the 10% penalty."[99]

The error of fact was that, as of that time, Welfare had never collected any penalty; they started doing so just that year. There were two legal errors. First, what was before the Legislature in 2005 was Welfare's request to ***change*** the statute to allow them to calculate penalties the way they wanted to, and the Legislature rejected the proposed amendment to the penalties statute. Second, there was no "twelve-year status quo" of Welfare's calculation of interest and penalties for the Legislature to consider – Welfare had ***never*** done either.

So the lower court's reliance on the 2005 Legislative history as supporting the Welfare calculation methodology was entirely misplaced.

VII. CONCLUSION

If this 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

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[98] AAP Vol 2, pg CAV00393.

[99] AAP Vol 2, pgs CAV00392, CAV00394, CAV00395.

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been rejected by the Nevada Legislature, would be counterproductive and illogical if applied, 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 it is doublespeak for Welfare to claim 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 for making the attempt.

The court below made a number of factual and legal errors, on the basis of which it mandated use of calculations that should not be used by anyone anywhere, but certainly should not be used in private family court cases.

The order requiring use of the defective Welfare methodology for calculating penalties on child support arrearages should be reversed, and the case remanded with directions to calculate penalties in accordance with the private Bar's methodology of assessing those penalties per the amount of time arrearages have remained outstanding.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e) 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 15th day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing was made on the 2nd day of September, 2009, pursuant to EDCR 7.26(a), by U.S. Mail addressed as follows:

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That there is regular communication between the place of mailing and the place so addressed.

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