IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

TONY MATKULAK,

Appellant,

vs.

KOURTNEY L. DAVIS,

Respondent.

S.C. NO. 83173
D.C. NO: FV20-00559

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal. In the course of these proceedings leading up to this appeal, Appellant has been represented by the following attorneys:

a. Shawn B. Meador, Esq. - Shawn represented Tony in the district court proceedings and is co-appellate counsel.

b. Marshal S. Willick, Esq. - Marshal is co-appellate counsel.

There are no corporations, entities, or publicly-held companies that own 10% or more of Appellant's stock, or business interests.

DATED this 4th day of January, 2022.

Respectfully Submitted By:
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ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals per NRAP 17(b)(10), as it is an appeal of a decision by the family court in a child support matter. However, Appellant believes that this matter should be assigned to the Nevada Supreme Court per NRAP 17(a)(12) as it concerns questions of first impression as to statutory construction of the newly-adopted child support regulations, implicating significant public policy that is of statewide public importance, and whether prior holdings of this Court do or do not remain controlling authority under those new regulations.[1]

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[1] There have been five orders of the Court of Appeals mentioning the regulations set out at NAC ch. 425. None are published, and those orders may not be cited as authority. NRAP 36(3)(c).

STATEMENT OF THE ISSUES

1. Whether the district court erred in ordering child support several times greater than the guideline schedule amount in the absence of any evidence of any specific need of the particular child not fully satisfied by the guideline schedule sum.

2. Whether it is conduct "unreasonably driving up the costs of litigation" for counsel to note the existence of factors permitting both upward and downward adjustments in child support and taking the deposition of a party who refused in advance of trial to state what sum was desired in support or its basis.

JURISDICTIONAL STATEMENT

Pursuant to NRS chapter 125, the Family Court in Washoe County had original jurisdiction to hear Respondent's (Kourtney's) *Petition to Establish Custody, Visitation and Child Support* filed against Appellant (Tony).

This Court is the appellate court for the district courts, and has subject matter jurisdiction to review the final decisions of those courts. Jurisdiction in this Court is pursuant to NRAP 3A(b)(1), under which an appeal may be taken from a final judgment, decree, or order entered in an action or proceeding in a district court.

STATEMENT OF CASE

Appeal from *Order Establishing Custody, Visitation and Child Support* requiring Tony to pay $2,000 per month more than the guideline schedule child support obligation of $1,596.56, plus all child care, all medical expenses, and 75% of all extra-curricular expenses for a child where the parties have joint legal and physical custody, the Honorable Sandra A. Unsworth, District Court Judge, presiding.

STATEMENT OF FACTS

The parties were never married but had a two year relationship. They are the parents of Bennett Davis Matkulak, born May 3, 2018, who was two at the time of trial and had just turned three years old at the time of the order on appeal.[2]

In April, 2020, Kourtney filed a *Petition* relating to custody and child support, asking for joint legal and physical custody, for child support "consistent with Nevada law including NAC Chapter 425," to equally divide medical expenses, day care, and activity costs, and to alternate tax exemptions.[3] Tony agreed with all of those requests.[4]

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[2] V AA 752-753.

[3] I AA 1-3.

[4] I AA 18-19.

The parties entered into a stipulation for 50/50 joint legal and physical custody of Bennett on a 2-2-3 schedule, and to split the costs of paid day care at an agreed preschool.[5] The only issue in dispute was the proper amount of child support.

Both parties have business degrees.[6] At the time of trial, Tony was a 52-year-old Morgan Stanley investment advisor earning $38,240 per month; he worked about 45 hours per week plus some evenings and weekends.[7]

Kourtney was 41 years old and had a part-time job coaching children's softball, but during the litigation obtained a full-time job with a company called Cordova and continued coaching softball about four hours a week

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[5] V AA 752-753; I AA 87-90.

[6] VII AA 927, 1060.

[7] VII AA 1061.

(during Tony's custodial time of Bennett),[8] giving her a total monthly income of $5,144,[9] working about 44 hours per week.[10] The parties stipulated to their experts' reports, and that guideline schedule child support under the regulations is $1,587.[11]

Tony had been voluntarily paying Kourtney $1,849 per month in child support for Bennett since before the litigation began.[12] That was higher than the guideline schedule. Bennett is a normal, healthy, well-adjusted child who

[8] III AA 1034-1035.

[9] V AA 581, 756; VII AA 930-933, 964.

[10] VII AA 1033-1034.

[11] V AA 732, 756.

[12] II AA 132-136; VII AA 995.

was two years old at the time of trial,[13] and whose only identified activity was swimming lessons.[14]

Tony's Financial Disclosure Form showed that he spent some $1,035 per month on Bennett, which included his half of child care and $150 for Bennett's swimming lessons[15]; the $1,849 he paid to Kourtney included a $53 reduction for her share of those swimming lessons.[16]

During the litigation, Kourtney filed several Financial Disclosure Forms; the expenses she claimed to have for Bennett increased from $110 to $691 to $787, but she swore under oath at her deposition in December, 2020, that the trial court could rely on that last amount as accurate.[17] Kourtney conceded that

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[13] VII AA 986, 1044.

[14] VII AA 1026, 1029.

[15] V AA 598.

[16] V AA 612; VII AA 1029.

[17] III AA 203, 254, 257; IV AA 362..

the $1,849 Tony was voluntarily paying in child support was two and half times as much as her actual expenses for Bennett.[18] Kourtney claimed that her total household expenses were $3,648 per month, which included at least $500 per month in retirement savings (later clarified as over $1,000 per month).[19]

Kourtney owned a home which she had bought before Bennett was born, but she rented it out and lived in a different rental home in a neighborhood she preferred.[20] She had over $286,000 equity in the house she owned, plus more than $150,000 in cash, investments, and retirement accounts.[21]

Pressed repeatedly at both her deposition and at trial for any specific needs of Bennett that warranted an upward adjustment of child support,

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[18] III AA 258.

[19] III AA 259-262; V AA 610-612, VII AA 1019-1020, 1029, 1124.

[20] III AA 220, 237, 285, 298-299.

[21] V AA 613.

Kourtney never identified any, and admitted that all of Bennett's basic needs were met.[22]

At deposition, Kourtney stated that she wanted a "nicer home" with a "bigger backyard" than the three-bedroom home with stone countertops and stainless steel appliances in a gated neighborhood in which she lived.[23] When it was pointed out that *she* would own the equity in any such nicer home, she responded that she could someday leave the property to Bennett.[24] While she had purchased a 2017 Lexus with cash after separating from Tony, she testified that his house was bigger than hers, and she also considered Tony's car to be nicer than hers.[25]

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[22] III AA 268-269, 296.

[23] III AA 237, 281-283.

[24] III AA 283-284.

[25] III AA 217-219, 278, 286-287.

Asked about her filings that requested "parity of lifestyles,"[26] Kourtney admitted that she had no knowledge that Tony ever spent any more money on Bennett than she did,[27] and that she in fact considered Tony either "frugal" or "cheap,"[28] but she wanted more money to have "financial stability," which required her to increase her retirement savings.[29] She also wanted more money so she could decide to work less when she did *not* have custody of Bennett so as to be "less stressed," not have to do housework, and spend more time with Bennett at her "healthy best."[30]

Kourtney's testimony at trial was similar. She confirmed that her total expenses for Bennett were $787, which included her half of Bennett's child

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[26] II AA 165.

[27] III AA 281.

[28] III AA 285

[29] III AA 269, 287, 294-295.

[30] III 270, 287-291.

care,[31] and that she had free medical insurance for the child through her employment, although there could be some co-pays and deductibles.[32]

Kourtney identified Bennett's "basic needs" as food and shelter, and stated that while she had a 1,600 square foot home for herself and Bennett, Tony had a larger home.[33] She repeated that she did not want to live in the house she owned, or the one she was renting, but "in a better neighborhood by my family."[34]

Asked to identify what "specific needs" of Bennett that were not met in her home that were met while with Tony, Kourtney responded with "quality time, and lifestyle, . . . standard of living . . . and financial security."[35] She

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[31] VII AA 963-965, 1027.

[32] VII AA 966.

[33] VII AA 967-968.

[34] VII AA 974.

[35] VII AA 969-970.

explained that she often worked long hours when Bennett was not with her, which left her "tired and stressed,"[36] so she should get increased child support so she could "take more time off of work."[37]

Kourtney explained that "lifestyle security" meant she should get more money to get a bigger house with a bigger yard, and so she could eat out more often.[38] She wanted more money for "financial security" to increase her retirement savings in case she ever lost her job.[39] Kourtney thought she should get all tax benefits for Bennett, and that Tony should pay the bulk of the costs for any of the child's activities.[40]

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[36] VII AA 970.

[37] VII AA 971.

[38] VII AA 971-972.

[39] VII AA 972-973.

[40] VII AA 978-980.

On cross-examination, Kourtney admitted that she had just acquired an extra $35,000 investment, that she actually was saving about $1,000 per month in retirement savings, rather than $500,[41] and that she considered 30 hours per week to be full time employment.[42]

Kourtney stated that while she did not need more money for a nicer car than her Lexus, she answered both "yes" and "no" to whether she should get enough extra child support to hire a maid.[43] She admitted that she already had access to a country club and use of a vacation home.[44]

Kourtney conceded that if she received guideline schedule child support under the regulations, she would be able to continue putting more than $1,000

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[41] VII AA 985-986, 1020.

[42] VII AA 1027.

[43] VII AA 1035-1036.

[44] VII AA 1039.

into retirement savings and still have a monthly surplus of $1,300 every month.[45] She agreed that Tony had long been paying more than the guideline schedule amount, and that the expenses of litigation had been driven by her request for a further increase rather than any attempt by Tony to get a downward adjustment.[46] She repeated that she wanted to greatly increase her personal retirement savings "for my son."[47]

Even though both parties spent about the same amount on the child, Kourtney was convinced that Tony was trying to "buy Bennett's affection" because he lived in a nicer home and ate out more often,[48] clarifying that it was not a matter of more lavish spending on the child, but simply Tony *having*

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[45] VII AA 1030-1031.

[46] VII AA 989-995, 1015-1016.

[47] VII AA 1036-1038.

[48] VII AA 986, 1040.

more money that made for a different "standard of living."[49] She therefore wanted a house as valuable as Tony's "for Bennett's emotional well being."[50]

Tony's testimony was far shorter. He explained that his job included taking clients out to dinner which is why his food expense was higher, and confirmed that he was quite frugal generally and that his direct expenditures on Bennett were modest,[51] but conceded that he did have a housekeeper come in once a month to help clean.[52] He supplied separate health insurance for Bennett under a pre-trial order, costing him some $237.50 per month.[53]

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[49] VII AA 1041.

[50] VII AA 1044-1045.

[51] VII AA 1061, 1099.

[52] VII AA 1065.

[53] VII AA 1064.

On June 14, 2021, the trial court issued its decision.[54] The court noted that the parties had stipulated to joint legal and physical custody and had exactly the same timeshares, and set a holiday schedule.[55]

Turning to child support, the trial court found the term "basic needs" in the regulations was undefined, and that under the parties' stipulated income figures, Tony owed Kourtney $2,415.70 while Kourtney owed Tony $823.14, producing an offset guideline schedule child support obligation of $1,592.56.[56]

Reciting each of Kourtney's declared direct expenses for Bennett totaling $787, the trial court found that those did not include her food, shelter, and automobile expenses which were "incurred in part to assure that Bennett's

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[54] V AA 752.

[55] V AA 753-756.

[56] V AA 756-757, 760. The $5.56 variation from the parties' stipulated guideline schedule sum of $1,587 was never explained.

basic needs for food and shelter are met and that he can be transported to and from childcare, visitation exchanges and swimming."[57]

The trial court found that both parties worked full time, and that "equity demands" that Tony pay the full child care costs during both parent's custodial time.[58] For the same reason, the trial court found that Tony could elect to continue his duplicate health insurance for Bennett, but in any event he would pay all "medical insurance costs, co-payments, deductibles, and maximum out-of-pocket expenses," and 75% of Bennett's swimming costs and of any future extracurricular activities.[59]

The trial court reviewed the adjustment factors listed in NAC 425.150, and found that most of them were inapplicable, but focused on two.

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[57] V AA 757.

[58] V AA 757.

[59] V AA 758.

Under factor (f), "The relative income of both households, so long as the adjustment does not exceed the total obligation of the other party," the trial court found "[Tony] has a GMI of $38,392.42 as compared with [Kourtney] who has a GMI of $5,144 and who works two jobs. [Tony] 7.46 times [*sic*] the amount that [Kourtney] earns per month."

Under factor (h), "The obligor's ability to pay," the trial court found "[Tony] clearly has the ability to pay child support."

The court then detailed that Kourtney's income was one-seventh of Tony's while her monthly expenses were about half his, that she "works two jobs" (a regular job and private softball coaching), and puts about 10% of her income into retirement savings. The court detailed that Tony invests $2,166.67 into his retirement, manages to save "more than Kourtney's income," and that because Tony had paid off his house, Kourtney's housing costs were higher

while she lived in a "1,600 square feet, three-bedroom house with a 5' square rock backyard" but Tony lived in a "4500 square foot home with five bedrooms and a five car garage." The court recited that Kourtney's food costs were one-third of Tony's.[60]

Reciting Kourtney's desire for a better home and backyard and to not "work two jobs," the trial court recited this Court's observation in *Barbagallo*[61] that total expenses of a child are likely increased in a joint custody situation and its direction that "a greater weight must be given to the standard of living and circumstances of each parent, their earning capacities, and relative financial means."[62]

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[60] V AA 759.

[61] *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989).

[62] V AA 760.

The trial court found that *Barbagallo* had not been overturned by the conversion of child support from being governed by NRS ch. 125B to NAC ch. 425, which does not define either "basic needs" or "specific needs." It found that language in that case gave "guidance" in holding "[w]hat really matters . . . is whether the children are being taken care of as well as possible under the financial circumstances in which the two parents find themselves," which the trial court found meant that the "needs" of a child are "subject to the socio-economic position of the child's parents."[63]

On that basis the trial court found that the "specific needs of the child" depended on the "economic circumstances" of the parents, footnoting that it "took into consideration" Kourtney's access to a country club and family vacation home.

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[63] V AA 760.

The trial court recited the parties' incomes again and again in different ways, observing that Tony "earns better than half of [Kourtney's] annual income in one month." Without actually identifying any "specific need," the trial court concluded that "Bennett's specific needs are not met by the award of the statutory amount of child support based upon the gross disparity in the parties' income, taken in conjunction with the parties' expenses for food and shelter and as such finds [Tony] has the ability to pay [Kourtney] additional support."

Acknowledging that it also required Tony to pay all childcare expenses ($936 per month), all medical insurance ($237.50 per month) and medical expenses, and 75% of all extracurricular expenses ($112.50 per month),[64] the trial court then increased the guideline schedule child support of $1,592.56 by

[64] $936 + 237.50 + $112.50 = $1,286.

an additional $2,000, to $3,500 per month,[65] plus the other $1,286, for a total of $4,786 per month.

The trial court found that the child tax exemptions should be alternated between the parties.[66]

As to fees, the trial court noted that Kourtney had gone through three attorneys, but found that two of them came and went before formal litigation, and that her current counsel's rate was "well below the market price."[67]

The trial court found that Tony's having noted during settlement negotiations that he was already paying more in support than the child's listed expenses was a "tactic" that "necessarily increased the costs of this litigation,"

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[65] V AA 760-761. The trial court's math was not precise.

[66] V AA 761.

[67] V AA 761.

and that Tony had involved his attorney "in even the most mundane decision related to Bennett," so Kourtney should receive an award of fees.[68]

This appeal follows.

STANDARD OF REVIEW AND SUMMARY OF THE ARGUMENT

Questions of statutory construction are reviewed *de novo*; this Court need not defer to the trial court's reading of a statute.[69] Errors of law in applying statutes or regulations are reviewed *de novo*,[70] while the exercise of

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[68] V AA 761-763.

[69] *See Irving v. Irving*, 122 Nev. 494, 134 P.3d 718 (2006); *Harris Associates v. Clark Co. School Dist.*, 119 Nev. 638, 81 P.3d 32 (2003).

[70] *Moseley v. Dist. Ct.*, 124 Nev. 654, 188 P.3d 1136 (2008); *Settelmeyer & Sons v. Smith & Harmer*, 124 Nev. 1206, 197 P.3d 1051 (2008).

the court's discretion in applying those regulations is reviewed for an abuse of discretion.[71]

This appeal basically boils down to the question of whether the new regulations allow a massive upward adjustment of child support based solely on one party's greater income than the other, unrelated to any specific need of the particular child, even though the statutory guideline formula in the guidelines already takes into account all income and any disparity in the parties' incomes in establishing the presumptive award.

While the prior statutes only addressed the first few thousand dollars of an obligor's income, and did not explicitly address joint custody cases at all, the new regulations expressly address every dollar and detail how to calculate

[71] *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

support for joint custody cases, overruling some prior case authority and rendering other cases moot.

It is legal error to disregard the actual words in the regulations and an abuse of discretion for a district court to find that one parent has no responsibility to contribute to the support of a child based on the higher income of the other parent. The district court here did both.

The award of attorney's fees was based on an error of law, and inappropriate under the circumstances.

The orders for both child support and attorney's fees should be reversed and remanded for decisions in accordance with the law.

ARGUMENT

I. THE TRIAL COURT'S AWARD OF SUPPORT WAS ERROR

There are two layers to this analysis. First, the district court misinterpreted the child support regulations, which error should be reviewed *de novo*. To the extent the district court's application of those regulations to the facts involved discretion, that discretion was abused.

A. Guideline Schedule Child Support Accounts for All Income

1. The Prior Statutes Only Addressed Lower Incomes and Did Not Account for Joint Custody

In 1989, when this Court decided *Barbagallo*,[72] it addressed a statutory scheme set out at NRS 125.070-.080 which was framed to treat one parent as

[72] *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989).

a physical custodian of a child, and the other as a "parent without physical custody."[73]

Those statutes included a presumptive maximum for child support (sometimes called a "cap"), originally set at $500 and later indexed for inflation.[74] It effectively ignored all income over $2,778 per month,[75] even if the obligor's income was many times that amount.

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[73] *See* NRS 125B.030.

[74] For a detailed discussion of the history of that provision, see Ed Ewert, *2001 Legislative Changes to Nevada's Child Support Laws*, Nev. Lawyer, Aug., 2001, at 12; Marshal Willick, *Nevada Has Effectively Lowered Child Support Across the Board*, 19 Nev. Fam. L. Rep., Spr. 2006, at 10; Marshal Willick, *What Almost Happened to Child Support in Nevada, and Why We Still Have to Fix It*, Nev. Lawyer, June, 2007, at 36.

[75] $2,778 x 18% = $500.04.

The prior statutes dealt with the "cap" by providing a "deviation factor" for "the relative income of both parents."[76] That factor was addressed by this Court twice in 1991. First, in *Herz*,[77] the Court rejected the obligor's complaint that statutory child support could only be deviated upward upon proof of the specific need of the child at issue, holding that an increase was proper under the deviation factors because of "the vastly different incomes and financial resources of the plaintiff and defendant, and the amount of time the children will spend with each parent as a result of this decree."[78]

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[76] Prior NRS 125B.080(9)(l).

[77] *Herz v. Gabler-Herz*, 107 Nev. 117, 808 P.2d 1 (1991).

[78] A separate deviation factor, 125B.080(9)(j), permitted deviation for "the amount of time the child spends with each parent," essentially allowing increased child support when a non-custodian exercised little time with a child and therefore made little direct contribution toward the child's expenses.

The Court re-affirmed the *Herz* holding in *Chambers*,[79] and again in 1998 in *Love*,[80] without much further exposition as to the basis beyond the explicit terms of the statute itself. The intended goal was to encourage courts to exercise their discretion within the bounds of the statutory framework, as the Court explained in *Lewis*[81]:

> the legislature has shifted the focus of the courts from a general inquiry into the best interests of the child to a specific inquiry of whether the noncustodial parent is satisfying the statutory support obligation. Where no special circumstances exist, courts must focus exclusively upon the noncustodial parent's duty to pay a fixed percentage of income.

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[79] *Chambers ex rel. Cochran v. Sanderson*, 107 Nev. 846, 822 P.2d 657 (1991).

[80] *Love v. Love*, 115 Nev. 572, 959 P.2d 523 (1998).

[81] *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992).

Some commentators criticized the *Herz* holding that support could be predicated on income differentials between the parties as opposed to the specific needs of the child at issue, arguing that doing so constituted "hidden alimony" or a "transfer of wealth" under the guise of maintaining the child's standard of living in both homes.[82]

The prior child support statutes had no mechanism for addressing joint custody cases. As this Court noted in *Rivero*,[83] it has been sometimes required to fill "gaps in the law" by setting out definitions and mechanisms not specified by the Nevada Legislature.

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[82] *See* Ron Logar, *Wealth, A Substitute For Need*, 57 *Inter Alia*, April, 1992, ("Logar") at 8; Eric Pulver, *Child Support in Wealthy Families*, 19 Nev. Fam. L. Rep., Fall, 2006, at 1.

[83] *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).

It did so in *Wright v. Osburn*,[84] a week-on, week-off joint custody case in which it provided an explicit means of adjusting child support for such cases by calculating child support for each parent, subtracting one from the other, and requiring the parent with the higher income to pay the parent with the lower income that difference.

All of that statutory, case law, and commentary history was analyzed and summarized for the Commission formed to revise Nevada's child support laws in the form of regulations.[85]

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[84] *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998).

[85] *See* Jane Venohr, REVIEW OF THE NEVADA CHILD SUPPORT GUIDELINES 78-82 (2016), https://www.leg.state.nv.us/Session/79th2017/Exhibits/Senate/JUS/SJUD144D.pdf ("Venohr").

2. The New Regulations Address Both All Income and Joint Custody Cases

The new regulations were adopted effective February 1, 2020,[86] codifying and modifying case law addressing both income disparity between parties and application to joint custody cases.

The regulations abandoned the presumptive maximums set out in the prior child support statutes, adopting a table in which ***all*** income is used for calculating child support, starting at (for one child) 16% of the first $6,000 of monthly income, 8% of the next $4,000, and 4% of all income more than that.[87]

Because all income was addressed, the prior statute's "relative income of both parents" deviation factor was deleted, replaced by an adjustment factor of the "relative income of both households, so long as the adjustment does not

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[86] AB 278, sec. 7, 2017 Nev. Stat. 2287-2288.

[87] NAC 425.140.

exceed the total obligation of the other party,"[88] and explicitly requiring that any upward adjustment be "in accordance with the specific needs of the child."[89]

The regulations expressly adopted the *Wright* offset formula for joint custody cases as part of the guideline schedule,[90] eliminating the "gap in the law" to be addressed by case law.

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[88] NAC 425.150(1)(f).

[89] NAC 425.150(1).

[90] NAC 425.115(3).

3. Comparison of the Math Under the Prior Statutes and the Current Regulations

Under the final version of the prior statutes and cases just before the regulations went into effect, when parties share joint physical custody, their presumptive support obligations were first offset and then capped.[91] Applied to these parties, it would have left Tony with a child support obligation to Kourtney of $1,165 per month.

A court ***could*** have used the deviation factors for "relative income of both parents" to increase that sum. There is no known published or unpublished case involving an increase in child support from $1,165 to $4,786.

Under the current regulations, taking into account the entirety of both parties' incomes and the joint physical custody of the child, the presumptive

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[91] *See Wesley v. Foster*, 119 Nev. 110, 65 P.3d 251 (2003).

child support sum is $1,592.56,[92] leaving to the discretion of the district court how to allocate child care, medical, and extracurricular expenses. As detailed above, the district court chose to impose *all* of those expenses entirely on Tony, for a monthly additional sum owed of $1,286, and then also increased the monthly sum owed by an extra $2,500.

In short, under the prior statutes, Tony's child support obligation would have been $1,165, plus whatever a court awarded as a deviation to account for medical expenses and child care. Under the current regulations, guideline schedule child support is $1,592.56, which the district court increased by $1,286 for all medical, child care, and other expenses, and then increased again by another $2,500 to $4,786 per month. That sum is not supportable under the current child support regulations.

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[92] V AA 756.

B. Under the Regulations, Increasing Child Support Based Solely Upon Income Difference is Error

1. The Regulations Changed the Law

The prior deviation factor of "relative income of the parties" was removed entirely. A precondition to application of *any* of the adjustment factors was added that adjustments must address *specific needs* of the child at issue; that is why the condition is in section (1), before listing the adjustment subsections under it:

> NAC 425.150 **Adjustment of child support obligation in accordance with specific needs of child and economic circumstances of parties.** (NRS 425.620)
>
> 1. **Any child support obligation may be adjusted by the court in accordance with the specific needs of the child and the economic circumstances of the parties based upon the following factors and specific findings of fact**:
>
> (a) Any special educational needs of the child;

(b) The legal responsibility of the parties for the support of others;

(c) The value of services contributed by either party;

(d) Any public assistance paid to support the child;

(e) The cost of transportation of the child to and from visitation;

(f) **The relative income of both households, so long as the adjustment does not exceed the total obligation of the other party**;

(g) Any other necessary expenses for the benefit of the child; and

(h) **The obligor's ability to pay**.

When the question was raised to the Child Support Commission as to whether an upward adjustment could be made *without* identifying a specific need that was unmet, one Commissioner correctly noted that a failure to tie an upward adjustment to an identified specific need would entirely nullify the regulation's requirement.[93]

[93] *See* Minutes of Child Support Commission ("Commission") of

Presuming that a court finds that the specific needs of a child are not met by the guideline schedule sum, the maximum possible upward adjustment is the sum of offset support payable by the other parent.[94] Multiple members of the Commission expressed surprise that anyone might interpret the language used any differently.[95]

As detailed above, the *Wright* offset is no longer any kind of adjustment, but part of the guideline schedule itself.[96]

September 17, 2021, at 5-6 (posted at https://dwss.nv.gov/Support/cs_meeting_minutes/). (a failure to tie an increase to an identified specific need would "overcome the court's need to make findings as to what the specific need would be").

[94] *Id.*

[95] *Id.*

[96] NAC 425.115(3).

2. The Prior Case Law is Moot

The elimination of the "relative income" factor and adoption of a required finding of "specific needs" of a child to make any adjustments overruled the contrary holdings of *Herz* and *Cochrane*.

The district court's citation of *Barbagallo* as a basis for upward adjustment[97] was entirely misplaced. That case actually addressed whether a parent with significant custodial time was entitled to a ***reduction*** in guideline child support; this Court advised caution in doing so unless an "injustice" would result. The case had nothing to do with increasing child support above the sum set out in the child support formula.

[97] V AA 760.

Even if *Barbagallo* ***had*** been concerned with upward deviations, the statutory factor of "relative incomes" has been eliminated, and joint custody situations are now part of the formula itself.

The current adjustment factor relating to "household incomes" addresses the situation where an obligor has no income because of reliance on the income of a new spouse.[98] And if the factor applied here at all – which it doesn't – any adjustment would be limited to the sum that the "other party" – Kourtney – owed in offset support: $823.04.[99]

This Court should expressly find that *Herz* and *Cochrane* have been overruled by the requirement of finding a specific need for an upward adjustment, and that *Barbagallo* is irrelevant to such an adjustment.

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[98] Commission Minutes of September 17, 2021, at 5-6.

[99] V AA 757.

C. To the Degree Judicial Discretion Was Involved, it Was Abused

"Specific" means "of, relating to, or designating a particular or defined thing."[100] The Commission records show that the term "specific needs" was adopted in 2017 without any great discussion.[101] This Court has directed that "words in a statute should be given their plain meaning unless this violates the spirit of the act."[102]

Kourtney argued below that because "specific needs" is not a defined term, it should be "relative to the financial circumstances" of the parties[103] – in

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[100] BLACK'S LAW DICT. (7th ed. 1999) at 1406.

[101] Commission Minutes of December 29, 2017, at 9; Minutes of September 17, 2021 at 5-6.

[102] *Matter of the Parental Rights as to N.J.*, 116 Nev. 790, 8 P.3d 126 (2000).

[103] V AA 581.

other words, that if money is available, "specific needs" does not refer to any ***specific*** needs at all.

The district court never identified any "specific needs" of two year old Bennett that were not met by the guideline schedule child support, but found that the term "specific needs" was "subject to the socio-economic position of the child's parents."[104] In other words, that if Tony has more money than Kourtney, Bennett's "specific needs" are *automatically* greater. That reasoning is exactly what Mr. Logar warned about in criticizing the *Herz* decision in *Wealth: A Substitute for Need*,[105] and was part of the reason for elimination of the prior deviation factor in the current regulations.

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[104] V AA 760; VII AA 1061, 1099.

[105] Logar, *supra*.

The district court's finding that "Bennett's specific needs" means something ***other*** than Bennett's specific needs was an abuse of discretion, as was relying on overruled caselaw and a no-longer-existent deviation factor.

Child support is "a flow of funds from one parent of a child to the other for the purpose of meeting the child's needs," whereas alimony is "financial support paid from one spouse to the other for a specified period of time, or in a lump sum, following a divorce."[106]

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[106] *See* Jennifer Abrams, *The Relationship Between Alimony and Child Support*, in *Advanced Family Law* (State Bar of Nevada CLE), Las Vegas, Nevada, 2021, at 1-2, posted at https://dwss.nv.gov/Support/cs_meeting_agenda_materials/, quoting from *Kogod v. Cioffi-Kogod*, 135 Nev. ___, 439 P.3d 397 (Adv. Opn. No. 9, Apr. 25, 2019).

Kourtney's ***total*** expenses for her rental home, food, and transportation were $1,950, $550, and $303 respectively, totaling $2,803 per month.[107] Before the order, Kourtney's direct expenses for Bennett for everything were $787,[108] but once the district court required Tony to pay all child care, all medical expenses, and 75% of extracurriculars, her monthly expenses for Bennett dropped to $292.50.

Kourtney had her house before Bennett was born, and three-year old Bennett consumes a tiny fraction of Kourtney's fixed expenses. The ordered "child support" of $3,500 plus $1,286 in other expenses actually pays the ***entirety*** of both Bennett's and Kourtney's food, housing, transportation, *and* child-related expenses, plus a couple thousand dollars per month more. In fact,

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[107] V AA 757.

[108] V AA 612.

the sum of "child support" ordered to be paid by Tony is greater than Kourtney's declared ***total*** monthly expenses, *including* her savings for retirement, by nearly $1,500 per month.[109]

That is definitionally an award of "hidden alimony" between Tony and Kourtney – *who were never married* – as warned by the commentators[110] and courts[111] that have stated that doing such a thing would be a mis-use of "child

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[109] V AA 612.

[110] Logar, *supra*; *see also* Venohr, *supra*; Laura Raatjes, *High Income Child Support Guidelines: Harmonizing the Need for Limits With the Best Interest of the Child*, 86 Chi.-Kent L. Rev. 317 (2011) ("Raatjes") (generally advocating amendment of guidelines to directly address the entirety of income of a potential obligor, and offering potential mechanisms to avoid the "hidden alimony" problem).

[111] *See*, *e.g.*, *In re Marriage of Lee*, 615 N.E.2d 1314, 1326 (Ill. App. Ct.

support." The district court's award of greatly increased "child support" based on "the parties' expenses for food and shelter" was an abuse of discretion on its face.

Similarly erroneous was any increase from guideline schedule child support based on "the obligor's ability to pay."[112] That adjustment factor has

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1993) ("In fixing the child support obligation of a high-income parent, the trial court must balance competing concerns. On one hand, [it] should not limit the amount of child support to the child's 'shown needs,' because a child is not expected to live at a minimal level of comfort while the noncustodial parent is living a life of luxury. . . . On the other hand, child support payments are not intended to be windfalls, but rather adequate support payments for the upbringing of the children.").

[112] NAC 425.150(1)(h).

nothing to do with increases in child support based on income or wealth; it is the use of "magic words" required by federal law to provide a specific factor for a court to ***reduce*** guideline schedule child support when an obligor is unable to meet his or her own basic subsistence needs.[113]

When the question was raised as to interpretation of the words "the obligor's ability to pay," one Commissioner flatly stated, without any contrary response from anyone else, that "the subsection is not to be used for upward adjustment"; another noted that the words were intended to mean "ability to comply," but the existing wording is a federal term of art.[114]

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[113] Commission Minutes of September 17, 2021, at 6-7.

[114] *Id*.

In other words, *none* of the adjustment factors cited by the district court actually permit an upward adjustment from guideline support, and citing them for that purpose was an abuse of discretion.

D. Statutory Interpretation and Public Policy Considerations Militate for Reversal

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,"[115] and "where possible, the statute should be read to give meaning to all of its parts."[116]

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[115] *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994), citing several precedents.

[116] *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610, 836 P.2d 633, 636 (1992).

When parents share joint physical custody, as here, they both have an obligation to support their child.[117] The guideline schedule sum is the amount of child support that is to be ordered absent "evidence proving that the needs of a particular child are not met or are exceeded by such a child support obligation."[118]

To order massive additional sums of "child support" without identifying any *specific need of the child* to support that award, as the district court did in this case, would render the words "specific needs" and "particular child" meaningless, and to enter an award of such size from one parent that the other parent contributes nothing would violate the statutory direction that *both* parents are to contribute to the support of that child.

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[117] *See* NRS 125B.020; NAC 425.015, 425.037.

[118] NAC 425.100(2).

There is academic literature indicating that larger child support awards may be justified to avoid situations in which a child alternates between opulence and deprivation,[119] but here the parties both testified that prior to the district court's order they spent about the same amount of money on the child, lived frugally, and that all of *Bennett's* needs were met in both households.[120] The commentators have made clear that where that is the case, "child support" above the sum produced by guidelines is not warranted.[121]

Kourtney admitted that Bennett had no perception of any difference between her car and Tony's, and she freely admitted that to her view, "lifestyle" differences of the child have nothing to do with what is actually spent on the *child* in each home, but on how much money each parent has in

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[119] Raatjes, *supra*.

[120] VII AA 986, 1040.

[121] *See*, *e.g.*, Raatjes, *supra*, at 345-346.

the bank and retirement savings.[122] In other words, Kourtney believes that having a child with Tony entitles her to the same house, car, and retirement accounts that Tony has – regardless of anything having anything to do with their child.

As a matter of statutory construction, this Court should hold that the "specific needs" of a child are the particular or defined needs of *that particular child*, not some amorphous "socio-economic position of the child's parents" concept based on comparing how much money each of the child's parents has in the bank.[123] Courts nationally have stressed that the focus of regulatory

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[122] III AA 278, 281; VII AA 972-973.

[123] *See gen'ly* Marshal Willick, *The Impact of Custodial Schedules on Child Support*, in *Advanced Family Law* (State Bar of Nevada CLE), Las Vegas, Nevada, 2021, posted at

schemes like that of Nevada should stay focused on the child.[124] Where expenses relating to the child are modest and comparable in both homes, there is no valid reason to exceed the guideline schedule sum of support.

The current regulations, even more than the prior statutes, are designed so that "where no special circumstances exist, courts must focus exclusively upon the noncustodial parent's duty to pay a fixed percentage of income."[125]

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https://dwss.nv.gov/Support/cs_meeting_agenda_materials/.

[124] *See*, *e.g.*, *Smith v. Smith*, 67 P.3d 351, 354 (Okla. Civ. App. 2002) ("[A]t least some consideration should be given to the child's actual needs, which may include consideration of the child's lifestyle"); *In re Marriage of Lee*, 615 N.E.2d 1314, 1325–26 (Ill. App. Ct. 1993) ("The trial court must consider the standard of living the child would have enjoyed absent parental separation and dissolution.").

[125] *Lewis v. Hicks*, 108 Nev. 1107, 843 P.2d 828 (1992).

As demonstrated above, no adjustment factors in the regulations apply to these facts.

Nevada is hardly alone in its regulatory effort to keep "child support" awards to a sum actually having something to do with the child. *Most* states with provisions addressing the situation at all permit downward deviation when formulas produce "unnecessarily high child support awards."[126]

As commentators have noted, there is a real-world cost to all parties in the form of avoidable litigation when judges do not make awards within the

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[126] *See* Laura W. Morgan, *Child Support in High-Income Cases: A State-by-State Survey*, FAM. L. CONSULTING, http://www.supportguidelines.com /articles/art200302.html; Raatjes, *supra*, at 331.

bounds of the statutory scheme.[127] The district court's order in this case has increased that cost, to everyone.

II. THE ATTORNEY'S FEE AWARD WAS AN ABUSE OF DISCRETION

As the basis of the district court's child support award was erroneous, the attorney's fee award to Kourtney as the prevailing party could and should

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[127] Thomas J. Walsh, *The Rise and Fall of An Archetype: Revisions of the "Wisconsin Model" Child Support Guidelines*, 36 U. MEM. L. REV. 1013, 1025 (2006) ("[T]he unpredictability of support orders from judge to judge ma[k]e support cases very difficult to settle, causing greater expense in litigation and consumption of court calendar time.").

be reversed on that basis alone.[128] But there are additional bases for reversing the fee award.

The district court justified awarding Kourtney attorney's fees because Tony's lawyer accurately observed that he was already voluntarily paying more in support than the child's listed expenses and that a downward adjustment could therefore be made.[129] It is inherently improper for a court to award fees to penalize a lawyer for correctly citing the law as part of negotiations and litigation, and doing so would have the effect of chilling the diligent litigation of claims in contravention of the applicable ethical directives.[130]

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[128] *See*, *e.g.*, *Pelkola v. Pelkola*, 137 Nev. ___, 487 P.3d 807 (Adv. Opn. No. 24, May 27, 2021).

[129] V AA 761-763.

[130] *See*, *e.g.*, NRPC 1.3 (Diligence).

While there was a lot of discussion about parties' comments during settlement negotiations, in fact Tony had been paying more than the guideline schedule sum since before the litigation began, and all of his offers were also for sums higher than the guideline schedule.[131]

Actually, the costs of litigation were unreasonably increased by the fact that Kourtney went through three lawyers, then filed inaccurate and contradictory financial disclosures making wildly disparate claims about her income and expenses while she failed to articulate how Bennett's needs would not be met by the presumptive support award but kept demanding "more." Kourtney finally agreed that her own behavior made taking her deposition necessary.[132]

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[131] II AA 132-136; VII AA 995, 1085, 1098.

[132] VII AA 1017.

Ultimately, it is difficult to see the district court's stated intent to award fees to Kourtney as anything other than a mechanism for handing her even *more* money because Tony "can afford it." The fee award should be reversed as an abuse of judicial discretion.

CONCLUSION

Ordering additional payments from Tony solely for the purpose of permitting Kourtney to accumulate equity in a bigger house, increase her retirement savings, and decide to take extra time off of work and hire a maid simply is not an award of "child support" at all; it is an award of alimony between never-married parties, and is not permitted under Nevada's child support regulations. The fee award based on the erroneous child support award should likewise be reversed.

The decision of the district court should be reversed and remanded for entry of a child support order within the bounds of Nevada's current child support guidelines; the Court should specify in its decision which prior holdings do and do not still direct district court orders.

Dated this 4th day of January, 2022.

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

DATED this 4th day of January, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the WILLICK LAW GROUP and that on this 4th day of January, 2021, documents entitled *Appellant's Opening Brief* were filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows, to the attorneys listed below at the address, email address, and/or facsimile number indicated below:

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