IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHELLE RIVERO,

Appellant,

vs. Case No. 46915

ELVIS RIVERO,

Respondent.

_____/

BRIEF OF AMICUS CURIAE
FAMILY LAW SECTION OF NEVADA STATE BAR

Family Law Section - State Bar of Nevada
RAYMOND E. OSTER, ESQ.
Nevada Bar No. 6079
JENNIFER V. ABRAMS, ESQ.
Nevada Bar No. 7575
MARY ANNE DECARIA, ESQ.
Nevada Bar No. 0024
MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 2515
c/o FAHRENDORF, VILORIA
OLIPHANT & OSTER L.L.P.
327 California Avenue
Reno, Nevada 89519
775-348-9999
775-348-0540 (fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

FEDERAL CASES

FEDERAL STATUTES

AMICUS CURIAE ANSWER TO PETITION FOR REHEARING

OF

THE FAMILY LAW SECTION OF THE STATE BAR OF NEVADA

The Family Law Section of the State Bar of Nevada ("FLS") submits its Amicus Curiae Answer to Petition for Rehearing in accordance with this Court's February 25, 2009, Order.

PROCEDURAL HISTORY

On October 30, 2008, the Nevada Supreme Court issued its *Opinion* in this matter.

On January 16, 2009, Respondent, Elvis Rivero, filed his Petition for Rehearing of En Banc Decision.

On February 25, 2009, this Court issued an Order Directing an Answer to Petition for Rehearing where it requested (at page one) that four questions be addressed:

1. Why the term "joint physical custody is not adequately defined, expressly or by implication, in *Truax v. Truax*, 110 Nev. 437, 874 P.2d 10 (1994) and *Mosley v. Figliuzzi*, 113 Nev. 51, 930 P.2d 1110 (1997).

2. Whether the district court's determination of joint physical custody resulting in an unequal timeshare should have any bearing on the district court's award of child support.

3. Whether this court's adoption of the Missouri definition of joint physical custody is appropriate and why or why not.

4. Whether the court should revisit the formula for determining child support in joint physical custody arrangements involving unequal timesharing.

DISCUSSION

FLS organizes its Answer in the order of the four questions posed by the Court's February 25, 2009, Order in two parts. The first responds to questions one and three, which go to matters of definition and construction. The second part responds to questions two and four, which go to matters relating to the policy governing child support in Nevada and calculation of support in joint-but-unequal timeshare situations.

In Part Two, Section III(D)(2), the FLS proposes a replacement analysis for the "Rivero Formula" that we believe will achieve the policy goals expressed in the *Opinion* more effectively,

without the unintended consequences specified in the *Petition for Rehearing*, the Mary Anne Decaria article, and this *Brief*. We believe it should be adopted for use in joint-but-unequal timeshare situations, as to downward deviations, and in situations where a non-custodial parent is exercising less than a 20% timeshare, as to upward deviations.

This *Brief* also asks this Court to announce decisions as to definitions, and a couple of policy points (such as whether the flow of child support to minority time share parents is permissible). Doing so, in this case, will go a long way toward preventing confusion in the family courts, and the waste of judicial and party resources on litigation of matters that would be made unnecessary by clarity in the legal standards and parameters.

PART ONE – MATTERS OF DEFINITION AND CONSTRUCTION

I. *Truax and Mosley* do not Adequately Define the Term "Joint Physical Custody"

Neither *Truax*[1] nor *Mosley*[2] define, either expressly or implicitly, the term "joint physical custody."

Truax addresses only the legal standard a court must follow when considering a modification of joint custody, without ever giving definition to the term, "joint physical custody." Although *Truax* noted that "the parents were subject to a 'shared' or joint physical custody order,"[3] the *Opinion* does not define the term "joint physical custody," nor does it specify the terms of the parents' custodial arrangement. Because of its limited factual recitation and lack of definition, *Truax* is of no assistance in discerning the meaning of "joint physical custody."

Mosley is an appeal from an order modifying a joint custody arrangement to sole custody. Although much of the case is dicta espousing shared custody as an ideal, it does not define the term, nor does it distinguish between legal custody and physical custody. The parties' son was an infant when their joint custody agreement was first approved by the trial court, and he was only five years

[1] *Truax v. Truax*, 110 Nev. 437, 874 P.2d 10 (1994).
[2] *Mosley v. Figliuzzi*, 113 Nev. 51, 930 P.2d 1110 (1997).
[3] *Truax*, 110 Nev. at 438.

of age at the time the fourth motion relating to custody, which led to the appeal, was filed by his mother. The original custody order provided that "the parents should have joint custody, with appropriate residential arrangements that would accommodate the child's age,"[4] and that "it was the intention of the parties to reach, when the child is of an appropriate age, a true 50/50 time share."[5]

Although *Mosley* makes many references to the parties' agreement and intent to have an equal time share, and to the district court orders of joint custody, the *Opinion* makes no finding as to the actual amount of time the child spent with each parent, and it is unclear as to whether the parties ever followed an exact 50/50 time share.

Mosley erroneously indicates that the policy of the State of Nevada "encourages both parents to share *equally* parental responsibilities after separation."[6] That statement does not comport with the actual policy of our State, as codified in NRS 125.460, which encourages "parents to *share* the rights and responsibilities of child rearing." (Emphasis added.) It would be a huge stretch to interpret an apparent misstatement in a footnote to mean that the words "shared" and "equal" are synonymous. They are not.

Just as two people may share a pizza without each having exactly equal allotments (one eats three slices of an eight slice pizza while the other consumes the remaining five), parents sharing joint physical custody may not have an equal time share (one parent may have the children three days each week, while the other has them four days). If the *Mosley* Court intended to define "joint physical custody," it did not accomplish it by means of the incongruous footnote.

Neither *Truax* nor *Mosley* defines the term "joint physical custody," nor do they provide clear, cogent, and unambiguous analysis or discussion of the meaning of the terms at issue here.

---

[4] *Id*. at 53.
[5] *Id*.
[6] *Id*. at 61, fn. 4.

II. The Supreme Court's Adoption of the Missouri Definition of "Joint Physical Custody" Is Appropriate, but the FLS Requests Guidance as to What Constitutes a "Significant but Not Necessarily Equal" Time Share and to Define All Forms of Custody

The Supreme Court's adoption of the Missouri definition of "joint physical custody" is appropriate, as it gives a trial court discretion to assess the facts unique to each individual case from a child-centered point of view. The definition focuses the inquiry on the significance of the child's relationship with each parent – where the child actually resides (does the child have one or two principal households) and on whether one parent or both meaningfully takes care of and supervises the child.

The definition also comports with the public policy of the State of Nevada as stated in NRS 125.460, which seeks to ensure that a child maintains frequent, meaningful and continuing contact with both parents, and recognizes that parents may have joint physical custody without having an exactly equal time share. However, the definition lends itself to vagueness and the Court should give guidance as to when an unequal time share may be characterized as one of joint physical custody.

A. The Court Is Asked to Clarify What Constitutes Joint Physical Custody Which Is Significant but Not Necessarily an Equal Time Share

As noted by the FLS in its February 28, 2008, *Amicus Curiae Brief* ("*First Brief*"), Missouri defines a time share as "joint physical custody" based on the vague and subjective basis of whether the time share is "significant but not necessarily equal."[7] The FLS suggests that the meaning of "joint physical custody" may be improved by the following clarifications.

First, the Missouri definition recognizes that "joint physical custody" could exist even if parents do not have an equal time share. The FLS asks the Supreme Court to clarify that an award of joint physical custody should not be an option the trial court may consider unless some objective minimum time threshold is established.

The FLS previously proposed[8] and reasserts here that joint physical custody should not be considered by the trial court, unless the child resides with or is under the direct care and supervision

[7] *First Brief* at 11: 17-25.
[8] *First Brief* at 12: 2-21; 13: 1-4; *see also* fn. 7.

of a parent for at least 40% of the time. Further, the trial court should not consider an anomaly occurring in one specific year – for example, leap year, illness, emergency or other exigency transiently altering the timeshare; the purpose of the 40% threshold is to define a base and ensure that each parent is routinely the custodian of a child for a meaningful and significant period of time.

If the Court is reluctant to adopt a specific percentage of time as the threshold to consideration of joint physical custody as a possible custody award, it is requested that the Court give clear guidance that if joint physical custody is to be considered an option in a less than equal time share, the time share must be close to equal. Without this clarification, the definition becomes meaningless, leaving the parties to argue over and the trial court to figure out what constitutes "significant periods of time."

Under the FLS proposal, an exactly equal time share is automatically considered to be "joint physical custody." However, it is imperative that if a time share falls within the 40% to 49% range, there should be no automatic or rebuttable presumption that joint physical custody is established. In those circumstances, the trial court must exercise its discretion as to whether a time share of 40% to 49% qualifies as joint physical custody under the specific facts and circumstances of the case before it.

It is suggested that the trial court should view the facts and circumstances of the case from a child-centered[9] perspective and look to facts establishing the quality of the parent's interactions with the child, including the relationship with the child, where the child resides and when, the care and supervision provided to the child, and how and where each parent provides that care and supervision. The foregoing are not intended to be the sole factors considered. The list should be inexhaustive[10] and focus the analysis on the unique facts of each child's life. Presumably, the burden

[9] The "child-centered" view is derived from case law involving the Hague Convention Regarding International Child Abduction. When addressing a case involving the Hague Convention, courts adopt a child-centered view of which country is a child's habitual residence. *Feder v. Evans-Feder*, 63 F.3d 217 (3rd Cir. 1995).

[10] In the same manner as the factors listed in *Buchanan v. Buchanan*, 90 Nev. 209, 523 P.2d 1 (1974) are utilized in alimony cases, or how determining a child's "best interest" includes, but goes beyond, considering the specific listed factors set out in NRS 125.480.

of making the showing should be placed on the minority time-share parent asking that the timeshare be recognized as one of joint-but-unequal custody.

It must be noted that after the Court adopted the Missouri definition, it became common practice for litigants to claim that the case law of Missouri must solely control determination of issues of joint physical custody. We do not believe that this Court intended to adopt the case law of Missouri merely because it chose to borrow that State's statutory definition of joint legal custody. While Missouri case law may be informative, and perhaps persuasive, it should not control the analysis and outcome of a case. A trial court must not be prevented or limited in its review of all law that is relevant and applicable to the facts and issues before it.

While this point is important in cases involving joint physical custody, it is equally important in other cases as well. If the Supreme Court adopts the definitions of other forms of custody, as asked for by the FLS in its original *Brief* and reasserted below, this issue becomes all the more important, as some of the requested terminology is based upon law from other jurisdictions.[11] Of course, Nevada principles of family law will govern all cases, regardless of the origins of any concept or definition borrowed from the statutory or case law of a sister jurisdiction. It might save some litigation, and perhaps prevent another appeal, for this Court to specify that Nevada statutory and case law is controlling, and the law of States from which terms are borrowed are persuasive authority only.

B. The Court Is Asked to Define All Types of Custody, Not Just "Joint Physical Custody"

In its *First Brief*, the FLS proposed definitions for all types of legal and physical custody.[12] These definitions were intended to work together to create a continuum where one type of custody ends and another type of custody begins.[13] Without clear definitions for all forms of custody, there

---

[11] The definition of "sole physical custody" proposed by the FLS was based upon New Jersey case law (*Brief* at 9: 19-26) and the definition of "primary physical custody" was based upon a Florida statute (*Brief* at 13: 18-21).

[12] *First Brief* at 6: 21-28; 14: 1-18. *See also First Brief*, Exhibit "B."

[13] *See* Exhibit 1 (forms of custody chart). We have derived these forms of custody from the statutory and case law; it might reduce confusion in future cases if the Court specifies what "forms of custody"

are no legal standards by which to measure when a time share moves from sole physical custody to joint physical custody, or from joint physical custody to primary physical custody.

For example, without clear definitions, how are litigants, attorneys and courts to know what it means to award or be awarded "primary physical custody" or "sole physical custody," or whether any difference exists between the two terms. Although we now know what "joint physical custody" is supposed to mean, there is no real clarity in the law until we are able to compare it to all other well-defined and understood types of custody. Therefore, the FLS renews its request that the Supreme Court take this opportunity to define all types of custody available under Nevada law.

We believe this Court's decision to define the term "joint physical custody" was an advancement of Nevada family law. It represented the first time a custodial term has actually been defined, even though there are statutory presumptions[14] and decades of case law[15] discussing and conditioning some types of custody.

The Court will further enhance the practice of family law by clarifying its definition of "joint physical custody" and by: 1) defining the other custodial terms; 2) setting a minimum standard before "joint physical custody" can be considered; 3) requiring trial courts to take a child-centered view when exercising its discretion; and 4) clarifying that adoption of a given State's definition of a custodial term does not mean that its accompanying case law is controlling. The FLS believes that the *Rivero* definition of joint physical custody is appropriate, but will be made more so by adoption of the clarifications outlined here.

---

are possible, so that terminology used in future decisions does not reference forms without legal meaning.

[14] These statutory presumptions are outlined in the *First Brief* at 3: 12-28; 4: 1-2.

[15] This case law is outlined in the *Brief* at 4: 4-28; 6: 1-20.

PART TWO – MATTERS RELATING TO CHILD SUPPORT POLICY AND CALCULATIONS

III. The District Court's Determination of Joint Physical Custody Resulting in an Unequal Timeshare Should Have a Bearing on Its Award of Child Support, in Appropriate Circumstances and this Court Should Revisit the *Rivero* Formula

A. Purpose and Goals of Child Support Awards

The purpose of child support is to ensure that children benefit from the same proportion of parental income in a divided household as they have in an intact family, according to the 1985 Nevada Commission on Child Support Enforcement.[16] The Commission sought guidelines that result in adequacy, consistency, and predictability of child support awards, a goal shared nationwide.[17] Over the years, Nevada's laws on child support have evolved in attempts to balance these competing goals, while maintaining a formula that is simple and easy to calculate. A summary of the development of pertinent Nevada child support guidelines is attached hereto as Exhibit 2.

B. Existing Statutory and Case Law Formulas Further the Purpose and Goals of Child Support Awards

The Nevada child support guidelines were initially derived from the Wisconsin Guidelines, making Nevada one of half a dozen "percentage of income" guideline states.[18] This theoretical model ***presumes*** a contribution from the custodial parent, and ***calculates*** a contribution from the non-custodian as a percentage of income to support the child in the primary household. While application of such a formula provides consistent and predictable outcomes, thus reducing litigation, strict application of the formula may cause inequity under the unique facts and circumstances of some cases. Thus, in order to balance adequacy in every case versus consistency and predictability, while keeping the formula simple, the Nevada statutory guidelines evolved to combine both a

---

[16] *See* 1985 Report of the Nevada Commission on Child Support Enforcement.
[17] *See* Family Support Act of 1988, Pub. Law No. 100-485, 102 Stat. 2343 (October 13, 1988).
[18] *See* 1989 Legislative History of A.B. 85 at 222-246.

formulaic approach,[19] and discretionary deviation factors that can be tailored to the facts of certain cases, as necessary.[20]

In the Nevada enactment, presumptions of adequacy are set out in NRS 125B.070, which establishes the definition of "gross income," sets forth the percentages to be applied to "gross income" based on the number of children involved, and sets out the presumptive minimum and the brackets at which presumptive maximums apply.

The following provision, NRS 125B.080, explains the various reasons the guideline amounts can be modified, including a list of statutory deviation factors. One of these, NRS 125B.080(9)(j), is: "the amount of time the child spends with each parent."

That deviation factor reflects the "presumed direct contribution" to child expenses by the non-custodial parent during visitation periods, which is inherent in the Nevada child support formula. As noted by the 1985 Governor's Commission, the two State Bar Family Law Section Child Support Statute Review Committee Reports of 1992 and 1996, and the current research of Laura Morgan, Esq.,[21] any Wisconsin-guideline model State, like Nevada, inherently includes a "presumed direct contribution" to child expenses by the non-custodial parent during normal visitation periods.

That presumed direct contribution by a non-custodian is part of the total support expected by the child support formula to be expended on a child. Thus, if the non-custodial parent's direct contribution to child expenses exceeds or falls short of that presumed in NRS 125B.070 as a result of the amount of time the non-custodial parent spends with the child, the court has discretion to deviate downwards or upwards from the child support calculated under that statute, as provided in NRS 125B.080(9)(j). This process of calculating support pursuant to a formula with inherent

---

[19] NRS 125B.070.

[20] NRS 125B.080. *See also* 1987 Legislative History of A.B. 424 at 96.

[21] In preparing this Amicus Brief, the Family Law Section commissioned additional research of what is done nationally in similar circumstances. Laura Morgan, Esq., is the author of CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION (Aspen Law & Business 1996 & Supps. 1997-2005) and many articles on the subject. Ms. Morgan's responsive work product is attached hereto as Exhibit 3.

presumptions, while allowing for deviations based on the particular circumstances of each case, furthers the original goals of fostering adequacy, consistency and predictability.

C. This Court Should Revisit The *Rivero* Formula

Criticism of the "Rivero Formula" falls into three broad categories. First, as noted in the article written by Mary Anne Decaria, which was attached as an exhibit to the *Petition for Rehearing*,[22] the "Rivero Formula" completely negates the effect of the deviation factors set forth in NRS 125.080 in certain circumstances.

Second, the "Rivero Formula" attempts to directly convert a parent's percentage of custodial time into dollars without taking into account either the "presumed direct contributions" inherent in NRS 125B.070, or the reality of "redundant expenditures" in joint custody situations (i.e., the fact that increased expenditures on the child by the non-custodial parent do not translate directly into reductions in expenditures in the primary custodial household but reflect redundant expenditures – the total amount expended relating to the child increases).

Third, the formula creates a "football" mentality where litigants are given a financial incentive to achieve a particular custodial percentage, or custodial label, not necessarily for the benefit of the child, but because of the automatic impact on support calculations.

The article written by Ms. Decaria includes hypothetical scenarios demonstrating an intractable flaw in the original "Rivero Formula."[23] Consideration of statutory deviation factors ***prior*** to application of the statutory cap has the effect of negating upward deviations when child support is reduced by the presumptive maximum. Although Ms. Decaria's article was not intended to address all of the perceived detriments of the "Rivero Formula" as set out in the original *Opinion*, the authors of this *Brief* agree with her analysis. We concur that this Court should unequivocally

[22] Ms. Decaria's article, "Child Support in Cases of Joint Physical Custody With Unequal Timeshare," was originally published in the January, 2009 edition of the Washoe County Bar Association publication, the *Writ*.

[23] There is an error in Hypothetical 1 of Ms. Decaria's article. The child support award under the "Rivero Formula" would be $1,280, not $910. That error does not affect this analysis, although it illustrates the ease with which error can creep into the fairly complex math that would be required by the original *Opinion* in a large number of custody cases.

withdraw the original "Rivero Formula," because it could, and would, cause more problems than it would resolve.

Additionally, the "Rivero Formula" fails to take into account the doctrines of "presumed direct contribution" and "redundant expenditures." As discussed above, NRS 125B.070 inherently includes a "presumed direct contribution" to child expenses by the non-custodial parent during visitation periods. As stated in the 1992 Report of the Child Support Guidelines Review Committee, discussing the reduction of statutory support below that which would have been directly expended in intact households:

> One plausible rationalization for the lowering of those original figures is that the non-custodial parent would spend a certain amount of time with the child, and expend a certain amount of money for the child's care that would otherwise be payable by the custodial parent. This can be called the "presumed contributions" interpretation. Under this theory, the child support paid may well be too little for the non-custodian's share of a child's complete support, but could be seen as not intended to provide it.[24] Some members of the Committee find this view to be the most reasonable way of accommodating conflicting studies and testimony previously presented.

The 1992 Report also discussed tying any reduction in guideline child support not just to expanded time spent by the non-custodial parent with the child, but also with reductions in expenses paid in the primary custodial household, and warned of the incentive to litigate custody in order to affect support awards that would be created by any mechanical (formula) set-up:

> The Committee had a consensus that support should not be abated in the absence of reasonably reliable data establishing a reduction in expenses to the primary custodian, and that the abatement should not exceed the amount by which the primary custodian's expenses are actually reduced. The available data indicates that, by and large, there is not an

---

[24] This helps interpret the *Herz* [*Herz v. Gabler-Herz*, 107 Nev. 117, 808 P.2d 1 (1991)] decision. Child support of double the presumptive ceiling was awarded, at least in part, on the basis of "the amount of time the children will spend with each parent as a result of this decree." The court made an implied finding that the decree resulted in the Obligor spending less than normal time with the children. If child support can be *increased* because of limited or no contact with the non-custodian, then the child support statute must be interpreted as *already factoring in* an adjustment for expenditures expected to be made for the children by the non-custodial parent.

This implied presumption that there will be some expenditures by the non-custodial parent would be partially consistent with the original design of the child support statute. As originally introduced, the full guideline amount applied if the non-custodial parent had physical custody for fewer than 147 days a year (approximately 40% of the time). If that time-share was exceeded, then the guideline child support was multiplied by the custodial parent's fractional time and only that sum was payable. *See* 1987 Legislative History of A.B. 424 at 2.

> appreciable reduction in the primary custodian's total expenses for maintaining a child despite a significant visitation period with the non-custodian, even when there is a considerable increase in the expenditures of the non-custodian.
>
> . . . .
>
> The big problem in any sort of explicit connection between child support on the one hand and time share or visitation on the other, is that the determination of visitation becomes a surrogate arena for disputes over the level of child support. Any such possibility should be avoided to the degree possible, for the benefit of the children involved, and must be acknowledged as a probable cost of any statutory abatement provision.

The doctrine of "redundant expenditures" has been noted in this Court's two cases addressing the unique circumstance in which there ***is*** no primary physical custodian because the parties equally share custody, and therefore presumably have equal direct expenditures relating to the child.[25] As this Court noted, "The sad reality that must be faced is that the desirable sharing of custody responsibilities by [another] custodian in joint custody situations has the inevitable result of increasing total child-related expenses."[26]

The Court stated in *Wesley* that given the reality of greater overall expenses in a shared custody case, the Court's goal was "to maintain the comparable lifestyle of the child between the parents' households."[27]

Thus, the existing deviation factor of "amount of time the child spend with each parent" can be a factor for either ***increasing*** guideline support (when presumed direct expenditures on the child are less than normal) or ***decreasing*** guideline support (when presumed direct expenditures on the child are more than normal). The original "Rivero Formula," however, is a blunt instrument that takes a strict percentage-of-time approach without regard for the financial impact on the respective parents or the adequacy of support of the child in either household. The analysis set out here is intended to address those concerns.

---

[25] *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998); *Wesley v. Foster*, 119 Nev. 110, 65 P.3d 251 (2003).

[26] *Wesley*, 119 Nev. at 113, 65 P.3d at 253.

[27] *Id*.

D. Approaches Relating to Unequal Joint Custody

1. Other Wisconsin-Guideline States' Approaches

The problems with the "Rivero Formula" noted in the *Petition for Rehearing*, in Ms. Decaria's article, and in this *Brief*, caused Amicus to review the other Wisconsin-guideline States' approaches to the problem of child support in joint custody cases. Those that have squarely examined it have reached the same result reached by this Court (total expenditures go up in a joint custody case) and have contrived a few different approaches to joint-but-unequal situations. We think none of them completely adequate, for the reasons set out below, and therefore suggest a different approach, tailored toward Nevada's particular enactment, which includes our presumptive maximum provision.

Alaska has, by statute, created a mathematical approach to the joint-custody problem, and takes into account the increase of total expenses on a child in such situations (the "redundant expenditures") by arbitrarily boosting whatever would have been total support from both parents by 50%.

Specifically, the Alaska joint-custody formula is triggered when the percentage of time (usually, but not always, to be defined as overnights of 110 or more) reaches 30% of custodial time. Trial courts are then to examine the details of the visitation schedule, and the financial disclosures, to determine whether ***expenses*** relating to the child divide in the same manner as the ***time*** spent with the child are divided. If so, normal guideline support is expanded by 50% to account for "redundant payments" in the two households, before application of Alaska's deviation factors.

Finally, the Alaska formulation contains a "look-back" provision under which courts are to eliminate the joint-custody offset if it was set up based on a custodial schedule that was not in fact followed by the minority-time-share parent, restoring full guideline support.

In Mississippi, pretty much the opposite approach to the mathematical construct of Alaska is directed, again by statute. There, courts are simply directed to deviate downward upon findings that expenses in the primary household have been "actually reduced" by the level of visitation/shared custody exercised by the other party. They are also directed to deviate upward upon findings that

the non-custodial parent has no involvement with the child and so makes no direct contribution to the child's expenses.

This non-mathematical approach incorporates the same "presumed contribution of direct expenditures" and "normal visitation" concept, but makes the line drawing pretty much entirely subjective with the trial courts.

The Wisconsin joint-custody provisions create a mathematical construct that appears to be similar to the original *Rivero* formulation. It is triggered at 25%, and like Alaska, usually (but not always) counts overnights as its measure of time, with the trigger-number being 92. Like Alaska, once the formula is activated, total support is increased to 150% to account for redundancy of expenses in the two households.

After that expansion of guideline support, courts are directed to offset each parent's obligation by the others' time share in a six-step process similar to the various steps set out in the original *Rivero Opinion*. At the end of that process, courts are to consider a variety of "fudge factors" for low-income parties and wide income disparity between parties, and make subjective adjustments accordingly.

According to Ms. Morgan, Illinois offers no statutory guidance, and because that State is in the midst of completely changing its guideline structure to an income shares model, we did not look at Illinois statutory or case law very closely.

2. Proposed Nevada Approach to Child Support in Unequal Joint Custody Cases

The approach is first summarized as a series of calculation steps, and then explained as a word problem, with an explanation for each stage of the analysis.

(a) Determine whether the minority time-share parent is exercising less time than 20% or more time than 40% with the child. If so, proceed to the next step. If not (i.e., the minority time-share parent is exercising between 20% and 40%), presume NRS 125B.080(9)(j) inapplicable as a modification factor.

(b) If the minority time-share parent is exercising less time than 20%, determine if guideline support was reduced by the presumptive maximum set out in NRS 125B.070. If so, the range of potential upward deviation for this factor is the difference between the presumptive maximum and the percentage of income for support set out in NRS 125B.070(1)(b). If not, the range of potential deviation for

this factor is based on the trial court's determination of the increased costs incurred in the majority time-share parent's household by virtue of the lack of the minority time-share parent's visitation.

(c) If the minority time-share parent is exercising more time than 40%, determine what child support would be calculated as being if the parents had exactly equal custody, under the *Wright*/*Wesley* offset methodology. The range of potential downward deviation for this factor is the difference between statutory support calculated for a primary/secondary situation under NRS 125B.070 and 125B.080, and support calculated under the *Wright*/*Wesley* offset methodology.

(d) If a *prima facie* case is made for deviation in either direction, determine whether the benefit that would be enjoyed by the deviation-seeking party and the child is greater, lesser, or the same as the detriment that would be suffered by the other party and the child. Only where the benefit is greater than the detriment – usually measured by comparison of household income – would the deviation be granted.

Framed as a word problem, the question presented is how to fairly adjust guideline child support based on "the amount of time the child spends with each parent," given the Nevada statutory guidelines, including its presumptive maximum provisions, across a wide variety of time-shares and parental incomes, while safeguarding the interest of the child to receipt of an adequate level of support in both households.

District courts should be advised to begin with a presumption of application of guideline support, and entertain requests for possible deviations as custody shares cross the fringes of "normal." Given the infinite permutations possible, we do not think an outright prohibition on requesting deviations based on NRS 125B.080(9)(j) should be laid down for any particular time-share. However, courts should normally not grant a deviation based on that factor when the time spent by the minority time-share parent is within the zone of "normal," because the child support statutes already presume a contribution to some of the child's expenses by the minority time-share parent during visitation, or joint custody. That is one reason guideline support is already lower than necessary to adequately support children, as set out above.

This analysis is simplest where a secondary custodian spends ***less*** time with a child than is considered "normal." In the bulk of cases it could be fairly presumed that there is less direct expenditure on the child by the non-custodial parent, which would favor an upward deviation from guideline support. Even here the rule should not be made axiomatic – it is possible to propose facts where the presumption of lesser direct expenditure is rebutted, as would be the case of a parent who

travels a great deal, but directly pays for a significant quantity of a child's activities, transportation, food, health care, clothing, etc., anyway.

We are reluctant to endorse any definition of time measurement. Particularly in Nevada, where parties regularly arrange child-custody schedules reflecting every conceivable variety of work shift, neither "overnights" nor clock hours may accurately reflect the variations in direct expenditures on a child that the mathematical constructs are designed to try to capture.[28]

Accordingly, district courts should be free to use whatever measure of time is appropriate given the facts of the case, and advised to see if the time share in question actually results in any decrease in expenditures in the primary residence as a precondition to any downward deviation from guideline support.

The district court should entertain a request for a downward deviation under NRS 125B.080(9)(j) when a parent has custodial time greater than 40%, and should consider that time share the equivalent of a *prima facie* case for deviation downward under that factor.

The maximum presumptive deviation downward would normally be that which would be produced by the *Wright*/*Wesley* process, since that would be the sum payable if custody was on a 50/50 basis.

The district court should entertain a request for an upward deviation under NRS 125B.080(9)(j) when a parent has custodial time less than 20%, and should consider that time share the equivalent of a *prima facie* case for deviation upward under that factor.

Where the statutory presumptive maximum operated to reduce statutory support below what NRS 125B.070 set out for percentages of income (i.e., 18% for one child 25% for two children, etc.), a rational maximum presumptive deviation would be the difference between the statutory presumptive maximum, and the percentage of income otherwise payable.[29] Under the "presumed direct contribution" theory, the child would be enjoying some benefit of the relatively wealthy

---

[28] For reference purposes, we have attached the approximate equivalencies of various time-share schedules to percentages of total custody, as Exhibit 5.

[29] To illustrate, if a non-custodian made $10,000 per month, the percentage of income payable for one child would be $1,800, but the applicable bracket presumptive maximum would be $785. The potential deviation would the difference between those numbers – $1,015.

obligor's income when in that parent's custody. If that parent is not actually exercising custodial time to a degree considered normal, the child would not be receiving that benefit directly, so providing it indirectly – by boosting support payable to the majority time-share parent's household – is the only mechanism for allowing the child to share in the lifestyle of both parents.[30]

It is more difficult to conceptualize a presumptive maximum deviation upward where the statutory presumptive maximum did ***not*** apply to reduce guideline support. When a minority time-share parent makes less than about $40,000 per year, even the one-child presumptive maximum does not activate, and any upward deviation based on the lack of normal visitation would have to be tailored to some approximation of the additional costs being borne in the majority time-share parent's household for the lack of the minority time-share parent's direct contribution.

If a *prima facie* case is made for deviation in either direction, a further step is required, to see if the benefit that would be enjoyed by the deviation-seeking parent and the child is greater than the detriment that would be suffered by the other parent and the child, or the benefit would be less than the detriment, or if the benefit and detriment were equal.

The benefit and the detriment of a deviation from guideline support are not always, or perhaps even usually, the same. For example, in *Barbagallo*, the parties had essentially a 4/3 custody split, giving the minority time-share parent about a 43% time share. If, on those facts, the minority time-share parent was wealthy, and the majority time-share parent was barely making a mortgage payment, then the proposed deviation would have no impact on the minority time-share parent's ability to care for the child during that time share, but a severe detriment would be suffered by the majority time-share parent and the child in the majority time-share parent's household. On those facts, deviation would be denied.

Reversing the incomes on the same time-share facts, the proposed deviation would greatly expand the relative resources available for the minority time-share parent and child during that 43%

[30] We do not mean to suggest that this analysis goes beyond this particular deviation factor, or overrides any other part of the child support formula, and this Court's *Opinion* should make that clear. For example, NRS 125B.080(5) still requires a showing that "the needs of a particular child are not met by the applicable formula" of NRS 125B.070, and if that showing is not made, deviation is inappropriate irrespective of time share or any income disparity between the parties.

time share, while the deviation would have no significant impact on the majority time-share parent's household. On those facts, the deviation would be granted.

And on facts where the proposed deviation would benefit the minority time-share parent and child just as much, but not more, than the detriment suffered by the majority time-share parent and child in the majority time-share parent's household, then deviation would be denied based on the policy reasons set out in *Barbagallo* and *Wesley* as to maintenance of a standard of living in the majority time-share parent's household. This allows judges to take parents' household incomes into account.[31]

A review of some hypothetical calculations illustrates the effects of this proposal.[32] Under the brackets now in effect, a minority time-share parent earning $10,000 per month would have a percentage-of-income obligation for a single child (18%) of $1,800, but would pay the majority time-share parent $785 under the presumptive maximum for that income bracket. If the majority time-share parent made $5,000 per month, that parent's income would be invisible to any normal guideline support analysis, because in a Wisconsin-guideline State, a percentage of income expended by the majority time-share parent for the benefit of the child is presumed but not calculated.

In a *Wright*/*Wesley* situation (50/50 custody), there would be cross-calculations, and the flow of support would be $664 – the presumptive maximum where there is a $5,000 differential in incomes.

In a joint-but-not-equal-custody situation, under our proposal, if the minority time-share parent were granted a custodial schedule of 43% of the time, the trial court would find a *prima facie* case for downward deviation, and proceed to the benefit/detriment balancing test, considering the potential deviation at issue to be $121 – the difference between guideline support, and support payable in a *Wright*/*Wesley* analysis.

While the facts of the specific case would dictate the result, deviation would probably be denied, because the detriment suffered in the household where the child spent 57% of his time, with

---

[31] *See Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994); *Jackson v. Jackson*, 111 Nev. 1551, 907 P.2d 990 (1995).

[32] Those discussed here, and others, are attached in tabular form as Exhibit 4 for ease of reference.

only $5,000 income for that household, would presumably be greater than the benefit that the party making $10,000 per month could get from having support lowered from $785 to $664. The $121 difference would probably be found to mean more to the household with lesser income.

Reversing the incomes of the parties in this hypothetical also produces sensible results, although the range of potential deviations is far greater. A minority time-share parent earning $5,000 per month would have a percentage-of-income obligation for a single child (18%) of $900, but would pay the majority time-share parent $664 under the presumptive maximum for that income bracket. If the majority time-share parent made $10,000 per month, that income would be invisible to any normal guideline support analysis, because in a Wisconsin-guideline State, a percentage of income expended by the majority time-share parent for the benefit of the child is presumed but not calculated.

In a *Wright*/*Wesley* situation (50/50 custody), there would be cross-calculations, and the flow of support, in exactly the same amount, would be reversed (the party making $10,000 per month would pay the party making $5,000 per month the presumptive maximum sum of $664).

The question is what to do in a joint-but-not-equal-custody situation, where the minority time-share parent makes far less than the majority time-share parent. Under our proposal, if the minority time-share parent was granted a custodial schedule of 43% of the time, the trial court would find a *prima facie* case for downward deviation and proceed to the benefit/detriment balancing test.

Deviation would probably be granted, because the detriment suffered in the household where the child spent 57% of his time, with $10,000 income for that household, would presumably be less than the benefit that the party making $5,000 per month could get from having support lowered from $664. The potential deviation would be enormous under this analysis, where the minority time-share parent has less income than the majority time-share parent – between ***paying*** $664 if considered a "secondary custodian" and ***receiving*** $664 under the *Wright*/*Wesley* analysis if considered a "joint physical custodian."[33] This is where the district court must exercise its discretion to provide adequately for the child in both households.

[33] The two possible ways of dealing with this wild swing – a byproduct of the presumptive maximum scheme superimposed on Nevada's child support statutes – are explored in the following section.

The proposed formulation has what we consider some salient advantages over the original *Rivero* formulation, and over the alternatives used in other Wisconsin-guideline States for "joint-but-unequal-custody" cases. Most of these advantages are in the negative.

Using this approach, absurd results stemming from the negation of upward deviations when the presumptive maximum is applied, will not occur. The proposed approach will also eliminate the possibility of absurd results stemming from the Rivero Formula's strict percentage-of-time approach which does not consider the direct financial impact on the respective parents or the adequacy of support of the child in either household.

Since custodial time-share is not directly linked to the final child support calculation, it is hoped that litigants will actually focus more on the best interest of the child when determining custody than they would if some automatic adjustment to child support kicked in at some particular percentage. Courts and litigants would be spared the expense and delay of performing complex multi-step calculations in all cases of joint physical custody, and we think this will reduce litigation over the meaning of terms such as "time."

Alaska and Wisconsin attempt to have it both ways – creating a precise mathematical formulation, and then building in subjective modification factors. We think this provides the worst of both worlds, both increasing the effort and cost of calculating guideline support in a large number of cases, ***and*** having too much doubt of the ultimate bottom line to ensure either predictability or consistency from court to court, which has the effect of increasing litigation. Mississippi avoid the "transactional cost" by having no formula for such cases, but leaves the outcome to the effectively unbridled discretion of judges, at the expense of predictability and consistency, and probably increasing litigation by parties willing to take a shot at altering their support obligations.

By establishing a threshold for a *prima facie* case for upward or downward deviation terms, and setting guidelines for the extent of deviation to be granted, it is hoped that a balance can be struck between predictability and consistency, on the one hand, and fairness, on the other, all within the strictures created by Nevada's presumptive maximum support statutes. The analysis to be applied by the district court can be done quickly, on the basis of papers already required to be filed (specifically the Financial Disclosure Form), and we think that outcomes under this proposal will

be sufficiently obvious most of the time that parties will be more inclined to stipulate than litigate them.

Within the strictures of Nevada's current child support scheme – including the presumptive maximum provision – we think the proposal described above for "joint-but-not-equal-custody" cases has the greatest chance of achieving adequacy, consistency, and predictability of child support awards in the great majority of cases, without over-complicating the child support calculation process. We think this preserves the advantages of the Wisconsin-guideline methodology, without penalizing either party, and while protecting the best interest of the children.

E. Question of Outright Prohibition of Support Flowing to Minority Time-Share Parent

Whatever decision is made by the Court as to the original "Rivero Formula," our proposal set out above, or any other alternative, one matter of public policy deserves explicit attention and decision.

Specifically, it has been noted in the Bar that under the original *Rivero* formulation, it is relatively easy to posit facts under which child support would flow from a majority time share custodian to a minority time-share custodian. This was considered significant, because long-standing practice in the Nevada Family Courts did not permit support except from a secondary physical custodian to a primary physical custodian, following *Barbagallo*, and because the Court did not announce that it was changing its direction in the original *Opinion*.

There are two scenarios to consider. First, the possibility that a less-than-50% timeshare custodian might be unable to provide adequate care for a child, financially, although otherwise appropriate to exercise a very substantial time-share with the child. Disallowing the possibility of child support to such a person could mean that the child would be inadequately supported during the substantial custodial time of that parent.

The second scenario is the California experience. A number of cases have appeared in Nevada from parties who had child support set in California. As noted, the California income-shares model is so complex that just figuring guideline child support, before considering deviations,

requires a computer program. Salient features of the California income-shares formula include that there is no presumptive maximum of any kind, and a direct sliding scale of support in relation to custodial time.

A number of California cases have been observed in which – if the income gap is large enough – even a primary custodian of a child with nearly 100% of the time-share can end up paying thousands of dollars per month to a non-custodian, essentially paying that parent to have limited, even supervised, visitation with the child.

Faced with these alternatives, the *ad hoc* Section Committee that directed the drafting of this brief discussed and voted on the matter, and believed that the latter danger outweighed the former, so any decision by this Court in this case should include a prohibition against child support flowing "uphill" – i.e., from a majority time-share custodian of a child to a minority time-share custodian of a child.

Notably, such a cut-off would lower the range of the swing in the second hypothetical set out in the preceding section by half. If it was in place, the range of potential deviation would be between paying $664 if considered a "secondary custodian" and down to zero – but no lower – if considered a "joint physical custodian."

A middle ground is possible. The Court could indicate that child support could only be ordered from a majority time-share parent to a minority time-share parent where the district court concluded that the child custody arrangement constituted "joint custody" where each parent was exercising between 40 and 60% custodial time.

Whichever decision the Court makes on this question, it should be stated clearly for the benefit of the Bench and Bar, as there are now disparate opinions as to the Court's intent on the question.

CONCLUSION

The FLS does not believe that existing case law provides adequate definitions of "Joint Physical Custody," or other terms frequently used in the family courts, and even in this Court's decisions relating to family law matters. The Court's adoption, in the original *Rivero Opinion*, of

such a definition was a good first step, but greater clarity of that definition, and issuance of definitions of other custodial terms, would be helpful to the Bench and Bar.

A finding that a particular custody schedule constitutes joint physical custody is significant and should have a bearing on a child support award. This court has a workable methodology where such a timeshare is 50/50. Where the timeshare is unequal, however, the formula announced in the original *Opinion* has a host of undesirable, and apparently unintended consequences, including significantly increased "transactional costs" to perform detailed calculations, litigation about the meaning of terms used within those calculations, and the apparent voiding of statutory modification factors, at least in practice.

Serving the goals of adequacy, predictability, and consistency, while retaining the relative simplicity and fairness of a Wisconsin-guideline approach to child support calculation, requires a different methodology in joint-but-unequal timeshare situations, a task made more difficult by the skewing effect of Nevada's presumptive maximum provision.

****

****

****

****

****

****

****

The FLS believes that the Court should revisit and jettison the "Rivero Formula" as set out in the original *Opinion*. The experience of the other Wisconsin-guideline States is instructive, both as to what to do and what not to do, again keeping an eye on the Nevada-specific problems created by our unique presumptive maximum provision. We believe the Court should adopt the four-part test set out above, which allows both upward and downward deviations, gives guidance for the amount of any such deviation, and contains an explicit step seeking protection of the adequacy of support for a child in both households, thus serving each of the purposes and goals of our child support statutes (adequacy, predictability, and consistency).

Finally, the question of whether child support can ever flow from a majority time-share parent to a minority time-share parent should be resolved, by either allowing it, prohibiting it, or permitting it solely in circumstances where the trial court has found that a joint physical custody situation actually exists, whether equal or unequal in timeshare.

DATED this _____ day of May, 2009.

By:_____
RAYMOND E. OSTER, ESQ.
Nevada Bar No. 6079
FAHRENDORF, VILORIA
OLIPHANT & OSTER L.L.P.
327 California Avenue
Reno, Nevada 89519
775-348-9999
775-348-0540 (fax)

_____
JENNIFER V. ABRAMS, ESQ.
Nevada Bar No. 7575

_____
MARY ANNE DECARIA, ESQ.
Nevada Bar No. 0024

_____
MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 2515

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, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. 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 ___ day of May, 2009.

_____
RAYMOND E. OSTER, ESQ.
Nevada Bar No. 6079
FAHRENDORF, VILORIA
OLIPHANT & OSTER L.L.P.
327 California Avenue
Reno, Nevada 89519
775-348-9999
775-348-0540 (fax)
Attorneys for Amicus Curiae

CERTIFICATE OF MAILING

I hereby certify that I am an employee of FAHRENDORF, VILORIA, OLIPHANT & OSTER L.L.P., and on the _____ day of May, 2009, I deposited in the United States Mail, postage prepaid, at Reno, Nevada, a true and correct copy of the Brief of Amicus Curiae, addressed to:

Brian Steinberg, Esq.
2250 South Rancho Drive, Ste. 215
Las Vegas, NV 89102
Attorney for Appellant

Bruce I. Shapiro, Esq.
8925 South Pecos Road, Suite 14A
Henderson, Nevada 89074
Attorney for Respondent

There is regular communication between the place of mailing and the places so addressed.

_____
Employee of FAHRENDORF, VILORIA, OLIPHANT & OSTER L.L.P.

P:\wp13\SBN\MSW5659C.WPD