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Alexander M. Falconi
[redacted]
Appearing in Proper Person

BY [redacted] DEPUTY

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FV08-03200
ALEXANDER M FALCONI
District Court
Washoe County

IN THE FAMILY DIVISION

OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ALEXANDER M. FALCONI,
Petitioner,

vs.

[redacted] ANN [redacted]
Respondent.

Case #: FV08-03200

Dept #: 11

MOTION TO MODIFY CHILD SUPPORT

COMES NOW, Petitioner, Alexander M. Falconi, appearing in proper person, and hereby files a motion to modify child support. This motion is based upon the following memorandum of points and authorities and all pleadings on file herein.

Memorandum of Points and Authorities

I. Factual Background

On August 25, 2008, Petitioner, Alexander M. Falconi, the natural father, hereafter 'FATHER', sued Respondent, [redacted] the natural mother, hereafter 'MOTHER', for custody and visitation of their common minor child of age six (6), [redacted]

On May 26, 2009, the Court awarded physical and legal custody to the parties jointly.

In July of 2010, FATHER was employed full-time by Pinnacle Services, Inc., d.b.a. Summit Collection Services as, *de jure*, a legal assistant, although *de facto*, a hybrid paralegal-

debt collector. FATHER enjoyed a $12.00 per hour salary with a lucrative bonus program that removed him from the retail sales industry and increased his income substantially.

On March 25, 2011, MOTHER filed a Motion to Modify Child Support in response to FATHER's elevation in employment.

In May of 2011, FATHER switched full-time employment to The Public Interest Law Firm, Inc. d.b.a. TPI Law. Because this position did not include bonuses FATHER's income decreased.

On June 15, 2011, Parties stipulated on MOTHER's Motion to Modify Child Support.

In February of 2012, FATHER was rendered unemployed after the dissolution of The Public Interest Law Firm, Inc. The owners of the corporation were eventually sued for fraud and misrepresentation (see CV12-01313) and are currently under investigation by the Nevada Attorney General.

In June of 2012, FATHER was employed by Collection Service of Nevada, Inc. as a part-time paralegal at $15.00 per hour. Because the hours are substantially lesser than those of his previous two (2) jobs, FATHER's income decreased further. FATHER has taken advantage of this reduction in hours to increase his student enrollment status from part-time to three-quarters-time. At this accelerated rate, FATHER can expect to graduate from the University of Nevada-Reno with a bachelor's degree in Computer Science and Engineering within a year.

II. Legal Analysis

Pursuant to *Rivero v. Rivero*, 216 P. 3d 213 - Nev: Supreme Court (2009) at page 232:

> In cases where the parties have joint physical custody, the *Wright v. Osburn* formula determines which parent should receive child support. 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998). We take this opportunity to note that *Wright* overrules *Barbagallo's* application of the statutory child support formulas in joint physical custody cases.

And pursuant to *Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998) at page 1072:

> Therefore, when custody is shared equally, the determination of who receives child support payments and the amount of that payment can be determined as follows: Calculate the appropriate percentage of gross income for each parent; subtract the difference between the two and require the parent with the higher income to pay the parent with the lower income that difference.

It would be in [redacted] best interests and consistent with *stare decisis* for the Court to modify child support in accordance with this precedent. Pursuant to *Lewis v. Hicks*, 843 P. 2d 828 - Nev: Supreme Court (1992) at page 831:

> Although the trial judge's discretion will continue to play an important role within the confines of the statutes, it cannot go beyond them. In accordance with this principle, **we have consistently found error where the trial court invented its own formula** for calculating [child] support awards. (emphasis added)

A. A Substantial Decrease in Gross Income Mandates Review

Pursuant to *Rivero v. Rivero* at page 228:

> The Legislature has specified when a court will review a child support order. A court must review a support order, if requested by a party or legal guardian, every three years. NRS 125B.145(1)(b). The court may also review a support order upon a showing of changed circumstances. NRS 125B.145. Because the term "may" is discretionary, the district court has discretion to review a support order based on changed circumstances but is not required to do so. *Fourchier v. McNeil Const. Co.*, 68 Nev. 109, 122, 227 P.2d 429, 435 (1951). However, a change of **20 percent or more** in the obligor parent's gross monthly income **requires** the court to review the support order. NRS 125B.145(4). (emphasis added)

An average of FATHER's last six (6) paychecks returns a gross monthly income of $1867.49. Exhibit 1. The stipulation and order entered June 15, 2011 bases the current child support

amount on FATHER's gross monthly income of $3072.22[1]. FATHER's income has decreased by over 39%. Therefore, a review of child support is mandatory.

B. Willful Underemployment

Pursuant to NRS 125B.080(8): "If a parent who has an obligation for support is willfully underemployed or unemployed to avoid an obligation for support of a child, that obligation must be based upon the parent's true potential earning capacity." FATHER takes this opportunity to state that his current part-time employment is not a willful underemployment, but rather, a consequence of the economic downturn.

However, FATHER understands that, although his increase in student status from part-time to three-quarters-time is merely an opportunistic taking advantage of the economic decline, it may serve to preponderate that he in fact is willfully underemployed. Consequently, FATHER would cite *Minnear v. Minnear*, 814 P. 2d 85 - Nev: Supreme Court (1991) at page 86:

> Under NRS 125B.080(8), this constitutes a valid reason for increasing a parent's support payments. While we believe that deliberate avoidance may be inferred from the record in this case, we are mindful that NRS 125B.080(8) **requires an additional finding** that a parent's willful underemployment be "for the purpose of avoiding an obligation for support of a child... ." **We now hold that, henceforth, where evidence of willful underemployment preponderates, a presumption will [redacted] that such underemployment is for the purpose of avoiding support. Once this presumption arises, the burden of proving willful underemployment for reasons other than avoidance of a support obligation will shift to the supporting parent.** *See People v. Sorensen,* 68 Cal.2d 280, 66 Cal. Rptr. 7, 12, 437 P.2d 495, 500 (1968). (emphasis added)

Under this precedent, FATHER would argue that his underemployment is not for the purposes of avoiding child support, but rather, to better his education. FATHER is not merely attending his

[1] Stipulation and Order: "18% of [FATHER's] gross monthly income which is $553.00". This means FATHER's gross monthly income was $3072.22. (Take $3072.22 and multiply by 0.18 to get $553.00)

first few classes; he is on the brink of graduation, having accumulated 120 credits. Exhibit 2. A degree in computer science is the gateway to a career in software engineering:

> Software engineers design, construct, and maintain both software and systems based on the needs of computer and mobile home users. They code the software, which tells the computer—or application—how to work. Most engineers and developers start out with a college degree, typically in a field such as computer science or software engineering...The Bureau of Labor Statistics reports that software developers earned an average of $100,000 per year in 2011. This figure, however, accounts for both developers and engineers, regardless of experience or skills. For 2012, starting salaries for a software engineer ranged from $78,000 to $120,000, predicts Robert Half Technology, one of the leading providers of IT professionals. (See Exhibit 3)

FATHER has already been exercising his skills in web design and produced two (2) websites[2]. Careers in software engineering are rated exceptionally high in salary, job availability, and advancement potential. Exhibit 4. This overcomes the presumption that FATHER is underemployed for the purposes of avoiding child support. FATHER's graduation would be in [redacted] best interests and, ironically, would eventually liberate MOTHER from child support as FATHER would undoubtedly be the one paying her in the future.

If the Court does eventually conclude that FATHER is underemployed for the purpose of avoiding child support, gross monthly income should be imputed[3].

C. Child Support Should Be Modified *Nunc Pro Tunc*

When child support is modified from the date of the filing of the motion requesting review and/or modification, it destroys the incentive for Parties to act in bad faith by dragging out the proceedings as long as possible. This underlying principle has resulted in stipulation on all three (3) of Parties' previous child support modifications. When parties stipulate, judicial

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[2] See www.smartlegaldocs.com and www.waltzworkshop.com. FATHER is proficient in HTML, xHTML, PHP, SQL databases, XML, Javascript, AJAX Techniques, C, C++, and Python programming languages.

[3] Such a determination would necessarily require the basis of the court's decision to be included in the written order so as to prevent delays on appeal.

resources are more efficiently allocated and costs and fees are kept at a minimum. Although there is case law prohibiting retroactive child support modifications, our superior court expressly exempted a modification-from-date-of-motion under *Ramacciotti v. Ramacciotti*, 795 P. 2d 988 - Nev: Supreme Court (1990) at page 990:

> Although *Day v. Day*, 82 Nev. 317, 417 P.2d 914 (1966) and its progeny preclude retroactive modification of a decree to increase child support, such a limitation is not applicable here. *See also Boyes v. Valley Bank*, 101 Nev. 287, 701 P.2d 1008 (1985) and *Clark County School District v. Beebe*, 91 Nev. 165, 533 P.2d 161 (1975). **These cases do not prohibit modification of a decree to increase a child support obligation as of the date a motion to modify the decree is filed.** As the Washington Supreme Court has observed:
>
> > In a situation warranting modification of child support or alimony, the court may make the modification effective either as of the time of filing the petition or **as of the date of the decree of modification**, or as a time in between, but it may not modify the decree retroactively.
>
> (Emphasis added)

III. Mediation is Futile

Pursuant to WDFCR 53(14)(b)(3), mediation is not appropriate when "The case is at the post-dissolution stage and has involved bitter conflict and frequent court appearances." The docket supports this. MOTHER is also affected by underlying psychiatric issues that interfere with mediation. WDFCR 53(14)(b)(4)[4]. Furthermore, the Court has ordered parties to mediation a total of three (3) times, none of which have resulted in successful resolution.

IV. Hearing

FATHER would prefer to resolve this matter without a hearing because it is primarily an exercise in number crunching; The Court could enter an order for review requiring that Parties file briefs on the substantively applicable law as well as whatever financial information is

[4] WDFCR 53(14)(b)(4): Mediation is inappropriate when "a parent has serious psychological problems or has displayed severely anti-social modes of behavior."

deemed necessary. However, if a hearing is deemed necessary, FATHER requests that the Court combine it with the upcoming contempt hearing scheduled to be set on June 5th, 2013.

V. Conclusion

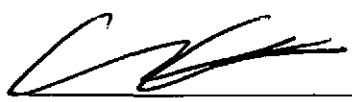
FATHER is requesting this modification reluctantly and only because, after two (2) years, his gross income has steadily been in decline. FATHER, upon graduation, should be able to obtain much better employment as a software engineer and one day expects to be the one paying child support.

THEREFORE, FATHER requests that:

1. The Court **ORDER** a review of child support; and,
2. The Court modify child support in accordance with *Wright v. Osburn*; and,
3. That any modification be applied *nunc pro tunc,* from the date of filing this motion; and,
4. For such further relief as the Court deems necessary and just.

AFFIRMATION[5]: This document does not contain a social security number.

SIGNED this 28 day of MAY, 2013.



Alexander M. Falconi

[5] This affirmation is in accordance with NRS 239B.030.