# Minority Report/Opinion to the Washington 2011 Child Support Schedule Workgroup:

## Court-Ordered Financial Aid – Two Arguments why Washington's Law Authorizing Courts to Order Divorced Parents to Pay Postsecondary-Education Costs is Unconstitutional

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*ABSTRACT: This Minority Report/Comment document submitted by a non-attorney member of the public with a financial interest in the legislative outcomes from the Washington 2011 Child Support Schedule Workgroup's Written Report analyzes the constitutionality of Revised Code of Washington (RCW) 26.19.090, which authorizes Washington courts to order either parent party to a divorce to pay a postsecondary-education subsidy for his or her postmajority children between the ages of eighteen and twenty-three. Due to the location of the statute within the Revised Code of Washington, the Washington Supreme Court has held that this statute may create a mandatory obligation only for divorced parents to support their children's postsecondary educations. It cannot apply to married parents or parents who never married. This Minority Report/Opinion document argues this varied application creates two classifications that violate the Equal Protection Clause of the U.S. Constitution. The first classification is between divorced and "nondivorced" parents. While this Minority Report/Opinion document acknowledges RCW 26.19.090 probably does not discriminate unconstitutionally against divorced parents as a class, it nevertheless argues that it unconstitutionally discriminates against divorced parents as to the exercise of their "fundamental right to parent," which the U.S. Supreme Court first recognized in* Meyer v. Nebraska *and* Pierce v. Society of Sisters, *and recently reaffirmed in* Troxel v. Granville. *The second classification this Minority Report/Opinion document examines is RCW 26.19.090's discrimination between children of divorced parents who can receive postsecondary-education subsidies and nonmarital or "illegitimate" children who cannot. This Minority Report/Opinion document argues that these distinctions also violate the Equal Protection Clause and that the Washington Supreme Court erred in rejecting an Equal Protection challenge in* Childers v. Childers.[2]

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[2] *See* 89 Wn.2d 592, 575 P.2d 201, 209 (Wash. 1978).

Respected and accomplished attorneys and legal authors[3] have repeatedly shown that, under common law, courts have *historically* held that parents have a duty to provide their children with the "necessities" of life. Historically, items such as food, clothing, shelter, and medicine were befitting of such a label; however, some courts have recently placed education – specifically a college education – in the aforementioned "necessities" of life category.[4]

The 1971 ratification of the Twenty-Sixth Amendment to the U.S. Constitution *lowered* the minimum voting age to *eighteen*.[5] This action precipitated many states *lowering* their '*age of majority*.' State courts' judicial dockets were subsequently awash with a cascading waterfall effect of litigation initiated by noncustodial parents seeking to adhere to this newfound common law rule *preventing postminority child support*. In direct response to this, several state legislatures created an '*education exception*' to the common law rule *prohibiting postminority child support* payments in an effort to *minimize the disadvantages of children of divorced parents*.[6] Consequently, courts in these 'enlightened' states may today compel a noncustodial parent to provide financial support for their child's postsecondary education, regardless of whether such payments are made after the child reaches the state-specific *age of majority*.[7]

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[4] *See, e.g.*, Esteb v. Esteb, 244 P. 264, 265 (Wash. 1926).

[5] Kathleen Conrey Horan, *Post-Minority Support for College Education—A Legally Enforceable Obligation in Divorce Proceedings?*, 18 N.M. L. REV. 153, 155 (1988); *see also* U.S. CONST. amend. XXVI (lowering the voting age to eighteen).

[6] Abraham Kuhl, *Post-Majority Educational Support for Children in the Twenty-first Century*, 21 J. AM. ACAD. MATRIM. LAW. 763, 765 (2008).

[7] *See* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 4.05(d) (Supp. 2007) (surveying U.S. state laws regarding postsecondary-education responsibilities for child support and listing states where parents have no obligation to support their children after they reach the age of majority).

Courts in all states that recognize this '*education exception*' have held that this '*education exception*' does *not* violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Historically, these same state courts have held that because the '*education exception*' does not involve a *suspect class* or a *fundamental right*, the '*education exception*' is *not* subject to *strict scrutiny* review and analysis. The pervasive argument has been that because the '*education exception*' does not involve gender-related classifications, the '*education exception*' is *not* subject to *intermediate scrutiny* review either. Instead, it has historically been argued that the constitutionality of the '*education exception*' is determined after applying the *rational basis* test, which sustains the '*education exception*,' so long as the challenged statute is *rationally related to a legitimate governmental purpose*. Based on this *rational-basis* scrutiny, some state legislatures have authorized state courts to order financially able-to divorced parents to support their children's pursuits of higher education.[8]

In those states where courts have ordered divorced parents to support their children's pursuits of higher education, many (but not all) of the respective state legislatures have placed *strict* guidelines or *limiting* conditions that must be met as a condition precedent in order for courts to award postsecondary-education subsidies.[9]

For example, Iowa courts can order postsecondary-education subsidies for children who are (1) eighteen to twenty-two years of age; (s) unmarried; and (3) enrolled full-time in a college,

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[8] Laura Johnson, *Child Support & College Support*, SMARTDIVORCE.COM, http://www.smartdivorce.com/articles/college.shtml (last visited Mar. 29, 2008). Johnson states:

> The following states have specific statutes or case law that give courts the authority To order college support in some form: Alabama, the District of Columbia, Georgia, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Missouri, Mississippi, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Carolina, Utah, West Virginia and Washington.

[9] While addressed later in this Minority Report/Opinion document, these strict guidelines and limiting conditions are what the Washington Postsecondary-Support Statute, RCW 26.19.090, lacks in comparison.

regularly attending vocational or technical training, or "accepted for admission to a college" for the next regular term.[10] But the Iowa statutorily-imposed *limitations* do not stop there.

Additionally, and something that the Washington Legislature should be cognizant of, is the affirmative requirement under the Iowa Postsecondary-Support Statute that a qualifying child cannot have repudiated his or her parent "by publicly disowning the parent, refusing to acknowledge the parent, or by acting in a similar manner."[11]

If a child meets *all* of these qualifications, Iowa courts have the discretion to order one or both of the divorced parents to pay a postsecondary-education subsidy "if good cause is shown."[12] To determine good cause, Iowa courts consider "the age of the child, the ability of the child relative to postsecondary education, the child's financial resources, whether the child is self-sustaining, *and the financial condition of each parent* [emphasis added]."[13]

If good cause is *not* present, however, the Iowa statute does *not* require Iowa courts to order a postsecondary-education subsidy.[14] If good cause is present, however, Iowa courts can order one or both parents to pay *up to one-third* of "the cost of attending an in-state public institution."[15] As a sidebar note, the Washington Legislature should take note of this "*up to one-third"* apportionment language, as well as the "cost of attending an in-state public institution" language that is discussed in more detail below.

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[10] IOWA CODE § 598.21F (2007); *see also In re* Marriage of Neff, 675 N.W.2d 573, 581 (Iowa 2004) (limiting the age in which children qualify for postsecondary-education subsidies to "older than seventeen but less than twenty three"). Thus under *Neff*, support does not end on a child's twenty-second birthday, but instead ends on his or her twenty-third birthday. *See id.*.
[11] IOWA CODE § 598.21F(4) (2007).
[12] *Id.* § 598.21F(1).
[13] *Id.* § 598.21F(2).
[14] *In re* Marriage of Sullins, 715 N.W.2d 242, 253 (Iowa 2006).
[15] IOWA CODE § 598.21F(2)(a) (2007).

Under the Iowa Postsecondary-Education Statute, Iowa courts are to base this amount on "the reasonable costs for only necessary postsecondary education expenses."[16] Thereafter, courts may terminate the subsidy "if the child fails to maintain a cumulative grade point average in the median range or above during the first calendar year [of his or her postsecondary education]."[17]

The Washington Legislature should sit up and take note of these guardrails or *affirmative limits* placed within the statutory language of the Iowa Postsecondary-Education Statute to buffer the often-times overwhelming financial impact upon divorced parents.

The Iowa statutory requirements create a number of explicit classifications that determine both (i.) who may be obligated to pay and (ii.) who may be qualified to receive court-ordered postsecondary-education subsidies.[18]

This Minority Report/Opinion document focuses on these classifications implicitly created by the Iowa statute's location within the Iowa Code which, by extrapolation, points to the similarities of the Washington Postsecondary-Support Statute and the Washington Legislature's juxtaposition of RCW 26.19.090 within the Revised Code of Washington.

The Iowa Postsecondary-Support Statute is located in Chapter 598 of the Iowa Code, which governs "Dissolution of Marriage and Domestic Relations."[19] Therefore, according to Iowa courts, the statute only applies in situations involving divorce and does not apply to familial

[16] *Id.*
[17] *Id.* § 598.21F(5); *see also In re* Marriage of Moore, 702 N.W.2d 519, 520-21 (Iowa Ct. App. 2005) (denying a postsecondary-education subsidy when a student's grade point average of 1.48 was well below the median).
[18] For example, the statute explicitly excludes people based on wealth, ability, age, and behavior. *See* IOWA CODE § 598.21F(2), (4), (5) (2007).
[19] IOWA CODE § 598 (2007).

situations involving married parents or parents who never married.[20] Such an application of the statute creates two *unconstitutional* classifications.

The *first* classification is between *different types of parents*. Under Iowa law, Iowa courts may only order *divorced* parents to pay postsecondary-education subsidies.[21] Iowa courts may not order married parents or parents who never married to do the same, which is unconstitutional. The same can be said for the Washington Postsecondary-Support Statute, RCW 26.19.090.

The *second* classification Iowa law creates is between *different types of children*. Specifically, the location of the Iowa Postsecondary-Support Statute only allows children of *divorced* parents to receive postsecondary-education subsidies.[22] The same is true under Washington law.

Under Iowa law, children of married parents and, perhaps most troubling, nonmarital, or "illegitimate," children cannot receive the same court-ordered support.[23] Again, the same is true under Washington law.

This Minority Report/Opinion document argues that this classification is also unconstitutional under the Equal Protection Clause of the U.S. Constitution.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[24]

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[20] *See Moore*, 702 N.W.2d at 519 ("[Section 598.21(5A)] does not apply to parents who are still married to each other or to those who never married." (citing Johnson v. Louis, 654 N.W.2d 886, 891 (Iowa 2002))).
[21] *See id.*
[22] *See Johnson*, 654 N.W.2d at 888-89 (holding that the Iowa Postsecondary-Support Statute does not apply to nonmarital children).
[23] *Id.*

Since the 1954 decision *Brown v. Board of Education*, [25] the Supreme Court has relied on the equal protection clause as a key provision for combating invidious discrimination and for safeguarding fundamental rights.[26] Laws implicate the Equal Protection Clause when they create *classifications* among people.[27] Courts subject different classifications to one of *three levels of scrutiny*.[28]

*First*, courts give *strict scrutiny* to laws that classify suspect groups or limit how certain groups may exercise fundamental rights.[29] In these cases, governments may justify their discriminating practices *only* by showing that the laws in question "are narrowly tailored measures that further compelling governmental interests."[30]

*Second*, courts give *intermediate scrutiny* to laws that classify "quasi-suspect" groups.[31] In order for a classifying law to be constitutional, governments must justify their discriminating practices by showing that the laws at issue "serve important governmental objectives and [are] substantially related to achievement of those objectives."[32]

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[24] U.S. CONST. amend XIV, § 1.
[25] Brown v. Bd. Of Educ., 347 U.S. 483 (1954) (striking down school segregation under the Equal Protection Clause).
[26] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1.1 (3d ed. 2006).
[27] *Id.* at 9.1.2.
[28] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938) (discussing different levels of scrutiny under the Equal Protection Clause of the U.S. Constitution).
[29] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (citing Graham v. Richardson, 403 U.S. 365 (1971); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); McLaughlin v. Florida, 379 U.S. 184 (1964); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942)). An example of a suspect classification is a race classification. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to a race classification because racial classifications are suspect). Other examples of suspect classifications include national origin and alieanage. CHEMERINKSKY, *supra* note 69, § 9.1.2.
[30] Johnson v. California, 543 U.S. 499, 505 (2005) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
[31] CHEMERINSKY, *supra* note 69, § 9.1.2. Examples of quasi-suspect classifications include child legitimacy or gender classifications. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (stating that "illegitimate children" are a quasi-suspect class); Craig v. Boren, 429 U.S. 190, 197 (1976) (stating that gender is a quasi-suspect class).
[32] *Craig*, 429 U.S. at 197.

*Third*, the remaining classifications only require courts to apply *minimal scrutiny*.[33] In these situations, courts employ a *rational-basis* review, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to legitimate state interest."[34]

It is neither a far-reaching conclusion, nor a logical leap, to assert that courts applying *higher* levels of scrutiny are more likely to find that a challenged law violates the Equal Protection Clause.[35] Thus, it is imperative for courts to *correctly* identify the type of classification at issue so that they may apply the proper *level* of scrutiny. If the challenged law does not withstand judicial scrutiny, a court *must* strike it down as unconstitutional.[36]

In direct comparison to the Iowa Postsecondary-Support Statute, the first strikingly similar classification created by the Washington Postsecondary-Support Statute, RCW 26.19.090, is the distinction between *divorced* and *nondivorced* parents (a classification purely based upon marital status). For the purpose of this Minority Report/Comment document, the term "nondivorced" parents includes *both* married parents and parents of nonmarital, or "illegitimate," children.

The second and also strikingly similar to the Iowa law, as noted above, the Washington Postsecondary-Support Statute is located in the Revised Code of Washington at Chapter 26, which governs "Domestic Relations."[37] This location limits the statute's application and thus

[33] CHEMERINSKY, *supra* note 69, § 9.1.2.
[34] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (citing Schwiker v. Wilson, 450 U.S. 221, 230 (1981); U.S. R.R. Ret. Bd. V. Fritz, 449 U.S. 166, 174-75 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).
[35] CHEMERINSKY, *supra* note 69, § 9.1.2.
[36] *Id.*
[37] Title 26 of the Revised Code of Washington located at http://apps.leg.wa.gov/rcw/default.aspx?Cite=26

creates a statewide *classification* whereby courts may order *only* divorced parents to pay postsecondary-education subsidies.

This Minority Report/Opinion document evaluates *two* potential ways that this discrimination among parents *based on marital status* may be unconstitutional under the Equal Protection Clause of the U.S. Constitution.

*First*, this Minority Report/Option document examines whether the law unconstitutionally discriminates against divorced parents in exercise of their *fundamental right to parent*.

The U.S. Supreme Court has never before determined whether or not a classification based on marital status is worthy of heightened scrutiny under the Equal Protection Clause. However, "[the Court] has previously *suggested* that distinctions based on *marital status* are *not* suspect."[38]

In 1980, the Iowa Supreme Court heard *In re Marriage of Vrban*, a case in which a divorced father challenged the constitutionality of his obligation to support his child through college.[39] The father in *Vrban* argued that the law violated the Equal Protection Clauses of the

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[38] *In re* Marriage of McGinley, 19 p.3d 954, 962 & n.13 (Or. Ct. App. 2001) (citing Claifano v. Jobst, 434 U.S. 47, 53 (1977)). The U.S. Supreme Court in *Califano* stated:

> Differences in race, religion, or political affiliation could not rationally justify a difference in eligibility for social security benefits, for such differences are totally irrelevant to the question [of] whether one person is economically dependent on another. But a distinction between married persons and unmarried persons is of a different character.

*Califano*, 434 U.S. at 53.

[39] *In re* Marriage of Vrban, 293 N.W.2d 198, 200 (Iowa 1980). The postsecondary-support statute in question in *Vrban* was Iowa Code Section 598.1(2). *Id*. at 201 (citing IOWA CODE § 598.1(2) (1977)). That statute provided:

> "Support" or "support payments" means any amount which the court may require either of the parties to pay under a temporary order or a final judgment or decree, and may include . . . child support . . . and any other term used to describe such obligations. Such obligations may include support for a child who is between the ages of eighteen and twenty-two years who is regularly attending an approved school . . . , or is, in good faith, a full-time student in a college, university, or area school; or has been accepted for

U.S. and Iowa Constitutions because "there [was] no similar obligation [to support children] for those parents who remain[ed] married."[40] The Iowa Supreme Court evaluated this claim and held that divorced parents were *not* a suspect class worthy of heightened scrutiny.[41] The New Hampshire Supreme Court,[42] the Oregon Court of Appeals,[43] and the Pennsylvania Supreme Court[44] have heard similar challenges to their respective states' postsecondary-support statutes and agreed that divorced parents are *not* a suspect or a quasi-suspect class.

Thus, if divorced parents in Iowa challenged the current Postsecondary-Support Statute by claiming that the law unconstitutionally classified them as a *group*, then it is highly unlikely that an Iowa court would consider the Iowa law's classification suspect. The same result would likely eventuate in Washington State, too, as a Washington court would likely only apply a *rational-basis* review of the law, just as it has previously done.

This Minority Report/Opinion document, however, asserts that the Washington State Postsecondary-Support Statute, RCW 26.19.090, implicates yet *another* (a second) prong of the equal-protection analysis.

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> admission to a college . . .; or a child of any age who is dependent on the parties to the dissolutions proceeding because of physical or mental disability.

*Id.* (quoting IOWA CODE § 598.1(2) (1977)).

[40] *Id.* at 201.

[41] *Id.*

[42] *See* LeClair v. LeClair, 624 A.2d 1350, 1356-57 (N.H. 1993) (using a rational-basis test to uphold a statute that allowed courts to require divorced parents, but not nondivorced parents, to pay postsecondary-education subsidies). The New Hampshire Supreme Court notably relied on *Vrban* to reach its decision. *See id.* at 1357.

[43] *See In re* Marriage of McGinley, 19 P.3d 954, 959-62 (Or. Ct. App. 2001) (holding that Oregon's postsecondary-support statute's classification between married parents and nonmarried parents was not a suspect classification and applying a rational-basis test to uphold the law).

[44] *See* Curtis v. Kline, 666 A.2d 265, 268-70 (Pa. 1995) (applying a rational-basis review and striking down Pennsylvania's postsecondary-support law).

That is, courts also review laws under the Equal Protection Clause when laws discriminate among people as to the exercise of their *rights*.[45] When a law discriminates "among people as to the exercise of a *fundamental* [emphasis added] right," courts apply *strict scrutiny* regardless of the characteristics of a given class.[46] When a law discriminates among people for their exercise of *nonfundamental* rights, courts only give the law *minimal* scrutiny.[47]

This Minority Report/Opinion document asserts that the Washington Postsecondary-Support Statute, RCW 26.19.090, discriminates against divorced parents as to what this Minority Report/Opinion document refers to as the "*fundamental right to parent*."

The U.S. Supreme Court recognized the *fundamental right to parent* in 1923, when the court held that people have a *fundamental right*, under the Due Process Clause of the Fourteenth Amendment, "to establish a home and bring up children . . . ."[48] A short two years later, in 1925, the U.S. Supreme Court held that this right includes the right "to direct the upbringing and education of children under their control."[49] In 2000, the U.S. Supreme Court characterized this parental right "in the care, custody, and control of their children . . . [as] perhaps the oldest of the *fundamental* [emphasis added] liberty interests recognized by this Court."[50]

This Minority Report/Opinion document asserts that *forcing* only divorced parents to pay for higher education interferes with this *fundamental right to parent*. When a child goes to college, financial support may be the most important, if not the *only*, influence that parents can

[45] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that courts will give deference to the legislature unless a law "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth" (citing Lowell v. Griffin, 303 U.S. 444 (1938); Stromberg v. California, 283 U.S. 359, 369, 370 (1931))).
[46] CHEMERINSKY, *supra* note 69, § 9.1, at 675.
[47] CHEMERINSKY, *supra* note 69, § 9.1.2.
[48] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[49] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).
[50] Troxel v. Granville, 530 U.S. 57, 65 (2000).

exert over their children. The Washington statute strips this influence *only* from *divorced* parents, not from *nondivorced* parents. Consider the following scenarios of disparate treatment among parents *based solely on marital status* in relation to the *fundamental right to parent*:

*Scenario 1*: A minor child graduates from Washington high school and has a number of college alternatives from which to choose. The child is leaning toward a decision that his or her parents know to be a financial, academic, professional, or personal mistake. Nondivorced parents may use financial support to influence the child to make a better, more appropriate decision for the child and for the family checkbook. Under the Washington statute RCW 26.19.090, however, divorced parents may be obligated to support their child no matter what. This is disparate treatment of Washington parents exercising their *fundamental right to parent*.

*Scenario 2*: Police arrest a Washington child attending college for underage drinking or for possession of a controlled substance or for some other crime statistically significant among college-age children. Nondivorced parents may withdraw financial support to influence or to correct their child's behavior. Divorced parents under Washington court order to pay postsecondary-education costs, however, cannot withdraw support under Washington statute. This is disparate treatment of Washington parents exercising their *fundamental right to parent*.

*Scenario 3*: A Washington child is technically passing his or her college classes but performing well below his or her potential. Nondivorced parents may voluntarily end financial support to influence their child's work ethic. However, divorced parents obligated to pay under Washington law cannot withdraw support so long as the student is meeting minimum academic requirements set by the institution. This is disparate treatment of Washington parents exercising their *fundamental right to parent*.

These are only *three* of many potential examples of how the Washington Postsecondary-Support Statute, RCW 26.19.090, interferes with divorced parents' abilities to raise and influence their children. Because the Washington statute does not similarly limit the influence of *nondivorced* parents over their children, the Washington statute discriminates against *divorced* parents as to the exercise of their *fundamental right to parent*.

One could argue, however, that the Postsecondary-Support Statute, RCW 26.19.090, does not implicate the *fundamental right to parent*, because college-aged students are not under their parents' control, *regardless of their parents' marital status*. Like typical college students in Iowa, a typical college student in Washington qualifying for a postsecondary-education subsidy under the Washington Postsecondary-Support Statute, RCW 26.19.090, is old enough to vote, does not live at home, and is legally free to make nearly any choice he or she desires.[51] However, to argue that the *fundamental right to parent* does *not* extend to college-age children implies that the Washington Legislature should *not* order postsecondary support at all.

To say that Washington parents have no right to continue "raising" and exerting influence over their children once they go to college is to say that Washington parents should *not* be forced to contribute to their children's educations in any way. To argue otherwise creates a double standard.

A more reasonable position would be to oblige *all* Washington parents to support their children as a part of their *fundamental right to parent*. If the *fundamental right to parent* does

[51] *See* THE UNIV. OF IOWA, COMMON DATA SET 2002-2003, *available at* http://provost.uiowa.edu/docs/data/cds/cds_0203.htm (reporting that the average age of first-time first-year undergraduate students at The University of Iowa was 18 and that the average undergraduate student was 21.1 years old). The study also reported that ninety percent of freshmen students lived in college housing. *Id.*

*not* extend past the age of majority, then there should be *no* legally-obligated support beyond that point.

Therefore, a Washington court examining a divorced parent's challenge to the Washington Postsecondary-Support Statute, RCW 26.19.090, should hold that the Washington statute implicates and interferes with his or her *fundamental right to parent*. The Washington court, therefore, would need to apply *strict scrutiny* to review the Washington Postsecondary-Support Statute, RCW 26.19.090.

The Washington Postsecondary-Support Statute, RCW 26.19.090, would probably not pass a *strict-scrutiny* review. When a Washington court applies the *strict-scrutiny* standard in assessing a constitutional challenge to a statute, the government has the burden of showing that a law is *narrowly* tailored to achieve a *compelling* government purpose.[52] To pass *strict scrutiny*, the government must show that it cannot achieve its compelling purpose through a less discriminatory alternative.[53] Because of these high standards, a law nearly always fails under *strict scrutiny*.[54] The Washington Postsecondary-Support Statute would probably not be any exception.

As noted and conceded above, the Washington Legislature arguably has a compelling interest in the education of its children.[55] The U.S. Supreme Court, however, in *Pierce v. Society of Sisters*, held that a state's interest in educating its populace is *not* more compelling than a parent's *fundamental right* to raise his or her children.[56]

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[52] CHEMERINSKY, *supra* note 69, § 9.1.2.
[53] *Id.*
[54] *Id.*
[55] *See supra* notes 119–20 and accompanying text (discussing the state's interest in postsecondary education).
[56] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (invalidating a state law requiring all children to attend public schools because it interfered with parents' fundamental rights to raise their children). *See generally* Wisconsin v.

Moreover, the Washington Postsecondary-Support Statute, RCW 26.19.090, is *not narrowly tailored* to achieve compelling state interests. If the Washington Legislature is genuinely interested in having an educated populace, then forcing *only* divorced Washington parents to contribute to their children's higher educations is an *underinclusive* method of accomplishing the goal. A more *inclusive* method would be to require *all* Washington parents, regardless of marital status, to contribute to their children's higher educations.

If the Washington Legislature's goal is to help Washington students who are not getting financial support from their Washington parents, then the Washington Legislature is leaving out Washington students from *nondivorced* Washington families who are *not* getting parental financial help. There are almost certainly students in Washington from *nondivorced* Washington families who are *not* getting financial help from their Washington parents. It is also highly likely that some of these Washington students meet the *same* qualifications as their peers from divorced Washington families who qualify for postsecondary-education subsidies.[57] These Washington students from *nondivorced* Washington families, however, do *not* qualify under Washington law to receive the same court-ordered postsecondary support. As a result, the Washington Postsecondary-Support Statute is almost certainly *underinclusive.*

Finally, the Washington Postsecondary-Support Statute, RCW 26.19.090, would likely fail *strict scrutiny* because the Washington Legislature *can* accomplish its stated altruistic goals by *less-intrusive* means. If the Washington Legislature is *genuinely* interested in helping Washington children from divorced Washington families go to college, then the Washington Legislature can establish *more* scholarship funds, give *more* grants, *forgive* student loans, or

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Yoder, 406 U.S. 205 (1972) (allowing Amish parents to withdraw their children from school, despite state compulsory education laws).

[57] *See supra* notes 47–54 and accompanying text (discussing the qualifications a child must meet before a court can order a postsecondary-education subsidy).

*enact other programs* to accomplish this goal.[58] Also, the Washington Legislature could *create more financial incentives* for Washington parents to contribute to their Washington children's educations. These programs could include tax breaks, tuition credits, or other benefits that might *motivate* Washington parents (or perhaps make paying for a college education more of a financial possibility) to support their Washington children in college. Such measures would not intrude on Washington divorced parents' *fundamental rights to parent*.

For these reasons, the Washington Postsecondary-Support Statute, RCW 26.19.090, should (and likely would) fail a *strict-scrutiny* review. Therefore, a Washington court hearing a Washington divorced parent's challenge to the Washington Postsecondary-Support law should hold that the Washington Postsecondary-Support Statute violates the Equal Protection Clause of the U.S. Constitution because it unconstitutionally interferes with the parents' *fundamental right to parent*. *Therefore, the Washington 2011 Child Support Schedule Workgroup should recommend to the Washington Legislature that RCW 26.19.090 be eliminated from the RCW.*

The second, and perhaps most troubling, classification that the Washington Postsecondary-Support Statute, RCW 26.19.090, makes is its distinction between children of divorced parents and nonmarital children. Nonmarital, or "illegitimate," children are children born to parents who never married.[59] Because the location of the Washington Postsecondary-Support Statute limits its application to situations involving divorce, nonmarital children do not

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[58] *See, e.g.*, House Bill 1795 – 2011-12, *Enacting the higher education opportunity act*, available at the following URL http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1795&year=2011.

[59] *See* CHEMERINSKY, *supra* note 69, § 9.6. Both the U.S. Supreme Court and Iowa Supreme Court refer to nonmarital children as "illegitimate children." *See generally* Clark v. Jeter, 486 U.S. 456 (1988) (declaring that Pennsylvania's six-year statute of limitations unconstitutionally limited nonmarital children's paternity actions and that such a law did not pass intermediate scrutiny under the Equal Protection Clause); Johnson v. Louis, 654 N.W.2d 886 (Iowa 2002) (upholding Iowa's Postsecondary-Support Statute even though it did not apply to nonmarital children).

qualify for postsecondary-education subsidies from their parents.[60] This is true even though nonmarital children in Washington qualify for minority child support.

Courts evaluating an Equal Protection challenge by a group of people must classify the challenging class as *suspect*, *quasi-suspect*, or *nonsuspect*.[61] A court's decision on this issue determines the *level* of scrutiny it must apply when evaluating the constitutionality of the law.[62] As previously detailed, courts reserve *suspect* and *quasi-suspect* classifications for classes that meet certain characteristics.[63]

Such groups receiving *suspect* classification review and scrutiny include those that have a history of being discriminated against, are classified by an immutable trait, and are politically underrepresented or weak.[64] Courts also consider whether the law's classification likely reflects prejudice and whether the classifying trait creates a difference between people's ability to contribute to society.[65]

Nonmarital children meet some, but not all, of the characteristics necessary for *suspect* or *quasi-suspect* classification. Their status is immutable, they have a long history of discrimination,[66] and their illegitimacy "'bears no relation to the individual's ability to participate in and contribute to society.'"[67] However, the U.S. Supreme Court has recognized

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[60] *See supra* notes 56–57 and accompanying text (discussing the location of the Postsecondary-Support Statute and the limits placed on the statute by its location).
[61] *See supra* notes 79–90 and accompanying text (discussing classifications under the Equal Protection Clause).
[62] *See supra* notes 79–90 and accompanying text (same).
[63] *See supra* notes 100–03 and accompanying text (discussing the characteristics of classes that are suspect or quasi-suspect).
[64] *See supra* notes 100–03 and accompanying text (same).
[65] *See supra* notes 100–03 and accompanying text (same).
[66] CHEMERINSKY, *supra* note 69, § 9.6, at 777 (citing Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 488–89 (1966)).
[67] *Id.* § 9.6 (quoting Mathews v. Lucas, 427 U.S. 495, 505 (1976)). In 1972, the U.S. Supreme Court supported this rationale when it stated:

> The status of illegitimacy has expressed through the ages society's condemnation

that, unlike race, "illegitimacy does not carry an obvious badge."[68] From this conclusion, some courts have inferred that "[i]t is now clearly established that *intermediate* [emphasis added] scrutiny applie[s] in evaluating laws that discriminate against nonmarital children."[69]

The Washington Postsecondary-Support Statute, RCW 26.19.090, probably would not pass *intermediate scrutiny* if *nonmarital children* in Washington challenged the law as unconstitutional under the Equal Protection Clause of the U.S. Constitution. To withstand *intermediate scrutiny*, a classifying law must be *substantially related to furthering an important governmental interest*.[70] Under this test, the Supreme Court has stated "the 'burden of justification is demanding and . . . it rests entirely on the state.'"[71]

As previously discussed, Washington state arguably has a legitimate interest in the education of its populace.[72] This interest is likely important enough to pass the threshold for *intermediate scrutiny*. However, if the goal of the Washington Postsecondary-Support Statute, RCW 26.19.090, is to help *all* Washington children who lack support for higher education, then the Washington statute is *underinclusive* because it leaves out a number of children who may need the same help as children of divorced families in Washington. This is especially true for nonmarital children in Washington.

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> of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972), *quoted in* CHEMERINSKY, *supra* note 69, § 9.6.

[68] Mathews v. Lucas, 427 U.S. 495, 505 (1976), *quoted in* CHEMERINSKY, *supra* note 69, § 9.6.

[69] CHEMERINSKY, *supra* note 69, § 9.6.

[70] CHEMERINSKY, *supra* note 69, § 9.1.2.

[71] *Id.*, § 9.1.2, at 671 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

[72] *See supra* notes 119–20 and accompanying text (discussing the state's interest in postsecondary education).

Nonmarital children face many of the same challenges that children of divorced families face.[73] These challenges include single-parent households, family instability, and financial insecurity.[74] In fact, one study shows that some of these problems may be more severe for nonmarital children than for children whose parents divorced.[75]

Some courts have blamed divorce on the state arguing that since the state legally terminates marriages, the state is thus responsible for the loss of stability in divorced families. The Iowa Supreme Court did just that when it validated Iowa's statutory distinction between children of divorced parents and nonmarital children.[76]

The Iowa Supreme Court reasoned that, because the state legally terminates marriages, it is responsible for the loss of stability in divorced families.[77] Accordingly, the Iowa Supreme Court stated that the postsecondary-education subsidy was a "quid pro quo" from the state to make up for its action and, therefore, the distinction was justified.[78]

The reality is that no state is responsible for divorce. Rather, divorce is a choice or the result of a choice that parents make.[79] State courts do not order divorces; rather, state courts

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[73] *See* ARIEL HALPERN, POVERTY AMONG CHILDREN BORN OUTSIDE OF MARRIAGE: PRELIMINARY FINDINGS FROM THE NATIONAL SURVEY OF AMERICA'S FAMILIES 1 (1999), *available at* http://www.urban.org/UploadedPDF/409295_discussion99-16.pdf (examining "whether the children of single mothers who were born outside of marriage are at greater risk of living in poverty than the children of single mothers who were born to married parents"). The study notes that both children of divorced families and nonmarital children live in single-parent households and that "extensive literature examining the well-being of children growing up with a single mother concludes that these children fare worse than children from two-parent families." *Id.*

[74] *See generally id*. (discussing children of divorced parents and nonmarital children in single-parent households).

[75] *Id*. at 16 ("The children of single mothers who were not married at the time of their child's birth are 1.7 times more likely to be poor than are the children of those who were married.").

[76] Johnson v. Louis, 654 N.W.2d 886, 891 (Iowa 2002) ("[C]hildren [of divorced parents] have had the attributes of a legally recognized parental relationship taken from them by court decree.").

[77] *Id.*

[78] *Id.*

[79] *See* ARIEL HALPERN, POVERTY AMONG CHILDREN BORN OUTSIDE OF MARRIAGE: PRELIMINARY FINDINGS FROM THE NATIONAL SURVEY OF AMERICA'S FAMILIES 1 (1999), *available at* http://www.urban.org/UploadedPDF/409295_discussion99-16.pdf (examining "whether the children of single mothers who were born outside of marriage are at greater risk of living in poverty than the children of single mothers who were born to married parents"). The study notes that both children of divorced families and nonmarital

merely grant petitions to dissolve marriages.[80] Thus, it is particularly difficult to blame any state for the instability children face when parents divorce.

Further, the assumption that divorce increases instability or adds burden to children, while true in many situations, is overbroad.[81] Situations exist where parental separation may provide the children with better stability.[82] Children with parents in strained marriages or marriages involving domestic abuse are arguably better off following a divorce.[83] Finally, as discussed above, even though children in divorced families often face instability, the instability is not necessarily *worse* than the instability nonmarital children face.[84]

For these reasons, perhaps best stated by and through the hackneyed phrase, 'when you don't *include*, you *exclude*,' the Washington Postsecondary-Support Statute, RCW 26.19.090, violates the Equal Protection Clause of the U.S. Constitution because it *excludes* nonmarital children.

Thus, while this concept of *forcing* divorced parents to pay for portions of their children's college by and through court-ordered financial aid may be a popular or a particularly trendy idea, and it *might* provide an attractive alternative to state financial aid in these unprecedented global austere economic times.[85]

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children live in single-parent households and that "extensive literature examining the well-being of children growing up with a single mother concludes that these children fare worse than children from two-parent families." *Id.*

[80] *See supra* note 105 and accompanying text (discussing parents' roles in divorces).

[81] Oregon Counseling, Understanding and Dealing with Children During Divorce, http://www.oregoncounseling.org/Handouts/DivorceChildren.htm (last visited Mar. 29, 2008) ("Divorce is a failure of a couple's commitment to their marital and family roles.") note 105 (recognizing that divorce "does not have a positive impact on a child's life and development").

[82] *See id.* (noting that "[o]ngoing abuse (e.g., child abuse, domestic violence) that cannot be stopped is more damaging to children than divorce itself" and that "[d]ivorce can be the right decision and can be handled responsibly").

[83] *Id.*

[84] *See supra* notes 184–86 and accompanying text (discussing challenges that nonmarital children face).

[85] The severity of these austere economic times in Washington is *underscored* by the fact that the Washington State Department of Social and Health Services (DSHS) Division of Child Support (DCS) reportedly could not afford (as it did in 2007) to hire a certified court reporter – or to purchase a recording device – to memorialize the meeting

However, these concepts of 'popularity' and 'economy' neither equate to (nor justify an attack on) constitutionality. This Minority Report/Opinion document argues that Washington's law *forcing* divorced parents to contribute to their children's higher educations without requiring nondivorced parents to contribute to theirs is unconstitutional. Therefore, RCW 26.19.090 violates the Equal Protection Clause because it discriminates against certain types of parents in their exercise of the *fundamental right to parent* and against only certain types of children.

RCW 26.19.090 interferes with divorced parents' *fundamental right* to parent, and it unconstitutionally discriminates against nonmarital children. Because Washington does not possess an adequate justification for these discriminations, Washington courts should rule that the Washington Postsecondary-Support Statute, RCW 26.19.090, is unconstitutional and the Washington Legislature should *on its own volition* look to *other* alternatives to achieve its goals.

Thus far, this Minority Report/Opinion document has dealt with legal *theories* and *prognostications* of the law by a non-lawyer member of the public based on peer-reviewed legal writing and legal research.

How do the Equal Protection Challenges expressed within this Minority Report/Opinion document square with Washington Caselaw and those of another, perhaps more enlightened, State Supreme Court ruling on the issue of the constitutionality of postsecondary education of children of parents who were separated, divorced, or unmarried?

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minutes of the 2011 Child Support Schedule Workgroup and its various Sub-Committees tasked by the Washington Legislature and Washington Governor Christine Gregoire with the quadrennial review of Washington child support guidelines and child support review under RCW 26.19.025(3).

## Squarely Addressing the Dichotomy of Two States' Supreme Court Rulings vis-à-vis Treatment of Postsecondary Education of Children of Parents Who are Separated, Divorced, or Unmarried:

## Washington State Supreme Court Caselaw

## vs.

## Pennsylvania Supreme Court Caselaw

The Washington Supreme Court in *Childers v. Childers*, held that the Washington statute requiring postminority child support for college education expenses did *not* violate the Equal Protection Clause.[86] Finding no involvement with a suspect class or a fundamental right, the Washington Supreme Court reasoned that the Washington's legitimate interest in minimizing the "irremediable" disadvantages faced by children of divorce was *rationally related* to the statute.[87] In the court's eyes, rather than being *discriminated against*, divorced parents were merely being *compelled* to provide their children with the same level of support they would have provided had the family stayed intact.[88] If the statute created a *discriminatory* classification, the court held, such classification was based on "reasonable and justifiable" grounds.[89]

Is it *truly* impossible, then, for a noncustodial payor parent in Washington to make a valid equal protection challenge to Washington's '*education exception*'?

Such a valid equal protection challenge *was* possible in the state of Pennsylvania. In 1992, the Supreme Court of Pennsylvania held that the parental duty of support was owed until a

[86] 575 P.2d 201, 209 (Wash. 1978).
[87] *Id.* at 208.
[88] *Id.*
[89] *Id.* at 209.

child reached the age of eighteen or graduated from high school, whichever occurred later.[90] In *Blue v. Blue*, the Pennsylvania Supreme Court *reversed* a lower court's decision holding that a noncustodial parent was financially responsible for a child's college expenses, regardless of whether the child chose to obtain educational loans or grants.[91]

In response to *Blue*, Pennsylvania's General Assembly approved Act 62 of 1993.[92] This anticipatory measure provided the Pennsylvania courts with the discretion to require noncustodial parents to pay postsecondary educational costs for their children, "taking certain factors and circumstances into consideration."[93] Anticipating a subsequent equal protection challenge, the General Assembly *expressly stated* in the Act's Preamble that it had a "rational and legitimate governmental interest in requiring some parental financial assistance" for the postsecondary education of children of parents who were separated, divorced, or unmarried.[94]

Despite that Pennsylvania Legislature pronouncement of a rational and legitimate governmental interest, Act 62 was held unconstitutional approximately two years after its passage, when the Supreme Court of Pennsylvania held in *Curtis v. Kline* that they could "conceive of no rational reason why those similarly situated with respect to needing funds for college education" should be treated *unequally*.[95] As they did in *Blue*, the Supreme Court found no involvement with a suspect class or a fundamental right and applied the *rational basis* test in their equal protection analysis.[96] In reaching their conclusion, the Pennsylvania Supreme Court

[90] Blue v. Blue, 616 A.2d 628, 633 (Pa. 1992).
[91] *Id.* at 633.
[92] Susan J. Germanio, Note, *When College Begins and Child Support Ends: An Analysis of the Pennsylvania Legislature's Response to Blue v. Blue,* 3 WIDENER J. PUB.L. 1109, 1110 (1994).
[93] *Id.* at 1111.
[94] *Id.*
[95] 666 A.2d 265, 270 (Pa. 1995).
[96] *Id.* at 270.

provided a *hypothetical* example of the inequities they felt Act 62 would create.[97] Under the measure, the Pennsylvania Supreme Court *supposed*, a father with two children – one from a first marriage and not residing with him and the other from a second marriage and still residing with him – could be required to provide postsecondary educational support for the first child but not the second, possibly to the *detriment* of his second child.[98]

This Minority Report/Opinion document squarely asserts that the *supposed* situation above envisioned by the learned members of the Pennsylvania Supreme Court is, in fact, a *reality* among divorced parents subject to Washington's Postsecondary-Support Statute, RCW 26.19.090; that is, the detrimental and chilling effects to children not before the Washington courts is *real*, not a mental exercise.[99]

The so-called '*education exception*' carved out by the Washington Supreme Court in *Childers v. Childers* should be overturned as an unconstitutional violation of the Fourteenth Amendment's Equal Protection Clause, because it *unreasonably* discriminates between potential college students based solely on the marital status of their parents. While "minimizing the disadvantages to children of divorced parents" is certainly a laudable goal, the heretofore unanswered question remains: *Are children of divorced parents the <u>only</u> children whose supposed disadvantage is legitimate enough to compel state involvement?*

If the Washington Legislature answers that question with a resounding "Yes," then the appropriate and logical response from the collective of divorced parents caught in the crosshairs

[97] *Id.*
[98] *Id.*
[99] The author has 4 children, aged 3 through 18; The two older children (ages 18 and 17) are before the Washington Superior Court in a Modification Action, and the two younger children (ages 3 and 9) of his 2nd marriage who are not before the court and who are residing with him in the Commonwealth of Kentucky. Ordering postsecondary-education support for the two earlier-born (older) children clearly stacks the deck against the two latter-born (younger) children, quite definitely to their disadvantage, which flies in the face of the alleged statutory intent of the Washington Legislature as expressed in RCW 26.19.001, *et seq*.

of the Washington Postsecondary-Support Statute, RCW 26.19.090, should resoundingly be that such a blanket assumption by the Washington Legislature overlooks the disadvantages imposed on children whose parents are disabled or unemployed or whose parents are not American citizens. Worse, this assumption completely disregards the disadvantages faced by children whose parents abandoned them or whose whereabouts are unknown.

As the learned members of the Pennsylvania Supreme Court point out, the relevant category of persons under direct consideration are children in need of funds for a postsecondary education.[100] Within this category are not only children of divorced, separated, or never-married parents, but also children of intact families.[101] Yet a child lucky enough to be from an intact family is by no means automatically guaranteed to have parents who can, or will, support his or her postsecondary education.[102] Thus, postminority students from broken homes or intact homes may have parents unwilling (or unable) to provide financial assistance for college.

Allowing the marital status of a child's parents to be the threshold factor in determining whether or not he or she should receive financial support for college is completely arbitrary and capricious. Neither Washington case law nor Washington statute entitles a Washington child to a college education. Why, then, can any noncustodial parent in Washington be *judicially compelled* to provide something that *they are not required to provide*?

This approach, too, neglects the supported child's ability to work part-time or full-time in an effort to at least partially finance his or her own education.[103] Consequently, following the

[100] Curtis v. Kline, 666 A.2d 265, 267 (Pa. 1995).
[101] *Id.* at 269.
[102] *Id.*
[103] In contrast, *See* IOWA CODE § 598.21F(2)(a) (2007).

statutory language of RCW 26.19.090, even the non-custodial father of Mark Zuckerberg would have been responsible for his son's college education expenses.[104]

This Minority Report/Opinion document asserts that the so-called '*education exception*' could successfully be challenged by a minor child in Washington state whose married parents adamantly refused to provide any resources to help him or her pay for his or her college. In this case, the "persons similarly situated" would not be a parent from an intact family versus a parent from a non-intact family. That particular juxtaposition of parents has been repeatedly hashed out in courts across Washington. Rather, the proposed tension in the above case would be between two high school seniors whose desire to attend college was matched only by their aptitude to excel in college. One child, of course, would have to figure out his or her own path to financing his or her education, simply because his parents never broke up. An argument can certainly be made that this distinction is unreasonable and arbitrary, thereby sustaining an equal protection challenge. *Therefore, the Washington 2011 Child Support Schedule Workgroup should recommend to the Washington Legislature that RCW 26.19.090 be eliminated from the RCW.*

Thus far, this Minority Report/Opinion document has focused on proposed or postulated equal protection challenges as to the constitutionality of the Washington Postsecondary-Support Statute, RCW 26.19.090.

What is the forward path if the Washington Legislature is *not* inclined to consider *removing* the unconstitutional Washington Postsecondary-Support Statute, RCW 26.19.090, from the Revised Code of Washington?

[104] Mr. Zuckerberg, founder and CEO of Facebook, was declared by Forbes to be the youngest self-made billionaire in the world. He is twenty-five years old. Del Jones, *'Forbes': Facebook CEO is Youngest Self-Made Billionaire*, USA TODAY, Mar. 5, 2008, http://www.usatoday.com/money/2008-03-05-forbes-billionaires_N.htm.

## *In the Dispositive*:

## Affirmative Statutory Language Limitations are ***Required*** if the Washington Legislature *Keeps* RCW 26.19.090

If the Washington Legislature is *determined* to maintain the unconstitutional Postsecondary-Support Statute, RCW 26.19.090, then the Washington Legislature must place guardrails, or affirmative safeguard limitations, within the statutory language of RCW 26.19.090, similar to those affirmative safeguards contained in the statutory language of Iowa's Postsecondary-Support Statute as codified in Iowa Code Section 598.21F.[105]

These proposed affirmative safeguard limitations are in keeping with the Washington Legislative intent.[106] Too, these proposed safeguard limitations just 'make good sense' from a public policy perspective, particularly in light of these unprecedented global austere economic times with ten states in double digit unemployment and the median rate for all 50 states is 8.3 percent in our great Country.[107]

On or about March 24, 1988, by and through the language codified in RCW 26.19.001, *Legislative intent and finding*, the Washington State Legislature set forth certain *goals* in establishing a *statewide* child support schedule, one of which was to, "…*reduce the adversarial nature of the proceedings . . . as a result of greater predictability* [emphasis added] …." [108]

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[105] *See* IOWA CODE § 598.21F(2)(a) (2007).
[106] *See* RCW 26.19.001
[107] *See* "10 states in double digit unemployment" available on The Christian Science Monitor's website at http://www.csmonitor.com/Business/Paper-Economy/2011/0925/10-states-in-double-digit-unemployment (stating that Nevada has the highest unemployment rate at 13.4 percent. The median rate for all 50 states is 8.3 percent).
[108] *See* RCW 26.19.001available at the following URL http://apps.leg.wa.gov/rcw/default.aspx?cite=26.19.001

Additionally, in the *Notes* of RCW 26.19.001, the Washington Legislature calls out the compelling government interests in effectuating the Washington Domestic Relations statutes, inclusive of the Washington Postsecondary-Support Statute, to wit: "…*the support of the state government and its existing public institutions* [emphasis added] … ." [109]

It logically follows, then, that the Washington Legislature was both clear and precise in stating its Legislative Intent behind RCW 26.19.001 as to its overarching goal of *achieving predictability while simultaneously supporting existing public institutions*. We know this to be true, because neither this Washington Legislative intent, nor the language used to express the Washington Legislative intent within RCW 26.19.001, has ever been previously challenged (or re-written) by the Washington Legislature since 1988.[110]

Therefore, it logically follows that the Washington Legislature can (and should) remain *steadfast* in its underlying legislative intent by simultaneously providing both *predictability* and *financial support* to Washington's accredited in-state p*ublic* institutions of higher education. How does this Minority Report/Opinion document suggest that this be accomplished?

***The Washington Legislature must, inter alia, limit the reach of Washington's Postsecondary-Support Statute, RCW 26.19.090, to the cost of attending the highest costing accredited in-state public institution of higher education.*** The 2011 Child Support Schedule

[109] *Id*.
[110] Now, more than 23 years following the Washington Legislative intent codified in RCW 26.19.001, the 2011 Child Support Schedule Workgroup does not proffer any changes today either. With the hundreds (if not *thousands*) of man-hours invested and expended by the collective efforts of at least *two* consecutive iterations of the Quadrennial Child Support Schedule Workgroup, not a *single* mention of affecting changes to the statutory language of RCW 26.19.001 has been uttered or memorialized in writing.

Workgroup on August 26, 2011, 'agreed' that limiting costs to those incurred by the child attending an accredited in-state public institution of higher education was a good idea, too.[111]

Further, the Washington Postsecondary-Support Statute, RCW 26.19.090, must specifically, by and through its plain statutory language, *apportion any court-ordered postsecondary-education costs by affirmatively limiting a Washington court or a Washington Administrative Law Judge to only order one or both divorced parents* (i.) to pay *up to one-third of the cost of attending an accredited in-state public institution of higher education*, and (ii.) *to assign or apportion no less than one-third of that sum certain to the child for his/her investment in his/her college education, of course absent any special needs or disabilities preventing the child from contributing to his/her own college education expenses*.[112]

Moreover, *these proposed custodial and non-custodial parents' apportionment(s) can be ordered only after a Washington court or a Washington Administrative Law Judge issues a written finding of fact evidencing a financial ability to pay*.[113]

In addition, the proposed statutory language changes to the Washington Postsecondary-Support Statute, RCW 26.19.090, must expressly state that *a Washington court or a Washington*

[111] *See* Memorialized comments of the 2011 Child Support Schedule Workgroup's Sub-Committee on Post-secondary Educational Support (PSES) are posted on the Workgroup's website at http://www.dshs.wa.gov/pdf/esa/dcs/draftminutes82611.pdf [Page 3 of 4, Item VIII(b)]; *see also* http://www.dshs.wa.gov/pdf/esa/dcs/psreport82611.pdf [Page 1 of 2, Item 2.] (Somehow, the phrase "*The Workgroup agreed*" used in the PSES Sub-Committee meeting minutes or notes did not constitute 'consensus' because all of the Sub-Committee Members were not present and accounted for at that (or any) Sub-Committee or Workgroup meeting. Sadly, no PSES Sub-Committee Member, although several were directly inquired upon, was compelled, either internally or externally, to affirmatively speak to this issue of placing a financial cap on any court-ordered award in the subsequent, final meeting held September 9, 2011. Worse, the previous 'agreement' never made it to the Workgroup's Final Report. Nonetheless, a great idea in the best interests of Washington's divorced parents, and more importantly the children of divorced parents in Washington, should not be quashed under the heels of the machinations of bureaucracy.)

[112] *See, e.g.*, IOWA CODE § 598.21F(2)(a) (2007).

[113] *See, e.g.*, IOWA CODE § 598.21F(2) (2007).

*Administrative Law Judge is to base any such apportioned amount on the reasonable costs for only 'necessary' postsecondary education expenses*.[114]

Moreover, the proposed statutory language changes to the Washington Postsecondary-Support Statute, RCW 26.19.090, must expressly state that *orders issued by either a Washington court or a Washington Administrative Law Judge* must expressly provide that *a qualifying child cannot have repudiated his or her parent by publicly disowning the parent, refusing to acknowledge the parent, or by acting in a similar manner*.[115]

Finally, the proposed statutory language changes to the Washington Postsecondary-Support Statute, RCW 26.19.090, must expressly state that *orders issued by either a Washington court or a Washington Administrative Law Judge must expressly provide that parents may terminate with prejudice the postmajority support order if the child fails to maintain a cumulative grade point average – based on a full-time course load – in the median range or above during the first calendar year of his or her postsecondary education*.[116]

Aside from its near-perfect alignment with the Iowa Postsecondary-Support Statute, the above-stated proposed statutory language changes to the Washington Postsecondary-Support Statute, RCW 26.19.090, perfectly square with the Washington Legislative Intent.[117]

Too, the above-stated proposed statutory language changes provide a clear and present level of *predictability* for those heretofore directly and financially-impacted parties (e.g., the Custodial Parent and Non-Custodial Parent) subject to the statewide child support schedule.

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[114] *See, e.g.*, IOWA CODE § 598.21F(2)(a) (2007).
[115] *See, e.g.*, IOWA CODE § 598.21F(4) (2007).
[116] *See, e.g.*, IOWA CODE § 598.21F(5); *see also In re* Marriage of Moore, 702 N.W.2d 519, 520-21 (Iowa Ct. App. 2005) (denying a postsecondary-education subsidy when a student's grade point average of 1.48 was well below the median).
[117] *See* RCW 26.19.001, *supra.*

Additionally, the above-stated proposed statutory language changes provide the Key Stakeholders – *the children seeking higher education* – with a clearly identified cost metric that is proposed to be inextricably tied to the tuition rates at Washington's accredited in-state public institutions of higher education that are *published* and available to *all* via the public domain of the Internet.[118]

This proposed approach, by and through the above-stated proposed statutory language changes, effectively forms a realistic paradigm of *predictability* from which the supported student can plan for, save for, and work toward via either athletic or scholastic efforts to earn scholarships, work-study programs, student loans, and other forms of financial aid (or some combination thereof) toward self-contribution and empowerment in achieving his/her educational goals.[119]

Moreover, the above-stated proposed statutory language changes resonate with a strong public policy perspective: *The children of divorced parents in Washington seeking higher education should be required to learn the rewards of work and the hazards of the dole, just like children from nondivorced parents in Washington are required to learn.* While some may argue that a college education is a 'necessity, 'the fact of the matter remains that since there's no provision for it in the RCW, a college education is a *privilege*, not a *right*, under Washington law.[120]

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[118] *See, e.g.,* "Tuition and Other College Costs" at the Washington Higher Education Coordinating Board website listing all the accredited in-state public institutions of higher education in Washington State available at the following URL http://www.hecb.wa.gov/PayingForCollege/CostFactors.

[119] *See, e.g.,* "Scholarships" at the Washington Higher Education Coordinating Board website available at the following URL http://www.hecb.wa.gov/PayingForCollege/Scholarships; *see also* "Saving for College; GET" at the Washington Higher Education Coordinating Board website available at the following URL http://www.hecb.wa.gov/paying-for-college/saving.

[120] *See, e.g.,* House Bill 1795 – 2011-12, *Enacting the higher education opportunity act*, available at the following URL http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1795&year=2011; *see also* "Gov signs higher ed bill to

Finally, the above-stated proposed statutory language changes do not, however, necessarily require that children of *divorced* parents in Washington attend an accredited in-state public institution of higher education. Rather, these proposed statutory language changes merely provide greater *predictability* in determining the *remaining amount* (or delta) in calculating the sum certain costs required *above and beyond* the child's and his or her divorced parents' required one-third each (if appropriate) of the reasonable costs for only necessary postsecondary education expenses of attending an accredited in-state public institution of higher education, that is, should the child of divorced parents in Washington wish to pursue a degree from *other* than one of Washington State's world-class, accredited, in-state p*ublic* institutions of higher education.

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maintain quality and access in WA colleges, universities" available at the following URL http://blog.senatedemocrats.wa.gov/the-hopper/gov-signs-higher-ed-bill-to-maintain-quality-and-access-in-wa-colleges-universities/; *see contra* Muhlenberg College website article, "The real deal on financial aid," available at the following URL http://www.muhlenberg.edu/main/admissions/realdeal.html ("Ultimately, college education came to be seen as a right, not a privilege, and as a necessity, not a luxury. As a result, colleges began to implement financial aid programs.")