STATEMENT OF JURISDICTION

The Appellees (hereafter State) agree with POPS' statement of jurisdiction.

STATEMENT OF THE CASE

A. General background

The child support and welfare programs are a federal-state cooperative effort administered by the states. The federal government provides approximately one-half of the cost of welfare grants for needy persons whose children are deprived of parental support. 42 U.S.C. §§ 601 et seq. To qualify for those funds, states must have a child support program which complies with the standards set forth in Title IV-D of the Social Security Act, 42 U.S.C. §§ 651 et seq., and which is approved by the Secretary of the Department of Health and Human Services. 42 U.S.C. § 602(b); Carelli v. Howser, 923 F.2d 1208, 1209-10 (6th Cir. 1991); Williams v. Dept. of Social and Health Services, 529 F.2d 1264, 1267-68 (9th Cir. 1976).

A mandatory child support enforcement program was added by the Social Security Act in 1975. Social Security Amendments of 1974, Pub. L. No. 93-647.[1] The program is available to persons who do not receive welfare, 42 U.S.C. § 654(6), and many of the state laws mandated by federal law must cover all child support cases in the state. 42 U.S.C. §§ 666, 667. The Child Support Enforcement Amendments of 1984, § 18, Pub. L. No. 98-378, 98 Stat.

[1]POPS mistakenly attributes this requirement to the 1984 Child Support Enforcement Amendments. POPS Brief, page 3.

1321-22, mandated that each state develop advisory, mathematical support guidelines by October 1, 1987. The Family Support Act of 1988, § 103, Pub. L. No. 100-485, 102 Stat. 2346, required that the support guidelines be made presumptive. 42 U.S.C. § 667(b).

B. Washington state background

Washington state consists of 39 counties and 30 judicial districts. Various support guidelines were in effect during the 1980s. State law required each judicial district to adopt a guideline by August 1, 1987. Laws of 1987, Ch. 440, § 3 (CR 67, Ex. B-4).[2] [3] Most districts adopted the Association of Superior Court Judges Child Support Guidelines (hereafter ASCJ Guidelines). Donigan Decl., Ex. D-10 (CR 66). The ASCJ Guidelines were advisory. Wartnik Decl. at 6 (SER 86). Originally promulgated in 1982, they were lowered in 1985. Id. at 5-6 (SER 85-86).

Governor Gardner created an Executive Task Force on Support Enforcement in June 1985 to investigate the State's child support program and related issues. Public hearings were held and one of the most frequently mentioned problems was the lack of consistency in support orders. Irlbeck Decl. at 2 (SER 58). The Executive Task Force's Final Report was issued in September 1986 and recommended adoption of a statutory, presumptive child support schedule. Id. Rather than adopting a schedule, the Legislature

[2]"CR" refers to the Clerk's Record. "ER" refers to POPS' Excerpts of Record. "SER" refers to the State's Supplemental Excerpts of Record.

[3]Reference to certain laws will be made to the enrolled enactment because they are no longer codified.

created a Child Support Schedule Commission (hereafter Commission). Laws of 1987, Ch. 440, § 1 (CR 67, Ex. B-2).

C. Washington State Child Support Schedule Commission

The Commission had ten members. The Chair was designated by the Secretary of the State's Department of Social and Health Services. Seven members, appointed by the Governor and subject to Senate confirmation, were to include a judge, a bar association representative, an attorney representing indigent persons, two persons with an interest in child support issues (one of whom was to be a noncustodial parent) and two persons representing affected populations (one of whom was to be a noncustodial parent). Two members were to be designated by the Administrator for the Courts and the Attorney General. Donigan Decl. at 2-4 (SER 34-36).

Ten public hearings were held in June 1987 to receive public testimony. Transcripts of the hearings were given to each Commissioner. Id. at 5 (SER 37). The Commission first met on July 17, 1987. All Commission meetings were open to the public and minutes were taken. A copy of all correspondence sent to the Commission was given to each Commissioner. Id. at 6 (SER 38).

One resource used by the Commission was Robert Williams' Development Of Guidelines For Child Support Orders.[4] Id. at 7 (SER 39). Published by the federal Office of Child Support Enforcement, the book analyzed economic data on family expenditures on children, discussed different models for support schedules and made various recommendations to help states create a

[4]A copy of Williams' book appears at CR 68, Ex. A.

support schedule.

Numerous public hearings and seventeen meeting later, the Commission issued its Report to the Legislature in November (hereafter November 1987 Report). Donigan Decl., Ex. B (CR 66).[5] The Commission refined its work in response to comments it received and issued a Supplemental Report on January 26, 1988. Id., Ex. C.

The Legislature debated the Commission's proposal, held hearings and considered various amendments. The Support Schedule was passed by the Legislature and approved by the Governor. (CR 67, Ex. C.) The Commission revised its November 1987 Report in light of the new law and issued its Final Report on May 1, 1988. Donigan Decl., Ex. D (CR 66). The Commission continued to work on the worksheets and instructions. Id. at 14 (SER 40). The Schedule went into effect on June 1, 1988. Id., Ex. E.

The Commission was authorized to propose changes to the standards by November 1, 1988 and, absent legislative action, the changes would become effective on July 1. (CR 67, Ex. C-5, 6.) The Commission amended the standards and revised the worksheets and instructions in 1989. Other changes were made to the Schedule in 1990. Donigan Decl. at 17-19, 21 (SER 43-45, 47). The Commission ceased operation on July 1, 1990. Id. at 1.

A change to the Schedule which did not involve support amounts passed the Legislature in 1989 but was vetoed by the Governor. Irlbeck Decl. at 4 (SER 60). Child support legislation

[5]All of the Commission's reports are attached to the Donigan Declaration (CR 66).

was again debated and passed by the Legislature during the 1990 legislative session. Governor Gardner approved the bill but vetoed four sections. Id. at 4-5 (SER 60-61).

The Schedule was debated during the 1991 legislative session. A bill was passed, although the Governor vetoed portions of it. Id. at 5-6 (SER 61-62). The law reduced the support amounts in the Schedule up to 25% for parents whose combined incomes exceed $2,500 per month. During the special session, the Legislature passed a bill that recodified the child support schedule laws. The current law, effective September 1, 1991, is set forth in the Addendum.

D. Structure and use of the Support Schedule

The Schedule is used to determine the amount of child support in any proceeding in the state. The current Schedule consists of five parts: definitions and standards, instructions, the economic table, worksheets, and a support order summary report form.[6] The definitions and standards which govern the Schedule's operation are codified in Chapter 26.19 RCW. The economic table contains the presumptive child support amounts. RCW 26.19.020. The worksheet must be completed whenever support is determined. RCW 26.19-.035(3), (4). There are five pages of instructions which explain how to complete the worksheet. The fifteen page Schedule is published by the Office of the Administrator for the Courts.

E. Operation of the Schedule

[6]The basic format of the Schedule has not changed since its inception. The current Schedule is included in the Addendum (A-9).

The Schedule defines gross income and the deductions from gross income that are allowed in computing net income. RCW 26.19.071; Worksheet lines 1-4 (Addendum at A-20). Virtually all income is included, RCW 26.19.071(3), (4); RCW 26.19.045, -.055, and only certain deductions can be taken. RCW 26.19.071(5). The court may award the federal income tax exemption. RCW 26.19.100. The combined family net income is applied to the economic table to determine the family's basic child support obligation. RCW 26.19.011(1); Worksheet line 5. The basic support obligation derived from the economic table is allocated between the parents based on each parent's share of the family's net income. RCW 26.19.080(1); Worksheet line 7. Donigan Decl. at 21 (SER 47).

The Schedule considers health care expenses and determines the ordinary health care cost, which is included in the economic table, and the extraordinary health care cost, which is shared by the parents in the same proportion as the basic support obligation. RCW 26.19.080(2); Worksheet lines 8, 12 (Addendum at A-20, 21).

Certain expenses were omitted from the economic table and are addressed separately. Day care, long distance transportation, and other special expenses are shared by the parents in the same proportion as the basic support obligation. RCW 26.19.080(3); Worksheet lines 9, 12. The necessity for and reasonableness of these expenses are determined by the court. RCW 26.19.080(4).

The total support obligation is calculated by adding the basic support obligation and the special expenses. Worksheet line

13. Credit is given for direct payments made by each parent (e.g., day care, health care). Worksheet line 14. The result is the standard calculation. RCW 26.19.011(8); Worksheet line 15.

The standard calculation is the presumptive amount of support that is required of each parent. The standards for deviation, set forth at RCW 26.19.075, are not exclusive. In re Marriage of Griffin, 114 Wn.2d 772, 791 P.2d 519 (1990). Written findings of fact are required when any deviation from the presumptive support amount is granted or denied. RCW 26.19.035(2).

Part VI of the worksheet (Addendum at A-21, 22, 23) contains factors that the court can consider in deciding whether or not to deviate. The worksheet lists items of wealth, income of other adults in the household, liens or extraordinary debt, child support or maintenance received or paid, and new children residing in the home. The court may deviate if a child spends "a significant amount of time" with the obligated parent. RCW 26.19.075(1)(d). The worksheet must be completed under penalty of perjury and filed in every support proceeding. RCW 26.19.-035(3). The court must review the worksheet and support order for the adequacy of the reasons set forth granting or denying any deviation and for the adequacy of the amount of support ordered. The worksheet on which the order is based must be attached to the order or signed by the judge if filed separately. The support order must state the amount of support actually ordered and the amount of support calculated using the standard calculation. RCW 26.19.035(4).

A hypothetical would be illustrative. According to a survey of Washington support orders, the average net monthly income is $1428 for fathers and $451 for mothers. Stirling Decl. at 2 (SER 76). If one child under the age of 12 lives with the mother, support would be calculated as follows. The combined net monthly income of the parties is $1879. The father has 76% of the family income and the mother has 24%. Rounding the family income up to $1900, the economic table support amount is $407 per month. The father's share of that amount is $309 and the mother's share is $98. If there are no credits and no deviations, the father would pay $309 per month to the mother. If the payment is made, the father would have $1119 per month to live on after mandatory deductions and child support. The mother and child would have $760 per month to live on. Donigan Decl. at 24-25 (SER 50-51).

Using the same income levels but considering two children under the age of 12, the economic table support amount is $632 per month. The father's share of that amount is $480 and the mother's share is $152. If there are no credits and no deviations, the father would pay $480 per month to the mother. If the payment is made, the father would have $948 per month to live on after mandatory deductions and child support. The mother and two children would have $931 per month to live on. Id. at 25 (SER 51). The Schedule produces an equitable sharing of support. However this example, which uses the average income of parents subject to a support order in Washington, leaves the children with a lower standard of living than that enjoyed by the noncustodial

parent. Nickerson Decl. at 29-30 (SER 70-71). In fact, the mother and children will have a standard of living below the official poverty level while the father's standard of living is considerably above the poverty level. Id.

STANDARD OF REVIEW

The standard of review for the granting of summary judgment is de novo. In re Bullion Reserve of North America, 922 F.2d 544, 546 (9th Cir. 1991). The appellate court must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Id. Which facts are material is determined by the substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

ARGUMENT

A. Judge Bryan correctly ruled that the Support Schedule can be rebutted both as a matter of law and in practice.

POPS cites to numerous Supreme Court cases in support of the proposition that irrebuttable presumptions are unconstitutional. POPS Brief, pages 23-26. Those cases do not apply because the Schedule can be rebutted.

1. The Support Schedule laws expressly allow deviation from the presumptive support amount.

Federal law requires each state to enact a presumptive support schedule. 42 U.S.C. §667(b). Federal regulations require states to analyze case data every four years "on the application

of, and deviations from, the guidelines" to "ensure that deviations from the guidelines are limited." 45 C.F.R. §302.56(h).

Judge Bryan reviewed the Schedule and statutes to determine if the schedule could be rebutted:

> Are the child support economic schedules in fact subject to rebuttal by individual parents? I'm satisfied just from a reading of the statute that these economic tables are rebuttable. . . .
>
> What I see in this statute is no limitation except equity on the power of the court to deviate from the support schedule. The goal found in Section 001, the legislative intent and finding, indicates that the intent is that the child support obligation should be equitably apportioned between the parents. The provisions that provide for deviation have no limitations except that there be findings of fact to support those deviations from the evidence and the requirement that reasons for deviation must be given. It is clear that the thrust of this statute is that there be a presumptive level, but that the court can deviate for practically any reason that it can articulate and that is not outside the realm of reasonableness. Oral Opinion, pages 10-11 (ER 63-64).

Judge Bryan's analysis of the statute is correct. The current statute, RCW 26.19.075, is entitled "Standards for deviation from the standard calculation" and begins as follows: "Reasons for deviation from the standard calculation include but

are not limited to the following: . . ." The statute lists various reasons for deviation and describes how the presumption is to be applied:

> (2) . . . The presumptive amount of support shall be determined according to the child support schedule. Unless specific reasons for deviation are set forth in the written findings of fact and are supported by the evidence, the court shall order each parent to pay the amount of support determined by using the standard calculation.
> (3) The court shall enter findings that specify reasons for any deviation or any denial of a party's request for any deviation from the standard calculation made by the court. The court shall not consider reasons for deviation until the court determines the standard calculation for each parent.
> (4) When reasons exist for deviation, the court shall exercise discretion in considering the extent to which the factors would affect the support obligation. RCW 26.19.075.[7]

Judge Bryan reviewed the evidence submitted by POPS. That evidence, when viewed in the light most favorable to POPS, did not establish that the Schedule is irrebuttable. To begin with, POPS conceded that the Schedule can be rebutted. Plaintiff's Memo. in Opp. to State's Motion for Summ. Jdgt., p. 14, lines 14-16 (SER 91). POPS tries to avoid the consequences of this concession by inconsistently framing its irrebuttable presumption argument. In this court POPS states that "parents cannot rebut the basic support obligation," while a sentence later it claims that the "Schedule is irrebuttable." POPS Brief, page 26 (emphasis added). The Schedule and the basic support obligation are not the same, a distinction which POPS often fails to make.

[7]The presumption and reasons for deviation appeared in the 1990 Schedule, Standards 3, 4, 11, 12, and 13 (ER 317-18).

> The "basic support obligation" is:
> the monthly child support obligation determined from the economic table based on the parties' combined monthly net income and the number of children for whom support is owed. RCW 26.19.011(1).

That calculation appears in Part I of the worksheet at line 7 (Addendum at A-20), while the worksheet consists of six parts and twenty-two lines. Determining the basic support obligation is merely the first step in determining the "standard calculation." The standard calculation, which appears at line 15 of the worksheet (Addendum at A-21), is the final number generated after all of the computations required by the Schedule are performed. The standard calculation is the presumptive amount of child support from which the court may deviate. RCW 26.19.011(8).

Following the standard calculation is a worksheet section entitled "Additional Factors for Consideration" which requires the parties to list information concerning their assets, liabilities, and familial responsibilities. It provides the parties with the opportunity to list factors to support a request for deviation. A deviation is defined as "a child support amount that differs from the standard calculation." RCW 26.19.011(4). As Judge Bryan ruled, the statute allows parties to deviate from the presumptive child support calculation. The Schedule is not irrebuttable.

2. Washington case law provides that the presumptive Schedule can be rebutted.

Judge Bryan reviewed Washington case law to determine if deviations from the Schedule were permitted. Oral Opinion, pp. 11-12 (ER 64-65). Judge Bryan quoted from In re Marriage of

Sacco, 114 Wn.2d 1, 4, 784 P.2d 1266 (1990):

> The statute does not forbid variations from the result dictated by the worksheet. The standard calculation is only presumptively correct, and the trial court may deviate from the calculation under some circumstances.

Judge Bryan also relied on In re Marriage of Lee, 57 Wn. App. 268, 275 n.4, 788 P.2d 564 (1990), where the court ruled that the Schedule's list of reasons for deviation is not exclusive. The Washington Supreme Court has confirmed this:

> the reasons given for deviation from the standard calculation in former RCW 26.19.020(6) are not exclusive. From reading the plain language of the statute, it is apparent the Legislature intended to allow judicial discretion in appropriate circumstances when calculating child support under the schedule. In re Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990).

Finally, Judge Bryan cited In re Marriage of Dortch, 59 Wn. App. 773, 779-80, 801 P.2d 279 (1990), where the court noted that the high cost of living in Alaska may warrant a deviation and remanded the matter to the trial court. Washington case law supports Judge Bryan's ruling that the presumptive Schedule can be rebutted.

3. Judge Bryan properly considered the evidence before him when he ruled that the Schedule could be rebutted.

POPS claims that Judge Bryan acted in "haste" or had a "predisposition to rule against P.O.P.S." because Judge Bryan "addressed a major portion of [his] opinion to privacy issues." POPS Brief, page 19, n.4. POPS further claims that Judge Bryan "resolved each legal issue by ignoring all of the evidence presented by P.O.P.S., even though on a summary judgment motion that evidence should have been construed in P.O.P.S.'s favor."

Id. at 15. Both of these statements are demonstrably wrong.

Judge Bryan ruled on the privacy issue because the State's motion for summary judgment requested a judgment declaring that the "Washington State Child Support Schedule and Chapter 26.19 RCW do not violate Plaintiff's members' rights of privacy." (CR 61.) POPS did not oppose the State's motion on this issue and, under local CR 7(b)(4), POPS' failure to respond was an admission that opposition to the motion was without merit. Plaintiff's Memo. in Opp. to State's Motion for Summary Judgment, p. 50, n. 14 (SER 92). However, the issue was placed before Judge Bryan by the State and Judge Bryan ruled on the issue as requested by the State.

a. The evidence submitted by POPS demonstrates that the Schedule can be rebutted even though the individual component costs of child support are not set forth in the economic table.

POPS alleges that Judge Bryan "completely ignored" its testimony that the "basic support obligation is in effect irrebuttable." POPS Brief, page 12. POPS claims that the "basic support obligation" is irrebuttable because the "assumptions underlying the economic table" are unknown. What evidence did POPS present and what does "underlying assumptions" mean?

POPS cites a court commissioner for the proposition that the Schedule is irrebuttable. POPS Brief, page 28. Yet that same commissioner testified that the Schedule can be rebutted:

Q:And is the existence of a new child a basis to deviate under the support schedule?
A:I think the existence of a child is a basis to deviate. Valente Dep. at 73, lines 2-5 (SER 121).

POPS' witness Miles McAtee acknowledged that deviations are granted when "exceptional circumstances [are] present that were clearly not considered by the operation of the Schedule, . . ." McAtee Decl. at 5, lines 2-4 (ER 383). Thus he also provides evidence that deviations from the presumptive support amount take place.

Boyd Buckingham stated that one cannot obtain a deviation for different spending patterns because it is forbidden by the "schedule's literature and case law" and because there is no way to determine where the numbers came from. POPS Brief, pages 27-28. However, he did not cite specific cases or literature to support his belief. His testimony is of little import because he did not claim that the Schedule is irrebuttable or that his clients have never obtained a deviation. In fact, his statement implies that he has obtained some deviations. Buckingham Decl. at 2, ¶ 5 (CR 58).

Other evidence submitted by POPS shows that the presumptive Schedule can be rebutted. For example, POPS introduced evidence from Bobby Bran. At his modification trial, the trial court granted him a deviation from $867 per month to $750 per month. Booth Decl., Ex. C (CR 98). POPS introduced evidence from Brent Whiting. He analyzed data from Dr. Stirling's survey of support orders in terms of the reasons for deviation. His testimony was that two-thirds of all deviations granted in this state were for reasons other than the existence of a second family. Second

Whiting Affidavit, p. 9 (CR 82, Tab 4). His evidence supports Judge Bryan's conclusion that the presumptive support amount can be rebutted and shows that deviations occur for a variety of reasons.

POPS quotes Miles McAtee and Robert Hoyden to the effect that they could not determine the "assumptions" behind the economic table. POPS Brief, pages 10-12. The nature of the "assumptions" that they were seeking to discover was explained by Commissioner Valente is his testimony:

> Well, yes, to the extent that Mr. Nickerson was never able to describe what the underlying assumption or model was for a particular income level. And by that I mean the cost or the expenses of a particular household for housing, food, clothing, et cetera, as a sum total comprising their budget. But we were never told that housing, for example, was 27 percent of that total child related expense figure that he came up with. Valente Dep. at 44, lines 10-18 (ER 237).

The underlying "assumptions" which POPS claims is required to be part of the Schedule is a breakdown of the economic table support amount into its major components such as food, clothing, housing, transportation, education, recreation, and miscellaneous. Second Betson Decl. at 7 (SER 123).

A review of the declarations by POPS' witnesses Robert Bancroft and Roger Gay reveals that they, too, bemoan the lack of information on the components which make up child support. Bancroft Decl., ¶ 10 (ER 83-84); Gay Decl., ¶ 30 (ER 151-52). Once it is understood that POPS objects to the lack of such information, the question can be properly stated: is the Schedule irrebuttable solely because it does not contain the various

component costs which make up a support obligation (i.e., housing, food, clothing, transportation)? The answer is no.

POPS cites Dr. Betson's deposition to the effect that a litigant cannot challenge the "underlying assumptions" of the Schedule. POPS Brief, page 12. However, POPS inaccurately characterizes Dr. Betson's testimony. Dr. Betson agreed that the Schedule does not include information on the different components of expenditures. Betson Dep. at 92, lines 1-10 (ER 177). He did testify, however, that such information is available:

> From the data that was available to Williams, in particular, the work done by Espenshade that Williams relied upon, Thomas Espenshade creates a series of components for the average expendtures [sic] made on children. Id., lines 18-22 (ER 177).

Dr. Betson does not state that one cannot deviate based upon an individual family's expenditures on children. He cautions, however, that deviation based upon the use of an individual component is economically unsound:

> deviation from one component doesn't mean deviation from the total average, because while you may be higher on one component or lower on another component, there can be offseting [sic] in other components.
> And that would have to be documented to say that you have sufficiently proven that you have deviated from the average. Betson Dep. at 99, lines 10-17 (ER 184).

Dr. Betson concluded his analysis of the use of component costs as a basis for deviation as follows:

> the use of identifiable component costs is based upon the faulty economic assumptions that households spend the same average amounts on various commodities and that parties could in fact document all of their component spending. A policy that would incorporate the use of estimated component costs would be harmful because it would increase the risk of error in setting an appropriate child support award. Second Betson Decl.

at 11 (SER 127).

Indeed, no support schedule in the country includes information on component costs or recommends deviation based upon a family's atypical expenditures for a single component. Second Nickerson Decl. at 12 (SER 145).

Similarly, Dr. Nickerson's deposition testimony quoted by POPS does not state that a deviation cannot be given if a parent's situation varies from the standard in the economic table. POPS Brief, page 10. Rather, that extract states that the mathematical work underlying the numbers in the table was never published, although Dr. Nickerson notes that the legal community never requested his formulae. Second Nickerson Decl. at 8 (SER 144). The referenced testimony has nothing to do with the ability of parents to seek a deviation.

POPS' expert, Robert Bancroft, refers to the economic table as a "black box" which is "for all practical purposes, an irrebuttable presumption." POPS Brief, page 27, Bancroft Decl. at 15, lines 18-20, p. 16, lines 9-11 (ER 92-93). Bancroft's metaphor, while dramatic, is extremely limited. His point is only that one cannot "break that [economic table] figure down into the various components it represents." Id. at 15, lines 23-24 (ER 92). He does not state that the Schedule is irrebuttable.

POPS poses a hypothetical in which a parent has no housing costs. POPS Brief, pp. 26-27. Under the Schedule, a judge is free to determine that a parent has a greater ability to pay support than contemplated by the Schedule because that parent has

no housing costs. The judge is also free to determine that such a parent is unable to pay more support because of other circumstances in the household. The Schedule does not attempt to quantify the deviation because there is no way to predict what other expenses that parent may have. For example, income not spent on housing may be spent on extraordinary medical costs. The picture POPS paints that deviations should be based on differences in a single component of spending is overly simplistic. The parent's entire financial situation is reviewed and the court is free to deviate for "practically any reason that it can articulate and that is not outside the realm of reasonableness." Oral Opinion, p. 11 (ER 64). Although the Schedule does not break down the economic table support amount into its component costs, the evidence submitted by POPS demonstrates that the presumptive Schedule can be rebutted. That evidence supports Judge Bryan's ruling.

b. Assuming <u>arguendo</u> that the basic support obligation is irrebuttable, sufficient discretion remains to judges to satisfy due process concerns.

Reduced to its essence, POPS' argument is that the Schedule is unconstitutional because one part of the computational process, "the basic child support obligation," is irrebuttable. POPS Brief, page 2, issue A, page 12. Assuming <u>arguendo</u> that the basic support obligation is irrebuttable, that does not render the Schedule unconstitutional.

Several courts have reviewed the federal Sentencing Guidelines in light of claims, similar to the ones raised here,

that they contain an "irrebuttable presumption." United States v. Klein, 860 F.2d 1489, 1501 (9th Cir. 1988); United States v. Frank, 864 F.2d 992 (3rd Cir. 1988); United States v. Harris, 876 F.2d 1502 (11th Cir. 1989). Although noting that discretion was limited by the Guidelines in certain respects, the courts concluded that sufficient discretion remained to judges such that the Guidelines were not unconstitutional.

To the same effect, if one assumes that the economic table numbers are irrebuttable, the court may deviate from the presumptive support amount for a myriad of reasons: (1) income of a new spouse or other adult in the household; (2) receipt of child support, gifts, or prizes; (3) possession of wealth; (4) tax planning considerations; (5) extraordinary income of a child; (6) nonrecurring income; (7) extraordinary debt not voluntarily incurred; (8) a significant disparity in the living costs of the parents; (9) special needs of disabled children; (10) special medical, educational, or psychological needs of the children; (11) if a parent spends significant time with a child; and (12) when either parent has children from other relationships. RCW 26.19.075. The statutory list of reasons for deviation is not exclusive. In re Marriage of Griffin, 114 Wn.2d at 776.

> As Judge Bryan stated:
> An irrebuttable presumption is one that conclusively presumes a fact or is incapable of being overcome by evidence. These presumptions are capable of being overcome by evidence, and they are not conclusively presumed facts. Oral Opinion, page 12 (ER 65).

Judges adopt the presumptive level of support unless "specific

reasons for deviation are set forth in the written findings of fact and are supported by the evidence." RCW 26.19.075(2). Sufficient discretion to deviate is available to judges such that the Schedule does not violate due process.

c. The uncontroverted evidence established that one in five support orders in Washington contains a deviation.

Two surveys on Washington support orders have been conducted and both reveal that approximately one out of five orders contains a deviation from the presumptive support level. Stirling, The Economic Consequences of Child Support in Washington State (CR 70); Welch, Survey of Child Support Orders In Washington State (CR 72). Dr. Stirling's survey revealed that one out of five initial court orders (not modifications) contained a deviation. Stirling Decl. at 3, lines 9-11 (SER 77). Dr. Welch's study revealed that 21% of the dissolution cases excluding modifications had a deviation. Welch Decl. at 6, lines 1-4 (SER 89). Several family law attorneys testified that support deviations had occurred in their cases. Hammerly Decl. at 3 (CR 94); Kelley Decl. at 3 (CR 96); Desonier Decl. at 2 (CR 97). Clearly the Schedule is not irrebuttable.

POPS submitted no evidence to contradict or invalidate the results of the Welch and Stirling surveys. POPS did not present any analysis of support orders entered in Washington state under the Schedule on which to base an argument that deviations do not take place. Judge Bryan apparently relied on the Welch and Stirling surveys when he stated:

> I am somewhat persuaded, also, in trying to analyze whether the statutory presumptions are really rebuttable by the evidence that they are in fact being rebutted on a fairly regular basis in this state. Oral Opinion, page 12, lines 17-21 (ER 65).

POPS cites Fitzgerald v. Fitzgerald, 566 A.2d 719 (D.C. 1989), where the court was concerned with a support schedule it believed to be irrebuttable. The Fitzgerald did not mention the goal that the Washington Legislature addressed, that of increasing the equity of orders by providing for comparable orders in cases with similar circumstances. RCW 26.09.001. The fear expressed by the Fitzgerald court has not come to pass in Washington, since one out of every five support orders in this state contains a deviation.

POPS' statements that Judge Bryan "examined only selective evidence", "shirked [his] constitutional responsibility", and relied "solely on the State's evidence" ignores the import of the evidence POPS presented. POPS Brief, page 32. POPS' witnesses, such as Valente, McAtee, and Bran testified that deviations from the presumptive support level do occur. POPS presented no evidence to rebut the findings of the Welch and Stirling surveys that one in five support orders contains a deviation. Finally, POPS' expert witnesses did not testify that the presumptive standard calculation (as opposed to the basic support obligation) was irrebuttable.

Based on the uncontradicted evidence that support orders in Washington do deviate from the presumptive support level, Judge Bryan correctly ruled that the Schedule can be and is rebutted in

practice. His ruling must be affirmed by this court.

B. The Support Schedule is rationally related to legitimate state purposes.

POPS asks this court to review the Schedule under a strict scrutiny test. The leading cases in this area are Zablocki v. Redhail, 434 U.S. 374 (1978) and Califano v. Jobst, 434 U.S. 47 (1977). In Zablocki, the Court applied strict scrutiny to a Wisconsin statute that barred noncustodial parents who were delinquent in their child support from marriage. Zablocki, 434 U.S. at 386-87. In Jobst, the Court did not apply strict scrutiny to a regulation which terminated benefits to a beneficiary who married a person not receiving such benefits. While acknowledging that the regulation deterred some from marrying and burdened those who did, Jobst, 434 U.S. at 54, the Court applied the rational basis test because the regulation was not:

> merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group, or . . . an attempt to interfere with the individual's freedom to make a decision as important as marriage. Id.

The Zablocki court distinguished Jobst by noting that the law in Jobst "placed no direct legal obstacle in the path of persons desiring to get married, . . ." Zablocki, 434 U.S. at 387 n.12. POPS agrees that strict scrutiny applies only when a statute "directly and substantially interferes with a fundamental right." Id. at 386-87; POPS Brief, page 35 (emphasis added).

1. Strict scrutiny does not apply because the Schedule does not directly interfere with fundamental family

rights.

The State agrees with POPS that the rights to marry, to have children, and to maintain a family relationship are fundamental. The State denies, however, that the Schedule directly interferes with the exercise of these rights.

a. The Schedule places no direct legal obstacle on the right to marry.

The Schedule makes no distinctions based on marriage. It applies to parents and children regardless of the parents' marital status. It does not condition or limit the right to marry nor does it impose any special burdens on those who do. The current law ignores a new spouse's income unless that parent seeks a deviation. RCW 26.19.075(1)(a)(i). Prior law authorized a deviation for a "shared living arrangement." 1990 Schedule, Standard 12 (ER 318). Since that rule applied both to married and unmarried couples, no burden was imposed solely on the basis of marital status.

POPS claims that Don Webb's right to marry was directly and substantially affected by the law when his wife divorced him because he believed her income would be considered in a support modification action. POPS Brief, page 37.[8] Any effect was indirect because the law did not require the Webbs to divorce.

[8]Papers filed in the modification action indicated that the Webbs were having marital problems before the action commenced. Peggy Webb Decl. at 43, lines 3-10 (CR 102). The Webbs were paying $800 to $1000 per month on their consumer debt of $28,000. Mr. Webb's support obligation for two daughters ages twelve and sixteen was $350 per month. Webb Dep. at 8, 43 (SER 118-119).

The Burge case cited by POPS does not establish a direct effect. Id. at 37. The Burges did not divorce and saved $200 per month after the modification action. Burge Dep. at 31, 71 (SER 101-102).

The Stipulation and Agreed Order Regarding Uncontested Facts (hereafter Stipulation) states that the amount of a support order affects a parent's decision to remarry or divorce. (SER 4, ¶¶ 7, 8.) However, "[o]ther financial obligations, income, dependents, resources of the parent and his or her new spouse and their relationship also affect the decision of some parents [to marry or divorce]." Id. POPS has not identified any law which "relates in any way to the incidents of or prerequisites for marriage . . ." Zablocki v. Redhail, 434 U.S. at 386. Absent such a law, strict scrutiny does not apply. In any event, POPS complains only about indirect effects. Strict scrutiny is not required "simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby." Califano v. Jobst, 434 U.S. at 55.

b.The Schedule places no direct legal obstacle on the right to have children.

The Schedule does not regulate the number of children a family may have, although the amount of support a parent pays or receives may indirectly affect the decision of parents to have additional children. A parent can have additional children and ignore the support order, as some do, or pay support and accept a lower standard of living. Stipulation, ¶¶ 9, 10 (SER 5).

The Schedule allows a deviation "when either or both of the parents before the court have children from other relationships to whom the parent owes a duty of support." RCW 26.19.075(1)(e). Although new children are not counted when determining the presumptive support level, RCW 26.19.075(1)(e)(ii), they are considered by the court:

> When the court has determined that either or both parents have children from other relationships, deviations under this section shall be based on consideration of the total circumstances of both households. All child support obligations paid, received, and owed for all children shall be disclosed and considered. RCW 26.19.075(1)-(e)(iv).

The 1990 Schedule authorized a deviation "when there are children from other relationships." 1990 Schedule, Standard 13 (ER 318).

POPS cites the Bruns family as an example of a family unable to adopt a child because of the Schedule. POPS Brief, pages 37-38. However, the Bruns were married for four years before Diane Andrews sued to obtain more support for their three teen-aged sons under the new Schedule. During that time they debated adopting a child and did not do so. Bruns Decl. at 1-2, 4 (ER 122-23, 125). Their reasons for not adopting a child existed both before and after the Schedule went into effect. The Schedule places no direct legal obstacle on the right to have children.

c.The Schedule places no direct legal obstacle on the right to maintain a family relationship.

The Schedule does not address the right to maintain a family relationship. The State's Parenting Act governs the children's residential placement and visitation. RCW 26.09.187(3). The

Parenting Act is not at issue in this case. Under current law, the court may "deviate from the standard calculation if the child spends a significant amount of time with the [paying] parent . . ." RCW 26.19.075(1)(d).[9] The Schedule regulates neither the amount of time nor the type of contact parents may have with children.

POPS' lay witnesses demonstrate the indirect effect of a support order and that many factors affect family relationships. Mr. Jaisun spent little time with his child because he travelled extensively. Jaisun Dep. at 15-16 (SER 107-108). Mr. Bran missed visits with his children because he worked at his wife's hair salon earning $50 to $100 per week. Bran Dep. at 23-25 (SER 96-98). Yet every month he put $300 into his voluntary pension plan. Id. at 34 (SER 99). Mr. Bran's decision to increase his income and decrease his visits was not required by his support order.

Mr. Jaisun allowed his son Devon to be adopted because of Devon's emotional difficulties with Mr. Jaisun's visits and conflict between the two households which pre-dated any support order. Jaisun Dep. at 26, 36-40 (SER 109-114). The adoption freed Mr. Jaisun from paying current support and relieved him from paying back support. Id., Ex. 1 (SER 115-116). Mr. Jaisun's decision was not compelled by his support order.

The other examples cited by POPS also involve parental choice to diminish family relations. Mr. Webb voluntarily reduced his

[9]Prior to September 1991, this credit was determined by applying a formula. 1990 Schedule, Standard 10; Worksheet B (ER 318, 328).

visitation, calling his children only once, collect. Peggy Webb Decl. at 4 (CR 102). Tom Campbell deliberately reduced his contact with his children after his divorce to attend to his business affairs. Campbell Dep. at 35-36 (SER 104-105). Mr. Bruns made himself unavailable to help his ex-wife raise his children for many years. Andrews Decl. at 5 (CR 99).

The problems POPS attributes to the Schedule occur under any support schedule and, in fact, occur even in the absence of a support order. For example, a newly married couple may postpone having children until the husband has a stable, higher-paying job. Many years and children later, they consider having more. Their decision will depend upon their financial obligations, income, dependents, resources of the parent and his or her new spouse and their relationship. The effects that POPS' witnesses complain about are the natural consequences of the decision to have children and the concomitant responsibility to support them.

POPS cites Lipscomb v. Simmons, 884 F.2d 1242 (9th Cir. 1988), to support its argument that strict scrutiny applies. In Lipscomb, Oregon funded the placement of children in foster care with anyone except a relative. POPS' statement that "other funding" was available is incorrect because federal welfare payments were "unavailable to many children." Id. at 1243; POPS Brief, page 39. The Oregon law directly regulated the family relationship by denying funds only if foster children wanted to reside with a relative. Thus Oregon "prevent[ed] family members from living together." Id. at 1245, citing Moore v. East

Cleveland, 431 U.S. 494, 498-99 (1977). The Washington Schedule does not have the same direct effect as the Oregon law because it does not prevent family members from living together, having children, or getting married. The Lipscomb Court distinguished cases which applied the rational basis test:

> When an individual has a special relationship with the State, such as a custodial relationship, the State assumes an affirmative obligation to secure that individual's constitutional liberty. Lipscomb, 884 F.2d at 1246.

Because the children in Lipscomb were in state foster care, their liberty interest was greater than that of criminals and required a special, affirmative obligation on the part of the state to assist them. Id. at 1247. Such a special, custodial relationship does not exist in this case. The children at issue here are with their parents. The Lipscomb case is not on point.

While the parties may disagree about the reasons POPS' lay witnesses acted as they did, there is no dispute as to any material fact. No evidence has been presented that the Schedule places "a direct legal obstacle" in the path of a fundamental right. While the amount of a support order affects custodial and noncustodial parents alike, neither court orders nor the Schedule barred any witness from marrying, having children, or visiting a child. The exercise of fundamental rights remains a matter of parental choice. Strict scrutiny does not apply.

2.Judge Bryan was correct in using the rational basis test to review the Washington Support Schedule.

States have a strong interest in regulating domestic relations. Sosna v. Iowa, 419 U.S. 393, 404 (1975). Washington courts have recognized that the state's interest in the welfare of its minor children is of compelling and paramount concern. In re Meacham, 93 Wn.2d 735, 612 P.2d 795 (1980). This interest has also been recognized by the Ninth Circuit: "[i]t is hard to imagine a more compelling state interest than the support of its children." Duranceau v. Wallace, 743 F.2d 709, 711 (9th Cir. 1984). This interest includes both the establishment and collection of child support. The interest of a state in the establishment of child support obligations has been described as follows:

> This state has an interest in protecting the welfare of its children which includes their standard of living. SDCL 25-7-7 serves to prevent the otherwise often precipitous drop in a child's standard of living when his or her parents divorce and to provide uniform standards for determining the amount of child support each noncustodial parent should pay. Feltman v. Feltman, 434 N.W.2d 590, 592 (S.D. 1989).

Support schedules are the essence of social and economic legislation. When reviewing such legislation, the role of the court is limited:

> only if Congress' choice in imposing burdens or erecting classifications represents 'a display of arbitrary power, not an exercise of judgment,' [cite omitted] is judicial intervention warranted. Women Involved In Farm Economics v. U.S.D.A., 876 F.2d 994, 1004 (D.C. Cir. 1989), cert. denied, 110 S.Ct. 717 (1990).

Judge Bryan carefully reviewed the applicable law and evidence when he held that the effects of the Schedule were indirect. Oral Opinion, pages 16-17 (ER 69-70). The appropriate

test to apply, then, is the rational basis test. The court's inquiry is whether the Schedule is rationally related to its objectives. Lyng v. Castillo, 477 U.S. 635, 638-39 (1986).

3.The Schedule is rational and serves legitimate state interests.

The Legislature's intent in creating a statewide Support Schedule was to benefit children and their parents by:

> (1) Increasing the adequacy of child support orders through the use of economic data as the basis for establishing the support schedule.
> (2) Increasing the equity of child support orders by providing for comparable orders in cases with similar circumstances; and
> (3) Reducing the adversarial nature of the proceedings by increasing voluntary settlements as a result of the greater predictability achieved by a uniform state-wide child support schedule. RCW 26.19.001.

POPS' complaints about the Schedule may well indicate that it is accomplishing its legislative purposes. POPS argues that the Schedule has a "general bias in favor of increasing, and bias against decreasing, child support awards." POPS Brief, page 46. The Schedule affects the standard of living that each household will attain in light of their respective incomes. Higher support payments raise the child's standard of living, whereas lower support payments reduce the child's standard of living. If the options chosen by the Commission tended to increase rather than decrease support awards, the Schedule operates rationally to achieve its first aim, to increase the adequacy of support orders.

POPS alleges that the Schedule is "irrebuttable" yet conceded to Judge Bryan that it can be rebutted. Plaintiff's Memo. in Opp. to Defendant's Motion for Summ. Jdgt., p. 14, lines 14-16 (SER

91). The most important factors identified by the Schedule for setting support are the income of the parties and the number of children at issue. Through the use of the presumptive calculation, people in similar circumstances will pay similar amounts for child support unless they rebut the presumption. By limiting the number of deviations (one out of five cases), the Schedule addresses its goal of increased equity. This end is particularly important in light of historical concerns with arbitrary and capricious decisions by judges which were essentially unreviewable on appeal. Irlbeck Decl. at 2, lines 19-24 (SER 58); Wartnik Decl. at 6 (SER 86).

The Schedule's final goal is to reduce the adversarial nature of proceedings by increasing voluntary settlements. The change from an advisory guideline to a presumptive schedule is a rational way to achieve this goal. As Judge Bryan noted:
decisions should be made easier by the certainty that goes

> along, and should go along, with a presumptive child support schedule because there is no longer the guesswork in regard to future support obligations that there has been in the past. Oral Opinion, p. 17, lns 6-10 (ER 70).

By disallowing parental agreement as a basis for deviation, the law made all support orders reviewable by the court and decreased the likelihood that support would be increased or reduced for purely subjective considerations. In this way support orders should be more predictable. Donigan Decl. at 15 (SER 41).

The Schedule has reduced the number of cases in which the custodial parent was forced to bargain away support rights to avoid a custody fight. Garrett Decl. at 2 (CR 95); Kelley Decl.

at 3 (CR 96). This problem can be kept at bay so long as the Schedule is truly presumptive and the court must give a reason for deviation. The Schedule is rational because it addresses the legislative goals set forth in RCW 26.19.001 to increase the adequacy of support orders, to increase the equity of orders, and to reduce the adversarial nature of support proceedings.

4. The Legislature's mandate to the Commission to use Washington data was satisfied when the Legislature enacted the Support Schedule.

POPS complains that Judge Bryan "brushed off the testimony of numerous experts" and ignored "a substantial body of evidence . . . regarding the flawed methodology underlying the Schedule." POPS Brief, page 40. Every issue raised by POPS in part B.3 of its Brief is premised on a claim that the Schedule "does not accurately measure child-rearing costs in Washington." Id. at iv. POPS bases this argument on the legislative mandate given to the Commission to use "updated economic data which accurately reflects family spending and child rearing costs for families of different sizes and income levels in the state of Washington." POPS Brief, pages 13, 22. Reference to this mandate completely misses the point.

> The Commission described its use of data as follows: Data on family expenditures is unavailable for the state of Washington alone. Furthermore, it is prohibitively costly to collect a reliable data set for the state. The federal government, however, has updated and revised the 1972-73 Consumer Expenditures Survey (CES) to 1986. This revision has included adjustments for cost of living changes, real income changes and demographic changes. It is regarded as the most reliable survey of its type now available and has been used by both the federal government and other

> states as the basis for child support schedules. While it is plausible that the spending patterns in Washington may differ from spending patterns in the country as a whole, there is no evidence to support that. For these reasons the CES data has been adopted as the data set for estimating the percentage of income spent on children. November 1987 Report at 22 (SER 56).

The Legislature accepted this explanation and passed the support schedule law, adopting the Schedule proposed by the Commission.

The original mandate to the Commission became irrelevant once the Legislature enacted the Schedule. The mandate is relevant only if the Legislature delegated authority to the Commission to enact a support schedule. This did not occur in Washington. Rather, the Legislature reviewed the Commission's proposal, debated it, approved it and enacted it into law. The legislative mandate was satisfied when the Legislature enacted the Schedule.

5. POPS' evidence that the Schedule is economically "wrong" is constitutionally irrelevant because all of the issues are debatable.

POPS' expert testimony sought to prove that the Schedule is economically wrong. POPS argues that the economic table amounts were "inflated," POPS Brief, page 40, that the Schedule incorrectly used the food-share methodology, Id. at 43, that the Schedule incorrectly relied on intact family data, Id. at 44, that the Schedule incorrectly converted expenditure data to income data, Id. at 45, and that the Schedule incorrectly required payment of "add-ons." Id. POPS thus objects to the choices made by the Commission and the Legislature in creating the Schedule.

POPS argues that the Schedule is methodologically flawed.

But a flawed Schedule is not unconstitutional:

> If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' [cites omitted] 'The problems of government are practical ones and may justify, it they do not require, rough accommodations--illogical, it may be, and unscientific.' [cites omitted] Dandridge v. Williams, 397 U.S. 471, 485 (1970).

Although a schedule is based on economic data, it represents a policy statement by the legislature of how much money should be spent by parents to support their children. Nickerson Decl. at 24 (SER 69). Support schedules vary widely throughout the country due to the different underlying rationales and economic theories used and due to the many other decisions inherent in creating a schedule. Id. at 23, 32-33 (SER 68, 73-74). Because payment of support increases the money in a child's household and decreases the money in the noncustodial parent's household, the level of support affects the standard of living of each household. Thus the level of support required by a support schedule represents a legislative determination of the relative standards of living that parents and children will maintain after separation in light of available income. Id. at 24 (SER 69). A schedule tells parents what they ought to spend. And what parents ought to spend on their children is a social and political question based on the legislature's collective wisdom and judgment. There is no single, correct answer to that question.

The Lewin/ICF Report confirms that a support schedule is not solely an exercise in economics:

> The central issue that must be confronted in determining

> whether or not existing child support guidelines are appropriate is how the guidelines distribute the reduction in living standards between the custodial and noncustodial households. The estimates of how much parents spend on behalf of their children, both in intact and single-parent families, can help to inform this determination. Ultimately, however, this determination must be made on the basis of value judgements about what is fair and what is not. Lewin/ICF, Estimates of Expenditures on Children and Child Support Guidelines, p. 6-44 (October 1990)(SER 138)(emphasis added).[10]

POPS asks this court to remand the issue of the economic correctness of the Schedule to Judge Bryan for determination. However, the correctness of the Schedule is a matter for the Legislature to debate, not the courts:

> Although parties challenging legislation . . . may introduce evidence to support their claim that it is irrational, [cites omitted] they cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable. Minnesota v. Clover Leaf Creamery, Co., 449 U.S. 456, 464 (1981)(emphasis added).

The testimony of Dr. Betson and Dr. Nickerson demonstrates that all of the errors which POPS claims to exist in the Schedule are matters of debate.

a.The economic table is not inflated.

The underlying model for the Schedule is the Income Shares Approach. This approach, which was the underlying basis for the ASCJ Guidelines in effect in Washington from 1982 until 1988, was also recommended by Robert Williams and by the national Advisory Panel on Child Support Guidelines. Williams, Development of

[10]The Lewin/ICF Report is the most comprehensive analysis available on the relationship between the costs of raising children and child support. Second Betson Decl. at 3 (CR 91).

Guidelines for Child Support Orders, pages I-15, II-67, 68 (CR 68, Ex. A). Dr. Betson stated that reliance on the Williams study was "prudent" because Williams was an acknowledged expert in the field of child support and was:

> perhaps the only person at the time who had carefully thought through the many steps that are required to take the primary research on the cost of children and make it useful for public policy. Betson Decl. at 6, lines 8-12 (SER 14).

The economic table adopted in Washington was taken directly from Williams except for a single adjustment. Id. at 13-14 (SER 19-20). Williams initially used economic data based on family expenditures on children. He had to adjust the numbers to convert to a table based on income. Development of Guidelines, p. II-138, Table I-4 (CR 68, Ex. A); Betson Decl. at 8 (SER 16). Williams described that adjustment as follows:

> That particular adjustment out has been somewhat controversial, but we believe that that's the correct way to handle that, but other people have decided that that's not an appropriate adjustment. Williams Dep. at 52 (SER 9).

After the adjustment was made, Williams used a "smoothing" technique to convert his table to one based on income in hundred dollar increments. Development of Guidelines, p. II-75; Betson Decl. at 14 (SER 20).

Dr. Nickerson, the Commission's economist, reduced the adjustment made by Williams because he believed the adjustment was inappropriate. Nickerson Decl. at 18-21 (SER 64-67). Dr. Nickerson accomplished this reduction by using a different "smoothing" technique to convert Williams' Table 16 to an income

based table. Id. at 19-20 (SER 65-66). The Commission's November 1987 Report described the "smoothing" process.[11] The net effect of the change was to increase support awards that would have resulted from direct use of Williams' table, with the largest increases at the highest income levels. Nickerson Decl. at 20 (SER 66); Betson Decl. at 14 (SER 20).

Dr. Betson testified that the Commission "wisely" chose to alter Williams' information in light of the economic changes which occurred since the data was compiled over fifteen years ago. Betson Decl. at 5-6 (SER 13-14). The major changes involved several oil crises, a drop in productivity and private savings, and stagnant or decreased real household income of the middle class. Id. at 5 (SER 13). A review of economic literature on the cost of raising children would reveal no consensus. Dr. Nickerson and the Commission were thus faced with the choice of adjusting Williams' study or attempting to use more recent data to determine their own cost estimates. Id.

Dr. Betson found that Williams' work resulted in a table which "was an underestimate at all levels of income." Id. at 12, lines 12-13 (SER 18). Dr. Betson also determined that "the Williams adjustment would lead to underestimates of child expenses

[11]The Report to the Legislature states: "In all, seven different expenditure percentages for seven different income groups have been identified and incorporated. For consistency and to avoid arbitrary assignments of averages, it was assumed that these proportions were based on marginal increments of income. This assumption results in a range of expenditures across income levels of from 22% to 18% on the proposed schedule for the support of one child under 12 years of age." Id. at 13 (SER 54).

which are to be included in the basic child support obligation." Id. at 13, lines 13-15 (SER 19). Dr. Betson supported the Commission's modification of the Williams adjustment, stating:

> Dr. Nickerson had sufficient reasons to justify raising the underlying assumptions about the percentages that parents in intact families spend on children from the figures suggested by Williams. Id., lines 17-20.

He concluded his analysis of the Schedule as follows:

> I am of the opinion that the end result of Nickerson and the Commission's work represented a reasonable estimate of the cost of raising children at the time the tables were constructed. Id. at 16, lines 9-12 (SER 21).

The testimony of Dr. Betson and Dr. Nickerson provide a rational basis to support the economic table and the Schedule.

POPS claims that Dr. Nickerson was biased, unqualified, and that he deliberately raised the numbers in the economic table in the expectation that the Legislature would reduce them. The factual record does not support their claims. The legislative mandate was for a person who "demonstrated an interest or expertise in the study of economic data or child support issues." Second Nickerson Decl. at 3 (SER 141). At the time he was appointed to the Commission, Dr. Nickerson was an Assistant Professor of Economics and Finance at Seattle University. He had several publications and had presented papers at numerous professional conferences. Nickerson Decl., App. (CR 68). Dr. Nickerson had researched and lectured on poverty. In particular, he had studied the increasing incidence of poverty among women, especially single women with children. He had also researched

marriage laws and ante-nuptial agreements. Second Nickerson Decl. at 3 (SER 141). His background included "extensive experience in the study of economic data." Id. Dr. Nickerson was fully qualified to serve on the Commission.

POPS also claims that Dr. Nickerson committed "apparent perjury" because he did not remember who nominated him to the Commission. POPS Brief, pages 19-20, n. 5. POPS claims this was "crucial" because the Northwest Women's Law Center was "a key lobbyist behind passage of the legislation." Id. There is no issue here. POPS had full discovery of the Commission's work and could have asked Dr. Nickerson about his 1987 Yakima statement at his deposition. It chose not to do so. While Dr. Nickerson may have been nominated by the Law Center, he did not serve as their representative or agent. There is no evidence in the record that the Law Center influenced Dr. Nickerson in any way. In his deposition, Dr. Nickerson testified that he did no professional work for them, did not attend their meetings, and did not consult with them. Nickerson Dep. at 16-18 (ER 194-96).

Finally, POPS claims that Dr. Nickerson deliberately inflated the Schedule anticipating that the Legislature would reduce it. POPS mischaracterizes a statement that Dr. Betson, not Dr. Nickerson, made. Dr. Betson testified as follows:

> The question is, why choose the higher bound, or what might have been construed at the time as a high bound, based upon the Deaton and Muellbauer article. I think one has to conclude that that decision was made in the absence of a well-defined lower bound, because Williams never constructed an estimate based upon, say, the work of Turchi. Okay?
> So it wasn't readily available. I think it would have been very difficult to construct an equivalent of one,

> . . .
> Hence, in the absence of knowledge of a lower bound, but knowledge of an upper bound, it might have been prudent, especially given, maybe, the political context, to choose that. Betson Dep. at 154-55 (CR 59, Tab 1).

Dr. Betson's testimony is that the numbers in the economic table are toward the upper bound of economic studies on family expenditures on children. His conclusion is that the Schedule "is rational and reasonable in light of existing economic data and theory." Second Betson Decl. at 23 (SER 134).

The Commission adopted a model for its Schedule that was recommended by Robert Williams and which formed the basis of Washington's prior support schedule. The Commission applied the Williams study, except it modified a single adjustment made by Williams which even Williams labels as "controversial." The modification was appropriate in light of the economic changes which occurred after 1972-73 and in light of Williams' underestimation of expenses. Although POPS' witnesses argue that the economic table is wrong, a rational basis for the table is provided by Dr. Betson and Dr. Nickerson. Where an issue is debatable, the Commission and Legislature cannot be arbitrary and capricious for deciding to go one way or the other.

b. The Schedule's methodology is appropriate.

There is no data which directly measures how much is spent on children. Second Betson Decl. at 12 (SER 128). The problem is that "[g]oods that are either jointly consumed or individually consumed by both children and adults account for approximately 90

percent of a typical family's total expenditures." Lewin/ICF Report at 7-2 (SER 139). Therefore, economists have devised models which indirectly determine how much a family spends on children. Id. Dr. Betson received a federal grant to apply different models of estimating expenditures on children to recent CES data. He describes his study as follows:

> In this approach, child expenditures are measured as the difference in total expenditures between a couple with children and an equivalent childless couple. . . . The major two contending methods in the literature are the Engel and Rothbarth approaches. The Engel approach utilizes the share of total expenditures on food to denote equivalently well off households, while the Rothbarth utilizes the level of expenditures on adult goods (adult clothing, alcohol and tobacco). Betson Decl. at 18-19 (SER 22-23).

Dr. Betson used the Engel and Rothbarth models because there is "theoretical proof that the Rothbarth approach would underestimate the 'true' unobserved cost of the children, while the Engel approach would overestimate them." Second Betson Decl. at 19, lines 15-18 (SER 133). The Lewin/ICF Report also adopts the Engel and Rothbarth approaches as the upper and lower measures of the true cost of raising children. Lewin/ICF Report, page 4-24 (SER 136).

POPS argues that the economic table is based on the Engel method and since that method is the upper bound of support, the Schedule overstates costs for children. POPS Brief, page 43. This argument completely misses the point. The Schedule does not require support at the same level as the Engel approach.

Dr. Betson applied the Engel and Rothbarth models to recent CES data to determine the upper and lower bounds of a support

schedule. Betson Decl., Tables 3-5 (ER 110-112). The one child table looks as follows:[12]

Net Income	Economic Table (1988-90)	Economic Table (1991)	Theoretical Range
600	23.9	23.9	[24.7, 32.0]
1300	23.7	23.7	[24.4, 32.1]
2100	23.0	23.0	[22.7, 30.3]
2900	22.5	20.7	[20.4, 27.3]
5000	21.2	15.9	[18.6, 25.1]
7000	20.3	15.2	[18.5, 25.1]

At six income levels, the table reports the percentage of family income that the former and current economic tables require as the presumptive level of support. The theoretical range contains the lower and upper bounds of family spending on children expressed as a percentage of family income. The lower number is the Rothbarth calculation and the upper is Engel. Betson Decl. at 20 (SER 24).

When the numbers from the economic tables are compared with the Engel (higher) numbers, it is clear that the economic table requires considerably less support than the Engel level. For example, a family with combined income of $5000 per month would be expected to spend 25.1% of its income on a child using the Engel approach, whereas the original economic table requires only 21.2%. Dr. Betson's three tables show that the economic table is

[12]The Rothbarth Range from the table has been omitted because it is irrelevant for purposes of this discussion.

substantially below the level of support that would be required under the Engel approach. Therefore, POPS' allegations that the numbers are "inflated" and its criticisms of the Engel approach are irrelevant because the Schedule does not require payment at that level.

Even if Washington's Schedule did adopt numbers derived by the Engel approach, such a choice would be rational. The Engel approach was applied by economist Thomas Espenshade in his book, Investing in Children. This work formed the basis of Robert Williams' Development of Guidelines. Williams recommended adoption of the Engel approach:

> Of these five studies, Thomas Espenshade's work seems to provide the most credible economic foundation for development of child support guidelines. Although the other four studies . . . share the same source of raw data, Espenshade uses the most traditional, straight-forward and apparently reliable methodology. Id. at II-19. (CR 68, Ex. A).

Dr. Betson states that "use of the Engel methodology is not entirely baseless or inconsistent with economic theory." Second Betson Decl. at 13 (SER 129). The State's reliance on Williams was rational and appropriate.

c.The use of intact family data is appropriate.

Plaintiff argues that the economic data which underlies the economic table is derived from intact families and that application of that data when families separate is inappropriate. POPS Brief, page 44. POPS claims that the assumption that families spend the same amount on child-rearing expenses after they separate is "not a reasonable economic assumption." Id.

POPS confuses economic assumptions with social policy judgments.

The underlying concept of the Income Shares model has been described as follows:

> The Income Shares model is based on the concept that the child should receive the same proportion of the parental income that he or she would have received if the parents lived together. Williams, Development of Guidelines, page II-67 (CR 68, Ex. A).

Dr. Betson concludes that the use of intact data to implement the Income Shares approach is appropriate:

> Given the underlying concepts of the Income Shares Model, the use of intact family spending patterns is most appropriate to implement this approach. The use of single parent family spending patterns would not be appropriate because such patterns would not define the proportion of parental income that the child would have enjoyed had the parents remained together.
>
> While the Plaintiff may disagree with the Income Shares approach and its concepts, the use of intact family spending patterns in constructing the economic table is economically and theoretically sound. Second Betson Decl. at 14, lines 14-23 (SER 130).

It should be noted that the child's standard of living is likely to fall even though intact family data is used. November 1987 Report at 11 (SER 53).

The only other data available would be single parent family data recently developed by Dr. Betson. Betson Decl. at 3 (SER 11). Use of this data would be totally inappropriate because the custodial parent's total expenditures on children are tarnished by nonpayment of child support and by inadequate support orders. "Any child support schedule based on such data would have built into it the very inadequacies that it was designed to address." Second Nickerson Decl. at 15-16 (SER 146-147). The use of intact family data was rational.

d. The conversion of family expenditure data to expenditures based on income is economically justified.

Because economic data yields information expressed as a percentage of total household expenditures, POPS states there is no adequate basis on which to convert that information to expenditures based on net income and that such conversion inflates child-related costs. POPS Brief, page 45. This claim is unfounded.

Lewin/ICF explain why support schedules are based on income information:

> We noted in Chapter 4 the theoretical and practical reasons why expenditures on children are calculated as a percentage of total expenditures rather than income. For establishing child support awards, however, income is a much more practical base than expenditures because income provides a better measure of the ability to pay and is less subject to manipulation (to avoid paying child support) than expenditures. Lewin/ICF Report at 6-22, n.24 (SER 137).

There is nothing magical about converting information expressed as a percentage of expenditures to expenditures based on income:

> The percentage of a family's income that is spent on its children is equal to: (A) the percentage of the family's total expenditures that is attributable to its children, multiplied by (B) the percentage of total family income that is consumed (i.e., spent). Id.

A similar analysis was conducted by Robert Williams, Development of Guidelines, pages II-24 to II-30 (CR 68, Ex. A), and by Dr.

Betson. Betson Decl. at 22-23 (SER 26-27). The conversion of data on family expenditures from a percentage of expenditures to a percentage of income is economically justified.

e.The Schedule's use of add-ons was appropriate.

Several expenditures are not built into the economic table and are added to the basic support obligation. Contrary to POPS' claims, this treatment is rational.

The reason for excluding the costs for day care and medical expenses from the economic table was explained by the Commission:

> Because these costs are potentially of a magnitude that might overwhelm the budget of either parent alone, the proposed schedule allows these costs to be considered separately from the income shares portion of support. November 1987 Report at 14, ¶ 4.1.5 (SER 55).

Day care is not included in the economic table. RCW 26.19.080(3). This was recommended by Robert Williams, who removed day care from his table. Williams, Development of Guidelines, p. II-iv, v, II-77 (CR 68, Ex. A). Every state using an income shares model includes child care as an addition to basic child support. Nickerson Decl. at 32-33 (SER 73-74). The medical provisions are a pragmatic method of allocating health care costs between the parents. Five percent of the economic table consists of ordinary health care costs. RCW 26.19.080(2). Expenses which exceed that amount are extraordinary and must be shared by the parents. Robert Williams also excluded extraordinary health care costs from his economic table. Betson Decl. at 7-8, 13 (SER 15-16, 19). Both of the State's experts testified that the treatment of medical expenses is rational. Second Betson Decl. at 17-19 (SER

131-133); Second Nickerson Decl. at 22-24 (SER 148-150).

The long-distance transportation provision allows a non-custodial parent to transfer costs back to the custodial parent. Without this provision, the distant non-custodial parent who wanted visitation would be solely responsible for transportation costs. This provision allows the cost to be shared by both parents based on their relative incomes, reducing the noncustodial parent's costs. The Schedule's use of add-ons was appropriate.

f.The Schedule operates in a rational manner in setting support obligations.

The evidence is not disputed about the operation of the Schedule. Acccording to Dr. Stirling, the median amount a noncustodial parent is required to pay for support is $324 per month. This figure includes all components of support, including day care and medical. Stirling Decl. at 2-3 (SER 76-77). The median percent of the noncustodial parent's income ordered for support is 22%, while the average is 26%. The percentage of the noncustodial parent's income ordered to be paid for support is as follows: (a) 21% of parents were ordered to pay 0-19% of their income; (b) 47% of parents were ordered to pay 20-29% of their income; (c) 21% of parents were ordered to pay 30-39% of their income; (d) 8% of parents were ordered to pay 40-49% of their income; and (e) 3% of parents were ordered to pay 50% or more of their income. Economic Consequences at 5 (CR 70, Ex. B).

Dr. Stirling analyzed support awards in light of family income and the number of children. She found that awards increase

as the number of children increase, Id. at 7, that the percentage of income required for support increases as the number of children increases, Id. at 8, and that support awards increase as family income increases. Id. at 13. This is a reasonable way for a support schedule to operate. Nickerson Decl. at 31-32 (SER 72-73).

Dr. Betson's analysis of the numbers in the Schedule demonstrates that the original economic table falls within a reasonable range of current estimates of the cost of raising children. Betson Decl. at 29 (SER 32). The current economic table falls within a reasonable range of current estimates, except it falls below current estimates for families with $7000 per month net and one child. Id. The level of payments required by the Schedule is consistent with economic studies on the cost of raising children.

POPS believes that a support schedule is a matter of economic fact and that there is only one, economically correct answer for every decision that must be made when creating a schedule. When POPS' expert discusses rationality, the expert is discussing "economic rationality":

> I'm here to talk about the economic basis of it, not to critique the objectives of the people at that time in developing the guidelines or why they used a particular, this study, or. Bancroft Dep. at 83 (SER 153).

Dr. Bancroft concedes he is not competent to discuss the rationality of lawmakers:

> I don't know what's rational for -- I've given up trying to figure out what's rational for policy makers and people why they implement various laws and do what they do.

Id. at 82 (SER 152).

Thus POPS' expert witness disqualified himself from the very inquiry which this court must make: was there a rational basis for the legislation?

The economic correctness of the Schedule is not relevant to a determination of its constitutionality because the Schedule is not purely an exercise in economics. As stated in the Lewin/ICF Report, the determination of a schedule's appropriateness "must be made on the basis of value judgements about what is fair and what is not." Lewin/ICF Report at 6-44 (SER 138).

Judge Bryan agreed with the State that POPS' economic arguments did not render the Schedule unconstitutional:

> It is argued here . . . that the economic data was simply not reliable, and other information, of course, is submitted that it was reliable, but it is really the legislature's call. They apparently were satisfied with the economic data they had, and there is no basis, that I can see, for me to say that what they chose to do was in some way so fundamentally flawed as to make the statute itself unconstitutional. A law, this law or any other law, doesn't have to be perfect, and many laws have equities [sic] in them, but if there is a reasonable justification for the law, those inequities by themselves, inequities viewed from one point of view, don't nullify that law. Oral Opinion, pp. 13-14 (ER 66-67).

Given the complex considerations and many policy judgments which inhere in a support schedule, the wisdom of the Schedule is a matter for the legislature, not for this court. The fact that all of the alleged deficiencies are controverted by Dr. Nickerson and Dr. Betson render the issue debatable. Since reasons can be given to support all of the decisions made by the Commission and

the Legislature, the Schedule is rational and Judge Bryan's decision must be affirmed.

C. The Schedule does not unconstitutionally discriminate against children in the noncustodial parent's household.

POPS claims that children in the noncustodial parent's household are discriminated against because they are not included in the presumptive support calculation. POPS Brief, pages 47-49. The claim is without merit.

To be a "suspect" or "quasi-suspect" class, the class must have suffered a history of discrimination, exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group, and show they are a minority or politically powerless. Lyng v. Castillo, 477 U.S. at 638. Noncustodial parents and their new families are neither a discrete group nor politically powerless. Irlbeck Decl. at 4-6 (SER 60-62). Since no suspect class is involved, the rational basis test applies.

POPS identifies the classification as follows:

> Children of the non-custodial household are excluded from the calculation of the basic and presumptive support obligation. Children of the custodial family are included. POPS Brief, page 47.

No distinction between children in the custodial and noncustodial parent's household is made by the Schedule. Rather, the distinction is between children that the parents have in common and children for whom only one of the parents is responsible. The presumptive support amount is determined by considering "the mother, father, and children of the family before the court . . ." RCW 26.19.075(1)(e). The Schedule does not consider "[c]hildren

from other relationships" when determining the presumptive support amount. RCW 26.19.075(1)(e). The class that POPS identifies does not exist under the Schedule.

The Schedule thus distinguishes family members whose support obligation is being determined from everyone else. For example, if John and Jane have a child named Bob, the presumptive support amount is based on the circumstances of those three people. The fact that John and Jane may have been married before or after their marriage to each other and may have additional children as a result of those relationships is not initially considered. The classification is rational because the only people responsible for Bob's support are his parents, John and Jane. John and Jane have no joint responsibility toward any other person. By considering only John, Jane, and Bob initially to calculate the presumptive support obligation, the court focuses on the only family group for whom all members have a joint responsibility. The classification is a rational way to provide a standard against which to measure a deviation for other reasons. Wartnik Decl. at 3, ¶ 2 (SER 83).

Once the presumptive support amount is determined, the court is free to deviate if there are new dependents or children. RCW 26.19.075(1)(e); 1990 Schedule, Standard 13 (ER 336); Valente Dep. at 73 (SER 121). The existence of children is the most frequently given reason for deviation. Stirling, Economic Consequences at 2 (SER 80). POPS apparently wants a formula so that judges will know how to deviate when parents remarry and have new children. This request is curious because POPS complains that the basic

support calculation is too restrictive. Apparently judges have too much discretion in modification cases.

Creating a formula to handle cases when parents remarry and have new children is extremely complex. The Commission looked at creating a formula for such cases in 1987 and 1989. No consensus could be reached on which formula to use, and a strong minority rejected the use of any formula. Donigan Decl. at 20-21 (SER 46-47). Some of the reasons against use of a formula include:

> 3.No one formula has been presented that will provide an equal and just adjustment regardless of whether the parent who has the new child is the residential or the non-residential parent; . . .
>
> 5.Even if one formula can be developed that treats both parents equally, the availability of only one formula would be unduly restrictive and might lead to erroneous and unjust results;
>
> 6.The formulas that have been reviewed rarely if ever dealt with the new spouse's income and or the needs of new children equitably; and . . . Wartnik Decl. at 3 (SER 83).

Guidance for judges in treating multiple families was provided in the Commission's Report On Use of Support Schedule For Blended Families, dated December 1989. (CR 66, Ex. I).

The policy of the Schedule toward second (third, fourth, and fifth) families was clearly stated by Professor Donigan:

> The Schedule did not adopt a "first family first" approach. Under such an approach, if a noncustodial parent remarried and had new children, the support obligation to the first family would have a priority and the new family would not be a reason to reduce support to the first family. . . . The Commission did not create a formula to factor in the income of a new spouse, which would automatically have increased the support obligation for a noncustodial parent who had remarried a person with income.

> Instead, the Schedule requires the court to determine the presumptive amount of support by ignoring new dependents and income of new spouses or other household members. If there are new dependents, the court may deviate, based on the circumstances of both households. The court is given the discretion to consider the total resources available to each household and the total obligations and dependents in each household. Donigan Decl. at 23-24 (SER 49-50).

Judge Bryan found no equal protection violation: "this statute on its face is not arbitrary, it does not create some discrimination against any party, it operates in regard to all parents, . . ." Oral Opinion, page 22 (ER 75). Judge Bryan's conclusion is correct. No child is given priority over another child by the Schedule. Rather the judge exercises discretion to come up with "a result that does equity for everyone involved, that is a balanced result." Wartnik Decl. at 4, lines 6-8 (SER 84). The Schedule does not violate equal protection.

CONCLUSION

POPS challenge to the Schedule, although couched in terms of due process and equal protection, is primarily a challenge to the wisdom and fairness of the Schedule. The Washingon Legislatue recodified the Schedule this year. The Legislature, not the Court,

is the appropriate forum to decide these issues.

Washington has a compelling interest in the welfare of its children: "The irremediable disadvantages to children whose parents have divorced are great enough. To minimize them, when possible, is certainly a legitimate governmental interest."

Childers v. Childers, 89 Wn.2d 592, 604, 575 P.2d 201 (1978).

The evidence submitted by POPS, when viewed in a light most favorable to POPS, does not raise an issue of material fact. It is undisputed that the Schedule can be rebutted. Even if the economic table cannot be rebutted, sufficient discretion remains to satisfy due process. The rational basis test applies because the lay witness testimony revealed that the Schedule does not directly interfere with any fundamental right. POPS' experts testified that the Schedule's methodology was flawed. However, reasons can be given for all of the choices made when creating the Schedule and the alleged "flaws" are controverted by the testimony of Dr. Betson and Dr. Nickerson. When the issues are debatable, the law is rational. POPS' equal protection challenge fails because the Schedule does not draw the distinction that POPS alleges. The distinctions made by the Schedule are rational.

For these reasons, Judge Bryan's ruling should be affirmed in its entirety.

DATED this 4th day of March, 1992.

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