JUDGE BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

P.O.P.S., a Washington non-profit corporation,	)	NO. C90-5344B
Plaintiff,	)	STATE'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
vs.	)	
BOOTH GARDNER, et al.,	)	
Defendants.	)	

INTRODUCTION

Plaintiff, Parents Opposed to Punitive Support (hereafter POPS), a non-profit organization, seeks to declare the Washington State Child Support Schedule unconstitutional. The Defendants are Governor Booth Gardner, Department of Social and Health Services (DSHS) Secretary Richard Thompson, the Washington State Support Registry, and the DSHS Office of Support Enforcement (hereafter OSE). The Defendants collectively will be referred to as the "State".

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, the state 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 Health and Human Services. 42 U.S.C. § 602(b). Carelli v. Howser, 923 F.2d 1208, 1209-10 (6th Cir. 1991); Williams v. DSHS, 529 F.2d 1264, 1267-68 (9th Cir. 1976). Once the plan is approved, the federal government pays approximately 66% of the state's program costs. DeKay Declaration, p. 2.

The child support enforcement program was added to the Social Security Act in 1975. Social Security Amendments of 1974, Pub. L. No. 93-647. 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. 1321-22, mandated that mathematical support guidelines be developed by October 1, 1987. The guidelines were not required to be binding. The Family Support Act of 1988, § 103, Pub. L. No. 100-485, 102 Stat. 2346, required the support guidelines to be made presumptive. 42 U.S.C. § 667(b).

Washington State Background

Washington state consists of 39 counties and 30 judicial

districts. During the 1980's various child support guidelines were in effect. As required by federal law, Washington required each judicial district to adopt a child support guideline by August 1, 1987. Laws of 1987, Ch. 440, § 3[1] (Irlbeck Declaration, Ex. B). Most districts adopted the Association of Superior Court Judges Child Support Guidelines (hereafter ASCJ Guidelines). Child Support Schedule Commission Final Report, p. 6 (Donigan Declaration, Ex. D).[2] The ASCJ Guidelines were not binding on the judge. Wartnik Declaration, p. 6. Originally promulgated in 1982, the ASCJ Guidelines were arbitrarily lowered in 1985. Id. at 5-6.

Governor Gardner created an Executive Task Force on Support Enforcement in June 1985 to investigate the State's child support program and related issues. During 14 public hearings throughout the state, one of the most frequently mentioned problems was the lack of consistency in support orders. Irlbeck Declaration, p. 2. The Executive Task Force's Final Report was issued in September 1986 and recommended the adoption of a statutory, presumptive child support schedule. Id. Rather than adopting a

[1]Reference to certain laws will be made to the enrolled enactment rather than to the statute as codified because many of those laws are no longer codified. A copy of each law is attached to the Declaration of Jean Irlbeck.

[2]All of the reports issued by the Child Support Schedule Commission and all of the support schedules since 1988 are attached to the Declaration of Helen Donigan. The reports and schedules will be referred to directly by name and page references will be to the original page of the report or schedule.

schedule, the Legislature created a Child Support Schedule Commission (hereafter Commission) and set forth certain parameters for the Commission to follow. Laws of 1987, Ch. 418 (Irlbeck Declaration, Ex. B-2).

Washington State Child Support Schedule Commission

The Commission was composed of ten members. The Chair was designated by the Secretary of DSHS. 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. Id.

Ten public hearings were held in June 1987 to receive public testimony. Transcripts were made of the hearings and given to each Commissioner. Donigan Declaration, p. 5. The Commission's first meeting was 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.

One of the Commission's resources in developing a support schedule was a book by Robert Williams entitled Development Of Guidelines For Child Support Orders.[3] Id at 4. The book,

[3]A copy of Williams' book is attached to the Declaration of

published by the federal Office of Child Support Enforcement, analyzed economic data on family expenditures on children, discussed different models for support schedules, and made various recommendations. Additional information was available to the Commission through its economist, Peter Nickerson, a Commission member.

Four public hearings were held in August, September, and October 1987. The Commission's recommendations were published in November 1987 in its Report to the Legislature (hereafter November 1987 Report). Donigan Declaration, Exhibit B. The Commission refined its work in response to comments it received and issued its Supplemental Report on January 26, 1988. Id., Exhibit 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. Laws of 1988, Ch. 275 (Irlbeck Declaration, Ex. C). The Commission revised its November 1987 Report in light of the legislation and issued its Final Report on May 1, 1988. Donigan Declaration, Exhibit D. The Commission continued to meet to finalize the worksheets and instructions. Id. at 14. The Schedule went into effect on June 1, 1988. Id., Exhibit E.

Major efforts were made to publicize the new Schedule. The Commission and Gonzaga University School of Law sponsored a

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Nickerson as Exhibit A.

seminar that was given in Spokane, Richland, Yakima, Olympia, and Seattle in June 1988. Donigan Declaration, p. 25, Exhibit K. The University of Washington School of Law sponsored a Seattle seminar in June 1988. Curtis Declaration, p. 2. A presentation was given at the WSBA Family Law Section Mid-Year Seminar in Vancouver in June 1988. Rosen Declaration, pages 1-2, Exhibit A. Seminars were given in November 1988 in Seattle and Spokane. Id. at 2, Exhibit B. Additional seminars have been given since. Id., Exhibit D.

The Commission was authorized to propose changes to the standards by November 1, 1988 and, if no legislative action was taken regarding that proposal, the changes would become effective on July 1. Laws of 1988, Ch. 275, § 5 (Irlbeck Declaration, Ex. C-5, 6). The standards were amended under this provision and other changes were made to the Schedule in 1990. Id. at 17-19, 21. The Commission ceased operation on July 1, 1990. Id. at 1.

Structure and Use of the Support Schedule

The Schedule is used to determine the amount of child support in any proceeding in the State of Washington. However, support orders entered prior to July 1, 1988 may require that the support amount be updated by reference to a schedule or guideline other than the Washington State Support Schedule. In re Marriage of Perez, 60 Wn. App. 319, 803 P.2d 825 (1991).

Reviewing the 1990 Schedule,[4] it consists of four parts:

[4]The basic format of the Schedule has remained the same since its inception. The 1990 Schedule is attached to the Donigan Declaration as Exhibit J.

standards, economic table, worksheets, and instructions. The sixteen standards govern the Schedule's operation and can only be changed legislatively. The economic table contains the presumptive child support amounts. Judicial districts were authorized to reduce the economic table by up to twenty-five percent for combined incomes in excess of $2500. Laws of 1988, Ch. 275, § 3(b) (Irlbeck Declaration, Ex. C-4). Effective September 1, 1991, a statewide economic table which essentially adopts the lower economic table allowed by the 1988 legislation will go into effect. Laws of 1991, Ch. 367, § 25 (Irlbeck Declaration, Ex. F-9-12).

The worksheets are a series of forms which must be completed whenever support is determined. RCW 26.19.070(4).[5] There are three separate worksheets. Worksheet A computes the presumptive level of support. Worksheet B addresses the issue of shared custody and visitation. Worksheet C provides the court with a list of additional factors to consider for deviation. There are six pages of instructions which explain how to complete the worksheets. The sixteen page Schedule is published by the Office of the Administrator for the Courts.

Operation Of The Schedule

The 1990 Schedule defines gross income and the deductions from gross income that are allowed in computing net income. Standards 3, 4; Worksheet A, lns. 1, 2, 3. All income is

[5]A copy of the current support schedule statutes is set forth in Appendix A.

included and only mandatory deductions can be taken. The court may award the federal income tax exemption. RCW 26.19.100. Based upon net income information supplied by the parties or as determined by the court, combined family net income is applied to the economic table to determine the family's basic child support obligation. Worksheet A, ln. 5. The basic support obligation derived from the economic table is allocated between the parents based on each parent's share of the combined monthly net income. RCW 26.19.080(1); Standard 6; Worksheet A, ln. 7. Donigan Declaration, p. 21.

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); Standard 7; Worksheet A, lns. 8, 12; Id. at 22.

Certain additional expenses not included in the economic table are addressed separately. Day care, education, long distance transportation, and other special expenses are shared by the parents in the same proportion as the basic support obligation. RCW 26.19.070(3); Worksheet A, lns. 9, 12. The necessity for and reasonableness of these additional expenses are determined by the court. RCW 26.19.080(4); Standard 7. Id.

The total support obligation is calculated by adding the basic support obligation and the special expenses. Worksheet A, ln. 13. Worksheet B is used to determine credit for visitation.

A two percent reduction in support is granted for each percentage of overnights spent with a child in excess of 25% (91 nights). Standard 10; Worksheet B. Id. at 12-13, 22.

Credit is given for direct payments made by each parent (i.e., day care, health care) and for residential time spent with a child. Worksheet A, ln. 14. The result is the standard calculation. Worksheet A, ln. 15. Id. at 22.

The standard calculation is the presumptive amount of support that is required of each parent. The Schedule contains several standards which address the issue of deviating from the presumptive support amount. Standards 3, 4, 11, 12, 13. The reasons for deviation listed in the Schedule are not exclusive. In re Marriage of Griffin, 114 Wn.2d 772, 791 P.2d 519 (1990). Unless specific reasons for deviation are set forth in the findings of fact or support order and are supported by the evidence, the court must order each parent to pay the presumptive support amount. RCW 26.19.070(5); Standard 11. Id. at 22-23.

Worksheet C contains factors that the court can consider in deciding whether or not to deviate. The worksheet lists items of wealth, liens or extraordinary debt, income of other adults in the household, child support or maintenance received or paid, and new children residing in the home. The Schedule requires both parents to disclose all income sources and financial assets relating to all members of their current household, regardless of those members' relationship to the child at issue. RCW 26.19.070(3); Standard 16. This information allows the court to

review the entire financial situation in both households and to consider whether a deviation from the standard calculation is appropriate. Id. at 23.

Worksheets must be completed under penalty of perjury and filed in every support proceeding. RCW 26.19.070(4). The court must review the worksheets and support order for the adequacy of the reasons set forth for any deviation and for the adequacy of the amount of support ordered. The worksheet on which the order is based must be initialed or signed by the judge and filed with the order. The support order must state the amount of support actually ordered and the amount of support calculated using the standard calculation. RCW 26.19.070(6). Id.

ARGUMENT

Plaintiff's Complaint contains a broad array of alleged problems with the Schedule and alleges seven constitutional infirmities. There is a substantial degree of overlap in those claims. The principle constitutional claims refer to procedural due process and the separation of powers doctrine, to substantive due process and equal protection, and rights to privacy. Each of these claims will be addressed separately.

I. The Presumptive Schedule Violates Neither The Due Process Clause Nor The Separation Of Powers Doctrine.

Federal law requires that each state establish presumptive guidelines for the establishment of child support. 42 U.S.C. §667. The amount of support which results from application of the guidelines is presumed to be the correct amount of support to

be awarded. 42 U.S.C. §667(b)(2). The presumption may be rebutted by a finding that the award would be unjust or inappropriate. Id. Federal regulations were recently adopted to implement these provisions. 45 C.F.R. §302.56, 56 Fed. Reg. 22354 (Appendix B).

Plaintiff alleges that the Schedule deprives its members of due process because it is irrebuttable, fails to disclose its underlying assumptions, and deprives the judiciary of a meaningful way to deviate. Complaint, ¶ 5(B). Plaintiff also alleges that the Schedule violates the separation of powers doctrine by eliminating judicial discretion. Id., ¶ 5(C). Plaintiff's argument fails because Plaintiff's allegation that the schedule is irrebuttable is incorrect both as a matter of law and practice.

A. The presumptive Schedule does not violate due process.

Standard 11 sets forth the basic rule on the presumption:

> The presumptive amount of support shall be determined according to the schedule. Deviations must be explained in writing and supported by evidence. When reasons exist for deviation, discretion shall be exercised in considering the extent to which the factors would affect the support obligation.

The "evidence" for a deviation is listed on Worksheet C, which is entitled "Additional Factors For Consideration." The Worksheet provides the parties with the opportunity to list factors to support a request for deviation. The Instructions are explicit: "[t]his information may also be used as a basis for a deviation from a standard calculation support amount." Schedule, p. 9.

> The Schedule contains several standards which address the issue of deviation. Donigan Declaration, p. 23. The court may deviate if spousal maintenance or child support is received or paid. Standards 3, 4. Standard 13 allows a deviation when there are "children from other relationships," based upon "all the circumstances of both households." Standard 12 states as follows: Reasons for deviation may include the possession of wealth, shared living arrangement, extraordinary debt not voluntarily incurred, extraordinarily high income of a child, a significant disparity in the living costs of the parents due to conditions beyond their control, special needs of disabled children, and tax planning. The transfer payment amount may deviate if tax planning results in greater benefit to the child. (emphasis added).

Applying this Standard, the Court of Appeals remanded a case for consideration of the high costs of living in Alaska. In re Marriage of Dortch, 59 Wn. App. 773, 779-80, 801 P.2d 279 (1990).

The Washington State Supreme Court, reviewing similar language formerly contained in statute,[6] held as follows:

> 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

[6]The statutory basis of this deviation was repealed in 1990. Laws of 1990, 1st Ex. Sess., Ch. 2, § 19 (Irlbeck Declaration, Ex. E-12). The language remains part of the Standards.

> apparent the Legislature intended to allow judicial discretion in appropriate circumstances when calculating child support payments under the schedule. In re Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990).

The presumptive Schedule is rebuttable as a matter of law.

Plaintiff also argues that the Schedule is "de-facto" irrebuttable because the issue is so complicated judges will abdicate their responsibility to review the support order and simply apply the presumptive amount without deviation. Two surveys have been conducted which invalidate this argument.

A study was conducted on behalf of the Commission of support orders finalized from January 1, 1989 to June 30, 1989. More than 2,100 usable cases were analyzed. Welch Declaration, pages 2-3. Almost 19% of the cases contained a deviation, while an additional 7% of cases "probably" had a deviation. Id. at 6.

A more recent survey was conducted by Kate J. Stirling, a public policy fellow at Evergreen State College. Reviewing the support order summary forms that the litigants prepared and filed with the clerk's office between September 1 and November 30, 1990, Dr. Stirling determined that 19% of the support orders deviated from the presumptive level of support. Most (85%) of the deviations were downward. The most common reason for a deviation was the presence of other children to support. The Economic Consequences of Child Support In Washington State, p. 2 (hereafter Economic Consequences). Both studies show that approximately one in five orders deviates from the presumptive support amount.

Empirically, then, Plaintiff's claim that the Schedule is irrebuttable is incorrect. Indeed, federal regulations seek to limit deviations by requiring states to review case data every four years "to ensure that deviations from the guidelines are limited." 45 C.F.R. § 302.56(h), 56 Fed. Reg. 22354.

Three reasons can be given for presumptive guidelines. The first is that the old system resulted in orders that were too low. The second is that judicial discretion led to inequity in support awards. For example, research showed that parents in similar circumstances were treated very differently even within the same jurisdiction. The third reason is that the public has a direct financial interest in the support amount paid by a parent whose children are potential recipients of welfare. Garfinkel and Melli, "The Use of Normative Standards In Family Law Decisions: Developing Mathematical Standards For Child Support," 24 Family Law Quarterly 160-62 (1990). See S. Rep. No. 98-387, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Ad. News 2436 (addressing need for support guidelines). The Schedule's purposes are to increase the adequacy of awards, increase the equity of awards by providing for comparable awards in cases with similar circumstances, and increase settlements by providing greater predictability. Laws of 1988, Ch. 275, § 1 (Irlbeck Declaration, Ex. C-3).

Similar due process challenges to other state support schedules have failed. Dalton v. Clanton, 559 A.2d 1197 (Del. 1989); Schenek v. Schenek, 780 P.2d 413 (Ariz. App. 1989). The

argument has also been rejected in cases challenging the federal Sentencing Guidelines. United States v. Klein, 860 F.2d 1489, 1501 (9th Cir. 1988); United States v. Harris, 876 F.2d 1502 (11th Cir. 1989). Sufficient discretion is available to judges such that the Schedule does not violate due process.

2. The presumptive schedule does not violate the separation of powers doctrine.

Under the separation of powers doctrine, the court will overturn laws:

> that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate branch. Mistretta v. United States, 488 U.S. 361, 382 (1989).

Regarding the judicial branch, courts guard against two dangers: that judges not be assigned tasks more appropriate to other branches and that no law "impermissibly threatens the institutional integrity of the Judicial Branch." Id. at 383.

As discussed above, the presumptive Schedule is rebuttable. Judicial training on the Schedule was given at the Spring Judicial Conferences in April 1988 and 1990. Curtis Declaration, p. 2. Donigan Declaration, p. 25. New judges receive training in family law and the Schedule in their judicial orientation program. Curtis Declaration, p. 2. The materials and presentations at those sessions addressed discretion to deviate from the Schedule. Id. at 2; Exs. A-20-23; Rosen Declaration, Ex. C-11, 12.

There is no danger that the Schedule will undermine the

integrity of the judiciary. How much child support a parent should pay is a policy determination appropriate for the legislature to make. Nickerson Declaration, pages 23-27. As shown above, courts retain discretion to deviate from the legislatively created Schedule and do so in approximately 20% of the cases. The Schedule does not violate the separation of powers doctrine.

II. The Support Schedule Is A Valid Exercise Of The State's Police Power And Satisfies The Constitutional Rights To Substantive Due Process And Equal Protection.

Plaintiff's Complaint alleges that the Schedule is not rationally related to any legitimate state purpose, Complaint, ¶ 5(A), and that it violates the equal protection and substantive due process rights of noncustodial parents, their children, and new spouses. Complaint, ¶¶ 5(D)-(F). Plaintiff's claims are economic and social. The economic claims are that support awards are excessive, that noncustodial parents pay a disproportionate share of support, that subsistence needs of noncustodial parents are not considered, that children in the noncustodial parent's family do not have an equal right to share in that parent's income, that the Schedule is methodologically flawed, and that there is no means to verify how the custodial parent spends the child support.

Plaintiff's social claims include the effect support orders have on decisions concerning remarriage and having children, that support orders chill the noncustodial parent's relationship with children the parent's involvement in the upbringing of children,

and that support orders destroy parent-child relationships. However, a review of the Schedule will reveal that it creates no suspect classifications, does not directly impinge on any fundamental rights, considers the circumstances of all parties, and is rationally related to legitimate state interests.

A. The extent of judicial review is determined by the classification or right at issue.

The appropriate level of scrutiny to be applied to a statute is determined by the nature of the classification or right involved. Classifications that involve a suspect class or infringe upon a fundamental family right are subject to a higher level of judicial scrutiny. Lyng v. Castillo, 477 U.S. 635, 638 (1986). When classifications are made in social and economic legislation, they will be sustained if the classification has some "reasonable basis." Dandridge v. Williams, 397 U.S. 471, 485 (1970). Plaintiff bears a heavy burden to show there is no rational basis for the classification. American Networks, Inc. v. Utilities and Transportation Comm., 113 Wn.2d 59, 78, 776 P.2d 950 (1989).[7]

B. The Schedule's classifications are rational and do not involve suspect classes.

Plaintiff's equal protection challenge requires the court to consider classifications made by the Schedule. Plaintiff challenges two classes: noncustodial parents and members of a

[7] Washington courts apply the same test under the federal equal protection clause and the state privileges and immunities clause. American Networks, Inc. v. Utilities and Transportation Comm., 113 Wn.2d at 77.

noncustodial parent's "second" family. 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 Declaration, pages 4-6. Since no suspect class is involved, the classification is reviewed under the rational basis test. Id.

The Schedule distinguishes between custodial and noncustodial parents in order to identify where the child will reside and which household will receive child support. Such a classification is unavoidable in a support schedule. However, either parent can be custodial or noncustodial. The purpose of the Schedule is to determine how much support is provided to a child. Identification of the child's residence is rational and must be sustained.

The Schedule 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. However, once the presumptive support amount is calculated, the court may consider the children, spouses, and live-ins of both

parents. 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 rational and must be upheld.

C. The Schedule does not directly interfere with fundamental family rights.

The nature of the right involved also affects the level of scrutiny to be applied to a statute. As discussed above, Plaintiff makes numerous economic claims about the Schedule. Put simply, Plaintiff claims that too much support is required of noncustodial parents and that the standard of living of noncustodial parents and their new family is unfairly reduced. There is no protected constitutional right to maintain a certain standard of living. Therefore, all of Plaintiff's claims concerning disproportionate economic effects on noncustodial parents and their second families are reviewed under the rational basis test. Id.

Plaintiff also alleges that the Schedule interferes with the rights to marry, to have children, and to maintain a family relationship. The State agrees that such rights are fundamental. Zablocki v. Redhail, 434 U.S. 374, 387 (1978). Nevertheless, a heightened level of scrutiny does not apply.

1. Strict scrutiny applies only if the Schedule directly

interferes with a fundamental right.

Courts have applied the strict scrutiny test to state action that is intended to regulate an individual's decision to marry or have children. Strict scrutiny has been required where the government has directed that a person "may only marry if" the state permits, Zablocki, supra (noncustodial parent cannot marry without court permission, which will not be granted if support is delinquent); if the person is able to pay a filing fee, see Zablocki, supra at 385 n. 10; or if the person is of a certain race. Loving v. Virginia, 388 U.S. 1, 12 (1967).

Along with Zablocki, the other leading Supreme Court case in this area is Califano v. Jobst, 434 U.S. 47 (1977). At issue in Jobst was a regulation terminating benefits upon the marriage of the beneficiary to a person not receiving such benefits. The Court acknowledged that the regulation deterred some from marrying and burdened those who did. Id. 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.

To determine the appropriate level of scrutiny to apply to a law which imposed higher tax burdens on married couples, the Court of Claims in Mapes v. United States, 576 F.2d 896, 901 (Ct.

Cl.), cert. denied, 439 U.S. 1046 (1978), analyzed Zablocki and Jobst and concluded as follows:

> application of strict scrutiny is appropriate only where the obstacle to marriage is a direct one, i.e., one that operates to preclude marriage entirely for a certain class of people, as in Zablocki.

Strict scrutiny has not been applied to classifications based on marital status where the government classifies state benefits such as employment[8] or welfare benefits[9] or state burdens such as taxes.[10] Women In Farm Economics v. U.S.D.A., 682 F. Supp. 599, 602 (D.D.C. 1988), rev'd on other grounds, 876 F.2d 994 (D.C. Cir. 1989), cert. denied, 110 S.Ct. 717 (1990). Thus, strict scrutiny applies only if the challenged law "directly and substantially interferes" with a fundamental right. Zablocki, 434 U.S. at 387.

2. The Schedule does not directly interfere with fundamental family rights.

The fundamental rights Plaintiff seeks to protect are the rights to marry, have children, and maintain a family

[8] Parsons v. County of Del Norte, 728 F.2d 1234 (9th Cir.), cert. denied, 469 U.S. 846 (1984)(anti-nepotism rule not subject to strict scrutiny).

[9] Bowen v. Gilliard, 483 U.S. 587 (1987)(AFDC program definition of "family unit"); Lyng v. Castillo, 477 U.S. 635 (1986)(Food Stamp program definition of "household").

[10] Druker v. C.I.R., 697 F.2d 46, 50 (2d Cir. 1982), cert. denied, 461 U.S. 957 (1983); Mapes v. United States, supra (elevated tax burden for married taxpayers); Ensminger v. C.I.R., 610 F.2d 189, 193 (4th Cir. 1979), cert. denied, 446 U.S. 941 (1980)(IRS' disallowance of dependency deduction for unmarried couple not subject to strict scrutiny).

relationship. Strict scrutiny applies only if the Schedule places a "direct legal obstacle" in the path of a fundamental right. Zablocki, 434 U.S. at 387 n.12. A review of the Schedule demonstrates that it does not directly interfere with any fundamental right.

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

The Schedule makes no distinctions concerning marriage. It applies to a child's parents regardless of their marital status. It applies to children regardless of the parent's marital status. It places neither conditions or limits on the right to marry nor imposes any special burdens on those who marry. The Schedule contains no classification relating to marriage.

Plaintiff may claim that the law discourages marriages because new spouses are afraid their income will be considered when setting child support. A court may consider a new spouse's income when determining support because Standard 12 authorizes a deviation for a "shared living arrangement." However, this rule applies both to married and unmarried couples. No burden is imposed solely on the basis of marital status.

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. Stipulation, ¶ 7. But Plaintiff has failed to establish the existence of any state regulation which "relates in any way to the incidents of or prerequisites for marriage . . ." Zablocki v. Redhail, 434 U.S.

at 386. Absent such a regulation, no equal protection argument can lie. And, even if such a regulation existed, Plaintiff complains only about the indirect effects of the law. 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 makes several references to new children. A deviation from the presumed support amount is available "when there are children from other relationships." Standard 13. The instructions also address how the Commission believes a court should treat children when the parents have remarried:

> Each child has an equal right to share in a parent's income and the schedule should avoid creating economic disincentives for remarriage.
>
> The actual amount of support ordered for each child of a parent may vary, however, because of the financial situation of the other parent of the child. Schedule, p. 9.

To enable each child to share in the parent's income, the court may deviate from the presumptive level of support if either parent has new dependents.

The Schedule does not require a parent to be current in a support obligation, as the law did in Zablocki, nor does it place any other direct obstacles in the path of parents having a child. The Schedule and support orders do affect the decision of

parents to have additional children. Stipulation, ¶ 9. But this is only an indirect effect. The parent can have children and either ignore the support order, as some do, Stipulation ¶ 10, or pay support and accept a lower standard of living. But the choice remains one for parents to make, free from direct state regulation imposing the state's views on how many children a parent may have. 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 sets forth the criteria a court applies to determine where the minor child will reside and what contact each parent may have with the child. RCW 26.09.187(3). The parenting plan not only makes residential provisions for each child but also allocates decision-making authority between the parents. RCW 26.09.187(2). The State's Parenting Act is not at issue in this case.

The Schedule recognizes the residential provisions in a parenting plan. If a child stays overnight with a noncustodial parent more than 25% of the time, that parent is entitled to a 2% reduction in support for each percentage of overnights in excess of 25%. Standard 10; Donigan Declaration, p. 13. However, the Schedule regulates neither the amount of nor the nature of contact that a parent may have with a child. While the amount of a support order may affect a noncustodial parent's visitation,

Stipulation ¶ 14, the degree to which a parent exercises such rights remains a matter of parental choice. The Schedule places no direct legal obstacle on a parent's right to maintain a family relationship.

As the above analysis demonstrates, the Schedule places no direct legal obstacle on the fundamental family rights to remarry, have children, or maintain a family relationship. Since strict scrutiny is not to be applied, the appropriate level of scrutiny is the rational basis test.

D. The Schedule is rationally related to legitimate state purposes.

States have a strong interest in regulating domestic relations laws. 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 at 1004.

The court's inquiry is whether the Schedule is rationally related to its objectives. Lyng v. Castillo, 477 U.S. at 638-39.

Washington's interest in the Schedule was addressed by the Commission and in the enacting legislation. The Commission listed the purposes of the legislation as follows:

1. Provide a uniform, consistent and objective method for determining child support obligations in all proceedings;

2. Reinforce the principle that parenthood entails continuing economic responsibility, and allocate that responsibility equitably between the parents;

3. Protect children from the adverse economic consequences of family break-up or nonformation;

4. Enable parents, attorneys and judges to predict child support amounts and reduce the adversarial nature of the proceedings;

5. Provide a standard for reviewing the adequacy of existing and future orders and settlement agreements; and

6. Reduce the number of children living near or below the poverty level by establishing adequate child support orders. November 1987 Report, p. 7; Donigan Declaration, Ex. B.

The legislation enacting the support schedule describes the legislation's purposes as follows:

1. Increasing the adequacy of child support orders through the use of economic data as the basis for establishing the child 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. Laws of 1988, Ch. 275, § 1; Irlbeck Declaration, Ex. C-3.

These purposes have been noted by the Washington courts. In re Marriage of Griffin, 114 Wn.2d 772, 779, 791 P.2d 519 (1990) (primary concern appears to be the adequacy of child support); In re Marriage of Sacco, 114 Wn.2d 1, 4-5, 784 P.2d 1266 (1990) (increase predictability and voluntary settlements); In re Marriage of Simpson, 57 Wn. App. 677, 679, 790 P.2d 177 (1990) (increase equity and adequacy of orders); In re Marriage of Lee, 57 Wn. App. 268, 274-75, 788 P.2d 564 (1990)(increase equity and adequacy of orders and voluntary settlements). When measured against these purposes, Plaintiff's challenges to the Schedule do not succeed.

1. The support schedule has a rational economic basis.

Plaintiff alleges that the Schedule lacks any rational economic basis and may argue that a different economic theory or rationale should have been applied. To understand this argument, it is necessary to understand the nature of a support schedule.

Although the Schedule has an economic basis, it represents an expression of state policy concerning the level at which children will be supported when their parents separate. Nickerson Declaration, p. 24. Depending on the underlying rationale and economic theory used, and many other decisions inherent in creating a schedule, support schedules vary widely throughout this country. Id at 23, 32-33. 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 will affect 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.

The underlying model for the Schedule is the Income Shares Approach. This approach suggests that in fairness to both the children and parents, the basic child support award should be based upon the level of expenditures that the children would have received had the family remained intact.[11] Each parent's contribution would be in proportion to that parent's share of the combined income of both parents. Economic data on the average expenditures made on children in intact families is used as a basis for the economic table. Betson Declaration, p. 4.

This approach, which was the underlying basis for the ASCJ

[11]Nevertheless, the child's standard of living usually decreases under this approach. Final Report, p. 10, ¶ 4.

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 Guidelines for Child Support Orders, pages I-15, II-67, 68. The Commission consulted a comprehensive list of the available literature at the time it created the Schedule. Betson Declaration, pages 4-5. Dr. David Betson, the State's expert economist, states that reliance on the Williams study was "prudent" because Williams was an acknowledged expert in the field of child support and:

> 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. Id. at 6.

Considering the legislative purposes to improve the adequacy of support awards and to protect children from the consequences of family breakup, that Washington pioneered the Income Shares Model, and that Williams and the national advisory panel recommended that approach, the choice of the Income Shares Model was rational.

The economic table adopted in Washington was taken directly from Robert Williams except for a single adjustment. Id. at 13-14. Williams initially created a table using economic data based on family expenditures on children. To convert to a table based on income, he reduced the proportion of income spent on children as family income increases up to a maximum of 29% at high income levels. Development of Guidelines, p. II-138, Table I-4; Betson Declaration, p. 9. 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 Deposition, p. 52, lns. 20-24 (Appendix C).

After the adjustment was made, Williams used a "smoothing" technique to convert his table from one based on seven different income ranges to one based on income in hundred dollar increments. Development of Guidelines, p. II-75; Betson Declaration, p. 14.

Dr. Nickerson, the Commission's economist, reduced the adjustment made by Williams because the adjustment was believed to be inappropriate. Nickerson Declaration, pages 18-21. Dr. Nickerson accomplished this by using a different "smoothing" technique to convert Williams' Table 16 to an income based table. Id. at 19-20. The net effect of the change was to increase the support awards that would have resulted from direct use of Williams table, with the largest increases at the highest income levels. Id. at 20; Betson Declaration, p. 14.

Dr. Bancroft, the plaintiff's expert economist, testified in his deposition that Dr. Nickerson made two errors when creating the economic table. One error was to use a marginal smoothing technique to Williams Table 16, and the other was to select Williams as a basis for the Schedule. Deposition, p. 72, lines 13-24.[12] Dr. Bancroft concludes that the Schedule has no rational

[12]The referenced pages of Dr. Bancroft's deposition are set forth in Appendix D.

economic basis or theory. Id. at 60, lines 1-8. However, Dr. Bancroft has trouble defining his concept of "rationality." Asked "[h]ow do you define rational?", he responded as follows:

> Something that has some economic basis or theory, that when it's implemented, as it is implemented, in which you've got to be careful, is when you take a theory of basis and you implement it. You implement it the way the theory says it should be. And then it has potential of revealing that kind of information that you're looking for. Id. at 73, lns. 5-10.

When later asked "What do you mean by rational?," he responded:

> Theory that will -- that we can look at that would indicate how we would go about capturing the expenditures on children. Id. at 80, lns. 10-12.

Explaining that the Schedule has no economic basis, he states:

> I do not believe there's any rational basis for using the Espenshade and the Williams work as a basis for developing child support guidelines. I think the theory and the implementation is flawed. Id. at 81, lns. 5-11.

According to Dr. Bancroft, the Schedule is irrational because it is based on two works with which he disagrees and because Dr. Nickerson modified Williams' work. Dr. Bancroft focuses on his preferred method of constructing a schedule, rather than if there is any reasonable basis for the Schedule. Dr. Bancroft applied the wrong standard and his testimony should be discounted.

Dr. Betson reviewed the underlying basis of the Schedule. He notes that the economic data relied on by Williams' was taken from the 1971-72 consumer expenditure surveys. Not only was that data sixteen years old when the Commission reviewed Williams, but fundamental economic changes had occurred in this country since

that time. 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. Betson Declaration, p. 5. A review of economic literature on the cost of raising children would reveal no consensus. Id. at 5. 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. Dr. Betson believes that the Commission "wisely" chose to alter Williams' information in light of the economic changes over the past fifteen years. Id. at 5-6.

Dr. Betson analyzed the underlying economic bases of Williams' work, particularly his use of economic data from Espenshade. Based on Williams faulty application of Espenshade's work, Dr. Betson found that Williams' use of Espenshade resulted in a table which "was an underestimate at all levels of income." Id. at 12. Dr. Betson also determined that "the Williams adjustment would lead to underestimates of child expenses which are to be included in the basic child support obligation." Id. at 13. Dr. Betson supports 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.

He concludes 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.

The Commission adopted a model for its Schedule that was recommended by 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 the consumer expenditure survey was taken and in light of Williams' underestimation of expenses. The economic basis and theory of the Schedule has a rational basis and must be upheld.

2. Support awards are appropriate and equitably placed on both parents.

Plaintiff alleges that noncustodial parents pay a disproportionate amount of child support, Complaint, p. 26, lns. 13-16, and that awards are excessive. Id. at 27, lns 9-17. Neither allegation can be sustained.

The underlying principle of the Schedule is that parents share in the support obligation based upon their share of combined family income. Standard 6. The proportionate share approach applies both to the basic support obligation and to any additional special expenses required by the court. Standard 7. For example, if a noncustodial parent earns 75% of the combined family income, that parent pays 75% of the support amount.

A hypothetical would be illustrative. According to Dr. Stirling's recent survey, the average net monthly income is $1428

for fathers and $451 for mothers. Stirling Declaration, p. 2. If there is one child under the age of 12 in the custody of 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 Declaration, pages 24-25.

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 deviation, 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. The Schedule produces an equitable sharing of support. However in this example, which uses the average income of parents subject to a support order in Washington, it leaves the children with a lower standard of living than that enjoyed by the noncustodial parent. Nickerson Declaration, pages 29-30. 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.

Furthermore, courts deviate from the presumptive support amount in approximately 20% of the cases. Welch Declaration, pages 5-7; Stirling Declaration, p. 3. Most of these deviations (85%) are downward. Id. In such cases the noncustodial parent may well pay a lower proportion of support than the custodial parent.

The Schedule's underlying principle is that each parent pays the same proportion of income for support as their share of combined family income. While many noncustodial parents pay more support than do custodial parents, this occurs because most noncustodial parents are men who earn considerably more than the female custodial parent.[13] Nickerson Declaration, pages 30-31. If they earn more, it is equitable for them to pay more. Linking payment to the parent's proportional share of family income is rationally related to the purpose cited by the Commission to equitably allocate the obligation between the parents. Id. at 28; November 1987 Report, page 7.

Plaintiff's allegation that support awards are excessive is also without merit. Dr. Stirling's study analyzed families with

[13]The father was the noncustodial parent in 89% of the cases. Economic Circumstances, p. 2 (Stirling Declaration, Ex. B). According to Dr. Stirling, the average net monthly income of fathers is $1428 and mothers is $451. Stirling Declaration, p. 2.

support orders. The median support award for a noncustodial parent including all components of support is $324 per month, while the average amount is $352 per month. 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, p. 5 (Stirling Declaration, 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 Declaration, pages 31-32.

Plaintiff also alleges that support awards exceed the amount that a child actually needs for support. Historically, the test for awarding child support was the needs of the child and the ability of the parents to pay. Puckett v. Puckett, 76 Wn.2d 703, 705-07, 458 P.2d 556 (1969). Nevertheless, the court

attempted to "perpetuate for the children of divorced parents a standard of living in some degree compatible with that provided them before the divorce." Id. at 705-06.

Under the Cost Sharing Model, the costs of raising children are calculated and the custodial parent is assured of having funds to cover those costs. The types of costs included are food, shelter, medical, clothing, and school expenses. Final Report, p. 10. This model assumes that parents are only responsible for some minimum standard of living for their children. Id.

Although Plaintiff would prefer such an approach, it was rejected both by the Washington Legislature and the Commission. The Commission chose the Income Shares Model in light of the following principle:

> Child support must cover a child's basic needs as a first priority, but, to the extent either parent enjoys a higher than subsistence level standard of living, the child is entitled to share the benefit of that improved standard. Final Report, p. 8.

The Legislature also rejected the "cost" approach favored by Plaintiff. The preamble to the Schedule legislation states: The Legislature intends, in establishing a child support schedule, to insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living. Laws of 1988, Ch. 275, § 1 (Irlbeck Declaration, Ex. C-3).

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

a noncustodial parent challenged the Washington statute authorizing a court to order payment of post-secondary educational support. The Court upheld the statute against the equal protection challenge and found it reasonable:

> It is based on considerations already mentioned, and the facts known to the legislature and this court as well as to the layman, of the disruptions to homelife, bitterness and emotional upset which attend most marital breaks. The irremediable disadvantages to children whose parents have divorced are great enough. To minimize them, when possible, is certainly a legitimate governmental interest. Id. at 604.

The State has a legitimate governmental interest in seeking to minimize the financial disruption to a child's life after divorce by providing adequate support to the child's home. The selection of the Income Shares Approach rather than a minimal cost approach is rational and must be upheld.

Plaintiff alleges that support awards are not rationally related to what families spend on children. Dr. Betson analyzed support awards from the Schedule to determine whether they were reasonable in light of economic studies on the cost of raising children. With a federal research grant, Dr. Betson applied different economic theories for determining the cost of raising children to the 1981-86 consumer expenditure surveys.[14] Using these results, he constructed a theoretical range with the economic theories which define the upper and lower bounds of the costs of raising children. He also constructed a Rothbarth range

[14]The work of Williams and others was based on the 1971-72 consumer expenditure surveys.

to determine the most conservative estimate of the costs of raising children. Dr. Betson then compared the Schedule to those ranges. Betson Declaration, Tables 3-5. Dr. Betson concludes that the original economic table "falls within a reasonable range of current estimates" and that the 1991 economic table "falls within a reasonable range of current estimates, except for families with $7000 net monthly income and one child, where the revised Table falls below the Rothbarth Range." Id. at 29. Put simply, both the original and 1991 economic tables fall within current estimates on the cost of raising children, except that the revised table is too low for higher income families with one child.

Plaintiff's claims that the Schedule requires excessive support and that it is based upon a flawed approach cannot be maintained. The Schedule has a rational economic basis.

3. The Schedule addresses the subsistence needs of noncustodial parents.

Plaintiff alleges that the Schedule fails to consider the subsistence needs of noncustodial parents. Complaint, page 26. The Schedule addresses the noncustodial parent's subsistence needs in Standard 8: "when combined monthly net income is less than $600, a support order not less than $25 per month per child shall be entered." The Schedule does not, however, guarantee any level of income to a noncustodial parent. This is consistent with the Schedule's purpose to meet the child's basic needs and reduce the number of children living below poverty level. Laws

of 1988, Ch. 275, § 1 (Irlbeck Declaration, Ex. C-3); Final Report, p. 7.

The Commission did recognize the problems that arise when there is not enough money for the family after separation. Addressing low income cases, the Commission wrote:

> the income and living expenses of the parents should be carefully reviewed to determine the maximum amount of child support that can be reasonably ordered without denying the parents the means for self-support at a minimum subsistence level." Final Report, pages 14-15.

A court may deviate from the Schedule if there is evidence in the record to support a deviation. The court has discretion to deviate to provide the noncustodial parent with sufficient income to maintain a minimum standard of living.

Nevertheless, assuming arguendo that the Schedule prefers the child's household to the noncustodial parent's household, that preference is consistent with the state's obligation to protect minor children. If there is not enough money for all, it is reasonable to protect the child's household rather than the noncustodial parent's household. Such a policy is rationally related to legitimate state purposes and must be upheld.

The 1991 Legislature granted noncustodial parents with low income additional protection. Effective September 1, 1991, neither parent's support obligation may exceed 45% of net income except for good cause. Laws of 1991, Ch. 376, § 33(1) (Irlbeck Declaration, Ex. E-51). The prior standard was fifty percent. Standard 9. That legislation also provides as follows:

When combined monthly net income is less than six hundred

> dollars, a support order of not less than twenty-five dollars per child per month shall be entered for each parent. A parent's support obligation shall not reduce his or her net income below the need standard for one person established pursuant to RCW 74.04.770, except for the monthly minimum payment . . . or in cases where the court finds reasons for deviation . . . Id.

The standard of need is $628 per month. WAC 388-29-100 (Appendix E).

This new section provides noncustodial parents with substantially more than a subsistence standard of living. Since the protection which Plaintiff seeks is provided by the Schedule, Plaintiff's constitutional argument fails.

4. The Schedule addresses the needs of second families.

Although Plaintiff alleges that the Schedule fails to consider the needs of the members of the noncustodial parent's "second" family, Complaint, ¶ 5(D), (F), this is incorrect. The law does not take a "first family first" approach and refuse to consider new dependents. Donigan Declaration, pages 23-24. Rather, the court has broad discretion to deviate when new dependents are present, although the presumptive award is determined initially based on the parents and children covered by the support order at issue:

> When there are children from other relationships, the schedule shall be applied to the mother, father and children of the relationship being considered. Deviations from the amount of support derived from this application may be based upon all circumstances of both

households. All income, resources, and support obligations paid and received shall be disclosed and considered. Support obligations include children in the home and children outside the home. Standard 13.

That Standard clearly allows the court to deviate from the presumptive award to consider the needs of a second family. Indeed, this is recognized in the Washington Family Law Deskbook: The existence of new families and new dependents would support a deviation from the schedule. Once that decision is made, the amount of support to be required is discretionary. . . . [i]n essence, this schedule will probably not determine the amount of support that should be ordered in a case involving new families and new dependents. That decision will remain a discretionary decision for the court. Standard 13. Washington Family Law Deskbook, Ch. 28, Child Support, § 28.5(4)(k), p. 28-22 (Wash. St. Bar Assoc. 1989); Rosen Declaration, Ex. C-12.

This basis for deviation has been recognized by the judiciary. According to Dr. Stirling, the most frequent reason to deviate from the presumptive support amount is the existence of other children to support. Economic Consequences, p. 2.

The considerations involved in setting support when the parents have remarried are described by Judge Anthony Wartnik:

I look at the income of each household, the number of children in each household, the comparative lifestyles

> in each household to the extent that they can be determined, the need for exceptional expenditures in either household related to health or disability issues, extraordinary involuntary indebtedness . . . and any other factors that appear to be reasonably relevant to the issue. I then attempt to evaluate these factors with the desired goal of coming up with a result that does equity for everyone involved, that is a balanced result. The new spouse's income, in this regard, is considered for the purpose of offsetting or counter-balancing the needs of new dependent children, rather than factoring it in equally with the parent's income. Wartnik Declaration, pages 3-4.

Setting support when parents have remarried with new dependents is a very complex task, beyond the ability of any formula to accomplish. Id. at 2-3. The Commission was divided both on whether any formula should be used to set support presumptively when parents have remarried and, if so, which formula to use. Donigan Declaration, pages 20-21, Ex. G. The Legislature has not adopted any formula for use in such situations.

The Schedule leaves that task to the discretion of the trial judge, after requiring the judge to determine the presumptive support amount to provide a measure against the support award. Standard 13. The trial judge's exercise of discretion applies to both custodial and noncustodial parents, for both may have

remarried. The Schedule recommends that "the approach for deviation must treat both parents in the same way, either including or excluding the income of new spouses and the needs of other children." Schedule, p. 9. That process is a rational way to address a complex task and does not violate the rights of noncustodial parents and their second families.

5. Noncustodial parents have no constitutional right to verify how custodial parents spend child support.

Plaintiff alleges that the Schedule is unconstitutional because it fails to provide a means by which noncustodial parents can verify how the custodial parent spends the child support. Complaint, ¶ 61. The issue is a complex one: should parents who pay support have the ability to require the receiving parent to account for all expenditures relating to children? The issue is complicated by the difficulty of determining how much of the custodial parent's food, shelter, and transportation expenses are for the child.

The Commission originally suggested that legislation authorizing a verification process be adopted by the Legislature. November 1987 Report, p. 25. The Legislature subsequently asked the Commission to study the matter further and report back. Laws of 1988, Ch. 275, § 8 (Irlbeck Declaration, Ex. C-6). The Commission reviewed the issue and prepared its Report to the Senate Law and Justice and the House Judiciary Committees, dated January 1989 (hereafter Verification Report). Donigan Declaration, Exhibit G. The Commission identified six reasons

for a verification process:

1. Disagreement with the policy that child support should reflect not only the basic living costs of children, but also the parents' standard of living;

2. Disagreement with the application of the economic data which is the basis of the Economic Table in the Child Support Schedule;

3. Disagreement with the allocation of decision making regarding day to day decisions and control over the child under current parenting and parentage statutes;

4. Disagreement with the standards for modification of parenting plans and child support orders under current statutes;

5. Concern that valid complaints regarding a parent's diversion for support for the child are not heard by the courts; and

6. Lack of trust that the other parent is spending the money for the benefit of the child. Verification Report, p. 2.

The Commission listed seven concerns with enacting a verification procedure:

1. A verification procedure would be a procedure without a remedy, in that verification itself would not modify the order regarding child support or parenting decision making.

2. A verification procedure would not satisfy a parent who is concerned with the amount of child support or the right to make decisions regarding the expenditure of support for a child.

3. The existing protections against continual litigation could be undermined by a verification procedure. Continual litigation could be detrimental to the child.

4. Much information relating to the expenditure of support would come from the child. Any proceeding which places the child in the center of conflict between the parents would be detrimental to the child.

5.The fiscal impact on the state and counties for a verification procedure must be balanced against the need for such a procedure.

6.Any record keeping system may be unreasonably burdensome and intrusive. These burdens are compounded in blended families because of additional adults and dependents and the difficulty of tracing expenditures for individual family members.

7.There may be no remedy which would adequately resolve this issue. Id. at 2-3.

After reviewing existing procedures which would address some of the problems associated with verification, the Commission recommended that no verification procedure be enacted. Id. at 3.

The Commission concluded as follows:

> Although there may be some situations in which a parent is not using support monies for the benefit of the child, the only procedure which would address all of the concerns in this area is a procedure that is complex, expensive, and subject to abuse. A verification procedure would create more problems than it would solve. Id. at 7.[15]

Although the Legislature passed a verification procedure, it was vetoed by Governor Gardner. Laws of 1989, Ch. 360, § 38 (Irlbeck Declaration, Ex. D). Governor Gardner's veto message stated:

> Although the procedural requirements of this section are intended to protect receiving parents from frivolous charges and harassment, I believe the result of these changes could encourage an increase in such behavior. Id., Ex. D-2.

Whether or not to provide a verification procedure is a policy decision which requires the weighing of numerous different factors. Having weighed those factors, this state did not

[15]The Report was agreed to by all Commissioners except one, who filed a minority report.

authorize a verification procedure. Such a policy decision should not be second-guessed by the court. There is no constitutional right to such a process.

The legislative purposes for the Schedule have been addressed above. Legislation will be upheld if it bears a rational relationship to a legitimate state interest. Plaintiff challenges both the wisdom of the legislation and whether it successfully accomplishes its purposes. Yet neither concern is properly the focus of a court's rational basis analysis:

> Although litigants challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, [cite 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.' [cite omitted] Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence that the legislature was mistaken. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981).

The effects of a support award will be felt by both parents. The Schedule's attempt to provide adequate support to a child, to make support awards more uniform for persons in similar circumstances, and to reduce the adversarial nature of proceedings by increasing the predictability of support awards are legitimate state purposes served by the Schedule. The Schedule does not violate rights to substantive due process or equal protection.

III. The Support Schedule Does Not Violate The Right To Privacy.

Plaintiff alleges that the Schedule violates constitutional rights to privacy of new spouses and other members of a noncustodial parent's household by requiring them to disclose personal financial data. Complaint, ¶ 5(G). An individual's interest in avoiding the disclosure of personal matters has been granted constitutional protection. Whalen v. Roe, 429 U.S. 589, 599-600 (1977). However, that right is not absolute. Most courts apply a balancing test to weigh the extent of the intrusion against the government's interest in disclosure. Fraternal Order of Police, Lodge 5 v. Philadelphia, 812 F.2d 105 (3rd Cir. 1987); Barry v. City of New York, 712 F.2d 1554, 1559 (2nd Cir. 1983).[16] Under that test, the government's interest in disclosure outweighs the limited intrusion required by the Schedule.

The Schedule does not require the new spouse or other household members to disclose any information. Rather, it requires the parent subject to the support order to disclose the income and resources of household members. Standard 16; Worksheet C, lns. 28, 30(a), (b). The information is put in Worksheet C, shared with the opposing party, and filed with the court. The court file is a public record. However, there is little reason to believe that the information will be viewed by or shared with anyone other than the parties to the proceeding.

[16]Outside of the search and seizure context, Washington courts appear to provide the same privacy protection under state and federal constitutional law. Bedford v. Sugarman, 112 Wn.2d 500, 506 n.5, 772 P.2d 486 (1989).

If necessary, protection is available to the parent and household member to protect their privacy. For adequate cause, the court may seal the file or grant a protective order barring further disclosure of personal information. Wartnik Declaration, pages 4-5.

A person's reasonable expectations of privacy must also be considered. State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990). Plaintiff does not question that parties to a support order must share financial information so that an appropriate support award can be set. Since at least 1981, Washington law has considered financial information concerning a household member relevant to the issue of setting child support. In re Marriage of Cook, 28 Wn. App 518, 624 P.2d 743 (1981). When a parent remarries or shares a home with someone, that person should be aware that the parent is a party to a support order which is subject to modification. The person is thus on notice that litigants and the court may consider the financial circumstances of the entire household at some time in the future. In light of this, a roommate or new spouse has little or no reasonable expectation of privacy in his or her financial information if child support litigation arises.

Turning to the need for disclosure, the court needs the information to set an appropriate amount of support:

> [t]he purpose for making this information available is to allow the court the opportunity to review the entire financial situation in both households and to consider whether a deviation from the standard calculation is appropriate. Stipulation, ¶ 5.

The court cannot accurately assess the financial circumstances of both parents without this information. For example, a court may well treat a parent differently if that parent is married to someone who has cancer and high medical bills as opposed to someone earning $5,000 per month.

Washington courts have recognized the need for such financial information. In re Montell, 54 Wn. App. 708, 716 n.3, 775 P.2d 976 (1989); In re Marriage of Cook, supra. The Commission accepted existing law that such information was relevant:

> Under present law the financial contributions to the household by a parent's new spouse, live-in companion, or roommate may be considered when setting child support. A shared living arrangement may decrease the parent's expenses, making more money available for the payment of child support.
> In either case, these additional resources should be disclosed and will justify a deviation from the amount calculated on the worksheets. Alternatively, the amount of income for a parent's household may be increased for calculation purposes to reflect additional financial benefits received by virtue of the shared household. Final Report, p. 20.

Withholding this information from the court denies it the ability to understand the financial circumstances of the two households and makes it extremely difficult to determine an appropriate support obligation. Fairness requires full disclosure of information.

> The right to privacy is a limited one:
> the right of confidentiality . . . protects against disclosure only of certain particularized data, information or photographs describing or representing intimate facts about a person. The case law does not support the existence of 'a general right to nondisclosure of private information.' Bedford v.

> Sugarman, 112 Wn.2d at 511-12 (citing J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981).

Disclosure of financial information has been upheld in a number of different contexts. The Washington law which requires disclosure of financial information by public officials and their spouses has been upheld. Fritz v. Gorton, 83 Wn.2d 275, 517 P.2d 911 (1974). See also Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978). Release of bank records without a warrant has been upheld. United States v. Miller, 425 U.S. 435 (1976).

The State has a compelling interest in the support of its children. Duranceau v. Wallace, 743 F.2d 709, 711 (9th Cir. 1984); State v. Wood, 89 Wn.2d 97, 569 P.2d 1148 (1977). The right to privacy may be regulated when the State has a compelling interest. In re Meacham, 93 Wn.2d 735, 612 P.2d 795 (1980). The need to disclose financial information required for a fair and equitable setting of child support outweighs the limited intrusion required by the Schedule. The disclosure does not violate personal rights to privacy.

CONCLUSION

Plaintiff's 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. Reduced to its essence, Plaintiff argues that the Schedule requires too much support of noncustodial parents. But such an argument is not one for a court to decide:

> We do not decide today that the . . . regulation is wise, that it best fulfills the relevant social and economic objectives that . . . might ideally espouse,

> or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. Dandridge v. Williams, 397 U.S. 471, 487 (1970).

The creation of a support schedule is a complex task, one that each state has handled in its own way. The Washington State Child Support Schedule was drafted by a duly-appointed Commission acting under legislative directives. The Commission's actions were public, its proposals were publicized and debated, and then submitted to the Legislature for further scrutiny and debate. The Legislature passed the Schedule and modifications have been made each year since its enactment. Such a process is particularly appropriate for a law implementing social and economic policy to families.

But Washington state has a compelling interest in the welfare of its children, and the state should be granted wide latitude in deciding the level of support which will be made available to those children. As the Washington State Supreme Court stated in Childers v. Childers: "The irremediable disadvantages to children whose parents have divorced are great enough. To minimize them, when possible, is certainly a legitimate governmental interest." Id., 89 Wn.2d at 604

The Washington Supreme Court has recognized that the Legislature's "primary concern appears to have been the adequacy of child support." In re Marriage of Griffin, 114 Wn.2d at 779. The Schedule, as a whole, is rationally related to this purpose

and to the purpose of equitably allocating support between parents. This court should grant the State's motion for summary judgment and declare the Schedule constitutional.

DATED this _____ day of July, 1991.

Respectfully submitted,

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By

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