JUDGE BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

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

INTRODUCTION

Two new laws concerning child support were enacted during the 1991 legislative session. Effective September 1, 1991, the support schedule laws are now entirely codified. To aid the court, the laws effective September 1 are set forth in the Statutory Appendix Of Child Support Laws. Legislative changes which touch on issues before this court are identified in the memorandum.

There is no dispute that child support laws and orders affect the lives of individuals in many ways. What Plaintiff repeatedly refuses to recognize is that parents subject to

support orders retain the ability to make decisions concerning marriage, to have children, and to contact their children. How a parent chooses to deal with a support order and his or her other financial and familial obligations remains a matter of personal choice not directed by the state. This can best be seen by reviewing the situations of Plaintiff's lay witnesses.[1]

Don Webb

Plaintiff offers Don Webb as an example of a man whose marriage and relationship with his children was destroyed by the support schedule. Don and Peggy Webb were divorced in 1980. In June 1989, Peggy Webb's attorney wrote to Mr. Webb announcing her intent to modify child support. Less than two weeks later, Don and his second wife, Ilene, separated. Mr. Webb repeatedly testified that he and Ilene were happily married and that "if it wasn't for this child support law, we would still be married." Id. at 28, lines 3-4. Yet this statement is directly contradicted by a worksheet he filed in the modification case in April 1990 stating: "When Ms. Webb found out that my second wife and I were having problems, she initiated this lawsuit for the sole purpose of breaking up my marriage permanently." Peggy Webb Declaration, page 4. The problems with his second marriage pre-dated the modification action. Perhaps the real problem was the enormous consumer debt he and Ilene had incurred. Using their credit cards for "just about everything," Webb Deposition, page

[1]Excerpts of the referenced depositions are set forth in the State's Appendix of Transcript Excerpts and Documents.

43, lines 3-10, they ran up a debt of $28,000, which required payments of $500 to $600 per month by Don Webb and $200 to $400 by Ilene Webb. Id. at lines 11-18. His child support for his two daughters, twelve and sixteen, was $350 per month. Id. at 8.

Although several attorneys advised him to the contrary, Webb persisted in the belief that Ilene's income would be included in calculating his child support. Id. at 64, lines 2-7. He admits, however, that they would have separated even if Ilene's income were not considered, given their level of debt. Id. at 64-65.

Finally, Mr. Webb has reduced his visitation. He has not seen his children since January 1991 and has called only once, collect. Peggy Webb has done nothing to interfere with his contact and has installed a private phone line so Don can contact the children directly. Peggy Webb Declaration, page 4. The only limitation on Don Webb's contact with his children is self-imposed.

Bobby Bran

Plaintiff offers the case of Bobby Bran as a person whose new family is treated unequally under the schedule, affecting the relationships and decisions in that home. Mr. Bran's declaration provides no support for the claim that his new family was treated unfairly. His ex-wife, Tina Booth, brought a modification action. The trial court in April 1989 granted him a deviation from $867 to $750 per month. Booth Declaration, Ex. C. If he pays his support, his new family of four (one of the two

children is a stepchild) has $1326 available to them (assuming no part-time work by Mr. Bran), which is $331 per person. Tina's family of five (her new husband and her three children with Mr. Bran) have $1590 available, or $318 per person. Mr. Bran's new family was not treated unequally.

Mr. Bran makes several other claims. He states that his work schedule is "directly caused" by his new support order. Bran Declaration, page 4, lines 21-22. This is untrue. He worked the graveyard shift and took numerous part-time jobs even before the modification action was brought. Id. at 3, ¶ 8. He alleges that he cannot have full weekend visitation with his children because he must work on Saturdays. Bran Deposition, page 49, lines 2-5. This statement does not survive analysis. He testified that he works 30 hours per week (six hours over 5 days) at his wife's beauty salon earning between $10 to $20 per day. Id. at 23-25, 49. However, he puts more than $300 per month of his Boeing wages into a voluntary pension plan. Id. at 34. Mr. Bran could reduce his voluntary pension payments slightly to cover the income he would lose on Saturdays to visit with his children, but he has not done so. Rather, he puts a higher priority on his income than on his Saturday contact with his children. This choice is made by Mr. Bran, not required by the support schedule.

In fact, Mr. Bran testified that he has a "very close relationship" with his children, Id. at 60, lines 15-22, that he sees them every other weekend, Id. at 40, lines 18-20, that he

phones them "as often as I wish," Id. at 41, lines 16-19, that he attends school functions, Id. at 42-43, and that his relationship with his wife is very strong. Id. at 65, lines 9-15. Mr. Bran has maintained an excellent relationship with both his former and present families, notwithstanding the existence of a support order.

Kathy Burge

Plaintiff offers Kathy Burge, the second wife of Bruce Burge, as an example of a family that has been "harmed" and treated "unequally" by the schedule. Kathy's affidavit states that her relationship with Bruce's children has been harmed. This is irrelevant because a noncustodial stepmother has no liberty interest in maintaining a relationship with her husband's children residing elsewhere. As for Bruce, she says that the support litigation created animosity. Burge Affidavit, page 5. However, she testified that Bruce's unsuccessful attempt to change custody, filed at the same time, may have caused the animosity. Burge Deposition, pages 44-47, 57-60. In fact, Kathy Burge is the source of the tension between the children and the Burges. Winquist Declaration, page 6. There has been no effect on her son, Jason. Burge Deposition, pages 31, 62-64.

Kathy Burge complains that the court considered her income and disregarded her son, Jason, when determining support. When Bruce Burge would not fully disclose his income after being asked to do so by the court, the court relied on the declaration he submitted. Winquist Declaration, pages 4-5, Ex. A. Bruce Burge

never asked the court to deviate because of Jason. Id. at 5; Burge Deposition, pages 27-28. Any error in setting support was waived when Bruce Burge settled his appeal and set current support at the trial court's amount for his son. Id., Ex. 4; Winquist Declaration, Att. 1. Kathy Burge admits that there are no financial needs which she and Bruce cannot meet. Burge Deposition, pages 30-31. Indeed, they put $200 per month into a voluntary pension plan and savings. Id. at 71.

Marilyn Bruns

Plaintiff offers Marilyn Bruns, wife of obligor Larry Bruns, as a family whose life has been affected by the schedule. Mr. Bruns' relationship with his ex-wife, Diane Andrews, has been difficult since their divorce. Bruns Deposition, pages 24-26, 51-52. Their problems affect his relationship with his children. So too does the fact that he was unavailable for many years to help his ex-wife raise his children. Andrews Declaration, page 5.

Marilyn Bruns also states that the support order may cause them to divorce and prevents them from adopting a child. Bruns Declaration, 9-10. Yet she testified that their marital problems may be rooted in their inability to communicate. Bruns Deposition, page 22. The issue of adopting a child has been under discussion since 1984. Id. at 11. They had four years before the modification was brought to adopt a child and did not do so. Apparently issues other than the support order are involved. Marilyn is 47 years old, which may make them reluctant

to adopt a child. Financial problems may play a part. But Mrs. Bruns had savings when she married Larry which they used for vacations, to purchase a home, and to make home improvements. Id. at 30-31, 64-66. Larry has "never lived within a budget" and "has always had a difficult time living within his means." Andrews Declaration, page 4. They chose to spend the money rather than save it for an adoption.

Jeffrey Jaisun

Plaintiff offers Jeffrey Jaisun in support of the propositions that entry of a support order eliminates a parent's ability to provide support directly to a child and that it affects that parent's relationship with that child. Plaintiff's Memorandum, page 11. Mr. Jaisun is a poor example of those propositions.

Jaisun claims he was unable to provide additional money for his child, Devon. The reason for that is quite simple: he was voluntarily underemployed. At the paternity trial the judge imputed income of $900 net, finding that Mr. Jaisun's income "is limited by choice." Booth Declaration, Ex. C., Findings of Fact and Conclusions of Law, page 4, ¶ 10. Mr. Jaisun had agreed to impute income above his actual net of $690. If Mr. Jaisun truly wanted to provide additional support for Devon, he could spend more time working as an electrician. His lifestyle also prevented him from establishing a relationship with Devon. Jaisun Deposition, pages 15-16. Jaisun chose to spend most of his time as a musician, travelling extensively and placing his

lifestyle above his interest in Devon.

Finally, Mr. Jaisun offered to let Devon be adopted by his new stepfather. The reason for this may well have been that Devon was having emotional difficulties with Mr. Jaisun's visitations and there was conflict between the two households. Id. at 36-40. Jaisun describes his relationship with Devon's mother as "the strife between warring parental parties." Id. at 38, lines 3-6. He does not attribute this strife to the child support order. Rather, his conflict with Devon's mother forced him to file a paternity suit in January 1987. Id. at 26, lines 9-17. So, to avoid continued conflict over the next twelve years, Mr. Jaisun agreed to the adoption. Id. at 55. It is essential to understand that Jaisun's decision was entirely voluntary. He was thus freed from the responsibility of making up for back support payments as well as paying for future support. Jaisun Deposition., Ex. 1.

Mr. Jaisun did not want to pay support unless he could control how the money was spent. Id. at 51. He wanted to use his child support so that Devon could receive counseling. At a court hearing the commissioner refused to order counseling. Id. at 47, lines 8-19. Devon did not live with Jaisun and they had only limited contact. Why should Mr. Jaisun control the spending of child support when he does not bear the responsibility for the daily care of Devon? There is no reason.

Tom Campbell

Plaintiff offers Tom Campbell in support of the proposition

that the schedule interferes with the ability of a parent to pass on moral and social values to a child. Plaintiff's Memorandum, page 10. The single social value Mr. Campbell argues which he could not instill in his son, T.J, was an appropriate work ethic. How did the schedule interfere with this? It set support so high that T.J. did not have to work for him. Campbell Declaration, page 3. This statement is ludicrous. Mr. Campbell only had to pay current support under the new schedule for five months before T.J. turned 18. Densmore Declaration, page 3. T.J. did not have access to the support prior to his graduation in May 1991 and he received an allowance from his mother of $20 per week. This was true both before and after the modification action. In order to earn extra money, T.J. has babysat, given friends rides to school in exchange for gas money and worked for his father mowing lawns and doing odd jobs. In addition, he and his father have refurbished VW Bugs and sold them at a profit. Id. at 4. T.J. has also bought and sold jukeboxes. Id. He has purchased his own TV, VCR, and guitar. Id. There is no question that T.J. knows how to work hard, earn money and save it.

In fact, Mr. Campbell has disapproved of his ex-wife's rearing of his children in this regard since their divorce. He has felt that the children were not required to work for their money or to assume responsibility in the household. Campbell Deposition, pages 28-30. The real problem with conveying moral and social values is not the child support, but the divorce. Mr. Campbell deliberately reduced his contact with his children to

attend to his business affairs after the divorce. Id. at 35-36. Mr. Campbell's self-imposed reduction in visitation reduced his ability to pass on social and moral values. The support schedule did not.

The support schedule and support order do not directly interfere in the exercise of any fundamental right. Rather, these witnesses show that decisions concerning marriage, having children, and maintaining a relationship with children from a former relationship remain a matter subject to individual choice and determination.

ARGUMENT

I. The Schedule Does Not Violate The Guarantee Of Procedural Due Process.

Plaintiff's argument that the schedule violates procedural due process is premised on the mistaken belief that the schedule is irrebuttable, see Plaintiff's Memorandum, pages 19-22, and based on a flawed application of the due process test. Before reviewing the statute's constitutionality, this court must understand the particular characteristic of the schedule which Plaintiff challenges. Once that characteristic is identified and analyzed, then the constitutional analysis can be conducted.

A. According to Plaintiff, the schedule's "flaw" is the lack of component cost information on the support obligation.

Plaintiff alleges that the schedule is irrebuttable. This allegation is based on the assertion that the assumptions underlying the economic table are unknown. Support for this

proposition is purportedly provided by Peter Nickerson,[2] David Betson, Commissioner Valente, Plaintiff's expert witnesses, and Boyd Buckingham. Plaintiff's Memorandum, page 8. Plaintiff argues further that, even if the underlying assumptions were known, it would not be an appropriate basis to deviate. Id. at lines 19-23. This assertion is purportedly supported by Commissioner Valente, Peter Nickerson, and attorney Boyd Buckingham. Id. at line 22. What does Plaintiff mean by "underlying assumptions?"

Commissioner Valente explains the concept of "underlying assumptions":

> 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 Deposition, page 44, lines 10-18.

A support schedule based on component costs would break down the total child support amount into its major components, such as food, clothing, housing, transportation, education, recreation, and miscellaneous expenditures. Second Betson Declaration, page 7.

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[2]Plaintiff refers to Dr. Nickerson's deposition testimony that the mathematical computations involved in "smoothing" the table were never released. Nickerson Deposition, pages 27-29. However, information on his "smoothing" process was included in the November 1987 Report to the Legislature. The referenced testimony has nothing to do with the underlying assumptions of the schedule and the ability of parents to seek a deviation.

A review of the declarations of Robert Bancroft and Roger Gay reveals that they, too, bemoan the lack of information on the components which make up child support. Once it is understood that Plaintiffs object to the lack of such information, the issue can then be properly stated: does the lack of information on component costs render the schedule irrebuttable? The answer is clearly no.

Plaintiff refers to Dr. Betson's deposition as authority for the proposition that a litigant cannot challenge the "underlying assumptions" of the schedule. Plaintiff's Memorandum, page 8, line 14-17. But this, too, is an inaccurate depiction of his testimony. Dr. Betson agreed that the schedule does not contain information on the different components of expenditures. Betson Declaration, page 92, lines 1-10. 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.

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:

> The notion here is, deviation from one component's average doesn't necessarily dictate that the overall average has been deviated. I would argue that that is not significant proof. . .
> Again, you know, that would be my caution to anyone who was looking at trying to break this down, would be two things: One is, I think we have greater uncertainty in measuring the components than we do the total average.

> And second of all, in their use within the schedule, to remind the designer that 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 Deposition, pages 98-99.

Indeed, after reviewing all of the schedules in effect in the country, Dr. Nickerson did not find a single state which includes information on component costs or that recommends deviation based upon a family's atypical component costs. Second Nickerson Declaration, page 12.

Similarly, Dr. Nickerson's deposition cited by Plaintiff does not state that a deviation cannot be given if a parent's situation varies from the standard set forth in the economic table. That extract simply states that the mathematical work underlying the numbers in the table was never published. Yet the total numbers are available as a reference to request a deviation.

Commissioner Valente opines that the parents' pre-separation lifestyle would be irrelevant because "I don't see anything in the support standards that indicate a court would take that into account." Valente Deposition, page 64, lines 16-18. But the list of reasons for deviation in the schedule is not exclusive. In re Marriage of Griffin, 114 Wn.2d 772, 791 P.2d 519 (1990). The Commissioner's opinion that the family's pre-separation lifestyle is irrelevant is not based on the schedule, ignores the

Griffin opinion, and is without merit.

In fact, Commissioner Valente testified that the court may deviate from the presumptive support amount:

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 Deposition, page 73.

Plaintiff also relies on attorney Boyd Buckingham. He states 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. Buckingham Declaration, page 3, lines 18-25. Mr. Buckingham cites neither specific cases nor specific literature in support of his belief. Mr. Buckingham wants to seek a deviation because a single component of spending is atypical. Id. at 4, lines 2-7. He does not state that the schedule is irrebuttable, nor does he state that he has never obtained a deviation for his clients.

Plaintiff's expert, Robert Bancroft, refers to the standard calculation as a "black box calculation" which is "for all practical purposes, an irrebuttable presumption." Bancroft Declaration, page 16, ¶ 22.[3] His metaphor simply does not

[3]Mr. Bancroft has been divorced twice and believes that his support order from his second divorce is unfairly high. He is the director of an advocacy group, Vermonters for Strong Families. He has previously testified in Vermont that that state's schedule has no economic foundation. He also advocates getting judges that do not have a "bias" of awarding custody to women. Bancroft Deposition, pages, 27-28, 31-32, 36-39. His marital problems and his advocacy color his judgment and prevent him from being objective. Similarly, Roger Gay had an abusive relationship with his wife. He also believes that his support

describe what happens in this state. Two surveys in this state have been conducted on support orders 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; Welch, Survey of Child Support Orders In Washington State.[4] Dr. Stirling's survey revealed that one out of five initial court orders (not modifications) contains a deviation. Stirling Declaration, page 3, lines 9-11. Dr. Welch's study revealed that 21% of the dissolution cases excluding modifications had a deviation. Welch, supra at 41-42. Clearly the schedule is not irrebuttable.

Since Plaintiff cannot possibly mean that the schedule is irrebuttable, what does Plaintiff mean by that phrase? If Plaintiff's rhetoric and hyperbole is set aside, Plaintiff's due process argument boils down to a single point: the schedule is unconstitutional because it does not contain the various components which make up a support obligation (i.e., housing, food, clothing, transportation), and parents therefore cannot seek a deviation based upon their level of spending in any particular component of the support obligation. The lack of information on component costs does not violate procedural due process.

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obligation was unfair. Gay Deposition, page 11; Ex. 2.

[4]A copy of these reports is attached as an exhibit to the declarations of Dr. Stirling and Dr. Welch.

B. The private interests require consideration of the interests of the noncustodial parent, the custodial parent, and their children.

Three factors must be considered when reviewing procedural due process: (1) the private interests affected; (2) the risk of error created by the State's process; and (3) the government's interests in the challenged procedure. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Turning to the first factor, Plaintiff relies heavily on substantive due process cases to determine the private interest affected,[5] thereby misstating the private interests involved.

The private interests in a support proceeding are to an accurate and just decision by the court. Lassiter v. Dept. of Social Services, supra at 27-28. Plaintiff does not contest that its members are entitled to a hearing. At that hearing the court considers the parties' financial information, determines how much income each party has, determines the presumptive support amount, considers requests for special expenses, and finally, considers any request for a deviation from the presumptive support amount. Donigan Declaration, pages 21-23. Parents are entitled to a hearing on child support.

[5]Among other substantive due process cases, Plaintiff relies on Moore v. City of Cleveland, 431 U.S. 494 (1977) and Carey v. Population Services Int'l, 431 U.S. 678 (1977). Plaintiff's Memorandum, page 16. Plaintiff's citation of Santosky v. Kramer, 455 U.S. 745, 753 (1982) is to the court's substantive due process analysis, not to its procedural due process analysis. The rights to the care, custody, and management of children involved in Lassiter v. Dept. of Soc. Serv. of Durham Cty., 452 U.S. 18, 27 (1981), simply are not at issue in a child support proceeding.

Plaintiff's analysis of the private interests omits any consideration of the interests of the custodial parent and child. They too have an interest in a just and accurate setting of child support. When asked whether the concerns he stated about noncustodial parents applied to custodial parents, Commissioner Valente replied: "Certainly the economic factors would impact both parents and both households." Valente Deposition, page 91.

Parents and children have a high interest in an appropriate determination of child support. The schedule balances the interests of all three parties. Take too much money, the noncustodial parent suffers; take too little, and the custodial parent and their children suffer. The Stipulated Facts entered with this court demonstrate how the support obligation affects both the custodial and noncustodial parent.

The extent of the loss is also a factor to consider. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970). While important, the payment of support is not as significant as the total loss of parental rights at issue in Lassiter and Santosky. Nor does this case involve taking benefits away from welfare recipients, as in Goldberg. In fact, the noncustodial parent's loss is the custodial parent and child's gain. Thus, while the private interests are important, they neither argue against State intrusion nor support an argument that the interests of the noncustodial parent are paramount. Rather, the private interests require the schedule to balance the rights of all parties

involved in a support proceeding.

C. The risk of error when applying the schedule is slight.

Plaintiff argues that the risk of error is substantial because the schedule is irrebuttable. As discussed above and demonstrated in the State's Memorandum for Summary Judgment and supporting documentation, this argument has no merit. For due process purposes, the issue is whether publication of component cost information would reduce the risk of error.

Publication of a table with component cost information is not likely to reduce errors in child support proceedings. In fact, it is likely to increase the risk of error. Second Betson Declaration, pages 9-11; Second Nickerson Declaration, pages 9-12. If component deviation were allowed, one problem would be to demonstrate what the family spent on the child in the past. It is extremely unlikely a parent can establish this because "[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, Estimates of Expenditures on Children and Child Support Guidelines, October 1990, page 7-2 (hereafter Lewin/ICF Report).[6] The parent has no basis on which to argue what expenses "belong" to the child. The very complexity of the problem would lead litigants to propose "simple" solutions to the issue. For

[6]The Lewin/ICF Report is the most comprehensive analysis on the relationship between the costs of raising children and child support. Second Betson Declaration, page 3. A copy of the report is attached to Dr. Betson's declaration.

example, a parent might argue that the cost of a child is the cost of food and clothing alone, since the parent would incur most other costs in the absence of that child. But such an approach would seriously underestimate the cost of raising children, and if accepted by a court, would increase the likelihood that support would be set erroneously and inadequately.

Plaintiff's single component issue is based on dubious economic assumptions:

> Implicit in Plaintiff's request for identifiable component costs is the dubious assumption that all households spend the same average amounts on all commodities. However, it makes better economic sense to assume that households spend more on some goods and less on others. For example, a household may spend less than the average on housing but more than the average on the child's recreational costs. In those circumstances, the household's total expenditures could remain unchanged or even at a level which is greater than the average. Second Betson Declaration, page 8.

The important information is the total amount spent on the child. Id.

Component cost information is also less reliable than information on the total amount spent on a child:

> Recognizing that there will be some variability in any estimate of the level of expenditures on children, there will be less variability in estimating the total level of expenditures than there would be from estimation of each component of the total. . . In my opinion, it would be unwise and unreasonable to base a child support schedule upon the components of total expenditures because of the increased uncertainty, and therefore error, in these numbers. Second Betson Declaration, page 11.

Dr. Betson concludes his analysis of the use of component costs

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. Id.

In fact, a table incorporating component cost information would need to set out component breakdowns based upon every individual income group, the child's age group wihin each income group, and family size within the income and age groups. The table would be immense and impractical to use. Second Nickerson Declaration, page 10.

The Washington schedule relies on a presumptive support amount and deviation only under exceptional circumstances, rather than an individualized examination of family spending on children in each case. This is the approach required by federal law. 42 U.S.C. § 667(b). This approach was based on legislative findings that the prior system resulted in inadequate support awards and that a presumptive support schedule would increase the equity of support orders and reduce the adversarial nature of support proceedings. Laws of 1988, Ch. 275, § 1; Irlbeck Declaration, Ex. C-3.

The purpose of the presumptive schedule is to reduce the risk of error in support determinations. This is accomplished by requiring evidence and a finding to support deviation from the schedule. Commissioner Valente acknowledges that it is easier to

review support orders under current law to determine if an order is unfair because the worksheets and support order set forth the income of the parties and the presumptive support amount, allowing comparison with the proposed support amount. Valente Deposition, pages 78-79. Thus the current presumptive schedule reduces the likelihood that support will be set erroneously.

Plaintiff refers to the case of Kathy Burge as evidence of the risk of error from the schedule. Ms. Burge states that the custodial parent (Rosemary Winquist) filed an affidavit requesting only $870 per month to raise two teenage boys. Burge Affidavit, ¶¶ 6-8. While Ms. Winquist did initially request $800, this amount represented the shortfall between her total income and the family's total living expenses. Winquist Declaration, page 4. This amount was insufficient to cover any expenditures necessary to raise the family's standard of living to a level commensurate with that of the Burges. Before the action was filed, Mr. Burge was paying $150 per month for two children while he was earning in excess of $50,000 a year. Id. at 1, 4. If an error were made in setting support, it was caused by Mr. Burge's refusal to supply the court with complete financial information. Id. at 4-5, Ex. A. Furthermore, the Burges are putting $200 per month into a voluntary pension plan and savings even though Kathy Burge is no longer working. Burge Deposition, page 71. Support was set appropriately in the Burge case.

The schedule requires judges to move away from their

subjective beliefs as to what is appropriate for support and apply the objective, presumptive support amount unless there is a reason to deviate. Reference to an objective standard will decrease the risk of error in support determinations. As stated above, deviations occur in approximately one out of every five cases. The risk of error when applying the schedule is slight, but would be increased if the schedule included information on the components of the support obligation.

D. The governmental interest in retaining the current support schedule is substantial.

Plaintiff essentially ignores the state's interest in its analysis, arguing instead that the state could have provided a table with component cost information. They explain this lack by insinuating that Dr. Nickerson sought to "cover up" his work. Plaintiff's Memorandum, page 28, fn. 18. This claim is ludicrous.

If the Commission wanted to include component cost information with the schedule, such information could have been included no matter what numbers were in the schedule. For example, if a family typically spends 30% of its income of housing, that information could have been included whether the economic table followed Robert Williams' analysis, Dr. Nickerson's analysis, or anyone else's analysis. Plaintiff's insinuation about Dr. Nickerson is uncalled for, misses the mark, is completely conjectural and speculative, and has no basis in the record. Information about components is not included in the

schedule because Robert Williams did not recommend giving such information and because component costs is an economically inappropriate basis on which to seek a deviation. Second Betson Declaration, page 11.

The state's interest in maintaining the current schedule is based on its parens patriae responsibility for children and on fiscal and administrative reasons. See Santosky v. Kramer, 455 U.S. at 765. The state has a compelling interest in ensuring that children are adequately supported. Duranceau v. Wallace, 743 F.2d 709, 711 (9th Cir. 1984). Entirely lost in Plaintiff's arguments is the fact that the children people are being asked to support are the children they decided to have. The support obligation arose when the child arrived. All that the schedule does is quantify their statutory and moral obligation to support their children.

One of the driving forces for a presumptive schedule was the extensive public criticism that awards were inconsistent under the prior system. Irlbeck Declaration, page 2. One of the legislative purposes of the schedule is to increase "the equity of child support orders by providing for comparable orders in cases with similar circumstances." RCW 26.19.001(2). The schedule focuses on income, and the presumptive support award will be the same for families with the same income. By limiting deviations as required by federal law, most support orders will be comparable for persons in similar situations. Use of component information will defeat this goal because it is likely

to increase the risk of error, reducing the equity of orders between cases.

Although the component argument for deviation is not available, parents may seek a deviation based on the total amount spent on their children. The schedule therefore does offer an alternative basis for deviation which is more in accord with economic theory because it focuses on the overall level of support for a child, not simply on a single component which may or may not reflect overall spending.

It is also extremely difficult to calculate what is spent on a child in an individual family because most expenses are shared with other family members. Publication of component information would increase the number of parents who would attempt to argue that they are entitled to a deviation because one single component is atypical, although there is no economic evidence that reduced spending in one area means reduced spending overall. With such information, parents would have to argue over how much was spent, component by component, on the child. The table supplied by Dr. Bancroft lists nineteen different components over which the parents could argue. Bancroft Declaration, Ex. 3. Such a process would increase litigation costs for most parents, even though such a deviation would not be granted in most cases. Under the present statute, the spending argument is generally not brought. This reduces the overall costs to the litigants.

Finally, and perhaps most importantly, a support schedule sets a normative standard which states what a parent ought to pay

for a child. By focusing primarily on income, rather than spending, the schedule emphasizes that parents should adjust their lifestyle and living arrangements in light of their financial obligation to their children. Use of component cost information focuses the court's attention to the parents' spending patterns and would subordinate the child support obligation to the parent's spending habits. For example, a parent might decide to spend 50% of his or her income on housing and argue that the income available for support is thereby limited. The effect of a support order is to make the child support obligation pre-eminent and have parents adjust their lifestyle in light of the obligation to support their children.

Weighing the various factors, the parents, children, and the state have an interest in appropriately setting child support. That interest is harmed through the use of component costs as a basis for deviation because it increases the risk of error in setting child support. The present schedule allows a parent to seek a deviation based on the total amount spent on a child because this amount is published as the economic table. Use of component costs would increase the cost of litigation generally, to the detriment of parents and children. The presumptive schedule provides for comparable orders in comparable cases. Finally, there are numerous other ways to deviate from the schedule. The schedule does not violate procedural rights to due process.

II. The Schedule Is Not Arbitrary And Capricious.

Although Plaintiff's second argument is labelled as an equal protection and due process argument, Plaintiff does not identify any classifications which violate equal protection. Plaintiff's Memorandum, pages 28 - 43. Rather, Plaintiff argues that the economic basis and operation of the schedule is arbitrary and capricious. This is a substantive due process argument.

Plaintiff baldly asserts that strict scrutiny applies, citing City of Akron v. Akron Center for Repro. Health, 462 U.S. 416 (1983), and State v. Schaaf, 109 Wn.2d 1, 743 P.2d 240 (1987). However, neither case lends any support for that position. In Akron, the Supreme Court applied strict scrutiny to a law which directly regulated the availability of abortions. The Schaaf court refused to apply heightened scrutiny to a statute which did not "directly implicate" the fundamental right at issue. Id. at 21. As demonstrated in the State's prior memorandum and as seen by the lay witness evidence, the schedule does not directly regulate the exercise of any fundamental right. This is also clear from the Stipulated Facts entered in this case: support orders affect the decisions that people make, but the decision remains that of the individual. The schedule does not directly bar the exercise of any fundamental right. State's Memorandum In Support of Motion For Summary Judgment, pages 20-23. Strict scrutiny does not apply.

The exact test to be applied in a substantive due process

challenge is unclear. This issue was recently explored by the First Circuit in Amsden v. Moran, 904 F.2d 748 (1st Cir. 1990). That court concluded its analysis as follows:

> Wordplay aside, we agree with Judge Friendly that, in the circumscribed precincts patrolled by substantive due process, it is only when some basic and fundamental principle has been transgressed that 'the constitutional line has been crossed.' [cites omitted] . . . And although the yardstick against which substantive due process violations are measured has been characterized in various ways, we are satisfied that, before a constitutional infringement occurs, state action must in and of itself be egregiously unacceptable, outrageous, or conscience-shocking. Id. at 754 (emphasis in original).

If the "conscience-shocking" standard of Amsden does not apply, then the schedule should be upheld unless it is arbitrary. See Zinermon v. Burch, 494 U.S. ___, 108 L.Ed.2d 100, 113.

A. The economic table was based on economic data.

Plaintiff argues that the schedule is "not based on any economic data regarding the costs of raising children," apparently because "there was never any attempt to directly measure the costs of raising children." Plaintiff's Memorandum, page 31, lines 16-17, 21-22. The argument is a non-sequitur. Neither the Child Support Schedule Commission (hereafter Commission) nor the Washington State Legislature attempted to directly measure the costs of raising children. To do so would require a family to report commodity-by-commodity expenditures on each member of the household. "A data base such as this does not exist, and I do not believe that it could ever exist." Second Betson Declaration, page 5. As stated above, 90% of expenditures

on a child are shared with other family members. How would one allocate shelter costs among family members or the food that is thrown away? Id. Since direct measurement is unavailable, an alternative procedure is required.

Although Plaintiff's witnesses criticize the Consumer Expenditure Survey (CES) data, their own expert approves its use:

> Although the accuracy and reliability of much of the information reported in various versions of the CES is routinely questioned by economists, it is the broadest and largest data source of information regarding family expenditures available. Because of that fact, I have routinely consulted CES data for various purposes in my work . . . First Bancroft Declaration, page 3, lines 5-11 (emphasis added).

The State's expert, Dr. Betson, agrees that the CES "is the best data base that we can hope to have available to use for constructing an Economic Table." Second Betson Declaration, page 5. The Commission used the data which Robert Williams developed in his Development of Guidelines and reported in his Table 16. Second Nickerson Declaration, page 6.

Plaintiff's expert, Dr. Bancroft, believes that the Commission could have used Washington state data and easily created its own economic table. He is wrong for two reasons. First, there is no Washington state data on expenditures for children. Id. Second, it would be extremely difficult and time-consuming to extract the data from the CES and derive an economic table. Second Betson Declaration, pages 5-6. As Dr. Betson notes:

> I find the claims made by Mr. Bancroft that an Economic Table could have been constructed easily and quickly using Washington State data to be preposterous. Id. at

5.

The Commission noted in its Final Report that no such Washington data was available. Final Report, p. 11; Donigan Declaration, Ex. D. Furthermore, Dr. Nickerson reviewed other data on Washington state and determined that it would be appropriate to use national data as the basis for an economic table. Second Nickerson Declaration, page 13.

Finally, the Commission and the Washington State Legislature relied on the work of Robert Williams. Dr. Betson states:

> The Economic Table was indeed based upon the best economic data available at the time. The Economic Table had as its basis Table 16 of Williams' Blue Book. the Blue Book incorporated the work of Espenshade which utilized CES data. Gay's claim that the Economic Table is not based on any economic data is completely fallacious. Second Betson Declaration, page 13.

The economic table was based on economic data.

B. The Commission and Legislature used an appropriate economic model as the basis for the schedule.

Plaintiff argues that the model chosen by the state was "particularly inappropriate" because it overestimates the amounts parents spend on children. Plaintiff's Memorandum, page 33. Plaintiff also complains about the "contorted manipulations of limited data" by economists to determine the cost of raising children. Essentially, Plaintiff dislikes the choice that the state made, because alternative choices might have lowered the amount of support parents pay for their children. While the choice of a model is a matter subject to debate, the choices made in developing the schedule are rational.

There is no data which directly measures how much is spent on children. Second Betson Declaration, page 12. In the absence of such data, "it is necessary to devise a methodology to allocate consumption expenditures to individual members of the household based upon the economic data that is available." Id. Even Plaintiff's expert acknowledges that the CES data is the "broadest and largest data source of information regarding family expenditures available." First Bancroft Declaration, page 3.

Dr. Betson received a federal grant to explore alternative methods of estimating expenditures on children using 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 difference between alternative marginal cost approaches lies with the different methods used to determine the equivalency between couples with children and those without children. 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 Declaration, pages 18-19.

Dr. Betson created theoretical ranges as a standard to measure the support levels of the economic table. An article by two economists provides "theoretical proof that the Rothbarth approach would underestimate the "true" unobserved cost of the children, while the Engel approach would overestimate them." Second Betson Declaration, page 19. Plaintiff's expert claims that the Engel and Rothbarth approaches have no theoretical basis and offers the USDA approach as an alternative. Dr. Betson

strongly disagrees:

> I take exception to Bancroft's claim that the 'Engels, Rothbarth and all other similar methodologies. . .really have no 'theoretical' basis regarding actual child expenditures.' Bancroft Second Declaration, ¶ 11. The importance of the Deaton and Muellbauer piece was that it outlined the conditions under which the Engel method would lead to correct estimates of the costs of raising children. No similar proof has been offered for the USDA method which Bancroft proposes be used as a more reasonable upper bound or range. Also, to use the USDA estimates as an upper bound would indeed be an error since the USDA estimates have no theoretical basis. Ironically, while Bancroft mistakenly criticizes Engel for lacking a theoretical basis, the method he proposes (the USDA method) has no theoretical basis. Id. at 20.

Indeed, Lewin/ICF adopts the Engels and Rothbarth approaches as the upper and lower measures of the true cost of raising children. Lewin/ICF Report, page 4-24.

Plaintiff argues that the economic table is based on the Engel method and since that theory is the upper bound of support, the schedule overstates costs for children. This argument completely misses the point. Plaintiff assumes that the support levels in the economic table are identical with application of the Engel method. But Plaintiff's experts have neither performed any calculations nor presented any evidence to support this assumption. However, such calculations have been performed by Dr. Betson and invalidate Plaintiff's assumptions.

As described above, Dr. Betson applied the Engel and Rothbarth methods to recent CES data. The percentage of income spent on children calculated using those approaches is set forth at Tables 3, 4, and 5 of his first declaration. For example, the

one child table looks as follows:

Net Income	Economic Table (1988-90)	Economic Table (1991)	Theoretical Range	Rothbarth Range[7]
600	23.9	23.9	[24.7, 32.0]	[21.3, 28.1]
1300	23.7	23.7	[24.4, 32.1]	[20.9, 27.9]
2100	23.0	23.0	[22.7, 30.3]	[19.4, 26.1]
2900	22.5	20.7	[20.4, 27.3]	[17.4, 23.5]
5000	21.2	15.9	[18.6, 25.1]	[15.7, 21.5]
7000	20.3	15.2	[18.5, 25.1]	[15.5, 21.5]

The theoretical range contains the percentage of income that families spend on children as calculated by the Engel and Rothbarth methods, with the higher number representing the Engel calculation. First Betson Declaration, page 20. That table also reports the percentage of family income that the economic table requires for the presumptive level of support. If the economic table numbers are compared with the Engel numbers, it is clear that the percentage of income required by the economic table falls considerably below the Engel level. For example, a family with combined income of $2900 per month would be expected to spend 25.1% of its income on children using the Engel approach, whereas the original economic table requires only 21.2%. The three tables show that the economic table is substantially below

[7]The Rothbarth Range was calculated from the Rothbarth estimate, includes a range to cover sample variability, and is irrelevant for purposes of this discussion.

the level of support that would be required under the Engel approach. Therefore, Plaintiff's criticisms of that approach are irrelevant to the Washington support schedule because the schedule does not require payment at that level.[8]

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. Mr. 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.

Dr. Betson states that "use of the Engel methodology is not entirely baseless or inconsistent with economic theory." Second Betson Declaration, page 13. The State's reliance on the seminal publication on the development of guidelines was rational and appropriate.

C. The use of intact family data is appropriate.

[8]Plaintiff repeatedly states that the schedule overestimates costs, yet has produced no objective evidence to support this. The only objective evidence on costs was produced by Dr. Betson, whose tables demonstrate objectively that the economic table does not overstate family expenditures on children. Plaintiff concedes this point by noting that the level of support in the schedule "is not the thrust of the issues brought to this court. Plaintiff's Memorandum, page 9, fn. 5. Plaintiff should be taken at its word and the statements that the schedule overestimates the costs of raising children should be ignored.

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. Plaintiff's Memorandum, pages 34-35. Plaintiff claims that the assumption that families spend the same amount on child-rearing expenses after they separate is "not a reasonable economic assumption." Id. Plaintiff confuses economic assumptions with social policy judgments.

The underlying concept of Income Shares 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.

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 Declaration, page 14.

Although intact family data is used, that does not mean that the child's standard of living will remain the same. This was pointed out by the Commission:

> It should be noted that the Income Shares Model does not provide a complete remedy for the potential loss in the standard of living for children of separated parents.

November 1987 Report to the Legislature, page 11.

Although Plaintiff objects to the use of intact family data, Plaintiff offers no alternative. Another alternative would be the use of single parent family data, such as that recently developed by Dr. Betson. First Betson Declaration, page 3. 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. "A child support schedule based on such data would have built into it the very inadequacies that it was designed to address." Second Nickerson Declaration, page 15.

The difference in the standard of living for the custodial and noncustodial parents is illustrated by the hypotheticals discussed in the State's Memorandum in Support of Summary Judgment, pages 32-33. If one uses the average net monthly income for fathers and mothers with support orders and assumes that one or two children reside with the mother, the father's standard of living will exceed the official poverty level while the mother and children's standard of living will be below the poverty level. Id. at 33; Donigan Declaration, pages 24-25; Nickerson Declaration, pages 29-30. The use of intact family data was rational.

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

After stating that the economic data yields information expressed as a percentage of total household expenditures,

Plaintiff then argues that there is no adequate basis on which to convert that information to expenditures based on net income. Plaintiff's Memorandum, pages 35-36. Plaintiff also asserts, without citation of any authority, that the conversion resulted in the overestimation of child costs. Id. at 36. Plaintiff's 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, page 6-22, n. 24.

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, and by Dr. Betson. Betson Declaration, pages 22-23.

The transformation did not result in the "overestimation of child related expenses." As demonstrated by Dr. Betson, the economic table falls within the range of accepted economic

studies of family expenditures on children. The conversion of data on family expenditures from a percentage of expenditures to a percentage of income is economically justified.

E. The Economic Table developed by Dr. Nickerson appropriately adjusted Williams' Table 16.

Plaintiff chooses to call Dr. Nickerson's "smoothing" of Williams' Table 16 an "error" and a "deliberate manipulation." Plaintiff's Memorandum, page 37, line 17, page 4, fn. 1. Plaintiff repeatedly argues that the economic table is too high, yet presents absolutely no objective evidence in support of that conclusion. Plaintiff's witnesses are capable of criticizing, yet have done no work on their own to determine an appropriate set of numbers. They have not applied any economic theory on determining the cost of raising children to the economic data to come up with an objective set of numbers against which the economic table can be compared. Their objections to the economic table, based solely on their subjective belief that the numbers are too high, are entitled to no weight whatsoever.

Plaintiff argues that Dr. Nickerson should have followed Robert Williams' method of converting Table 16 to a table based on income rather than using a marginal approach. Plaintiff's Memorandum, page 37. Yet Dr. Betson has demonstrated that the application of logarithmic smoothing to Williams' Table 12[9] produced results closer to Dr. Nickerson's than to Williams.

[9]Williams' Table 16 was derived from his Table 12 by adjusting for differences in the age of children. Id. pages 6-7.

Betson Declaration, pages 13-16. Dr. Betson also sets forth the many reasons which justified raising the numbers which would be generated from Williams' Table 16. Id. at 9-16.

Dr. Nickerson applied a marginal rate approach to "smooth" the numbers in Table 16. His use of this procedure was expressly recognized in the Commission's Report:

> 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 are based on marginal increments of income. November 1987 Report To The Legislature, p. 13 (emphasis added).

The seven different expenditure percentages for seven different income groups were taken directly from Williams' Table 16.

The Lewin/ICF Report observes that a number of arbitrary results may occur under the Income Shares Approach if the percentages are applied to all income. Id. at 7-10. They recommend use of a constant rate or applying the different rates to marginal income to avoid this result. Id. at 7-11. Thus Dr. Nickerson's use of marginal rates is both recommended and economically appropriate.

Plaintiff's argument that Dr. Nickerson artificially inflated the economic table because he expected the Legislature to lower it is absurd. Plaintiff's Memorandum, page 38. Plaintiff mischaracterizes a statement made by Dr. Nickerson as reported by Dr. Betson. Dr. Nickerson's written statement was as follows:

> It was also concluded that the legislature could develop its own economic table, modify the commission's proposed

> economic table or request that the commission develop a new one. The legislature in fact gave the judicial districts the option of using the commissions economic table or adopting any alternative that did not change the amounts on the table for incomes below $2,500 nor reduce the amounts for incomes above $2,500 by more than 25 percent. Second Nickerson Declaration, Ex. A.

Dr. Nickerson did not say that the Commission inflated the economic table in anticipation that the Legislature would reduce it. Rather, he said that the Commission would not arbitrarily reduce the schedule and that such a prerogative belonged to the legislature.

F. Expenses allowed in addition to the basic support obligation are economically justified and not covered by the economic table.

Plaintiff asserts that adding extraordinary child care expenses onto the basic support obligation is economically irrational and inflates child support awards. Plaintiff's Memorandum, pages 39-40. There are several special expenses which are expressly allowed under the schedule, including day care, long-distance transportation expenses, and health care. These expenses are appropriately addressed by the schedule.

1. Day care expenses are appropriately handled by the schedule.

According to Dr. Stirling, only 13% of the orders require payment of day care. Stirling, The Economic Consequences Of Child Support In Washington State, page 2. The cost of day care is not included in the economic table. RCW 26.19.080(3). Robert Williams expressly removed day care costs from his Table 12. Williams, Development of Guidelines, page II-77. He summarized

the appropriate treatment of these expenses as follows:

> In some guidelines, work-related child care expenses are added to basic calculations of child support obligations and divided in proportion to both parties' income. There are three justifications for this approach: (1) child care costs represent a large variable expenditure incurred only in specified circumstances; (2) when incurred, child care costs can represent an inordinate proportion of the costs of rearing a child at a particular point in time; and (3) treating child care costs separately maximizes the marginal benefits of working for the custodial parent. Id. at II-iv, v.

The State also has an interest in allowing custodial parents to work so they remain off welfare. Second Nickerson Declaration, page 17.

Plaintiff believes that the basic support obligation should be reduced in some unquantifiable manner to offset the additional cost of day care. But reducing the basic support obligation would reduce the money available to the custodial parent and child when there has been no reduction in their basic living costs. This extra cost is shared by both parents, so both bear the burden of providing support in excess of the basic support obligation. In addition, the court retains the authority to determine "the necessity for and the reasonableness of all amounts ordered in excess of the basic child support obligation." RCW 26.19.080(4).

The State's decision to allow day care expenses as an obligation in excess of the basic support obligation was a rational one, fully supported by the Williams publication. Although there may be other ways to apportion the expense, the

one chosen by the State is neither arbitrary nor capricious and must be upheld.

2. Health care expenses are appropriately handled by the schedule.

Five percent of the economic table consists of ordinary health care expenses. RCW 26.19.080(2). Expenses which exceed five percent are considered to be extraordinary and are shared by the parties based on their share of family income. Id. Plaintiff argues that parents whose medical insurance is paid by an employer are unfairly treated under the schedule, resulting in a windfall to the custodial parent. This argument is based on several questionable assumptions and by ignoring the credit available for payment of health care premiums.

The original schedule, published in 1988, did not define the difference between ordinary and extraordinary health care expenses. Donigan Declaration, Ex. F-4. Therefore, there was no way for litigants to know what level of medical expenses was included in the economic table. The result of this confusion was that a noncustodial parent could be ordered to pay for medical expenses which were included in the economic table. This was remedied by adjusting Standard 7. Id. at 18-19.

The Commission determined that five percent of the economic table covered ordinary health care expenses. Dr. Bancroft speaks of a $935 "windfall" for custodial parents if the employer pays for health care premiums. First Bancroft Declaration, page 21, ¶ 28. This assumes that the noncustodial parent is responsible for

all of the child's expenses. Such an assumption is incorrect because the expenses are shared by the parents in proportion to their share of combined family income.

This also assumes that the medical insurance covers all of a child's health care costs. This, too, is incorrect:

> The current trend in health care insurance plans is to limit the coverage of the plans and to increase deductibles and co-payments so as to shift costs back on the consumer. Second Betson Declaration, page 18.

Plaintiff's expert also failed to consider the effect of the credit given to parents who pay insurance premiums. The schedule grants a credit for medical premiums which exceed five percent of a parent's share of the basic support obligation. Therefore, if the parent's presumptive support payment is $1,000 per month, five percent of that is $50. The cost of premiums in excess of $50 per month is deducted dollar for dollar from that parent's share of the support obligation. Second Nickerson Declaration, page 23. Thus the schedule makes an adjustment to treat parents with and without employer paid medical benefits similarly.

In addition, any unfairness to a noncustodial parent whose employer pays all of the insurance premium is made up by the fact that the "benefit" of those premiums is not included in that parent's income. If it were, the parent would have higher income and a larger percentage of total family income, thereby increasing the support obligation. Id. at 24. Furthermore, any such "windfall" is greatly reduced by the reduction in the economic table effective September 1, 1991.

Finally, Plaintiff complains that the schedule does not attempt to refund money to the noncustodial parent if medical costs are less than the economic table amounts. There are two reasons for this. The ordinary health care cost is typically small. Also, it is impractical to require a parent to keep track of and allocate each individual health care expense, many of which are shared by the family. Id. at 22.

The medical provisions are a pragmatic method of allocating health care costs between the parents. The provision is rational.

3. The residential credit issue appropriately handles the parents' substantial sharing of time with the child.

Under the schedule, the noncustodial parent receives no reduction in child support for time spent with a child until the child spends a minimum of 25% of nights with that parent. Plaintiff argues this process is not "carefully tailored to 'equitably apportion' the child support obligation between the parents." Plaintiff's Memorandum, page 42. Although the credit may not be equal, it is equitable.

Before addressing this issue, the legislature has completely replaced the existing residential credit system with a new one. The new law provides as follows:

> The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment. The court may not deviate on that basis if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child or if the child is receiving aid to

> families with dependent children. When determining the amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment. Section 6, Chapter 28, Laws of 1991, 1st Spec. Sess.

Since the law that Plaintiff seeks has been enacted, Plaintiff's claim is moot. Current Washington law allows a modification every two years based upon changes in the income of a parent. RCW 26.09.170(8)(a). Effective September 1, parents can bring a modification based on a change in the support schedule two years after their last support order was entered. Section 2, Ch. 28, Laws of 1991, 1st Spec. Sess. Since parents can have their support based on the new residential credit provision, there is no need to hear this issue.

Considering the merits of Plaintiff's claim, Robert Williams recommended the use of a threshold before granting residential credits:

> An adjustment for shared physical custody is made only when physical custody by the obligor exceeds a "traditional" level of visitation. States with shared physical custody adjustments do not generally grant eligibility for the adjustment unless physical custody exceeds a specified threshold (normally defined as a proportion of overnights spent with the parent). The lowest threshold is an informal twenty percent set by Delaware . . . but Delaware is considering an increase in that level. Colorado has set a threshold of twenty-five percent and Wisconsin has set a threshold of thirty percent. A threshold is set because the non-custodial parent is not likely to incur substantial costs in major expenditure categories (e.g. housing, home furnishings, clothing, transportation) until the parent spends more than a nominal amount of time caring for the child. Costs incurred by the obligor in exercising

> traditional levels of visitation are considered to be incidental expenditures which have been factored into development of the basic guideline. Williams, Development of Guidelines, page II-56.

While Plaintiff argues the residential credit provision is unfair to noncustodial parents, it may also be unfair to custodial parents:

> Frequently, "non-custodial" parents who sought the extra time, did not actually exercise it, or if they did exercise it, merely cared for the children for the extra overnights. They rarely shared in the actual costs of the additional expenses for the child. Hammerly Declaration, page 6, lines 12-16.

Plaintiff ignores the fact that most of the custodial parent's expenses remain when visitation to the noncustodial parent's house occurs. Second Nickerson Declaration, page 19. As Dr. Nickerson states:

> The issue is one of legitimate competing interests. The policy decision was to ensure that the primary household was able to pay its bills before any reductions in child support transfers took place. Id.

It should be apparent from the Williams' material quoted above that it was standard to allow a reduction for visitation only after a threshold was met. Defining an appropriate threshold may be a matter for debate. The Commission compromised on the figure of twenty-five percent. Donigan Declaration, page 13. In light of the purposes set forth by Williams and Nickerson, such a decision is not arbitrary or capricious.

4. The schedule allows the parties to account for tax benefits available to them.

Plaintiff argues that all tax benefits "flow to the

custodial household" and the schedule results in a windfall to that parent. Plaintiff's Memorandum, pages 42-43. Plaintiff mischaracterizes Washington law and does not understand the operation of the schedule.

In the first place, the personal exemption for children can be awarded to either parent. RCW 26.19.100. Granting this exemption to the noncustodial parent is frequently done when that parent pays a substantial portion of support. Hammerly Declaration, page 5, lines 9-12. The exemption usually goes to the father because he typically has the most income and will receive the greatest benefit from the exemption. Kelley Declaration, page 3. This will increase child support because it will increase the noncustodial parent's net income. Thus the noncustodial parent benefits from paying less federal income tax and the child benefits by receiving more child support. Id. at 14-19. Second Betson Declaration, pages 16-17; Hammerly Declaration, page 5.

The day care credit changes the taxes paid by the custodial parent, which increases that parent's income and changes the child support computation accordingly. When this credit is pointed out to the court, "it is usually taken into consideration." Id. at 6, line 3; Kelley Declaration, page 3. Indeed, more complex tax planning is also permitted and may occur in cases involving child support and maintenance. Id.

Robert Williams has shown another way to consider the day care credit:

> [i]f the value of the credit can be predictably calculated in individual situations, it may be appropriate to reduce allocated child care costs by that amount when determining the level of child support. Williams, Development of Guidelines, page II-51.

Various tax benefits are authorized by federal law. The income of the parent receiving the tax benefit will increase as a result of the decreased tax liability. That adjusted net income will be reflected in the schedule which bases support on net income. The court may also allocate the personal exemption for children. The schedule is not arbitrary or capricious.

In summary, Plaintiff attempts to show that the schedule is economically irrational by taking apart the various components and arguing that alternative methods could have been used. The appropriate standard of review is best exemplified by two United States Supreme Court decisions which, although they involve equal protection, address the rationality of challenged legislation:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. 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, if they do not require, rough accommodations--illogical, it may be, and unscientific.' [cites omitted] Dandridge v. Williams, 397 U.S. 471, 485 (1970).
>
> Although parties challenging legislation . . . may introduce evidence supporting 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. [cite omitted] Where there was evidence before the legislature supporting the classification, litigants may not procure invalidation of the

> legislation merely by tendering evidence in court that the legislature was mistaken. Minnesota v. Clover Leaf Creamery, Co., 449 U.S. 456, 464 (1981).

The issues raised by Plaintiff are all a matter of debate and were debated by the Support Schedule Commission and by the Legislature. Indeed, the Washington Legislature continues to debate many of these issues. In this context, the court cannot declare the schedule to be arbitrary and capricious and must uphold it as constitutional.

III. The Schedule Does Not Discriminate Against Children In the Noncustodial Parent's Household.

Plaintiff claims that children in the noncustodial parent's household are discriminated against because they are not included in the presumptive support calculation and because judges do not deviate for them. Plaintiff's Memorandum, pages 43-45. The claim is without merit.

The reasons for excluding new spouses and dependents from the presumptive support calculation were addressed in the State's prior memorandum and will not be repeated here. State's Memorandum in Support of Motion for Summary Judgment, pages 17-18. If a parent has additional children, that fact alone is sufficient for a deviation. Standard 13; Valente Deposition, page 73. The existence of children is the most frequently given reason for deviation. Stirling, Economic Consequences, page 2. Guidance for judges in treating multiple families is provided in the Schedule's Instructions and in the Commission's Report On Use of Support Schedule For Blended Families, dated December 1989.

Donigan Declaration, 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. This approach has been labelled as primogeniture by a number of critics. 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 Declaration, pages 23-24.

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 Declaration, page 4, lines 6-8. The schedule does not unconstitutionally distinguish between children of different relationships.

IV. Requiring Parents Who Are Separated To Pay For A Child's Postsecondary Education Does Not Violate Equal Protection.

Plaintiff argues that Washington law violates the U.S. Constitution's equal protection clause because parents who are separated can be required to pay for postsecondary education while parents who remain together cannot. Plaintiff's

Memorandum, pages 46-49. This argument, based on no authority, is without merit.

The relevant statute is RCW 26.19.090.[10] The statute grants the court discretion to award postsecondary educational support.

> The court must base its consideration on the following factors: age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources. Also to be considered are the amount and type of support that the child would have been afforded if the parents had stayed together. Id.

All of the concerns that a parent wishes to raise in the hearing may be argued and considered by the judge. The judge can consider whether or not the child should be required to pay for some or all of the education. The parents' concerns and the type of support they would have provided had they remained together are all legitimate considerations. Nothing is foreclosed from the judge.

Plaintiff challenges this law only under the federal constitutional provision because the Washington State Supreme Court has upheld the constitutionality of this law under both the state and federal constitutions. Childers v. Childers, 89 Wn.2d 592, 575 P.2d 201 (1978), overruling 15 Wn. App. 792, 552 P.2d 83 (1976)(holding the law violates both the state and federal constitutions). As that court stated:

[10]This statute was amended by § 7, Ch. 28, Laws of 1991, 1st Spec. Sess. The changes are not relevant to this discussion.

> The irremediable disadvantages to children whose parents have divorced are great enough. To minimize them, when possible, is certainly a legitimate governmental interest.
> Note too that the governmental interest at stake here extends beyond the children to our nation as a whole. A well-educated citizenry is one of the major goals of a democratic society. Id. at 604.

This issue has been addressed by two other courts. Kujawinski v. Kujawinski 376 N.E. 2d 1382 (Ill. 1978); Neudecker v. Neudecker, 566 N.E.2d 557 (Ind. App. 1991). Both courts upheld postsecondary educational support statutes against equal protection challenges. This court must do the same.

CONCLUSION

Perhaps the best way to conclude is to quote Dr. Betson's concluding comments:

> To estimate expenditures on the costs of raising children and to construct a child support schedule that reflects these estimates requires sophisticated economic analysis. The bulk of Plaintiff's criticisms of the Washington State Child Support Schedule are subjective in nature and are not based upon economic theory. The Plaintiff's witnesses Bancroft and Gay do not define "economic irrationality". Their test of irrationality is simply something that they do not like or that they would have done differently. There may have been different methods or theories that Washington State could have used in constructing its child support schedule. But the methods and theories chosen by Washington State are not wrong simply because the Plaintiff could have constructed the schedule differently. Based upon my review of the Washington State Support Schedule, I conclude that it is rational and reasonable in light of existing economic data and theory. Second Betson Declaration, page 23.

The support schedule is constitutional and the State's Motion for

Summary Judgment should be granted.

DATED this _____ day of July, 1991.

Respectfully submitted,

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By

_____

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