

No. 77890-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

ANGELA K. McCAUSLAND,

Cross-Respondent,

vs.

ROBERT G. McCAUSLAND,

Cross-Petitioner.

Respondent

SUPPLEMENTAL BRIEF OF CROSS-PETITIONER

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I. INTRODUCTION

By statute, support in excess of the economic tables in over-\$7,000 cases must be supported by findings of fact. Extrapolation is an artificial construct that does not address the children's needs or the parents' obligation to provide additional support. The economic table addresses the children's needs. Additional support obligations must be based on the parents' income, resources, and standard of living. This supplemental brief analyzes the award of support in over-\$7,000 cases and suggests a means of guiding the trial courts' exercise of its discretion in awarding support in these cases in the context of recent published decisions of the intermediate appellate courts.

II. SUPPLEMENTAL ARGUMENT

The trial court set the father's monthly transfer payment at \$2,842.00 (CP 511), extrapolated from \$1,473.18 under the Washington State Child Support Schedule Economic Table (hereafter "economic table"). (CP 505, 510, 511) The trial court extrapolated based on a finding that: "[t]he children participate in dance and sports activities, which are significant expenses. The children have the expectation of support at the level of their father's significant historical income." (CP 506) The only arguably

extraordinary expenses to which either parent testified were dance classes (\$220 a month) and other expenses for costumes and sports uniforms (\$600 a month). (RP 89)

Division Two rejected the father's request that the court adopt Division One's standards for child support in excess of the economic table, which requires the trial court to enter specific findings explaining why the amount of support is both necessary and reasonable. The court confirmed Division Two's continued adherence to the reasoning of *Marriage of Clarke*, 112 Wn. App. 370, 382, 48 P.3d 1032 (2002), which held that while "specific findings are preferred, the absence of such findings does not require vacation of the order." This Court accepted review of the father's cross-petition asking the Court to provide guidance on the use of extrapolation and the findings necessary to justify support in excess of the economic table where the parties' combined net monthly income exceeds \$7,000 (hereafter "over-\$7,000 cases").

In the last two years, the intermediate appellate courts have issued five published decisions on when child support can and should be extrapolated from the economic table because the parties' net monthly income exceeds \$7,000:

- ***Marriage of Rusch***, 124 Wn. App. 226, 233, 98 P.3d 1216 (Division One, August 23, 2004) (court must consider the standard of living of each parent and special medical, educational, or financial needs of the children before extrapolating; the court's findings must explain why additional support is necessary);
- ***Marriage of Daubert/Johnson***, 124 Wn. App. 483, 497-98, 99 P.3d 401 (Division One, October 25, 2004) (without evidence of children's *future* needs for additional expenditures, court could not make necessary findings to support extrapolation);
- ***State ex. rel. M.M.G. v. Graham***, 123 Wn. App. 931, 942, 99 P.3d 1248 (Division One, November 1, 2004), *reconsideration denied* (September 14, 2005), *review granted* (Cause No. 77858-2-I, July 5, 2006) (encouraging the trial court on remand to reconsider its decision not to extrapolate, despite lack of evidence of additional expenditures);
- ***Marriage of Marzetta***, 129 Wn. App. 607, 622-23, ¶¶ 48, 54, 120 P.3d 75 (Division Three, April 21, 2005, *published with modifications* September 20, 2005),

review denied (July 5, 2006) (affirming extrapolated support award based "on the parties' wealth" without discussion of necessary need findings);

- ***Marriage of McCausland***, 129 Wn. App. 390, 412, ¶ 57, 118 P.3d 944 (Division Two, August 30, 2005) (expressly rejecting Division One's analysis in ***Daubert***, relying on ***Marriage of Clarke***, 112 Wn. App. 370, 48 P.3d 1032 (2002)).

A. By Statute, Support In Excess Of The Economic Tables In Over-\$7,000 Cases Must Be Supported By Findings Of Fact.

The child support statutes expressly require written findings whenever support is established at an amount in excess of the economic table guidelines:

When combined monthly net income exceeds seven thousand dollars, . . . the court may exceed the advisory amount of support set for combined monthly net income of seven thousand dollars upon written findings of fact.

RCW 26.19.065(3). Because the statute requires findings, this court should disapprove Division Two's adoption of ***Clarke's*** holding that "the absence of [specific] findings does not require vacation of the order." See ***Marriage of Horner***, 151 Wn.2d 884, 896, 93 P.3d 124 (2004) (reversing Division Two's affirmance of

order denying relocation despite lack of findings on statutory factors; “only with such written [findings] or oral authorizations can [this court] be certain that the trial court properly considered the interests of the child and the relocating person within the context of the competing interests and circumstances required by the [Relocation Act].”).

B. Extrapolation Is An Artificial Construct That Does Not Address The Children’s Needs Or The Parents’ Obligation To Provide Additional Support.

There is no statutory basis for what amounts to a presumption in favor of extrapolation in the analysis of *Clarke*, *Graham*, and *Marzetta*. Rather than a statutory mandate, extrapolation itself is a marketing feature of proprietary software programs sold to family law practitioners to facilitate calculation of child support under the statutory guidelines. Various formulas have been “reverse engineered” from the economic tables by these software manufacturers, but the creators of these programs freely admit that there is no basis in the statutory scheme for their extrapolation formulas, and caution against reliance on the formulas in their marketing literature and program manuals. See <http://marginsoft.net/Faqs.htm>; see also *Rusch*, 124 Wn. App. at 233 (“extrapolation programs do not base calculations on economic

data. Instead, they merely extend the numbers on the table out to the appropriate income level and provide a child support number. Therefore, the figures provided by the extrapolation program are not based on the child's specific, articulable needs”).

Extrapolation is an artificial construct that does not address the children’s needs or the parents’ obligation to provide additional support consistent with RCW 26.19.001. Allowing a trial court to rely on a finding that “the parties’ wealth” alone will justify extrapolated support, as in *Marzetta*, creates an improper presumption in favor of extrapolation that improperly abdicates to a proprietary software manufacturer the court’s obligation to “exceed the advisory amount of support” only “upon written findings of fact.”

Extrapolation also should be discouraged as a default means of establishing support in over-\$7,000 cases because it can have the effect of unduly increasing the support obligation of the poorer parent when the richer parent has primary residential care. That result was properly disapproved by Division One in *Marriage of Scanlon/Witrak*, 109 Wn. App. 167, 179-80, 34 P.3d 877 (2001) (when mother’s income alone exceeded \$7,000 it was error for the trial court to extrapolate the father’s support obligation).

C. The Economic Table Addresses The Children's Needs. Additional Support Obligations Must Be Based On The Parents' Income, Resources, And Standard Of Living.

The statutory child support schedule creates a presumption that the guidelines "are adequate to meet a child's basic needs." RCW 26.19.001. The legislature also intends that child support orders "provide additional child support commensurate with the parents' income, resources, and standard of living." RCW 26.09.001. The *Rusch* factors for extraordinary support properly reflect these goals without unduly relying on income alone, and this Court should adopt the *Rusch* standards for support in excess of the economic table guidelines.

Division One in *Rusch* held that findings supporting an award of support in excess of the economic tables should address each parent's standard of living and the special medical, educational or financial needs of the children that make additional support necessary. 124 Wn. App. at 233. This is an appropriate application of both the presumption that the economic table will meet the children's needs and the legislature's intent in providing a mechanism for exceeding the economic table given the public policies governing additional supports in RCW 26.19.001. In establishing the findings that will justify support in excess of the

economic tables in over-\$7,000 cases, the Court should make clear that *future* extraordinary expenses alone need not be the only basis for an award, as the analysis of ***Daubert/Johnson*** unduly penalizes a parent with primary care who has managed to live within her means given an arguably inadequate support award.

In ***Daubert/Johnson***, Division One held that the mother's evidence of opportunities the children had been forced to forego because of the inadequacy of the father's transfer payment could not support findings justifying extrapolation. 124 Wn. App. at 497-98. But evidence of this sort should justify a reasoned determination of support in excess of the economic table guidelines.

Conversely, a parent with primary care should not be able to increase her household spending to justify a higher transfer payment, and a high-income parent who chooses a modest lifestyle should have that choice honored in deciding whether support in excess of the economic tables is justified. In this regard, Division One's decision in ***Marriage of Ayyad***, 110 Wn. App. 462, 471, 38 P.3d 1033, *rev. denied*, 147 Wn.2d 1016 (2002), properly affirmed the trial court's decision declining to extrapolate based on its conclusion that "the law does not anticipate that a child should have

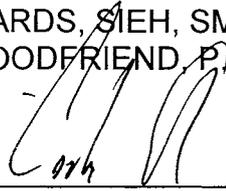
a lifestyle more lavish than the obligor parent's when all support needs are met." This is a second reason why extrapolation should not be presumed, and that any additional support obligation must be based on fact-specific finding of the parents' income, resources, and standard of living.

III. CONCLUSION

The parties agree that the Washington State Child Support Schedule establishes the parameters for support in over-\$7,000 cases. It is clear from the findings necessary to justify additional support that extrapolation, or a presumption of extrapolation, has no place in the court's exercise of its discretion in establishing support in over-\$7,000 cases. This Court should adopt the analysis of *Rusch*, disapprove the reasoning of other cases as set out in this supplemental brief, and remand for an award of support at the advisory level in this case.

Dated this 1st day of September, 2006.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 1, 2006, I arranged for service of the foregoing *Supplemental Brief of Respondent/Cross-Petitioner* to the court and counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 1st day of September,
2006.

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