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# Escalation Clauses in Washington Child Support Awards

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# ESCALATION CLAUSES IN WASHINGTON CHILD SUPPORT AWARDS

## I. INTRODUCTION

For people of average means, child support is often the most significant issue in a dissolution action.[1] The duty to support children is a long term obligation that cannot be terminated when the final decree of dissolution is entered.[2] The traditional approach to child support, in Washington and elsewhere, is to award a fixed dollar amount in the decree of dissolution, with future increases dependent on the outcome of modification proceedings.[3] Once decreed, however, child support awards rapidly become obsolete in the face of inflation.[4] As a result, the custodial parent must either repeatedly return to court to modify the decree, which results in additional attorneys fees, court congestion,[5] and emotional trauma, or face the prospect of increasingly inadequate support.[6]

Many of the costs resulting from modification of child support awards could be avoided by the use of escalation clauses. Properly drafted escalation clauses can accurately and efficiently meet needs over time and be fair to all parties concerned.[7]

This comment analyzes the Washington courts' interpretation of the statutes providing for making and modifying child support awards and the policies these statutes are designed to effect. It concludes that the use of escalation clauses is consistent with the statutes and policies on which the Washington support system is based, and that the use of such clauses is a more effective means of promoting the state's policy of providing adequate child support than the traditional approach of awarding support in fixed amounts subject to court modification. Finally, the comment suggests one possible escalation device that seeks to accurately predict future increases in child support needs.

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1. Kelly, *Child Support*, DISSOLUTION UPDATE 5 (Law and Practice Series, Washington State Trial Lawyers Ass'n, 1976).

2. The duty to support dependent children extends to both parents. WASH. REV. CODE § 26.16.205 (1976). At the court's discretion the duty may continue even after the child reaches age 18. Childers v. Childers, 89 Wn. 2d 592, 605, 575 P.2d 201, 209 (1978). *See generally* Note, Domestic Relations—*Post-Minority Child Support in Dissolution Proceedings*—Childers v. Childers, 54 WASH. L. REV. 459 (1979).

3. H. CLARK, LAW OF DOMESTIC RELATIONS 494–95 (1968).

4. P. EDEN, ESTIMATING CHILD AND SPOUSAL SUPPORT 5 (1977); *see also* Eden, *How Inflation Flaunts the Court's Order*, 1 FAM. ADVOCATE 2 (1979).

5. Dissolution actions constitute the bulk of litigation in Washington. Kelly, *supra* note 1. at 5.

6. P. EDEN, *supra* note 4, at 5, 52–53.

7. *See* Part III–B *infra*.

## II. ESCALATION CLAUSES AND THE CHILD SUPPORT SYSTEM: STATUTES, POLICIES, AND RELEVANT FACTORS

### A. *Escalation Defined*

An escalation clause is any provision in a support decree that causes the amount awarded to increase over time. The term "escalation clause" has been used by different courts to denote at least three distinct escalation devices.[8] In open-ended escalation, a base dollar amount of support is awarded, and the amount of support rises by a fixed percentage of the income increases of the supporting parent.[9] In a second form of escalation, the amount of support, calculated as a fixed percent of income,[10] varies directly with fluctuations in income, with no guaranteed minimum or maximum. A third form of escalation clause increases or decreases the amount of the award according to fluctuation in income, but sets a fixed dollar or percentage limit on the possible range of the award; this form is most often used when income varies widely from year to year.[11]

### B. *Child Support Escalation Under Washington Case Law*

Washington case law provides little guidance for determining what is or is not a permissible escalation clause. Indeed, only one Washington case has squarely faced the issue.[12] In a split decision[13] and over vigorous dissent,[14] the Washington Court of Appeals recently upheld the use of an open-ended escalation clause in a child support decree.[15]

An earlier Washington Court of Appeals decision[16] held that when the supporting spouse has the ability to pay increased support, and an increase is in the child's best interest, an escalation provision does not bar future modifications of the support award.[17] While the permissibility of

8. *See* notes 9–11 and accompanying text *infra*.

9. *See, e.g., In re* Marriage of Mahalingam, 21 Wn. App. 228, 232, 584 P.2d 971, 975 (1978) (trial court ordered husband to pay child support in the amount of two hundred dollars per month, plus 20% of net salary increases from his present or any other employer, and 10% of net income received from any other source).

10. *See, e.g.*, Taylor v. Taylor, 367 S.W.2d 58, 59 (Mo. Ct. App. 1963).

11. *See, e.g.*, Collins v. Collins, 12 Wn. App. 850, 532 P.2d 1185 (1975).

12. *In re* Marriage of Mahalingam, 21 Wn. App. 228, 584 P.2d 971 (1978).

13. The court was divided only on the escalation issue. The court unanimously rejected the four other bases for appeal. *Id.* at 230–32, 584 P.2d at 974–75.

14. *Id.* at 237, 584 P.2d at 978 (Roe, J., concurring in part, dissenting in part).

15. *Id.* at 234, 584 P.2d at 976 (base amount increased by fixed percent of income increases).

16. Collins v. Collins, 12 Wn. App. 850, 532 P.2d 1185 (1975).

17. *Id.* at 855, 532 P.2d at 1188.

using escalation clauses was not itself in issue, the decision contains some significant comment on the proper role of escalation clauses.[18] The only other Washington cases which mention escalation clauses involve the interpretation of provisions escalating spousal maintenance awards in separation agreements;[19] these cases have not questioned the propriety of such clauses.[20]

### C. *Child Support Awards: Policy Considerations and Relevant Factors*

R.C.W. § 26.09.100[21] authorizes the court, after considering all relevant factors,[22] to order either or both parents to pay reasonable or neces-

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18. *Id.* The issue in *Collins* was whether a graduated child support scale included in a separation agreement was subject to modification. The agreement was concluded while the husband was furloughed from his job and his economic prospects were uncertain. The action to modify the support provision was brought three years after the agreement was made, long after the husband had returned to work. Even though his income was within the scale provided for in the agreement, the court held that it was not an abuse of discretion, in light of changed circumstances, to modify the support provision by increasing the child support payments.

The *Collins* opinion is significant for several reasons. First, it emphasizes the state's interest in child support. The court modified the agreement even though at the time it was entered into the parties contemplated that the husband's income would reach the level it ultimately attained, and the agreement provided for some increase when it reached that level. Second, it demonstrates the need for rational escalation provisions; the court noted that "a mere increase in the father's earnings is itself of little moment unless there is a showing that the welfare and best interests of the child require an increase of support which the increased income enables the father to pay." *Id.* Finally, *Collins* represents the type of situation in which the statutory provision for the judicial modification of support awards should be invoked. WASH. REV. CODE § 26.09.170 (1976). *See* Part II-E *infra* (discussion of R.C.W. § 26.09.170). The true function of the modification provision should be to provide a means to alter support awards when unanticipated changes make alteration necessary. The sliding scale escalation provision in *Collins* may have been reasonable when conceived, but unforseeable future changes necessitated modification.

19. *E.g.*, Verde v. Verde, 78 Wn. 2d 206, 471 P.2d 84 (1970) (escalation clause based on percentage of income increases; issue was whether it was permissible for a supporting spouse to deduct his new wife's community interest in his income prior to calculating the amount of alimony due); Jensen v. Jensen, 54 Wn. 2d 473, 341 P.2d 882 (1959) (support based on percent of monthly income; issue was whether an agreement labeled as a property settlement was actually one for support).

20. However, Berry v. Berry, 50 Wn. 2d 158, 310 P.2d 223 (1957) contains dictum to the effect that it is "proper and desirable" to tie the award to a percent of income after providing for basic needs, though the court did not specify the considerations on which it based this conclusion. *Id.* at 163–64, 310 P.2d at 226.

21. The statute provides:

> In a proceeding for dissolution of marriage, legal separation, declaration of invalidity, maintenance, or child support, after considering all relevant factors but without regard to marital misconduct, the court may order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount reasonable or necessary for his support.

WASH. REV. CODE § 26.09.100 (1976).

22. By express provision, marital fault is not to be considered. WASH. REV. CODE § 26.09.100 (1976).

sary child support. The statute is based on the fundamental policy that all parents have a legal duty to support their dependent children.[23] This policy arises from a recognition of the helplessness of children to provide for themselves,[24] and reflects the state's interest in supporting and educating children so that they may become useful citizens.[25] Decisions underscoring the strength of this policy are legion,[26] and the duty to support has been construed liberally in favor of children.[27]

To effectuate the policy of guaranteeing adequate child support, the Washington Supreme Court has articulated a set of factors which must be considered in calculating the "reasonable or necessary" award required by the statute.[28] The factors include the earnings, earning capabilities, and economic prospects of the parents, the age and health of all the parties, the family's predivorce standard of living, and the parents' ability to maintain or enhance this standard of living subsequent to the divorce.[29] Other factors relate specifically to the child's welfare: the normal and reasonable costs of clothing, medical and dental expenses, education, food, and the incidental needs of the child.[30]

The objection to escalation provisions consistently voiced by courts is that they focus unduly on the income of the supporting spouse without adequately considering the child's needs or the supporting spouse's abil-

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23. Childers v. Childers, 89 Wn. 2d 592, 599, 575 P.2d 201, 206 (1978). The parental duty to support dependent children has been explicitly imposed by statute in Washington since 1881. *Id.* at 599, 575 P.2d at 206; WASH. REV. CODE § 26.16.205 (1976) (both parents are jointly and severally liable for family expenses and children's education).

24. Puckett v. Puckett, 76 Wn. 2d 703, 706, 458 P.2d 556, 557 (1969).

25. Corson v. Corson, 46 Wn. 2d 611, 615, 283 P.2d 673, 676 (1955).

26. *E.g.*, Fuqua v. Fuqua, 88 Wn. 2d 100, 558 P.2d 801 (1977) (attorney's lien may not be asserted against any portion of funds paid in satisfaction of a judgment of child support); Gaidos v. Gaidos, 48 Wn. 2d 276, 293 P.2d 388 (1956) (duty to support is not contingent on the convenient exercise of the right of visitation); Lear v. Lear, 29 Wn. 2d 692, 189 P.2d 237 (1948) (violation of visitation rights not grounds for withholding support). *See also* WASH. REV. CODE § 26.09.160 (1976) (failure to comply with provision of dissolution decree or temporary order does not suspend obligation to make support payments).

27. *See, e.g.*, Childers v. Childers, 89 Wn. 2d 592, 575 P.2d 201 (1978) (trial court may impose duty on parents of sufficient means to provide for children's college expenses); Moses v. Miller, 86 Wn. 2d 712, 548 P.2d 542 (1976) (breach of duty to support gives rise to a tort for purpose of invoking state long-arm statute).

28. Puckett v. Puckett, 76 Wn. 2d 703, 458 P.2d 556 (1969); Garrett v. Garrett, 67 Wn. 2d 646, 409 P.2d 470 (1965).

29. Puckett v. Puckett, 76 Wn. 2d 703, 705–06, 458 P.2d 556, 557 (1969).

30. Garrett v. Garrett, 67 Wn. 2d 646, 648, 409 P.2d 470, 472 (1965). The *Puckett* and *Garrett* factors were not altered when the current version of the child support award statute was enacted in 1973, Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 WASH L. REV 375, 413–14 (1974), as is evidenced in their application in post-1973 decisions. *See, e.g.*, Childers v. Childers, 89 Wn. 2d 592, 598, 575 P.2d 201, 205 (1978); *In re* Marriage of Mahalingam, 21 Wn. App. 228, 235, 584 P.2d 971, 977 (1978); *In re* Marriage of Nicholson, 17 Wn. App. 110, 119–20, 561 P.2d 1116, 1121 (1977).

ity to pay.[31] Absent specification of the relevant factors underlying the terms of the clause, the objection has merit: the purpose of child maintenance is to provide reasonably for a child's needs,[32] not to impose arbitrary burdens on the supporting spouse.[33] The objection loses all force, however, if the factors articulated by the Washington Supreme Court for determining reasonable or necessary awards are made mandatory considerations in the formulation of escalation clauses, and if the clauses are drafted in a manner calculated to be fair to all.[34]

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31. The failure to consider all the relevant factors has been the basis for rejecting escalation provisions in several jurisdictions. The Michigan Supreme Court has upheld the use of an escalation provision based on a percent of income with a maximum amount. Anneburg v. Anneburg, 367 Mich. 458, 116 N.W.2d 794, 796 (1962). The lower courts of appeals, however, have limited *Anneburg* strictly to its facts. Hagbloom v. Hagbloom, 71 Mich. App. 257, 247 N.W.2d 373, 375 (1976) (percentage support permissible if upper limit established). They have also rejected escalation provisions which focused exclusively on the paying parent's income and thereby abrogated the purpose of the modification provision. Stanaway v. Stanaway, 70 Mich. App. 294, 245 N.W.2d 723, 724–25 (1976). The Michigan appellate courts have so ruled even in the face of statutes much broader than those in Washington. MICH. COMP. LAWS § 552.16 (1970) (the court may make such further decrees as it shall deem just and proper); *id.* § 552.17 (1970) (on petition the court may make a new decree as circumstances of parents and benefit of children shall require). Courts in other jurisdictions have also found escalation clauses objectionable because they focus unduly on only a few relevant factors. McManus v. McManus, 38 Ill. App. 3d 645, 348 N.E.2d 507, 509 (1976) (must consider all factors: cannot accurately predict changes); Breiner v. Breiner, 195 Neb. 143, 236 N.W.2d 846, 849 (1975) (must consider all attendant circumstances); Di Tolvo v. Di Tolvo, 131 N.J. Super. 72, 328 A.2d 625, 628, 75 A.L.R.3d 484, 488 (1974) (appropriate procedure is to establish a fixed dollar award; many factors are to be considered and no modification should be made without judicial approval); Picker v. Vollenhover, 207 Or. 45, 290 P.2d 789, 801 (1954).

The petitioner's assertion in *Mahalingam* was that the award ignored most of the relevant factors in determining the amount of support. *See* text accompanying notes 28–30 *supra*. The argument, as stated by the court, was that "an open-ended escalation award exclusively and impermissibly focuses on the circumstances of the paying parent while ignoring the complex factors relating to the needs of the child and the ability of the mother to pay support." 21 Wn. App. at 233, 584 P.2d at 975.

32. *See* notes 23–27 and accompanying text *supra*.

33. The arbitrariness of escalation clauses which fail to consider the child's needs and both parents' ability to pay is the heart of the dissenting argument in *In re* Marriage of Mahalingam, 21 Wn. App. at 237, 584 P.2d at 977 (Roe, J., concurring in part, dissenting in part).

34. Since the trial court had given full consideration to the parties' economic prospects and needs, both present and future, in arriving at its award, the majority in *Mahalingam* saw no merit to the contention that there had been an impermissible overemphasis of one factor. *Id.* at 235, 584 P.2d at 977. Thus the court concluded the award was fair to all.

Case law in other jurisdictions also supports the conclusion that escalation clauses are not per se invalid. A concern frequently voiced in the cases has been the failure of the specific escalation clauses employed to keep the relevant factors in balance, and the tendency of the clauses to focus solely on changes in the supporting spouse's income to the exclusion of other factors. McManus v. McManus, 38 Ill. App. 3d 645, 348 N.W.2d 507, 509 (1976) (future changes cannot be predicted with accuracy and should not be anticipated); Stanaway v. Stanaway, 70 Mich. App. 294, 245 N.W.2d 723, 725 (1976) (escalation clause focused exclusively on paying parent). The reasoning of these cases seems to permit escalation clauses if their singular focus is eliminated.

The only jurisdiction banning escalation has done so by narrowly construing a statutory provision requiring that the award "specify what amount" to require a fixed sum. Newsome v. Newsome, 237

### *D. Spousal Maintenance Distinguished*

Escalation clauses have frequently been the subject of interpretation in Washington spousal maintenance cases. In Washington, spousal maintenance and child support are founded on fundamentally different policies. Spousal maintenance is based on the policy that dissolution of the marriage should be accomplished without unnecessary hardship to either party; once reconciliation becomes impossible, the court's role is to divide the property fairly and to provide for maintenance during the transition to self-supporting status.[35] The supreme court has emphatically stated it is neither just nor equitable to give one spouse a perpetual lien on the earnings of the other.[36]

This policy of providing support only during the transition period is reflected in a Washington statute authorizing the use of written separation agreements.[37] The statute authorizes the parties to enter into a written

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Ga. 221, 227 S.E.2d 347, 348–49 (1976). No other jurisdiction has gone this far, nor are there any sound policy reasons for doing so.

Finally, several courts have specifically sanctioned escalation. Viles v. Viles, 316 F.2d 31, 34 (3d Cir. 1963) (provisions for anticipated future changes held permissible; agreement was carefully attuned to wide income fluctuations of supporting spouse); Spotts v. Spotts, 355 So. 2d 228, 229 (Fla. Dist. Ct. App. 1978) (escalation clause upheld where increase small, formula precise, time and money saved for all parties, and modification still available); McIntyre v. McIntyre, [1979] 5 FAM. L. REP. (BNA) 2289, 2290 (the New York Family Court, in reversing a long line of cases, held that a separation agreement with no provisions for changes in child support could not be fair when made or in the future and was not binding against a modification request; provision must be made to assure that the value of the original award remains constant over time); Wells v. Wells, 2 Or. App. 221, 467 P.2d 650, 651–52 (1970).

35. Lockhart v. Lockhart, 145 Wash. 210, 212–13, 259 P. 385, 386 (1927). The policy reflects the doctrine that spousal maintenance is awarded not as a matter of right but only upon a showing of need and only within the confines of the supporting spouse's ability to pay. Baker v. Baker, 80 Wn. 2d 736, 744, 498 P.2d 315, 320 (1972); Friedlander v. Friedlander, 80 Wn. 2d 293, 297, 494 P.2d 208, 211 (1972).

36. Lockhart v. Lockhart, 145 Wash. 210, 212–13, 259 P. 385, 386 (1927), is the seminal case as to the policy and law of spousal maintenance in Washington. The case stands for the propositions that a divorce severs the marital relationship and that, except under rare circumstances, a divorced spouse has no claim for perpetual support. *Id.* The *Lockhart* decision was subsequently criticized and limited to its facts, and the court adopted the rule that alimony is permanent until a substantial change in circumstances can be demonstrated. Warning v. Warning, 40 Wn. 2d 903, 905–06, 247 P.2d 249, 251 (1952); Bartow v. Bartow, 12 Wn. 2d 408, 412–13, 121 P.2d 962, 964 (1942); Underwood v. Underwood, 162 Wash. 204, 208–09, 298 P. 318, 319 (1931).

In Morgan v. Morgan, 59 Wn. 2d 639, 369 P.2d 516 (1962), the court returned to the policy of *Lockhart* and set forth a two-fold test for entitlement to maintenance: need and ability to pay. 59 Wn. 2d at 643, 369 P.2d at 518. This doctrine was codified in 1973. WASH. REV. CODE § 26.09.090 (1976). Spousal maintenance is still a matter of discretion rather than right, although the statute removed marital fault as a factor and permitted consideration of the marital standard of living. *See* Rieke, *supra* note 30, at 403.

37. WASH. REV. CODE § 26.09.070 (1976).

agreement which provides for spousal maintenance and the division of property, as well as for child custody, support, and visitation rights.[38] The separation agreement is binding upon the court if the provisions were fair when executed, with the notable exception of provisions relating to the children. The part of the agreement relating to spousal maintenance and the division of property will be incorporated into a final dissolution decree, and the agreement may, by its terms, limit or preclude all future modifications.[39] The parties may not, however, impose such a limitation on the provisions relating to the children. This difference in freedom to modify the agreement reflects a basic difference in presumptions: children are presumed to require support, while absent a contrary showing spouses are presumed to be capable of providing for themselves.

This contrast in policy and presumptions, combined with the nonbinding character of separation agreements over matters concerning children, precludes the inference that because escalation clauses are valid in the spousal support provisions of separation agreements,[40] they are also permissible in child support awards. Indeed, as long as the spousal maintenance provisions in separation agreements are fair to both spouses, the parties may limit the agreement's duration, prevent its modification, and include whatever terms, including escalation, they desire. Child support, on the other hand, must be based on specific factors, may not be based on any one factor, and is inherently modifiable.

### *E. Rules and Policy Governing Modification Actions*

Modification of child support awards is authorized by R.C.W. § 26.09.170.[41] This statute establishes two prerequisites to modification: there must be a change in circumstances and the change must be substantial.[42] In determining whether circumstances have changed the court looks to the needs of the supported children and to the ability of the supporting spouse to meet an increased support obligation.[43] As a practical matter, the

38. *Id.* § 26.09.070 (1).

39. *Id.* § 26.09.070 (3), (5).

40. No Washington court has expressly upheld the validity of escalation provisions in spousal maintenance awards. Their usage has been approved in dictum, however, Berry v. Berry, 50 Wn. 2d 158, 163–64, 310 P.2d 223, 226 (1957), and escalation clauses often appear in cases construing spousal maintenance provisions. *See* note 19 and accompanying text *supra*.

41. WASH. REV. CODE § 26.09.170 (1976). This statute also provides for the modification of spousal maintenance awards. *Id.*

42. *Id.*

43. Lambert v. Lambert, 66 Wn. 2d 503, 508, 403 P.2d 664, 667 (1965); Collins v. Collins, 12 Wn. App. 850, 852–54, 532 P.2d 1185, 1186–88 (1975).

decision involves a reexamination, in view of subsequent changes, of the factors considered in making the initial award.[44]

The point at which a change becomes substantial is difficult to define with precision. The apparent purposes of the substantial change requirement are to avoid wasteful litigation and to deter use of the courts for harassment by constant petitioning for modification.[45] To effectuate these purposes, the burden of producing evidence of substantial change is placed on the petitioning party[46] and a good faith claim is essential.[47] Further, the substantiality requirement appears to be more stringent when the supporting spouse rather than the child is the petitioner.[48]

Some courts have found a direct conflict between statutory provisions for modification and the use of escalation clauses.[49] The objection, in essence, is that by providing a statutory procedure for modifying awards, the legislature precluded devices which automatically adjust the amount of support; the use of escalation clauses allegedly "impugns" the purpose of the statute.[50]

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44. *See* Collins v. Collins, 12 Wn. App. 850, 854, 532 P.2d 1185, 1187–88 (1975). *See also* text accompanying notes 28–30 *supra*.

45. Viles v. Viles, 316 F.2d 31, 34 (3d Cir. 1963); Heuchan v. Heuchan, 38 Wn. 2d 207, 214–15, 228 P.2d 470, 474–75 (1951).

46. Corson v. Corson, 46 Wn. 2d 611, 614–15, 283 P.2d 673, 675 (1955).

47. A job change which the supporting spouse knew would reduce his income was held to be insufficient basis for modification. Lambert v. Lambert, 66 Wn. 2d 503, 509–10, 403 P.2d 664, 667–68 (1965). However, a reduction in income caused by entering the army to serve as a doctor was held to justify modification. Dillon v. Dillon, 21 Wn. 2d 311, 312–13, 150 P.2d 594, 594 (1944).

48. Modification was denied when requested by a supporting spouse who had assumed additional responsibilities of a new marriage, Feek v. Feek, 187 Wash. 573, 581, 60 P.2d 686, 689 (1936), but allowed in favor of a child upon a showing of increased needs and the negative effect of inflation on the original award, Collins v. Collins, 12 Wn. App. 850, 854, 532 P.2d 1185, 1187–88 (1975).

Courts have, however, refused to modify child support awards when faced only with evidence of inflation and increased earnings on the part of the payor. Fensterheim v. Fensterheim, 55 A.D.2d 516, 389 N.Y.S.2d 13, 14 (1976) (showing of increase in husband's earnings without a similar showing of increase in child's needs is no warrant for modification); Dunn v. Wescott, 81 Misc. 2d 501, 366 N.Y.S.2d 291, 293 (Fam. Ct. 1975) (evidence that the cost of living has increased is not sufficient in itself to establish a substantial change); Fakouri v. Perkins, 322 So. 2d 401, 402 (La. Ct. of App. 1975) (both parties affected equally by inflation).

It is noteworthy, however, that in none of these cases was a showing made of the impact of inflation on the needs of the supported spouse or child. In *Mahalingam* the court took judicial notice of inflation, 21 Wn. App. at 234, 584 P.2d at 976, and in a recent New York decision the Family Court held that a decree which fails to make provision for inflation's effects is prima facie unfair, McIntyre v. McIntyre [1979] 5 FAM. L. REP. (BNA) 2289, 2290.

49. Stanaway v. Stanaway, 70 Mich. App. 294, 245 N.W.2d 723, 724–25 (1976); Breiner v. Breiner, 195 Neb. 143, 236 N.W.2d 846, 849 (1975); Di Tolvo v. Di Tolvo, 131 N.J. Super. 72, 328 A.2d 625, 627, 75 A.L.R.3d 484, 487 (1974).

50. In dealing with this argument the *Mahalingam* court stated: "The award does not impugn the efficacy of [R.C.W. § 26.09.170] since petitioner may at any time seek modification of the support award should a change occur in the circumstances which the court relied upon for the original decree of support." *In re* Marriage of Mahalingam, 21 Wn. App. at 236, 584 P.2d at 977.

The statutes and policy underlying the support system demonstrate the weakness of this objection. Res judicata dictates that facts which could or should have been considered in determining the initial award may not be advanced to modify it.[51] One factor to be considered in making the initial award is the economic positions and prospects of both parents at the time of the decree.[52] To the extent that evidence produced on this issue permits a determination of future increases, the logic of res judicata mandates that all such evidence be considered at the time the award is made. By incorporating an escalation clause into the support decree, the parties can account for evidence of future income increases.

Further, escalation is consistent with the policies underlying modification. Resort to the courts should be had only when significant, unforeseeable changes transpire; the potential for harassment, renewed trauma, unnecessary expense, and use of court resources should be avoided where possible.[53]

Finally, escalation avoids the uncertainty of whether modification will be allowed. Inflation's effect is not always deemed substantial by the courts,[54] and the decision to modify is largely discretionary.[55] The use of an escalation clause eliminates the need to rely on the court's discretion.

## III. A SUGGESTED APPROACH TO ESCALATION CLAUSES

### *A. Child Support Schedules in Washington Practice*

In response to enormous caseloads and increasing costs, the King County Superior Court adopted Local Rule 94.04(h),[56] authorizing temporary child support awards in pending cases based on court-approved schedules.[57] The schedules base the amount of support on a percentage of

51. Heuchan v. Heuchan, 38 Wn. 2d 207, 214, 228 P.2d 470, 474–75 (1951). The Washington court is uncertain as to the doctrinal basis (res judicata or equitable laches) for the rule but is convinced that public policy mandates that facts which could have been considered in making the initial award are unavailable as a basis for modification: Litigants should not be permitted to engage in a "continual readjudication and reconsideration of their affairs." *Id.* at 215, 228 P.2d at 475. *Accord*, Collins v. Collins, 12 Wn. App. 850, 853, 532 P.2d 1185, 1187 (1975).

52. Puckett v. Puckett, 76 Wn. 2d 703, 705–06, 458 P.2d 556, 557 (1969). *See* notes 28–30 and accompanying text *supra*.

53. *In re* Marriage of Mahalingam, 21 Wn. App. at 236 n.10, 584 P.2d at 977 n.10. *See* notes 1–6 and accompanying text *supra*.

54. *See* note 48 *supra*.

55. Lambert v. Lambert, 66 Wn. 2d 503, 508, 403 P.2d 664, 667 (1965); Rehak v. Rehak, 1 Wn. App. 963, 465 P.2d 687 (1970).

56. Local R. Super. Ct. 94.04(h).

57. Kelly, *supra* note 1, at 5. *See also* Wash. Rev. Code § 26.09.060 (1976) (authorizes temporary spousal maintenance and child support orders).

the absent parent's income. The applicable percentage is determined according to the number of children and the supporting spouse's income.[58] The schedules were the product of a study by Florence T. Hall, which determined relative family spending patterns based on family size, income, and the average cost for all ages of dependent children.[59] Although the Hall support schedules were adopted only to guide the determination of the amount of temporary support, they have become persuasive in fixing final support awards.[60] The Hall schedules are not themselves escalators,[61] but they could provide the basis for escalation if their percentages were incorporated into the decree to allow adjustments as income increases.[62]

### *B. Percentage Escalation*

A system of fixed-percentage escalation is capable of meeting both the "necessary or reasonable" criteria of R.C.W. § 26.09.100[63] and the practical demands of simplicity and certainty. Percentage escalation can reasonably take one of two forms; a fixed percentage of the supporting spouse's income, or a base sum award to be annually increased by a fixed percentage.

A fixed percentage of income approach could use the Hall data as its empirical base.[64] Since the Hall schedule percentages were computed on

58. Hall, *Child Support for Children of Dissolved Marriages*, DISSOLUTION UPDATE 26, at 31 (Law and Practice Series, Washington State Trial Lawyers Ass'n, 1976).

59. *Id.* at 26–27.

60. Kelly, *supra* note 1, at 6–7; *New Child Support Schedule*, SEATTLE-KING COUNTY BAR BULL 1 (Dec. 1974).

61. Kelly, *supra* note 1, at 21–22. Kelly stresses that the schedules are intended to assist the court in determining the dollar amount to be included in the divorce decree or temporary support order, but he recommends that the court consider some form of escalation to account for cost of living and take-home pay increases. *Id.*

62. Escalation by incorporating the Hall support schedule percentages into support decrees is distinguishable from the escalation at issue in *In re* Marriage of Mahalingam, 21 Wn. App. 228, 584 P.2d 971 (1978). The Hall schedules set a fixed percentage of income to be awarded, the percentage being determined by the number of children and based on an empirical assessment of need and ability to pay. In contrast, the formula in *Mahalingam* escalated the amount awarded by a percentage of income increases rather than using the total income as the basis for escalation, and the percentage itself was variable and unrelated to any empirical determination of need and ability to support. The basis of Justice Roe's dissent on this issue in *Mahalingam* was this absence of a rational basis for the escalation formula. Indeed, he did not object to percentage support payments, but only to "automatic, percentage escalation in the future, without regard to need and ability to pay." *Id.* at 237, 584 P.2d at 978 (Roe, J., concurring in part, dissenting in part).

63. WASH. REV. CODE § 26.09.100 (1976).

64. Hall, *supra* note 58, at 31–32. The percentage of a supporting spouse's income awarded under the Hall support schedules depends upon the number of children up to four: for one child the payment is 24% of income, for two children it is 35%, for three children it is 42%, and for four

the basis of family consumption budgets for goods and services across a variety of income levels and family compositions, they reflect many of the considerations demanded by the award statute and the Washington Supreme Court,[65] and thus avoid the unfairness and arbitrariness of unduly emphasizing one factor in the child support equation to the exclusion of all others.

Percentage-of-income escalation is also simple and definite.[66] A fixed percentage applied annually to net income yields a definite monthly amount. By defining net income as income after federal tax and other mandatory and standard[67] deductions, the Hall schedules also avoid disputes over permissible deductions and potential manipulation of income.[68]

Alternatively, a decree could award a base sum, determined by considering the relevant factors,[69] and set a fixed percentage by which the base sum would be annually increased.[70] The data for this approach could be obtained from a study by Philip Eden.[71] Eden gathered pre- and post-dissolution data concerning the income of both spouses, composition of the households, and relative allocation of family budgets.[72] He also studied changes in budget needs as children mature.[73] From this data he developed guidelines for setting the initial support amount[74] and for determining the extent of future increases. Eden concluded that future increases in child support are necessitated by inflation and by the increas-

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children it is 48%. The schedules apply these percentages to net monthly income, ranging between $300 and $2,500 at fifty dollar intervals, to arrive at dollar amounts for an award. Omitting the last step and simply placing one of the percentages into the decree in accordance with the number of children to be supported automatically provides for escalation.

65. *See* text accompanying notes 28–30 *supra*.

66. *See* notes 81–85 and accompanying text *infra* (discussion of enforceability of judgment problems where escalation clauses indefinite).

67. Hall, *supra* note 58, at 31. The standard deduction has been replaced by the zero bracket amount. I.R.C. § 63(d) (1976).

68. Hall, *Proposed Support Schedules for Children of Divorced Parents*, SEATTLE-KING COUNTY BAR BULL. 4, 7 (Dec. 1974).

69. *See* text accompanying notes 28–30 *supra*.

70. For example, an award of $200 per month could be increased annually by 5%; after one year the monthly amount would be $210 (5% × 200 = 10), after two years it would be $220.50 (5% × 210), and so on.

71. P. EDEN, *supra* note 4.

72. *Id.* at 36.

73. *Id.*

74. *Id.* at 37–51. Eden is careful to note the limitations of economic analysis in arriving at support awards. Most significantly, low income places the parties in a "no win" situation. If, after the award, the supporting spouse is left with income below the poverty level, he may leave the jurisdiction. However, to hold down the award to keep him above the poverty level leaves an inadequate amount for the custodial spouse and children, who may then be eligible for relief assistance. *Id.* at 37.

ing cost of children as they mature, and that such increases should be provided for if permitted by income increases of the noncustodial spouse.[75] Eden concluded that four options regarding future increases were available; not increasing the base amount; increasing it on the basis of the child's age; increasing it on the basis of child's age and inflation; and finally, increasing it on the basis of age, inflation, and projected increases in the supporting spouses's income.[76] Increasing a base sum by a fixed percentage is a simple and certain escalation device since it requires merely multiplying the current base amount by a fixed percent at a specified time each year.[77]

### C. *Limitations of Escalation*

Limitations as well as benefits inhere in any type of escalation device. Support schedules, no matter how accurate generally, reflect only statistical norms and are in constant tension with demands for individualized treatment. Support schedules or percentages ought not be mechanically applied in every case, but should be treated as generalized guidelines against which the parties can evaluate their own positions.[78] If the parties fit the norm, the schedules can be applied without alteration; if they do not, alterations can be made to accommodate particular needs.

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75. *Id.* at 52–57.

76. *Id.* at 53–54. In analyzing the four options, Eden concluded that not increasing the base amount was inherently inadequate and flatly rejected it. Increases on the basis of the child's age would be acceptable if prices and incomes were static but, since they are not, Eden rejected this option as well. Eden conceded that option three, which allows for children's growth and price inflation, is difficult in a period of sharp inflation, but he concluded that even a conservative inflation factor of 3% (half the 6% of the past decade) would afford some protection against erosion of an award's purchasing power. To this 3% Eden added a 2% increase for children's growth. The fourth option, which also accounts for the reasonably probable increase in the income of the noncustodial spouse, approximates what the child would have received had the divorce not occurred. This poses the same problem of imprecision as does option three, and works only where incomes are high or both parents work. *Id.*

77. This approach also provides guidelines for determining the base amount of support. This should assist the courts in properly weighing the relevant factors and should avoid the current problem of wide variances in awards for similarly situated children. *See generally* Comment, *Calculation of Child Support in Pennsylvania*, 81 DICK. L. REV. 793 (1977); White & Howlman, *Models for Court Use in Divorce Cases*, 52 FLA. B.J. 179 (1978).

78. P. EDEN, *supra* note 4, at 63. As Eden cautioned:

> It is not the author's intention to provide a mechanical device. Rather it is hoped that the process of establishing the statistical norms and guidelines and listing the alternative ways of approaching the problems of awarding child and spousal support will help all those who are involved to arrive at more informed decisions.

*Id.* While Eden acknowledged the reluctance of parties and judges to speculate as to the future, he concluded that the alternative of no increase will always fail the test of time, while a schedule may be effective some of the time. *Id.* at 56.

Another potential limitation of escalation clauses is the inability to obtain enforcement of judgments containing such clauses[79] and the refusal of foreign courts to afford them full faith and credit.[80] To the extent that the amount owing in a judgment is indefinite because it is subject to constant fluctuation, local courts cannot enforce the judgment and foreign courts will not recognize it.[81] Since judgments can be enforced only when the amount owing is clear on the face of the decree, some courts have held that escalation clauses providing for periodic adjustments based on a formula or index are invalid.[82] Many courts, including the Washington Court of Appeals,[83] reject the indefiniteness argument if the amount due and owing is periodically calculated on a given date by the mechanical application of a predetermined formula.[84] Once the calculation is made, all parties are on notice of the amount of the obligation, which remains constant until a subsequent calculation is made. Since the amount is at all times fixed and certain and the formula itself is not subject to change, court enforcement of such an award involves no more uncertainty than an accounting action to enforce a judgment for a sum certain.[85]

## IV. CONCLUSION

The present practice[86] of awarding child support without providing for inevitable and predictable increases in future needs offends the policy of

79. The reason R.C.W. § 26.09.170 permits only future installments to be modified is to entitle the judgments to full faith and credit. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 109, Comments a, c (1971); RESTATEMENT OF JUDGMENTS § 41, Comment a (1942). Considering the present mobility of Americans, enforceability in other jurisdictions of judgments for support is a matter of major importance.

80. *See* note 81 and accompanying text *infra*.

81. For example, in Picker v. Vollenhover, 207 Or. 45, 290 P.2d 789 (1955), the court refused to give full faith and credit to an Illinois support order because the judgment was tied to the supporting spouse's income and therefore susceptible to increases or decreases. Because facts outside the judgment were necessary to determine the amount owing, the court found it to be indefinite and refused to acknowledge it. *Id.* at 799–801. *See* notes 82–85 and accompanying text *infra* (discussion of whether escalation clauses are too indefinite to be enforced).

82. Taylor v. Taylor, 367 S.W.2d 58, 65 (Mo. Ct. App. 1963); Breiner v. Breiner, 195 Neb. 143, 236 N.W.2d 846, 848 (1975); Picker v. Vollenhover, 207 Or. 45, 290 P.2d 789, 799 (1955).

83. *In re* Marriage of Mahalingam, 21 Wn. App. at 236, 584 P.2d at 977.

84. *E.g.*, Golden v. Golden, 230 Ga. 867, 199 S.E.2d 796, 797–98 (1973); Vollenhover v. Vollenhover, 4 Ill. App. 2d 44, 123 N.E.2d 114, 115 (1954); Sheldrup v. Gaffney, 243 Iowa 1297, 55 N.W.2d 272, 276 (1952).

85. *In re* Marriage of Mahalingam, 21 Wn. App. at 236, 584 P.2d at 977.

86. The Subcommittee on Escalation Clauses of the King County Family Law Committee recently recommended against the automatic use of escalation clauses in child support decrees. Minutes of Seattle-King County Family Law Comm. Meeting (Sept. 21, 1979) (on file with *Washington Law Review*). The subcommittee was considering a proposed court rule providing for mandatory es-

providing adequate child support at the least cost to all parties and to the judicial process. Percentage escalation clauses are an effective method of anticipating increases in future needs; if a prediction is inaccurate and results in hardship, the award can be modified.

While the Washington Supreme Court has not yet addressed the propriety of escalation clauses in child support awards, the policies and statutory provisions involved in making and modifying child support awards justify the use of escalation clauses. Percentage escalation provisions are fully consistent with Washington law and policy, and should be common components of child support awards.

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calation clauses. It rejected the proposed rule on two grounds. First, it would foster unnecessary litigation because parties will file to quash the automatic increases. Second, automatic increases "do not give adequate consideration to any relevant factors including remarriage, changes in the asset/debt picture of either party, unusual increases of expenses for the non-custodial spouse and so forth," *Id.* at 1.

The proposed court rule is distinguishable from the escalation proposed in this comment because the rule mandates escalation clauses in all child support decrees; escalation as here proposed is not mandatory. In cases where changes affecting the ability to pay support are forseeable escalation should not be provided, or should await the outcome of the uncertainty. Furthermore, the frequency and impact of unforseeable changes affecting the supporting spouse's ability to pay escalated support must be balanced against inflation's impact on child support awards. Every child stands to lose without escalation, but not every supporting spouse will experience the concerns the committee expressed. Where an inability to pay escalated support is not forseeable, child support escalation should be provided for; if hardship to the supporting spouse results, modification is always available.