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NO. ~~5622-71~~

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON, on behalf of  
MCKENZIE MICHELE GRAHAM and  
VICTORIA MATTSON GRAHAM, children,  
Petitioner

vs.

RICHARD SCOTT GRAHAM, Father,  
MICHELE LEANN CUNLIFFE, Mother,  
Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler, Judge

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OPENING BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. The trial court erred when it revised the order of child support to apply an “**Arvey**-type deviation,” including when it entered the following finding and/or conclusion (Order of Child Support, P 3.7):

In lieu of deviation, this court has applied the principles of *In Re Marriage of Arvey*, 77 Wn. App. 817 (1995), as set forth on the attached worksheets, which fully recognizes the fact that each parent is required to provide a primary home for the children.

2. The court erred when it failed to consider whether the children’s basic needs would be met in mother’s home, where five other children also reside, by this level of support.

3. The trial court erred when it revised the order of child support so as not to extrapolate the income of the parties, which exceeded \$7,000.00.

4. The trial court erred when it adopted child support worksheets and entered an order of child support in accord with these erroneous rulings.

### Issues Pertaining To Assignments Of Error

1. Does the “**Arvey**” calculation apply to shared custodial arrangements, or only to “split” custodial arrangements?

2. Do the facts of this case, the best interests of the child, and equity warrant extrapolation of income?

Motion for Attorney's Fees

Appellant Cunliffe moves for attorney's fees under RCW 26.09.140.

**B. STATEMENT OF THE CASE**

Cunliffe and Graham have two daughters. They share residential time with their daughters equally, meaning that the daughters spend a week with one parent, then alternate and spend a week with the other parent. CP 118-119. In other words, the parents have a "shared" custodial arrangement.<sup>1</sup>

An order of child support entered March 28, 1996, granted Graham a deviation from his support obligation (from \$872.33 to \$300.00) because "the child[ren] spend[-] a significant amount of time with the parent who is obligated to make a support transfer payment. The deviation does not result in insufficient funds in the receiving parent's household to meet the basic needs of the child.

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<sup>1</sup> In the interests of clarity, Cunliffe will refer to the arrangement that pertains in her situation as a "shared" arrangement, in contrast to the "split" arrangement contemplated by *In re the Marriage of Arvey*, 77 Wn. App. 817, 894 P.2d 1346 (1995), where parents with more than one child each provide a primary residence to one of the children, thus "splitting" them between the two residences. This distinction is suggested by *Arvey* itself. See 77 Wn. App. at 823.

The child does not receive public assistance.” CP 129. These findings comport with the statute’s requirements. RCW 26.09.175.

On October 14, 2002, the state petitioned for modification of child support because the previous order had been entered more than two years before, there has been a change in the income of the parents, and a child has moved into a new age category for support purposes. CP 4. Graham answered the petition with the assertion that “the parties share on a mathematically equal basis residential time with the children, with each parent having residential time with the two children on alternating weeks.” CP 22. He asked that the court modify child support in accord with *In re the Marriage of Arvey*, 77 Wn.App. 817, 894 P.2d 1346 (1995). “by analogy, so that each parent pays support to the other custodial parent to assist in maintaining the costs and support of the children during the 50 percent of the time that the children reside with the other parent.” CP 22.

Cunliffe responded to Graham’s “*Arvey*” argument by observing that the parties “are not splitting children, we are splitting time.” CP 24. Despite that the girls spend alternating weeks with Graham, Cunliffe must maintain a complete household, a complete set of apparel and other necessities. *Id.* She points out that the

proper analysis is that provided under RCW 26.19.075(d), which allows for a residential credit when the obligor parent incurs increased expenses because of the significant amount of time the children spent in his or her home, but only so long as the children are not deprived of their needs by the decrease in payments to the obligee parent. CP 24. Cunliffe observes further that she has five other children in her home, so seven. CP 24-25. Finally, she notes the substantial disparity between the parties' income. CP 24, 37. See, also, CP 44-45.

The State agreed with Cunliffe's analysis. CP 45-46. The State observed that "[o]ther than food and utilities, [Cunliffe's] expenses for her children are fixed."

The cost to provide housing, clothing, shoes, school supplies and school expenses are the same regardless of the split [sic] residential schedule. The children leave the mother's home on Friday with the clothes that she has provided them and they return the following Friday with the same clothes. The gifts the parents give to the children[,] such as bikes and rollerblades[,] remain in that parent's home.

CP 46. The State further argued that, though a deviation based on residential time might have been appropriate in 1996, at the time of the last child support order, it no longer was so because of the additional children now in Cunliffe's household. Id. Finally,

because the Legislature intends the child support guidelines to ensure support for a child's basic needs, the **Arvey** analogy is inappropriate, as it applies only to where each parent is an obligor and an obligee (with two or more children "split" between their residences). *Id.*

The family court commissioner granted the petition for modification. CP 223-224. The new child support order required Graham to pay \$800.00 a month in child support. CP 213. Though an increase over the former support ordered (\$300.00), that amount nevertheless represents a substantial deviation from the net support obligation of \$1,629.00, as calculated by the commissioner using the parties' financial information and the extrapolation process (because their income combined exceeded \$7,000.00/month, the top rung of the child support schedule). CP 218, 220. The commissioner based the deviation on the significant amount of time the children spend in Graham's home and on the parties' financial and living situations, concluding that the deviation did "not result in insufficient funds in the receiving parent's household to meet the basic needs of the children." CP 213-214. The commissioner specifically rejected Graham's "**Arvey**"

argument, holding it inapplicable to “shared” versus “split” residential arrangements. CP 217.

Graham moved for revision, arguing again for the application of **Arvey** and against extrapolation. CP 226-27. A superior court judge revised the commissioner’s order, finding that an “**Arvey**-type deviation is appropriate,” and, finding further that an extrapolation was not appropriate. CP 231-232. The court then reduced Graham’s child support obligation to \$403.00 (from a standard calculation of \$1,216.63). CP 234.

Cunliffe moved for reconsideration on both these grounds, **Arvey** and extrapolation, as well as the failure of the superior court to reflect that change in the age of one child, as the commissioner had done. CP 245-254; see, also, CP 235. The judge granted the request to increase support to reflect the child’s movement into a higher age category, but denied her other relief. CP 255-256.

This appeal timely followed. CP 257-274.

**C. ARGUMENT**

1. THE ARVEY CALCULATION DOES NOT APPLY TO SHARED VERSUS SPLIT RESIDENTIAL ARRANGEMENTS.

The family court commissioner rightly rejected Mr. Graham’s invitation to extend **Arvey** to the circumstances present in this

case. There is no authority for such an extension. **Arvey** is a tool devised by the court to address a circumstance not provided for by the statutory scheme, namely, those rare circumstances where the children of one family will be “split” between two primary caretakers.

**Arvey** expressly notes the gap in the legislative scheme:

When the Legislature enacted Washington's child support statute, RCW 26.19, it did not establish a method for calculating child support when each parent has primary residential care of one or more of the children. Washington courts have therefore been faced with the task of fleshing out an acceptable method that is consistent with the overall purpose of the act.

**Arvey**, 77 Wn. App., at 823 (emphasis added). Because the Legislature did not address this “split” custody situation, the court has had to fashion a mechanism to deal with those occasions where it arises.

Thus, as in **Arvey**, daughter resided with mother and son with father. Or, as in the only other published case on the subject, the son resided with mother and the daughter with father. **See In re Marriage of Waters and Anderson**, 116 Wn. App. 211, 63 P.3d 137 (2002). In the more recent case, the court described **Arvey** as applying to “arrangements where one or more children, but not all of the children, reside a majority of the time with one parent, and the remaining child(ren) reside a majority of the time with the other

parent.” *Waters*, 116 Wn. App. 216. No case has extended *Arvey* to circumstances such as here where the parents share or trade off residential responsibility for all (in this case, both) children.

The reason that *Arvey* has not been extended is straightforward. *Arvey* addressed a gap in the legislative scheme, a scheme that assumes all children of one family will reside with one primary caretaker. *Arvey*, 77 Wn. App. at 823 (cited above). Conversely, the Legislature has provided a mechanism for use in circumstances such as pertain here. In RCW 26.19.075(1)(d), the Legislature authorizes a court to deviate from the standard support calculation “if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment.”<sup>2</sup>

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<sup>2</sup>The statute provides as follows:

(d) Residential schedule. 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 temporary assistance for needy families. 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.

RCW 26.19.075(1)(d).

Where the amount of time is roughly equal, the “shared residential arrangement” should be addressed under the deviation provision.<sup>3</sup>

In this case, involving a shared residential arrangement, the commissioner rightly relied on this statutory mechanism (even if, in Ms. Cunliffe’s view, he deviated too liberally in favor of Mr. Graham). As a matter of law, the proper mode to address this family’s residential arrangement and support obligations is by means of the statute. There is no need to use **Arvey**, and because there is no need, there is no authority or rationale for extension of **Arvey** to this case.

2. EXTRAPOLATION WAS APPROPRIATE UNDER THESE FACTS AND IN THE CHILDREN’S BEST INTERESTS, AS THE COMMISSIONER FOUND.

The preeminent concern of child support calculations is to satisfy a child’s basic needs and to provide additional financial support commensurate with the parents’ income, resources, and standards of living. RCW 26.19.001; *In re Marriage of Leslie*, 90 Wn. App. 796, 803, 954 P.2d 330 (1998), *review denied*, 137

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<sup>3</sup> The **Arvey** court noted the difference between “split” and “shared” residential arrangements, implying they would receive different treatment. 77 Wn. App. at 823 (“... under the terms of the parties’ arbitration agreement, Aaron spends 66 percent of his time with Richard and Sarah spends 60 percent of her time with Julie. This residential schedule is therefore consistent with a “split-custody” arrangement and not, as the trial court found, an equally shared residential arrangement.”)

Wn.2d 1003, 972 P.2d 466 (1999). Accordingly, the Legislature authorizes trial courts to extrapolate from the actual income of the parties where it exceeds the top rung of the statutory child support schedule. RCW 26.19.020 ("When combined monthly net income exceeds seven thousand dollars, the court may set support at an advisory amount of support set for combined monthly net incomes between five and seven thousand dollars or the court may exceed the advisory amount of support set for combined monthly net incomes of seven thousand dollars upon written findings of fact."). Thus, the statute invites courts "to extrapolate from the existing schedule when the parents' income exceeds the amounts calculated in the schedule, ..." *In re Marriage of Clarke*, 112 Wn. App. 370, 379, 48 P.3d 1032 (2002). This process is a precise computation derived from the child support schedule. *Id.*, at 379.

The commissioner was legally correct to apply this procedure in this case, under the statute and the case law. Moreover, the commissioner's decision was warranted by the facts and best serves the children's best interests, given the disparity in the families' circumstances, including financial and size of family. The result reached by the commissioner follows the same logic as in *Clarke, supra*. There, as here, the combined family income

exceeded \$7,000.00 and the father's support obligation was less than 30 percent of his net income. Moreover, here, father cannot rightly complain of hardship from the increased obligation, at least not in light of the fact that the commissioner granted him essentially a 50% deviation as a residential credit. In short, the commissioner took the most logical route to the calculation of the proper amount of support required by the parties' two children. Any lesser amount runs afoul of the Legislature's paramount mandate, which is to provide adequate funding for dependent children.

#### D. ATTORNEY FEES REQUEST

Because of the disparity in financial resources, Ms. Cunliffe seeks attorney fees on the authority of RCW 26.09.140, which provides:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection there with, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

"The purpose of the statutory authority is to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage." 20 Kenneth W. Weber, Wash. Prac.,

*Family and Community Property Law* § 40.2, at 510 (1997).

Cunliffe's husband enjoyed one good financial year, which skewed the child support calculation at issue here, to her disadvantage.

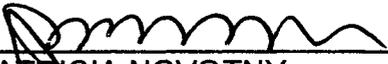
The contrast between the parties' current economic circumstances justifies application of the statutory provision.

E. CONCLUSION

For the foregoing reasons, Michele Cunliffe asks this Court to reverse the order on revision and order of child support entered by the superior court judge, reinstating the orders entered by the family court commissioner. Further, Ms. Cunliffe asks this Court to award her attorney's fees on appeal.

Dated this 9<sup>th</sup> day of October, 2003.

RESPECTFULLY SUBMITTED,

  
\_\_\_\_\_  
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0011010100

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON, on behalf of )  
McKENZIE MICHELE GRAHAM and )  
VICTORIA MATTSO GRAHAM, children, )  
 )  
 ) Petitioner, )  
vs. )  
 )  
RICHARD SCOTT GRAHAM, and )  
 )  
MICHELE LEANN CUNLIFFE, parents, )  
Respondents. )  
\_\_\_\_\_ )

No. 52622-7-I  
DECLARATION OF  
SERVICE

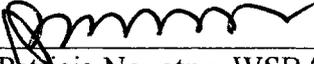
Patricia Novotny, counsel for appellant, certifies as follows:  
On October 07, 2003, I served upon the following copies of the Appellant's  
Opening Brief and this Declaration, by:  
 depositing same with the United States Postal Service, postage paid  
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I certify under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
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