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NO. \_\_\_\_\_

SUPREME COURT  
OF THE STATE OF WASHINGTON

NO. 52622-7-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

*FILED*  
*app*  
OCT 23 2005  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, on behalf of M.M.G. and V.M.G,  
children,

Nominal Respondent,

v.

RICHARD SCOTT GRAHAM, Father,

Petitioner,

and

MICHELE LEANN CUNLIFFE, Mother,

Respondent.

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PETITION FOR REVIEW

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EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

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**A. Identity Of Petitioner.**

Scott Graham, respondent in the Superior Court and the Court of Appeals, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

**B. Court Of Appeals Decision.**

Division One of the Court of Appeals filed its decision on November 1, 2004. A timely motion for reconsideration was denied on September 14, 2005. The decision is published at 123 Wn. App. 931, 99 P.3d 1248 (2004) and is reproduced in the appendix at A-1 through A-12. A copy of the order denying respondent's motion for reconsideration is in the appendix at B-1.

**C. Issues Presented For Review.**

1. May a trial court equitably apportion the child support obligation of parents who equally share residential time by setting off one parent's obligation from the other's to arrive at a transfer payment?

2. Is the establishment of child support for parents whose combined net monthly income exceeds \$7,000 a "deviation" from the child support guidelines, and is there a presumption that the court will extrapolate from the child support guidelines when income exceeds \$7,000?

**D. Statement Of The Case.**

Petitioner Scott Graham and respondent Michele Cunliffe have two daughters, born December 16, 1989, and March 23, 1991. (CP 117) Since their dissolution in 1994, the parties have equally split residential time, with both children alternating households each week. (CP 118) The mother is designated as custodian in even-numbered years, and the father in odd-numbered years. (CP 120)

Both parents remarried after their divorce, and each has other children in their households.<sup>1</sup> The parties' combined net monthly income has always exceeded \$7,000, and support was not extrapolated in the two child support orders entered before the order at issue here. (CP 15) In October 2002, the State petitioned for modification of child support on the grounds that more than two years had passed since the previous order, the parents' income had changed, and their younger daughter had moved into a new age category. (CP 4)

Division One's opinion asserts, without citation to the record, a "disparity between the parties' respective household incomes; over

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<sup>1</sup> The mother and her husband have five children. (CP 97, 142) The father and his wife have a son, and the father's wife has primary residential care of her daughter from a previous marriage. (CP 96, 142)

\$10,000 per month for Graham and around \$2,000 per month for Cunliffe." (Opinion at 3) The family court commissioner found that the mother's household had actual monthly income of \$5,709, exclusive of income imputed to and earned by the mother, while the father's net monthly income was calculated at \$6,654. (CP 214) On revision, the father's net monthly income was calculated at \$8,018.21. (CP 268) The worksheets impute income to the mother of \$1,957 and include actual investment income of \$200. (CP 268)

The trial court increased the father's transfer payment to the mother from \$300 to \$455, which had the effect of equalizing the parents' household incomes and support obligations. (CP 80-81, 100) The trial court calculated the transfer payment by setting off the amount that the mother would owe the father from the amount that the father would owe the mother given that each parent has the children half-time. (CP 271) The trial court's calculation of child support in this manner was consistent with the reasoning of *Marriage of Arvey*, 77 Wn. App. 817, 894 P.2d 1346 (1995), a Division One case in which the court established how child support should be calculated when the parents split residential time, with each parent having primary care of one child. The trial court declined to extrapolate support from the child support schedule, which governs

the calculation of child support only up to a combined monthly net income of \$7,000. (CP 260) RCW 26.19.065(3).

The mother appealed, asserting that the trial court erred in equitably apportioning child support by analogy to *Arvey* and in refusing to extrapolate. The father cross-appealed the trial court's decision refusing a reasonable credit against his monthly transfer payments for excess child support he paid during the five months while revision of the family court commissioner's tentative ruling was pending.

The Court of Appeals reversed in a published opinion. Division One rejected equitable apportionment of the child support obligation of parents who share, rather than split, residential time, and encouraged the trial court on remand to extrapolate in calculating the appropriate "deviation" from the child support guidelines. The father petitions for review.

**E. Argument Why Review Should Be Accepted.**

The parties have combined monthly net income that exceeds \$7,000 and equally share residential time with their children in "blended" families. The Court of Appeals resolved issues raised by this common fact pattern in a published decision that is contrary to several other intermediate court decisions and that raises issues of substantial public interest that should be determined by this Court:

**1. Both Parents Should Be Considered Child Support Obligees When The Parents Equally Share Residential Time. The Court Of Appeals Decision Is In Conflict With *Arvey* And *Holmes*.**

Division One reversed the trial court's decision with the admonishment that the trial court can "deviate" from the "basic child support amount" only "so long as doing so will not result in insufficient funds in the household receiving the support to meet the needs of the children while they are residing in that household." (Opinion at 9-10); see RCW 26.19.075(1)(d). But parents sharing residential time each have an identical and equally important obligation "to meet the needs of the children while they are residing in that household." Division One's analysis has the effect of defining the child support obligee not in terms of the parents' residential time but based on which parent has more income.

The Court of Appeals' opinion is in conflict with *Marriage of Arvey*, 77 Wn. App. 817, 894 P.2d 1346 (1995). In *Arvey*, each parent had one child for approximately 60 percent of the time and the other child for approximately 40 percent of the time. Division One vacated an order designating only the father as the child support obligor and the mother as the child support obligee because the order failed to recognize each parent's primary caretaking responsibility.

The court held that the trial court should equitably allocate each parent's support obligation in proportion to his or her caretaking responsibility. *Arvey*, 77 Wn. App. at 825.

The Court of Appeals' opinion also is in conflict with *Marriage of Holmes*, \_\_\_ Wn. App. \_\_\_, 117 P.3d 370 (August 8, 2005), in which another panel in Division One held that the child support obligee is the parent with whom the child resides the majority of the time. In *Holmes*, the mother appealed an order terminating the father's child support obligation after primary residential care was transferred to the father, arguing that he should be required to continue making a transfer payment to her because of the father's much larger income. The court rejected that proposition, holding that the mother was the "presumptive child support obligor" because the child resided the majority of the time with the father. 117 P.3d at 376, ¶ 29. See also *Marriage of Waters and Anderson*, 116 Wn. App. 211, 63 P.3d 137 (2003).

Neither *Holmes*, *Arvey*, nor any other case discusses or decides how child support should be calculated when the parents equally share residential time of more than one child. But the Court of Appeals' analysis, contrary to *Holmes* and *Arvey*, presumes that the parent with less income is the child support obligee, and that the

parent with more income is only entitled to a "deviation" for significant time spent with the child, contrary to the legislative history of RCW ch. 26.19.075(1)(d).<sup>2</sup> This Court should accept review and hold that both parents should be considered child support obligees when the parents equally share residential time.

**2. A Trial Court May Equitably Apportion The Child Support Obligation of Parents Who Equally Share Residential Time By Analogy To The Analysis Of Arvey.**

The Court of Appeals rejects equitable apportionment of child support by parents equally share rather than split residential time of their children, but gives the trial courts no guidance in how to calculate

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<sup>2</sup> In House colloquy, "significant time" for purposes of residential credit was defined as less than equally shared time:

Ms. Belcher: What is "significant time" for purposes of residential credits?

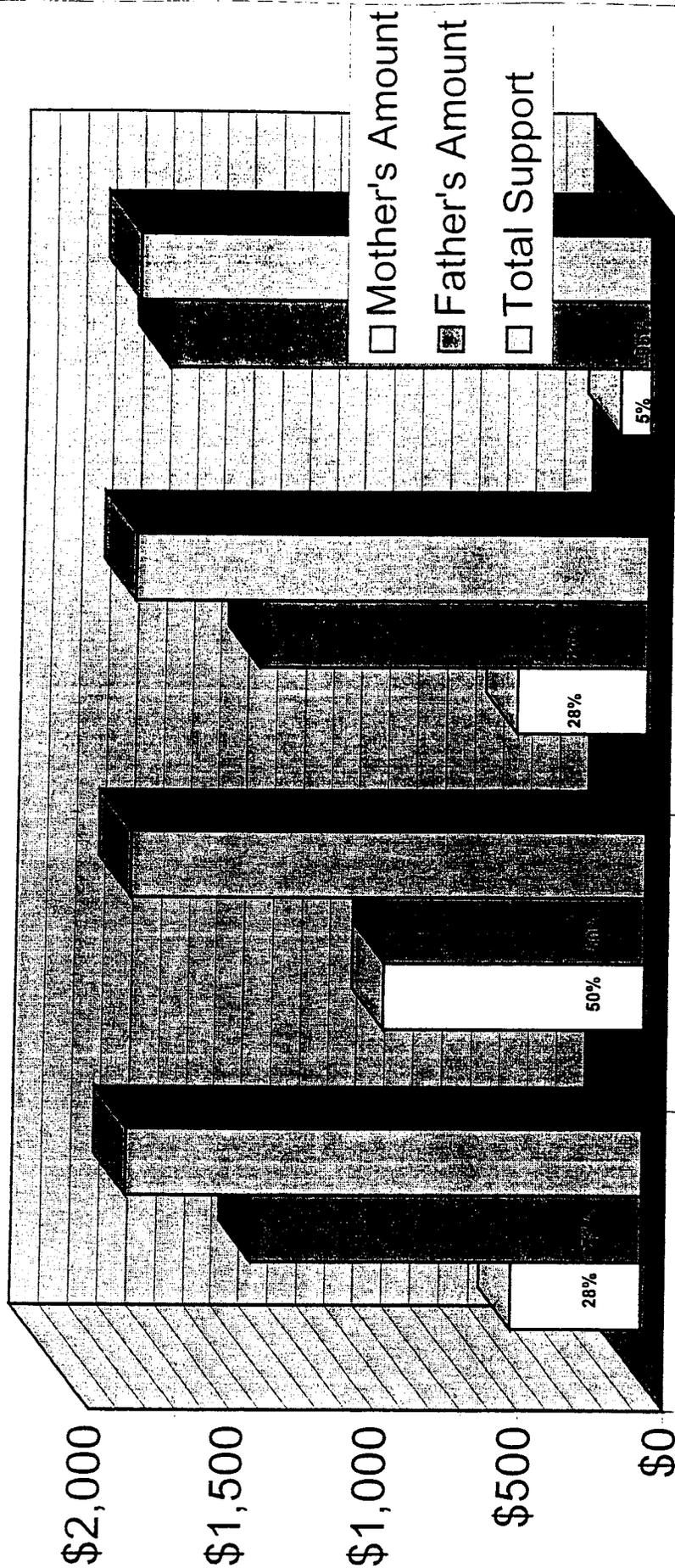
Mr. Appelwick: "Significant time" is not defined in legislation. It will be determined on a case-by-case basis. The section does reject the idea of the bright-line ninety day rule adopted by the commission. The majority of parenting plans still have a residential split between households in the eighty/twenty to sixty-five/thirty-five range. *Presumably, residential time in excess of thirty-five percent and up to 49.9 percent would be significant time.* Again, it is ultimately up to the court based upon the facts of the case.

House Journal, 6/27/91, at 52<sup>nd</sup> Leg., Reg. Sess., at 4320 (Wash. 1991) (emphasis added).

child support in the increasingly common situation where the parents equally share residential time. This Court can encourage equity, predictability and consistency in child support orders, RCW 26.19.001, by approving use of the **Arvey** formula for equitable apportionment of child support in cases where the parents equally share residential time with their children.

Consistent with RCW 26.19.001, child support should be equitably apportioned between the parents. The Court of Appeals rejected equitable apportionment by analogy to **Arvey** on the grounds that it "would result in disparate financial circumstances to the detriment of the children . . ." (Opinion at 9) But the order in this case had in fact the effect of equalizing the income in each parent's household. (CP 80-81, 100) As set out in the Chart reproduced on the next page of this Petition, the trial court's order made the father responsible for 72% of the children's support, consistent with the parents' actual and imputed income. (Columns A, C) The calculation proposed by the mother instead would impose 95% of the child support obligation on the father. (Column D)

**NET Support Obligation: \$1806** (CP 335)  
**Father's Share: \$1358**    **Mother's Share: \$448**



A: Worksheet Allocation (CP 269)  
 B: Cost of Support in each home  
 C: (Current Order) Support from each parent if Father makes \$455 Transfer Payment makes \$903 + \$455 = \$1358 father; \$903 - \$455 = \$448 mother  
 D: Support from each parent if Father makes \$800 transfer payment (commissioner's amount)

The Court of Appeals' analysis of household income confounds the parents' real and imputed income, which must be relied upon in the worksheet standard calculation, RCW 26.19.071(1),(3),(6), and their household income, including the income of other adults in the household, which is relevant to the determination of a residential credit. RCW 26.19.071(1); RCW 26.09.075(1). The father presented evidence, uncontradicted below, that the income of the two households was roughly equal, but that the father's substantial mortgage and other debts left him with less disposable income. (CP 79-81, 100) Division One's exclusive focus on the household of the parent with less imputed income fails to properly consider the consequence of the transfer payment on the available "funds in the household" of an employed parent who shares primary care.

Equitable apportionment acknowledges that each parent is entitled to recognition of the expenses paid in his or her home when the parties equally share child-rearing time and responsibilities. **Arvey's** emphasis on equitable apportionment of support in light of equal childcaring responsibilities is equally persuasive where the parents share rather than split primary care. This Court should accept review and hold that a trial court does not abuse its discretion

by equitably apportioning the child support obligations of parents who equally share residential time.

**3. Where Combined Net Monthly Income Exceeds \$7,000, Child Support Is Not A "Deviation" From The Guidelines. The Court Of Appeals Decision Is In Conflict With *Daubert* And *Leslie*.**

Division One's published opinion repeatedly refers to the calculation of the parties' support obligation in this case as a "deviation." See. e.g, Opinion at 1 ("The commissioner extrapolated an increased net support obligation, and deviated below. . ."); Opinion at 9 ("Such a deviation could be warranted in a situation where the children's residential time is shared between parents . . ."); Opinion at 9-10 ("[A] trial court must calculate the basic child support amount and may then deviate . . . We remand for recalculation of the basic child support obligation and consideration of any deviation not based on *Arvey* that the court deems appropriate.") But the child support calculation in this case is not a "deviation." Because the parties' combined net monthly income exceeds \$7,000, the child support schedule is only a guide, and not mandatory. RCW 26.19.020; RCW 26.19.065(3). Division One's characterization of the calculation of support in over-\$7,000 cases as a "deviation" unnecessarily confuses the analysis of child support in an area that is already fraught with inconsistency and doubt.

The Court of Appeals opinion is in conflict with the Court of Appeals decision in *Marriage of Daubert and Johnson*, 124 Wn. App. 483, 99 P.3d 401 (2004). "Since incomes above \$7,000 are not in the economic table, setting support for incomes above \$7,000 does not require a deviation." *Daubert*, 124 Wn. App. at 494, citing *Marriage of Leslie and Verhey*, 90 Wn. App. 796, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). The Court of Appeals opinion is also in conflict with *Leslie*, in which Division One reversed a trial court decision that had reduced support in an over-\$7,000 case to the guideline maximum on the grounds that there was no basis for "deviation." "[I]n couching its order in terms of 'deviation,' the trial court inappropriately narrowed the scope of its inquiry and contravened legislative intent." *Leslie*, 90 Wn. App. at 804.

The characterization of support in over-\$7000 cases as a "deviation" in published decisions may have profound unintended consequences for child welfare policy in this state. Federal funding of family aid depends upon consistent child support orders, and the State is obligated to track and report compliance with the child support schedules in child support orders. 42 U.S.C.A. §654(15)(a); 45 CFR §302.56(h) (purpose of "review of the guidelines to ensure that deviations from the guidelines are limited."). Recent reviews

report much larger deviation rates in Washington state (29%) than the national average (17%). Policy Studies Inc., "Washington State Child Support Schedule: Selected Issues Affecting Predictability and Adequacy" at 3 (Report for DSHS, January 20, 2005). This reported level is artificially inflated if the calculation of support in over-\$7,000 cases is characterized as "deviation." This Court should accept review and hold that the calculation of child support for parents whose combined net monthly income exceeds \$7,000 is not a "deviation" from the child support guidelines.

**4. There Is No Presumption That The Court Should Extrapolate From The Guidelines When the Parents' Combined Net Monthly Income Exceeds \$7,000. The Court Of Appeals Decision Is In Conflict With *Rusch And Daubert*.**

Division One encouraged the trial court on remand to extrapolate, emphasizing "that the trial court is not precluded from reconsidering extrapolation, in light of our rejection of the *Arvey* formula." (Opinion at 11) Yet there is nothing about the trial court's order that suggests that its rejection of extrapolation was related to its analogy to *Arvey*. (CP 260) And in encouraging extrapolation, Division One's opinion is in conflict with a published decision of a different panel of Division One decided the previous week. *Marriage*

*of Daubert and Johnson*, 124 Wn. App. 483, 99 P.3d 401 (October 25, 2004).

In *Daubert*, Division One reversed an extrapolated child support award that was not supported by findings that the children had extraordinary needs that could not be met by support under the guidelines. Extrapolation as a matter of course was also rejected by another Division One panel in *Marriage of Rusch*, 124 Wn. App. 226, 98 P.3d 1216 (August 23, 2004). The *Rusch* court expounded on the faulty bases for extrapolation:

Extrapolation programs do not base calculations on economic data. Instead, they merely extend the numbers on the tables 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. They merely continue the economic table past the \$7,000 mark. Had the Legislature intended this result, the Legislature would not have capped the table at \$7,000.

*Rusch*, 124 Wn. App. at 233.

Two other panels in Division One thus have held, contrary to the opinion in this case, that written findings must explain why additional support is "reasonable and necessary," identifying specific needs of the child that will remain unmet if support is set according to the guidelines. This requirement has been rejected in Division Two, however, which consistent with this opinion expressly declined to

adopt the reasoning of *Daubert* in *Marriage of McCausland*, \_\_\_ Wn. App. \_\_\_, ¶ 57, 118 P.3d 944, 955 (August 30, 2005) ("We reject [the father's] invitation to adopt the strictures of Division One in *Daubert*"), relying on *Marriage of Clarke*, 112 Wn. App. 370, 48 P.3d 1032 (2002). Division One in turn has held that "good grounds exist to use the extrapolated amount,' as the trial court did in *Clarke* is not sufficient." *Rusch*, 124 Wn. App. at 233. See also *Marriage of Marzetta*, \_\_\_ Wn. App. \_\_\_, ¶¶ 48-54, 120 P.3d 75 (Division Three, publication ordered September 20, 2005) (affirming extrapolated support award based "on the parties' wealth" without discussion of necessary findings).

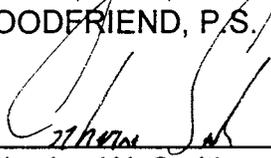
Since August 2004, the intermediate appellate courts have issued five analytically inconsistent published decisions on when child support can and should be extrapolated from the guidelines. This Court should accept review and provide needed guidance to practitioners and litigants on the calculation of child support in over-\$7000 cases.

**F. Conclusion.**

This Court should accept review under RAP 13.4(b)(2) and (4), reverse the Court of Appeals, and award petitioner his fees on appeal.

October 14, 2005

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By:   
Catherine W. Smith, WSBA No. 9542  
Attorneys for Petitioner

**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 October 14, 2005, I arranged for service of the foregoing Petition for Review to the court and the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Patricia Novotny Attorney at Law 3418 NE 65th Street, Suite A Seattle WA 98115	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Lori Smith Deputy Prosecuting Attorney Family Support Division 610 West Meeker Street, Suite 203 Kent WA 98032	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger [next day] <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

**DATED** at Seattle, Washington this 14th day of October, 2005.

  
\_\_\_\_\_  
Tara D. Friesen

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, on behalf of )  
M.M.G and V.M.G., children )

Petitioner/  
Respondent. )

v. )

RICHARD SCOTT GRAHAM and )

MICHELE LEANN CUNLIFFE, parents, )

Respondents. )

NO. 52622-7-1

DIVISION ONE

PUBLISHED OPINION

FILED November 1, 2004

RECEIVED

By \_\_\_\_\_

NOV 11 2004

ESSG  
ATTORNEYS AT LAW

**KENNEDY, J.** — Michelle Cunliffe and Richard Graham are divorced and have two daughters, M.M.G. (DOB 12/16/89) and V.M.G. (DOB 3/23/91). The daughters together spend alternating weeks with each parent throughout the year. Graham was granted a deviation in his monthly support obligation in 1996, from \$872.33 to \$300, based on the significant amount of time the children spend with him.

In 2002, the State petitioned for modification of child support. Graham asked the court to apply In re Marriage of Arvey, 77 Wn. App. 817, 894 P.2d 1346 (1995) by analogy and split the parties' child support obligation equally because of the children's residential time with him. Cunliffe countered that Arvey was not applicable and that RCW 26.19.075 allowed for residential credit only when the children's needs were met by such arrangement. A court commissioner rejected Graham's arguments. The parents' combined monthly income exceeded \$7,000. The commissioner extrapolated an increased net support obligation, and deviated below that amount to order Graham to pay \$800 per month. A trial court revised the order, refused to extrapolate, and

applied Arvey. The court then split child support equally between the parents and ordered Graham to pay \$403 per month, later revising this amount to \$455 per month. Cunliffe appeals and Graham cross-appeals the court's refusal to give him credit for amounts paid pursuant to the commissioner's original order. We grant the appeal, reject the cross-appeal, and reverse and remand with instructions.

### FACTS

The parties' original parenting plan, entered on March 28, 1996, specified that the two children would reside one week with their father and the following week with their mother, alternating throughout the year. A child support order was entered the same day. This order estimated Graham's net monthly child support obligation at \$872.33, and Cunliffe's net monthly child support obligation at \$436.67. However, the court deviated from Grant's standard calculation finding that the "child[ren] spends [sic] a significant amount of time with the parent who is obligated to make a support transfer payment" and that the deviation did not result in insufficient funds in the receiving parent's household to meet the basic needs of the children. The court then ordered Grant to pay \$300 per month to Cunliffe.

In August of 2002, the State petitioned for modification of child support, asserting that the previous order was entered more than two years previous, that the parents' incomes had changed, and that at least one of the children had moved into a new age category for support purposes. Both parties had also remarried and had additional children living at home—Graham had two additional children, and Cunliffe had five.

Graham responded to the petition and asked the court to modify the child support obligation. Graham requested that the court apply, by analogy, the holding in In re Marriage of Arvey, 77 Wn. App. 817, 894 P.2d 1346 (1995), a situation in which the

court split the child support obligation where one child resided primarily with one parent and another child with the other parent. Graham requested that Arvey be applied "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." Clerk's Papers at 22.

Cunliffe countered that application of the Arvey principles was improper because the parties "are not splitting children, we are splitting time." Cunliffe argued that halving child support obligations was appropriate in the Arvey situation because each parent was responsible for maintaining a household for only one child, but that application of those same principles would not be appropriate where each parent provided a complete household for both children. Cunliffe pointed out that child support must meet a child's basic needs and should provide additional support commensurate with the parents' income, resources, and standard of living. RCW 26.19.001. Cunliffe argued that RCW 26.19.075 allowed a court to deviate from the standard calculation if the child spent a significant amount of time with the obligor parent, but only if the deviation would not result in insufficient funds in the household receiving the payment to meet the basic needs of the child. Cunliffe asserted that she also had five other children in her household and noted the disparity between the parties' respective household incomes; over \$10,000 per month for Graham and around \$2,000 per month for Cunliffe.

The State agreed with Cunliffe's analysis, arguing that it would be inappropriate to apply Arvey to the present situation because each parent maintained costs for a full household for both children. The State pointed out that the court could also choose to deviate from the standard child support obligation if the court found the obligor parent spent a significant amount of time with the children, pursuant to RCW 26.19.075(1)(d).

The State also argued for extrapolation of the child support obligation because Graham's monthly income was clearly in excess of \$7,000 even without imputing income to Cunliffe, pursuant to RCW 26.19.020.

A court commissioner rejected Graham's argument, declining to extend the Arvey holding "to cases in which the parties have equally shared residential time." The commissioner also commented that support should be extrapolated to reflect the fact that the monthly income of the parties was \$8,801, and thus exceeded \$7,000. However, the commissioner also opined that application of residential schedule credits in accordance with prior law would not make a sufficient reduction/adjustment in the child support in situations, as in the present case, where residential time is equally shared by the parents. The commissioner commented that a more liberal deviation in the net child support obligation was necessary, taking into consideration the best interests of the children and fairness to the parties.

Using the child support worksheets, the commissioner extrapolated to Graham a net support obligation of \$1629 per month. These worksheets reflected the income of each parent's new spouse, their assets, debts, and additional children. The commissioner then deviated substantially below the net support obligation of \$1,629 per month and ordered Graham to pay Cunliffe \$800 per month. The commissioner stated that the factual basis supporting the substantial deviation was that the children spent 50 percent of their time in each household on a "week-on/week-off basis," that each parent provided full resources to the children while living in their household, and that each household had substantial income and resources such that the deviation did not result in insufficient funds to Cunliffe's household to meet the basic needs of the children. This order was entered on February 12, 2003.

Graham filed a motion to revise the commissioner's ruling and the trial court revised both the commissioner's decision to extrapolate an increased basic child support obligation based on the parties' incomes and the commissioner's determination that Arvey did not apply. The trial court estimated a much higher combined monthly net income than the commissioner had estimated, \$10,174.21 rather than \$8,801.00. The trial court calculated a net support obligation of \$1,216.63 per month as to Graham and \$410.72 per month as to Cunliffe. The court stated that "[i]n lieu of deviation, this court has applied the principles of In re Marriage of Arvey, 77 Wn. App. 817 (1995) . . . which fully recognizes the fact that each parent is required to provide a primary home for the children." Clerk's Papers at 235. The court then reduced each parent's obligation by half, reduced Graham's obligation further by the amount by which Cunliffe was obligated, and then ordered Graham to pay Cunliffe \$403 per month.

Cunliffe filed a motion for reconsideration, asserting that Arvey was inapplicable and that extrapolation was proper. Cunliffe also pointed out that V.M.G. was twelve years of age and that the court had improperly calculated her basic level of child support. In his response to Cunliffe's motion Graham requested, for the first time, reimbursement of the overpayments made pursuant to the commissioner's ruling. Cunliffe responded that the request was untimely. The court denied Cunliffe's motion, but increased the transfer amount to \$455 per month based on V.M.G.'s age, and denied reimbursement to Graham. This order was entered on June 3, 2003. Cunliffe appeals the trial court's application of Arvey and refusal to extrapolate the parties' income. Graham cross-appeals the court's refusal to give him credit for amounts paid for five months under the commissioner's original order.

## DISCUSSION

### I. Application of In re Marriage of Arvey

Cunliffe first asserts that the trial court erred in concluding that the analysis of In re Marriage of Arvey, 77 Wn. App. 817, 894 P.2d 1346 (1995) is applicable to the facts of the present case, where children spend alternating weeks with each parent and each parent maintains a residence for both children. Generally, we review child support modifications and adjustments for abuse of discretion. In re Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). However, whether a trial court has properly applied the Arvey analysis in a child support case is a question of law, reviewed de novo. See, e.g., In re Marriage of Waters, 116 Wn. App. 211, 215, 63 P.3d 137 (2002).

In establishing the child support schedule, the Legislature intended to insure that every child support award satisfies the child's basic needs and provides additional financial support commensurate with the parents' income, resources, and standard of living. RCW 26.19.001; In re Marriage of Leslie, 90 Wn. App. 796, 803, 954 P.2d 330 (1998). The Legislature also intended to equitably apportion the child support obligation between both parents. RCW 26.19.001; In re Marriage of Ayyad, 110 Wn. App. 462, 467, 38 P.3d 1033 (2002).

To meet these goals in determining the child support obligation, the trial court first determines the income of each parent and calculates their combined net monthly income. RCW 26.19.071. The court then determines the presumptive or advisory amounts of child support from an economic table contained in the statutory child support schedule based on the parents' combined net income. RCW 26.19.020; RCW 26.19.071. The economic table is presumptive for combined monthly net incomes up to and including five thousand dollars, but is only advisory for combined monthly net

incomes that exceed five thousand dollars. RCW 26.19.020; RCW 26.19.065(3). The court must enter written findings of fact when it deviates from either the presumptive or advisory amounts set forth in the child support schedule. RCW 26.19.035(2); RCW 26.19.075(3); Clarke v. Clarke, 112 Wn. App. 370, 380, 48 P.3d 1032 (2002). See also, Rusch v.. Rusch, \_\_\_ P.3d \_\_\_, 2004 WL 2335116 (Wash. App. Div. 1, Aug. 23, 2004).

This process for determining child support obligations is readily applicable to divorced family situations where the children reside a majority of the time with one residential parent. In those situations, the obligor parent is the one with whom the children do not reside a majority of the time and that parent makes a transfer payment to the parent with whom the children primarily reside. However, this court has previously recognized that the child support schedule set forth in Chapter 26.19 RCW does not address the appropriate method of calculating child support where each parent has primary residential care of one or more children. See, e.g., Arvey, 77 Wn. App. at 822-23; In re Marriage of Oakes, 71 Wn. App. 646, 650, 861 P.2d 1065 (1993).

Thus, the Arvey court established a method for determining child support when one child resides primarily with one parent, and another child or other children resides primarily with the other parent. Arvey called this arrangement a "split-custody" situation and held that in such situations each party should be viewed as both an obligor and an obligee to the other with whom one or more of their children reside. Arvey, 77 Wn. App. at 823. Arvey established that in such "split-custody" situations, after determining each parent's net child support obligation, the trial court should adjust the figure to reflect

each parent's proportional share based on the number of children who primarily reside in his or her household.<sup>1</sup> Arvey, 77 Wn. App. at 823-26.

Graham encourages this court to affirm the trial court's application of Arvey to the present situation, and to hold that Arvey also applies to situations where parents equally divide residential time with their children. However, Arvey specifically distinguished "split-custody" situations from equally shared residential arrangements where the parents divide time with their children. Arvey, 77 Wn. App. at 823. Both M.M.G. and V.M.G spend an equal amount of residential time with each parent; they do not primarily reside with one parent or the other, they reside with both. The current situation presents a shared residential arrangement rather than the "split-custody" arrangement addressed by Arvey.

No case has applied Arvey where both parents spend an equal amount of residential time with all children. Further, application of the Arvey principles to shared residential arrangements; where each parent is required to provide a household to not just one, but to two or more children, often would result in disparate economic circumstances. Dividing the basic child support obligation by the number of children and then splitting it between the parents would qualitatively reduce the amount of funds available to the children in the household that is less financially well off. This would often result in not meeting the Legislature's intent to satisfy the basic needs of the children and to provide additional financial support commensurate with the parents' income, resources, and standard of living. RCW 26.19.001.

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<sup>1</sup> For instance, two children lived with parent A (whose total obligation was \$561.80) and one child with parent B (whose total obligation was \$115.21). Parent A's obligation is divided by 1/3 (\$187.27) and parent B's obligation divided by 2/3 (\$743.47). The smaller amount would be subtracted from the larger, and the resulting amount becomes a transfer payment to parent A. See, Arvey, 77 Wn. App. at 826.

In sum, because Arvey addresses “split-custody” situations rather than shared residential arrangements, and its application often would result in disparate financial circumstances to the detriment of the children, contrary to the intent of the child support statutes, we conclude that Arvey is not applicable to shared residential arrangements. Thus, the trial court erred when it applied Arvey by analogy to the present situation, and we reverse.

However, placing the entire child support obligation on one parent where the residential schedule is shared also would not meet the Legislature’s intention of equitably apportioning the child support obligation between both parents. RCW 26.19.001. The Legislature has allowed a deviation from either the presumptive or advisory amount of child support where the children spend “a significant amount of time with the parent who is obligated to make a support transfer payment,” as long as the deviation will not result in insufficient funds in the household receiving the support to meet the needs of the children. RCW 26.19.075(1)(d). Such a deviation could be warranted in a situation where the children’s residential time is shared between parents, but would still be discretionary and focused on the Legislature’s primary intent to maintain reasonable support for the children in each household. Thus, it appears that the Legislature has already considered and provided for the situation presented here.

We hold that where the residential care of children is not split between two households as in Arvey, but is instead shared as in this case, Arvey does not apply. Rather, a trial court must calculate the basic child support amount and may then deviate from that amount based on the amount of residential time spent with the obligor parent, pursuant to RCW 26.19.075, so long as doing so will not result in insufficient funds in the household receiving the support to meet the needs of the children while they are

residing in that household. We remand for recalculation of the basic child support obligation and consideration of any deviation not based on Arvey that the court deems appropriate. Such deviation will require the trial court to enter findings of fact. RCW 26.19.035(2); RCW 26.19.075(3).<sup>2</sup>

We disagree with Cunliffe's argument that the trial court necessarily erred when it refused to extrapolate an increased net child support obligation because the parties' combined monthly income exceeded \$7,000. Chapter 26.19 RCW provides that

[w]hen 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.

RCW 26.19.020 (emphasis added). This statute grants the court express authority to exceed by extrapolation the amount calculated in the child support schedule when the parents' combined net monthly incomes exceed \$7,000. Clarke v. Clarke, 112 Wn. App. 370, 379, 48 P.3d 1032 (2002). While a trial court must consider what additional amounts might be paid where monthly net incomes exceed \$7,000, the trial court retains discretion to decide whether or not to extrapolate above the advisory amounts. In re Marriage of Fiorito, 112 Wn. App. 657, 664-65, 50 P.3d 298 (2002).

The trial court here had information regarding the incomes of both parties as well as the incomes of their spouses, their debts and assets, their additional children and various expenditures including costs of childcare. Because the trial court considered these factors, it does not appear that it abused its discretion solely by refusing to

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<sup>2</sup> Although Cunliffe additionally asserts that we should apply the method set forth in the American Law Institute's (ALI) *Principles of the Law of Family Dissolution: Analysis and Recommendations*, § 309, p.492 (2000), she did not argue these ALI Principles in her first appellate brief nor in her argument to the trial court. Thus, we decline to consider them on appeal. See, RAP 10.2(a)(5), (c).

extrapolate in this particular case. While remand for recalculation of child support is necessary because the trial court erroneously applied Arvey, we emphasize that the trial court retains discretion to determine whether to extrapolate an increase in the child support obligation where the parents' combined monthly income exceeds \$7,000. We also emphasize, however, that the trial court is not precluded from reconsidering extrapolation, in light of our rejection of the Arvey formula—it being unclear from the record whether the court rejected extrapolation entirely on its own merits under the facts of this case, or whether the primary reason for the rejection was based on Arvey. For a recent discussion by this court of principles guiding the trial court's exercise of discretion with respect to extrapolation, see, Rusch, \_\_\_ P.3d \_\_\_\_, 2004 WC 2335116 (2004).

Graham cross-appeals the trial court's refusal to give him credit for the \$1,985 he estimates that he paid under the commissioner's original orders. This request was made for the first time in Graham's response to Cunliffe's motion for reconsideration of the trial court's order. Graham fails to cite any authority to support his proposition that he should be credited this alleged overpayment, and thus we refuse to consider it on appeal. RAP 10.3(a)(5). Finally, to the extent that Graham could request reimbursement after revision of a commissioner's order by a trial court, it does not appear from the record that Graham either argued or proved to the trial court that the reimbursement would not cause an "undue hardship upon the receiving parent or the child." See, e.g., In re Marriage of Stern, 68 Wn. App. 922, 932-33, 846 P.2d 1387 (1993). Thus, it does not appear that the trial court abused its discretion in refusing to grant Graham reimbursement of the previously paid amounts.

Finally, Cunliffe seeks attorney fees on appeal, pursuant to RCW 26.09.140. Cunliffe has substantially prevailed on appeal and has shown need. Graham also has

the ability to pay. We grant attorney fees to Cunliffe on appeal in an amount to be set by a commissioner of this court upon Cunliffe's timely application.

Reversed and remanded with instructions, all as set forth in this opinion.

/s/ Kennedy, J.

WE CONCUR:

/s/ Cox, C.J.

/s/ Coleman, J.

SEP 15 2005

ESSG  
ATTORNEYS AT LAW

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

STATE OF WASHINGTON, on behalf of M.M.G. and V.M.G., children,	)	No. 52622-7-1
	)	
Petitioner/ Respondent,	)	ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO STRIKE
	)	
v.	)	
	)	
RICHARD SCOTT GRAHAM and MICHELE LEANN CUNLIFFE, parents,	)	
	)	
Respondents.	)	
	)	
	)	

Respondent, Richard Scott Graham, has moved for reconsideration of the opinion filed in this case on November 1, 2004. Respondent, Michele Cunliffe, has moved to strike certain evidence. The panel hearing the case has considered the motions and has determined that the motion for reconsideration and the motion to strike should be denied. This court hereby

ORDERS that the motion for reconsideration and the motion to strike are denied.

Dated this 14<sup>th</sup> day of September 2005.

FOR THE PANEL:

*Cox, CJ*

Judge

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