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NO. 52622-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Nominal Respondent,

v.

RICHARD SCOTT GRAHAM, Father,

Respondent/Cross-Appellant,

and

MICHELE LEANN CUNLIFFE, Mother,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
HONORABLE RONALD KESSLER

BRIEF OF RESPONDENT AND CROSS-APPELLANT
RICHARD SCOTT GRAHAM

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

By: Catherine W. Smith
WSBA 9542

Attorneys for Respondent/Cross-
Appellant Richard Scott Graham

500 Watermark Tower
1109 First Avenue
Seattle, WA 98101-2988
(206) 624-0974

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I. RESTATEMENT OF FACTS

With the exception of appellant's characterization of the trial court's child support orders as being the result of "deviation,"¹ respondent Scott Graham accepts the appellant's statement of facts. The following facts are also relevant to the court's determination of whether the trial court abused its discretion in establishing and equitably apportioning child support for the parties' children:

The parties' daughters were born December 16, 1989 and March 23, 1991. (CP 95) Since their dissolution in 1994, the parties have equally split residential time. (CP 95) Even though the parties' combined net monthly income has always exceeded \$7,000, support was not extrapolated from the top of the Child Support Schedule in the two child support orders entered before the order at issue here. (CP 11)

In late 1997, the mother filed a petition for modification, seeking primary residential care of the parties' daughters. (CP 95-

¹ The amount of child support is discretionary with the trial court in cases where the parents' combined monthly net income exceeds \$7,000. The trial court's establishment of child support in this case thus was not a result of "deviation" from the Child Support Schedule, which governs the standard calculation only in cases where the parents' combined monthly net income does not exceed \$7,000. RCW 26.19.020, .065(3).

96) After a trial, the petition for modification was denied and the current split residential schedule was maintained. (CP 96, 135-39) The trial court in that action specifically found that "[a] new residential schedule which placed the children primarily in either household, would create a feeling of loss in the children with regard to the parent with whom they would not be primarily residing, and that has a potential of substantial harm to the children." (CP 136)

Prior to her remarriage in 1995, the mother had monthly earned income of \$3,750. (CP 97, 110) After marriage, the mother decided to stay home, and sold her business. The worksheets impute income to her in accordance with the statutory schedule. (CP 240) The mother and her husband have five children, who ranged in age from one to seven at the time of the trial court decision. (CP 97, 142)

The family court commissioner found that the mother's household has net monthly income of almost \$6,000 a month, exclusive of income imputed to the mother. (CP 214) In January 2002, the mother offered to send the parties' children to Seattle Christian School at her own expense, stating that she was "willing and able to accomplish this with my husband's income. . ." or "with money I am still receiving from Alaska. . ." (CP 203) At the time of

decision below, the mother and her family lived rent-free in a house provided by her husband's parents, and the family was relatively-debt free. (CP 64, 220, 337, 342)

As does the mother, the father's wife stays home full-time with the family's children, including her daughter from a previous marriage and their son, age 7. (CP 96) The father presented evidence below that the income of the two households is roughly equal, but that the father's substantial mortgage and other debts leave him with less disposable income. (CP 79, 80, 100)

The State represented the mother at no expense to her below. The mother, but not the State, has appealed the order increasing the father's child support obligation from \$300 to \$455 per month. (CP 255)² The father cross-appeals the trial court's decision refusing a reasonable credit against his monthly support obligation to recoup \$1,985 in overpayments the father made during the five months while revision of the commissioner's tentative ruling was pending. (CP 361)

² Appellant represents that the father's support obligation is \$403 a month. (App. Br. at 6) The father conceded and the trial court ordered a net transfer payment of \$455 based on the parties' younger daughter reaching age 12 and entering a new age category. (CP 335)

II. ARGUMENT

A. This Court Reviews Only The Revision Judge's Orders, For Only A Manifest Abuse Of Discretion.

Appellant proposes that this court "reinstate" the commissioner's child support order. (App. Br. at 12) But the commissioner's ruling was never an effective order of the superior court, and cannot be reinstated on appeal. "Only the superior court's decision is at issue because 'once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's.'" *Marriage of Rideout*, ___ Wn.2d ___, 77 P.3d 1174, 1179 n.5 (2003) (citation omitted).

This court's review of the trial court's decision is more deferential than the superior court's de novo revision of a commissioner's ruling. *State v. Wicker*, 105 Wn. App. 428, 432-33, 20 P.3d 1007 (2001). Establishing the parent's child support obligation is discretionary with the trial court. *Marriage of Clarke*, 112 Wn. App. 370, 383, 48 P.3d 1032 (2002). "The amount of child support rests in the sound discretion of the trial court. This court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances." *Marriage*

of Fiorito, 112 Wn. App. 657, 664, 50 P.3d 298 (2002), *citing Marriage of Stern*, 57 Wn. App. 707, 717, 789 P.2d 807, *review denied*, 115 Wn.2d 1013 (1990).

There thus is no commissioner's order to be reinstated. Instead, this court reviews the revision judge's orders for a manifest abuse of discretion, keeping in mind that "[t]he emotional and financial interests affected by [dissolution] decisions are best served by finality." *Marriage of Griffin/Booth*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990) (*quoting Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985)).

B. The Trial Court Did Not Abuse Its Discretion In Recognizing That The Parents Each Have Both Children Half-Time When Establishing The Support Obligation.

The trial court determines the basic child support obligation and the standard calculation on the basis of the parties' income, the number of children the parties have together, and their standard of living. RCW 26.19.020, .065(3). The amount of the basic child support obligation is discretionary where the parties' combined monthly net income exceeds \$7,000. RCW 26.19.020, .065(3). The court must consider the parties' income, resources, and standard of living in light of the "totality of the financial circumstances." *Marriage of Scanlon/Witrak*, 109 Wn. App. 167, 177, 34 P.3d 877

(2001), *rev. denied*, 147 Wn.2d 1026 (2002) (citing **Marriage of Leslie/Verhey**, 90 Wn. App. 796, 804, 954 P.2d 330 (1998)). "The legislature also intended to equitably apportion the child support obligation between both parents." **Marriage of Clarke**, 112 Wn. App. 370, 377-78, 48 P.3d 1032 (2002), *citing* RCW 26.19.001; **Marriage of Ayyad/Rashid**, 110 Wn. App. 462, 467, 38 P.3d 1033, *rev. denied*, 147 Wn.2d 1016 (2002).

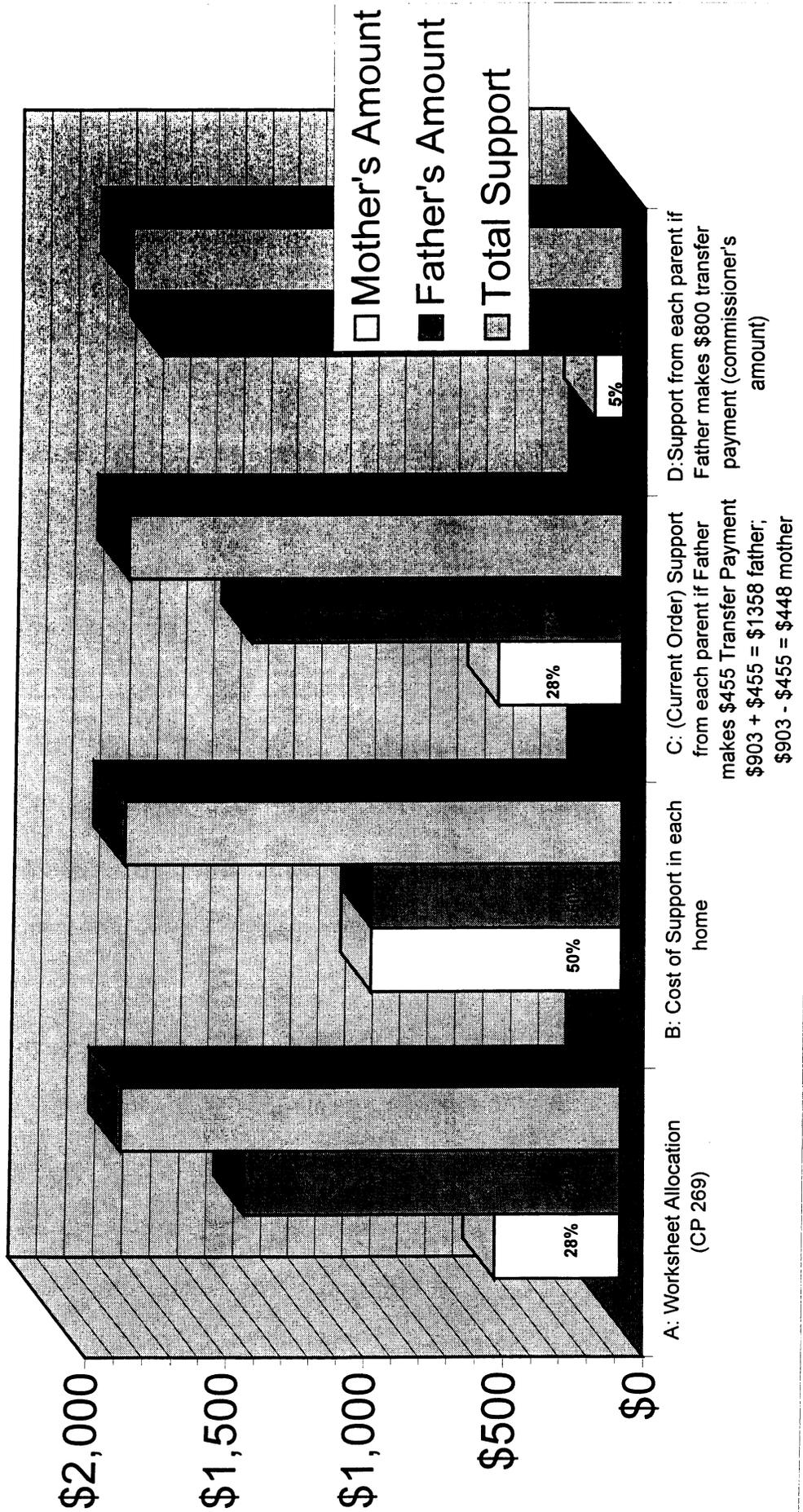
Considering the totality of the economic circumstances, the trial court in this case did not abuse its discretion in determining and in equitably apportioning the parents' child support obligation based on an analysis consistent with **Marriage of Arvey**, 77 Wn. App. 817, 894 P.2d 1346 (1995). The child support schedule contemplates that one parent pays his or her share by providing care to the child, and the obligor nonresidential parent pays child support to contribute to the cost of that care. *See, e.g.* **Marriage of Oakes**, 71 Wn. App. 646, 649, 861 P.2d 1065 (1993) (noting assumption that residential parent pays balance by housing and raising children."). When the parents equally share caregiving responsibilities, however, the trial court does not abuse its discretion by choosing to allocate the child support obligation consistent with the analysis of **Arvey**. 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. This court vacated an order designating only the father as the obligor 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.

Arvey's emphasis on equitable apportionment in light of equal childcaring responsibilities is equally persuasive here. Consistent with RCW 26.19.100, child support should be equitably apportioned between the parents when they share child care responsibilities. See **Clarke**, 112 Wn. App. at 377-78; **Ayyad**, 110 Wn. App. at 467. As set out in the Chart on the following page (Column C; CP 335), the trial court's order has the effect of making the father responsible for 72% of the children's support, consistent with the parties' actual and imputed income (Column A; CP 269). In urging this court to "reinstate" the commissioner's ruling, 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



The mother complains of the trial court's reliance on an analysis consistent with **Arvey** because RCW 26.19.075(1)(d) allows a court to deviate "if a child spends a significant amount of time with the parent who is obligated to make a support transfer payment." (App. Br. at 8-9) This argument has no merit for at least three reasons:

First, the trial court's decision in this case did not involve "deviation," because the parties' net monthly income exceeds \$7,000. As a consequence, the child support schedule is only a guide, and not mandatory. RCW 26.19.020, .065(3).

Second, RCW 26.19.075(1)(d) presumes that the obligor with whom the child spends "significant time" is a nonresidential parent. This presumption does not apply when the children spend equal time with each parent.

Third, RCW 26.19.075(1)(d) provides no "mechanism" (App. Br. at 8) or formula for deviating when a parent spends significant time with the children, contrary to the appellant's sole argument for rejecting the reasoning of **Arvey**. The trial court properly exercised its discretion by using an analysis consistent with **Arvey** in determining what formula should be applied in establishing a support transfer payment when the parties share, rather than "split," the children.

The trial court did not consider itself bound by *Arvey*, but instead was convinced that its reasoning would lead to an equitable apportionment of the parents' child support obligation in this case. "This court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances." *Fiorito*, 112 Wn. App. at 664. This court can encourage equity, predictability and consistency in child support orders, RCW 26.19.001, by approving this use of the *Arvey* formula in cases where the parents equally share residential time. The trial court did not abuse its discretion in using an analysis consistent with *Arvey* when establishing the parents' support obligation.

C. The Trial Court Did Not Abuse Its Discretion In Choosing Not To Extrapolate.

The trial court did not abuse its discretion in refusing to extrapolate. Setting the standard calculation within the advisory range as the court did here is within the scope of the trial court's discretion in high income cases. *Marriage of Fiorito*, 112 Wn. App. 657, 665, 50 P.3d 298 (2002)

In *Marriage of Leslie/Verhey*, 90 Wn. App. 796, 804, 954 P.2d 330 (1998), this court noted that "a trial court is not limited to

the maximum amount of support provided by the schedule," and that "[i]t is permitted to 'exceed' this amount upon written findings of fact." *Leslie*, 90 Wn. App. 796, citing RCW 26.19.020. But neither *Leslie* nor any other case *requires* a trial court to extrapolate from the child support tables. The trial court's decision instead is a matter of discretion:

While the trial court must consider what additional amounts might be paid, the trial court retains the discretion to decide what amount is appropriate, after such consideration. *Within the scope of that discretion is the choice of deciding that no additional award is appropriate.*

Fiorito, 112 Wn. App. at 665 (2002) (emphasis added).

Extrapolation would be especially inappropriate in this case because the parties' child support obligation has never been extrapolated even though their net monthly income has always exceeded \$7,000. *Marriage of Trichak*, 72 Wn. App. 21, 863 P.2d 585 (1993). In *Trichak*, the mother brought a petition for modification and sought to bar a deviation based on an offset against support for social security benefits received by the child. This court rejected the mother's challenge, holding that she could not raise the issue on modification because the deviation formula had been used without challenge in the original decree. Although

the trial court disavowed use of the "law of the case" doctrine here (CP 232), the fact that the parties' support obligation has never been extrapolated further supports the court's exercise of its discretion in declining to extrapolate. See *Marriage of Rideout*, ___ Wn.2d ___, 77 P.3d 1174, 1183 (2003) (appellate court "'may affirm the [lower] court on any grounds established by the pleadings and supported by the record'" (brackets in original; citation omitted)).

D. This Court Should Deny Fees On Appeal.

The appellate court awards fees on appeal after considering "the arguable merit of the issues on appeal and the financial resources of the respective parties." *Marriage of Griffin/Booth*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990); see RCW 26.09.140. The mother has the family resources to pay her own attorney fees, while the father does not have the ability to pay fees. Just as the trial judge denied an award of fees (CP 256), this Court should decline to award fees to the mother.

III. CROSS-APPEAL

Cross-appellant Scott Graham appeals the court's decision refusing a reasonable credit against his monthly support obligation to recoup \$1,985 in overpayments made during the five months while revision of the commissioner's tentative ruling was pending.

A. Assignment of Error.

The trial court erred in entering its June 3, 2003, order refusing to order recoupment of \$1,985 in child support overpayments made while revision of the commissioner's ruling was pending. (CP 274)

B. Issue Related to Assignment of Error.

Whether a child support obligor who has made payments pending revision of a family court commissioner's tentative ruling modifying child support is entitled to a reasonable credit against his monthly support obligation to recoup overpayments when the superior court establishes a lower child support obligation, in the absence of any finding that repayment would work a hardship on the children?

C. Statement of Facts Relevant to Cross-Appeal.

Cross-appellant relies on the facts as set forth in the responsive portion of this brief and on the following facts:

The father paid excess support of \$397 per month between November 2002 and March 2003 while revision of the family court commissioner's ruling was pending. (CP 213, 263-64) He requested a credit against his monthly support obligation at a

reasonable rate to recoup these overages. The trial court without explanation denied any credit or repayment. (CP 274)

D. Argument of Cross-Appeal.

A parent who pays more than the amount of child support eventually ordered by the superior court on revision of a commissioner's ruling is entitled to repayment of excess support paid pursuant to the tentative ruling. This is particularly true where, as here, the overpaying parent has proposed a means of recoupment by credits against future payments that is intended to ameliorate the effect on the other parent and the children and there is no finding that repayment would work any hardship.

The trial court did not explain its reasoning in striking from its order on reconsideration the proposed repayment credit. The only authority cited in opposition to the proposed reimbursement was ***Marriage of Stern***, 68 Wn. App. 922, 846 P.2d 1387 (1993). (CP 349) ***Stern*** does not support denial of reimbursement for at least three reasons:

First, in ***Stern*** the court considered a claim for reimbursement of excess support paid during the pendency of an appeal. Unlike the commissioner's tentative ruling here, the trial court's order in ***Stern*** was fully enforceable during appeal, RAP

7.2(c), and a mechanism existed to supersede enforcement of the judgment. RAP 8.3, see **Stern**, 68 Wn. App. at 932-33; RAP 12.8.

Second, the father should not be penalized for his good faith compliance with the commissioner's ruling, which never became an enforceable order of the superior court because revision was requested within 10 days. RCW 2.24.050, Wash. Const. Art. IV, § 23. To encourage respect for all judicial officers and for the process by which child support decisions are made in the superior courts, the court should not discourage compliance with a tentative ruling by denying recoupment when a child support obligation is decreased on revision.

Third, **Stern** itself held that recoupment should be limited only upon a showing that repayment will work a hardship:

The court should take into account the amount of the excess payments, whether the payments have already been spent in support of the child, and whether the sum is readily available for restitution without causing undue hardship upon the receiving parent or the child.

Stern, 68 Wn. App. at 932. These are all matters upon which the obligee parent who has received the excess funds must have the burden of proof, as evidence of the use of excess payments is peculiarly in the receiving parent's control. No findings or other

showing suggest such hardship in this case, particularly where the father proposed recoupment through reasonable credits against future child support to ameliorate any effect on the children.

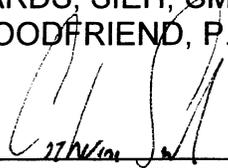
Courts routinely enter large judgments for many months of back due support when a child support obligation is increased on revision, without regard to the effect of such a lump sum judgment on the obligor parent. It is unfair to deny recoupment when a child support obligation instead is decreased on revision. The trial court erred in denying the father a reasonable credit against his monthly support obligation to repay overpayments made while revision was pending in the absence of any finding that repayment would work a hardship on the children.

IV. CONCLUSION

This court should affirm the trial court's order of child support, deny the mother's request for fees, and order recoupment of \$1,985 in excess payments made by the father by credits against his future support obligation.

November 19, 2003

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

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

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 November 18, 2003, I deposited in the mails of the United States of America, postage prepaid, an envelope containing a true and correct copy of the Brief of Respondent Richard Scott Graham addressed to:

Patricia Novotny
Attorney at Law
3418 NE 65th Street, Suite A
Seattle WA 98115

Lori Smith
Deputy Prosecuting Attorney
Family Support Division
610 West Meeker Street, Suite 203
Kent WA 98032

DATED at Seattle, Washington this 18th day of November, 2003.



Tara D. Friesen

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