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STATE OF WASHINGTON

NO. 77858-2

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 52622-7-1

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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**STATE'S RESPONSE TO PETITION FOR REVIEW**

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**A. IDENTITY OF PETITIONER**

Richard Scott Graham, father, is the party who petitioned for review.

Michele Cunliffe, mother, and the State Of Washington are also parties to this action. The State is not asking for review.

**B. COURT OF APPEALS DECISION**

The Court Of Appeals decision is published at 123 Wn.App. 931, 99 P.3d 1248 (2004) and was supplied as an appendix to Graham's petition for review.

**C. ISSUES PRESENTED FOR REVIEW**

1. Should a court apply the Arvey formula to a situation where each parent has about the same amount of residential time with all the children? (Marriage Of Arvey, 77 Wn.App. 817, 894 P.2d 1346 (1995), examples for computing child support in 2 children and 3 children split custody cases are set out in footnote 4 of Arvey) The Arvey decision dealt with a case where each parent had custody of a different child, which it called "split custody". The Arvey court distinguished split custody from a situation where the parents had approximately equal residential time with all the children. Arvey at 823.

2. a. Should a court consider establishment of child support for parents whose combined income was over \$7000 to be a deviation?
2. b. May a court extrapolate from the child support economic table when the combined income of the parents exceeds \$7000?
3. Is the Court's decision at 123 Wn.App. 931 in conflict with other published appellate decisions?

**D. STATEMENT OF THE CASE**

Richard Scott Graham and Michele Cunliffe are the parents of 2 daughters. (CP 117). Both children live with each parent for a week at a time. (CP 118). The parents' combined net monthly income is greater than \$7000. (CP 15).

The Child Support Schedule (RCW 26.19) utilizes the Child Support Economic Table as a statutory method for determining child support based on the parents' combined incomes. RCW 26.19.020. The Child Support Economic Table is presumptive for combined incomes up to \$5000 per month and advisory for combined incomes between \$5000 and \$7000 per month. RCW 26.19.020.

The Court Of Appeals reversed a Superior Court judge who calculated child support based on the formula set out in Marriage

Of Arvey. Marriage Of Arvey, 77 Wn.App. 817, 894 P.2d 1346 (1995), Court Of Appeals decision p. 9. The Court Of Appeals then remanded the case to have child support recalculated. Court Of Appeals decision p. 9-10.

**E. ARGUMENT**

**1. The Arvey analysis should not be applied to this case.**

Arvey does not apply to this case for the reasons stated by the Court Of Appeals in pages 6-9 of its decision.

As Division I pointed out, the purpose of child support is to provide for the basic needs of the children and also additional support commensurate with the parents' income, resources, and standard of living. In Arvey, each parent provided a household for only some of the children. In this case, the children live with each parent serially. Simply dividing the support in proportion to the amount of time the children spend with each parent would disadvantage the parent with less income and would not adequately provide for the children.

On page 7 of his Petition For Review, Graham quotes a colloquy between Representatives Belcher and Appelwick in an attempt to show that the legislative history of the Child Support Schedule (RCW 26.19) supports the use of an Arvey formula to

determine his child support. The representatives were discussing residential credit as a basis to deviate in computing child support. That colloquy precisely refutes Graham's position. Representative Appelwick is quoted as saying: "Presumably, residential time in excess of thirty-five percent and up to 49.9 percent would be significant time [to use as a basis to deviate]." Appelwick is saying that a virtually even split in custody (49.9 percent) would be handled by giving a deviation based on residential credit.

As the Court Of Appeals stated, no appellate court has applied the Arvey formula to a case where the parents equally split residential time of the children. Court Of Appeals decision p. 8.

**2. Computing support for parents with a combined income of over \$7000 is not a deviation.**

"'Deviation' means a child support amount that differs from the standard calculation." RCW 26.19.011(4). If there is no standard calculation when combined incomes are over \$7000, there is no standard calculation to differ from and therefore a deviation within the meaning of this statutory definition is not possible. In its Graham/Cunliffe opinion, for instance on page 1, the Court Of Appeals uses the verb "deviate" to indicate that the support ordered differs from the figure arrived at by extrapolating.

The Court Of Appeals' use of the term deviate is broader than the narrow statutory definition.

When the parents' combined incomes exceed \$7000, it is permissible for a court to order support amounts above those in the schedule for combined incomes of \$7000. RCW 26.19.020. The statute requires written findings of facts in this circumstance, but does not give any guidance on how to arrive at the higher support amount. Here the Court Of Appeals, at pages 10-11 of its decision, found that Arvey did not apply and remanded this case to have support calculated according to the child support schedule. Arguably the Court Of Appeals used the verb "deviate" imprecisely, but any such usage did not affect its holding.

Graham also contends that the use of the word "deviate" can "have profound unintended consequences for child welfare policy in this state". Petition For Review, p. 12. He goes on to argue that support amounts that deviate from the schedule are not in compliance with the schedule and further argues that excessive non-compliance in Washington support orders could adversely effect our State's relationship with the federal government. However, any child support amount ordered that is: 1) entered in a case where the parents' combined income is over \$7000; 2) greater

than the amount for a combined income of \$7000; and 3) supported by appropriate findings of fact, is in fact in compliance with the support schedule. RCW 26.19.020. Just because the word “deviate” or “deviation” appears somewhere in the court papers, does not bring such a support amount out of compliance.

**3. The Court of Appeals did not require the trial court to extrapolate.**

The Court Of Appeals stated that the statute gives a court authority to extrapolate a support amount from the support schedule, citing Clarke v. Clarke, 112 Wn.App. 370, 379, 48 P.3d 1032 (2002). “Extrapolation is a predictable ‘process of estimating an unknown number outside the range of known numbers.’ Black’s Law Dictionary (6<sup>th</sup> Ed. 1990) 587”. Clarke v. Clarke, 112 Wn.App. 370, 379, 48 P.3d 1032 (2002). The Court was saying nothing more than child support may be set higher than the amount at the top of the schedule if the parents’ combined income is higher than \$7000. On remand the Court Of Appeals did not direct the court below to use any particular method of computing support, and it certainly did not direct the use of an improper method.

**4. The Court of Appeals decision is not inconsistent with any other appellate decision.**

The cases cited by Graham in his Petition For Review, while disapproving of the term “extrapolation”, do not contradict the Court Of Appeals decision in this case. Note that in Daubert the court found that the findings of fact entered were inadequate. In Re Marriage Of Daubert And Johnson, 124 Wn.App. 483, 99 P.3d 401 (2004) at 496-499. In Rusch the court disapproved of extrapolation, which it characterized as calculations that “merely continue the economic table past the \$7000 mark”. Marriage Of Rusch, 124 Wn.App. 226, 98 P.3d 1216 (2004) at 233. In Graham and Cunliffe’s case, the Court Of Appeals told the Superior Court to recalculate child support and that the support could be higher than the schedule amount for combined incomes of \$7000.

In Marriage Of Holmes the court found that the parent with the higher income was not necessarily the obligor. Marriage Of Holmes, 128 Wn.App. 727, 117 P.3d 370 (2005), p. 737. But in Holmes, the court found that the parent with the higher income also had custody of the child a majority of the time. Holmes at 730. In Graham and Cunliffe’s case the parties have equal residential time. Holmes is not in conflict because the relevant facts are different.

In Leslie the parents had a combined income of over \$7000 per month. In Re Marriage Of Leslie And Verhey, 90 Wn.App. 796, 954 P.3d 330 (1998) at 800-801. The trial court characterized an award of support greater than the advisory level for \$7000 combined income to be a deviation. Leslie at 801. The Court Of Appeals reversed and remanded finding that for combined incomes above \$7000 support above the top of the schedule may be awarded based on written findings of facts. Leslie at 803. Like the Leslie court, the Court Of Appeals in Graham and Cunliffe's case remanded for calculation of support. In this case the Court Of Appeals never instructed the lower court to consider a support award above highest schedule amount to be a deviation.

Here the Court Of Appeals refused to apply Arvey to a case where the parents spent equal residential time with the children and then remanded the case to have child support determined. Court Of Appeals decision p. 11. The Court Of Appeals' action did not contradict any of the cases cited. Any support ordered at an amount larger than support based on \$7000 combined net income must be supported by findings of fact. RCW 26.19.020. No one can say that child support has been incorrectly computed because the computations haven't been done yet; no one can say that the

findings of fact are inadequate because they have not yet been entered. Review cannot be based on incorrect computation of a support order because at this point there is no support order in effect.

**F. CONCLUSION**

Graham, the petitioner for review, has not shown that any of the four factors set out in RAP 13.4(b) apply to compel review. The petition should be dismissed.

DATED this 16<sup>th</sup> day of November, 2005.

RESPECTFULLY submitted,

NORM MALENG  
King County Prosecuting Attorney

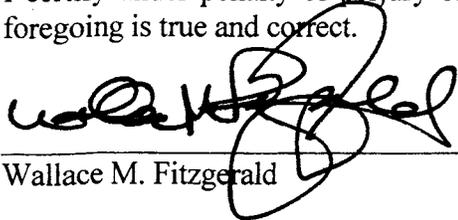
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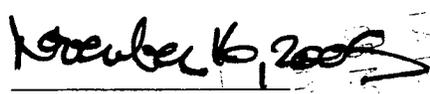
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Certificate of Service by Legal Messenger

Today I sent by ABC Legal Services, 910 5th Ave, Seattle, WA 98104, a copy of the **State's Response to Petition for Review**, in State of Washington, et. al. v. Richard Scott Graham, et. al, Supreme Court of Washington No. 77858-2, Court of Appeals, Division I, of the State of Washington No. 52622-7-I to 1) Catherine Wright Smith, attorney for the Petitioner Richard Scott Graham, at Edwards, Sieh Smith & Goodfriends PS, 1109 1st Ave., Suite 500, Seattle, WA 98101-2988; and 2) Patricia S. Novotny, attorney for Respondent Michele Leann Cunliffe, at 3418 NE 65th St., Suite A, Seattle, WA 98115-7397.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Wallace M. Fitzgerald

  
\_\_\_\_\_  
November 16, 2005  
Done in Seattle, Washington

NOV 16 2005  
11:15 AM  
CLERK OF COURT  
SUPERIOR COURT  
SEATTLE, WA