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No. ~~70048-4~~ I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

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LALIDA SCHNURMAN, Respondent

v.

SETH SCHNURMAN, Appellant

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PETITION FOR REVIEW TO
THE WASHINGTON STATE SUPREME COURT

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## I. Identity of Petitioner

Seth Schnurman, Respondent, Appellant below.

## II. Decision Below

In Re the Marriage of Lalida Schnurman, Respondent v. Seth Schnurman, Appellant, Case # 70048-1- I, filed December 30, 2013 (see **Appendix 1**).

## III. Issues Presented for Review

A. Whether The Decision Below, Or *State ex rel. M.M.G. v. Graham*, 159 Wn. 2d. 623, 152 P.3d 1005 (2007) Explain What, If Any, Provision Of RCW 26.19 Entitles Either Parent To An Award Of A Standard Calculation Of Child Support Where Both Parents Share Residential Time With Their Children Equally?

B. Whether A Court Abuses Its Discretion By Awarding A Standard Calculation Transfer Payment of Child Support Solely Because One Parent Earns Less Income Than The Other, Where The Parents Share Residential Time With The Children Equally?

C. Whether The RCW 26.19.075 Deviation Standards Apply Where There Does Not Exist A Parent Entitled To The Presumption of The Standard Calculation Of Child Support?

D. Whether There Is To Be One Method (The Standard Calculation/Deviation Construct) Where The Parents' Incomes Are Not Equal, But A Different Method Where Incomes Are Equal But The Costs Of Caring For The Children Such As Housing Costs Are Widely Disparate In Each Household?

E. Where Parents Share Equal Residential Time With Their Children, What Methodology Should Be Applied To Determine A Transfer Payment That Implements The Goals of **RCW 26.19** to Identify The Needs of the Children And Equitably Apportion Their Costs Between The Parents?

## IV. Statement of the Case

The marriage of Seth and Lalida Schnurman was dissolved on February 15, 2013. They have two children who at the time of dissolution in February 2013 were age 8 and age 6 (CP 159). At trial each party sought majority residential time with the children. The trial court instead ordered a final parenting plan in which neither parent provides primary residential care of the children. Each parent has equal residential time. (CP 172-175). Resolution of child support issues occurred through post-trial memoranda.

The decision below inaccurately states that Seth requested a deviation from the standard calculation of support, (slip opinion page 2). It inaccurately states that he suggested a "formula," and that his position was that he should not have to make a transfer payment (slip opinion page 3).

His position before the trial court was that since the legislative history of RCW 26.19 reveals that the presumption of a standard calculation only goes to the parent who provides primary residential care of the children, and there is no such parent here, the standard calculation/deviation method does not apply. (Reply Brief page 5). He urged the trial court to adopt a methodology designed to accomplish the

goals of RCW 26.19.001 similar to the one announced by this Court in *In re the Marriage of McCausland*, 159 Wn. 2d 607, 152 P.3d 1013 (2007) to include consideration of the reasonable and necessary child care costs in both households (where there is a parent with whom the children reside a majority of the time and incomes exceed the maximum advisory level).

In the appellate brief submitted on his behalf, he summarized his position before the trial court that "...he necessarily will pay her a transfer payment..." (Brief of Appellant p. 19). Thus the decision below misstates his position.

The court found the mother's after tax income to be $3,380.33 per month and the father's to be $6,337.69 (CP 108). The trial court determined that the mother was entitled to the standard calculation transfer payment solely because her income was less than the income of the father. It treated the father's approach as if it were a request for a deviation (CP 160).

## V. Argument: Reasons Why Review Should Be Accepted

### A. This Petition Involves Issues Of Substantial Public Interest (RAP 13.4 (4)):

#### 1. A Case Of First Impression

The decision below holds that an award of a standard calculation transfer payment is not limited to a parent with whom the children reside a majority of the time and by implication that entitlement to a standard calculation automatically goes to the parent who earns the lesser income. It also holds that this court's decision in *State ex rel MMG v. Graham*, 159 Wn. 2d 623, 152 P.3d 1005 (2007) is dispositive of that issue. However, in *Graham*, supra, this Court did not answer upon what authority either parent can be awarded a standard calculation transfer payment where neither one provides primary residential care, to wit: how the obligee parent is to be determined where the parents share residential time equally?

Nor did this Court in *Graham*, supra, answer the remaining questions raised here because none of them were before this Court to determine in that decision.

The decision below also provides a rationale independent of its reliance on *Graham*, supra. It cites RCW 26.19.035(1) which states that the support schedule (economic table) and the standards of RCW 26.19 shall be applied in all proceedings to establish or automatically modify child support obligations. However, the observation in the decision below that "the statute" requires "**the same process** (emphasis supplied) for all

child support obligations" is inaccurate. This misstatement of the law goes to the heart of the issues raised here. In fact, there is no statute that explains how to determine which, if any, parent is to be an obligee parent entitled to the standard calculation in any residential circumstances.

Thus there is no statute that defines a process that results in entitlement to a standard calculation to a parent solely because he or she earns less income than the other. Any yet, that is the effect the unstated holding of the decision below. The court's rationale conflicts with a number of decisions of the Court of Appeals and this Court as well.

In *Graham*, supra, the contending parties urged very different theories. The father advocated the *Arvey* formula, which begins with a premise. The premise was that each parent is entitled to the presumption of a standard calculation because each parent had primary residential care of a different child within the family. The mother and the State began with the same premise by urging the extrapolation formula to the benefit of the parent earning the lesser income since the parents' combined incomes exceeded the maximum advisory level on the economic table.

Thus, each of these competing theories, both rejected by this Court, had the same premise in common: that the presumption of a standard calculation transfer payment applies. Since none of the parties

argued an alternative method for the Court to consider, this court had no reason to question the validity of that premise (and with it, the applicability of RCW 26.19.075 the "deviation" statute) in equal sharing of residential time arrangements. Thus, appellant's brief explained to the Court below at page 14 that, as a result, the questions raised here were not addressed in *Graham*, supra, because they were not raised for this Court to determine in that case.

This is the only case to challenge the validity of both the premise, and the outcome, by raising the questions cited in section C of this petition.

**2. The Decision Below Affects A Significant Number of Households Across The State**

Attached to this petition is the most recent publication by the Washington State Center For Court Research (see **Appendix 2**). It reveals that of all residential arrangements in final parenting plans that do not contain Section 191 restrictions, equal residential time arrangements are the most common in this state as a whole, and are the most common in Benton, King, Lewis, Spokane, Thurston, and Yakima counties. In King County, from where this case arises, 25% of the filings were 50/50 arrangements. In Benton and Lewis counties, 31% were 50/50 scenarios.

In Chelan and Lincoln Counties, 24% were 50/50; Spokane and Thurston counties each, 22%, etc. It is the second most common residential arrangement in Chelan, Clark, Grant, Island, Lincoln, Snohomish, Walla Walla, and Whatcom counties.

Thus a significant number of children and parents are impacted, across the state who have equal sharing of residential time arrangements and who try to figure out how to determine child support incident to initial parenting plan orders, or when they will adjust these orders potentially, every two years, deserve definitive answers to the questions raised for the first time in this case. The decision below does not give them adequate or accurate answers to those questions.

### 3. The Potential For A Conflict Between The Divisions Of The Court Of Appeal Is Real.

There is a case pending on the same issues in Division III: *Zasso v. Lopez,* Cause No. 317111, where parents share residential time equally. Division III might well agree that *Graham*, supra, is not "dispositive"; or that it does not hold that the parent earning the lesser income is automatically entitled to the standard calculation where parents share residential time equally.

For the *Graham* court framed the issues as follows:

"1. Should the trial court apply the *Arvey* split custody formula... where the parents equally share residential time with their children?

2. Does RCW 26.19.020 create a presumption that a trial court should extrapolate when it exceeds the economic table?" *Graham*, supra at 632 (2007). What the *Graham* court "held" said nothing of the standard calculation/deviation construct; nor did it hold that RCW 26.19 entitles the parent earning the lesser income to the presumption of the standard calculation subject to deviation considerations. In fact, the *Graham*, supra, decision stands for two important but very limited principles: "We... hold the *Arvey* split residential formula does not apply in shared residential situations...

...In *McCausland* we held that the trial court may not use extrapolation when it exceeds the economic table..." *Graham*, supra at 636-637 (2007). It then extended that holding to reverse the Court of Appeals adoption of the extrapolation formula.

Thus, the language in *Graham*, supra, as to implementation of the standard calculation and deviation statute is, in reality, pure dicta.

If Division III agrees with this analysis, and is persuaded that there is no statute that either governs a determination of which, if either parent, is entitled to a standard calculation transfer payment, or that entitlement to

it automatically goes to the parent who earns the lesser income, it will not agree with Division I. Therefore the potential for its decision to be in conflict with Division I is very real.

Dicta or not, the fact is that the questions raised here were not before the *Graham* Court to answer and have never been raised before. Given the number of families impacted state-wide by how these questions are to be answered. There is a substantial public interest in this Court granting review so that these issues can be given a proper airing since although posed to the court below they were not answered in its decision.

**4. The Decision Below Draws Inaccurate Legal Conclusions To Support Its Rationale Including Conflict With The Observations Of Prior Case Law Which Demand A Definitive Decision From This Court**

The decision below makes the following inaccurate representations which form part of its rationale for holding that the standard calculation automatically is necessarily for the benefit of the parent earning the lesser income independent of its determination that *Graham* supra is dispositive.

1. "The statute does not recognize primary or secondary parent." (slip opinion page 7, footnote 5). The statute to which the decision below refers is RCW 26.19.011 (Definitions). In fact, RCW 26.19.011(9) defines a support transfer payment as "...the amount of money the court

orders one parent to pay to another parent or **custodian** (emphasis supplied)..." This Court and Division I in an earlier case, use the term "primary residential care" in referring to the parent with whom the children reside primarily. (See, *State ex rel. M.M.G. v. Graham*, supra at 634 (2007) and *Arvey*, supra at 825 (1995). The legislative history summarized in *In re the Marriage of Holmes*, 128 Wn. App. 727, 117 P.3d 370 (2005) makes clear that it is only the parent with whom the children reside a majority of the time is entitled to a standard calculation transfer payment (see section 2, infra page 16).

2. "Adopting Seth's language would also require us to ignore clear statutory language requiring courts to follow **the same process** (emphasis supplied) for all support obligations." (slip opinion at page 8). RCW 26.19.035(1) does not define a process. As previously noted, no statute defines a process for determining which parent, if any, is entitled to a standard calculation in any residential circumstances.

Case law demonstrates that in fact not all support obligations follow the same process to determine the amount of a transfer payment. There are two other scenarios in which a different methodology is required.

Division I came to the opposite conclusion in what it labeled "a split custody arrangement" (in which each parent has primary residential care of different children within the same family): "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 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 v. Wood*, 77 Wn. App. 817 at 823, 894 P.2d 1346 (1995).

This Court made a similar observation, in a second scenario in which it was "faced with the task of fleshing out an acceptable method." That scenario is where there is a primary residential parent, the combined incomes exceed the maximum advisory level of the economic table and the adequacy of the standard calculation as it relates to the actual and reasonable needs of the children is challenged. This court defined a process not defined in any statute : "...to ensure that awards of child support meet the child's or children's basic needs and to provide additional support 'commensurate with the parents' income, resources, and standard of living. RCW 26.19.001." *In re the Marriage of McCausland*, 159 Wn. 2d 607 at 617, 152 P.3d 1013 (2007).

Thus, while obligations upward or downward, as a counterpoint to the standard calculation within the economic table are "deviations" under RCW 26.19.075, obligations in excess of the maximum advisory level are not "deviations." *Leslie v. Verhey*, 90 Wn. App. 796, 954 P.2d 330 (1991). Thus the factors under RCW 26.19.075 do not govern.

What is clear is that the insistence by the decision below, that "the statute" requires the same "process" for "all support obligations," is patently inaccurate and in conflict with this Court's own determination. The rationale of the decision below conflicts with that of this Court in *McCausland*, supra in another significant way.

The decision below justifies its implied holding that the standard calculation is the entitlement of the parent earning the lesser income, irrespective of its reading of the holding in *Graham*, supra in the name of "predictability" to avoid the costs of litigation. Predictability indeed is a stated goal under RCW 26.19. But this court rejected the extrapolation formula (which could have been justified in pursuit of predictability) for the more important goal under RCW 26.19.001 of ensuring the needs of the children are met to be equitably shared between the parents given the total resources and incomes of the parties.

Thus, instead of answering the questions raised for the first time (in this case), the decision below actually begs the very questions put before it by making inaccurate observations of what "process" the statute requires for "all support obligations." These failures, in combination with the numbers of families affected by the decision below, renders it incumbent for this Court to see the substantial public interest that justifies acceptance of review of this petition.

### 5. Equal Incomes; Disparate Costs Of Care: The Quandary Created By The *Schnurman* Decision

If the decision below is not reviewed by this Court, the resulting state of the law will be the inaccurate conclusion that RCW 26.19 defines a process for all child support obligations which necessarily includes equal sharing of time residential arrangements. This is patently inaccurate. To further illustrate, this court is asked, as was the court below, in oral argument the following:

If each parent earns equal incomes, but one has no rent or mortgage payment and the other does, or covers the children on car insurance and the other does not, (numerous other examples court be cited) is the parent who shoulders the greater burden of actual child care

costs stuck because incomes are equal? If not, what "process" under the statute will enable an equitable sharing of those costs?

It won't be the deviation statute because RCW 26.19.075 is only triggered as a counter point to payment to the other parent of the standard calculation to which neither parent would be entitled if the entitlement is a function of earning the lesser of the two incomes.

Or, is there one methodology for parents who earn the same incomes, in which the parent incurring the greater costs is automatically entitled to the standard calculation, and a different methodology, based strictly on incomes, in which the parent earning the lesser income is automatically entitled to the standard calculation, since the decision below holds that the standard calculation/deviation construct governs all support obligations? Would it not make more sense to have one methodology applicable to both to resolve the quandary?

This quandary was presented in oral argument to Division I in this case. The written opinion does not even attempt to explain how its decision can be reconciled with that quandary. Thus review by this court is necessary.

### B. The *Schnurman* Decision Is in Conflict with *In re Marriage of Holmes*, 128 Wn. App 727, 117 P.3d 370 (2005)

Division I of the Court of Appeals in *Holmes*, supra emphasized two principles that go to the heart of the conflict that exists between it and the decision below. Holmes, supra, analyzed the legislative history behind RCW 26.19 which included the prior child support law. The court concluded: "However, the legislature did not change the historical presumption in practice that the parent with whom the child resided a majority of the time would satisfy the support obligation by providing for this child while in his or her home and the other parent would make a child support transfer payment." *In re the Marriage of Holmes*, supra at 739 (2005).

Thus the *Holmes* court held first, that Sallie's request that she be entitled to the presumption of the standard calculation strictly as a function of the disparity of the incomes (she only could earn $4,000 per month and he was earning $620,000 per month) was rejected because "...Jack resides a majority of the time with John" (see *In re the Marriage of Holmes*, supra at 740 (2005).

Second, *Holmes*, supra held that the entitlement to the standard calculation of support is a "presumption" in favor of the parent with whom the child resides to which there is an exception. "This exception is created by deviation..." *Holmes*, supra at 740 (2005).

Thus, two principles emerge from *Holmes* supra. This first is that RCW 26.19.075 is only triggered if the other parent is entitled to the presumption of entitlement to the standard calculation of support. The second is that the only parent entitled to the presumption of the standard calculation is the parent with whom the children reside a majority of the time. Those principles are clear from the *Holmes* supra decision.

The decision below is in direct conflict because it holds that in an equal sharing of time arrangement (where neither parent provides residential care a majority of the time) the parent who earns the lesser income is automatically entitled to the benefit of the standard calculation and the only exception is under the deviation statute.

The decision below reasons that *Holmes*, supra is inapposite because it did not involve an equal sharing of residential time. However, this is a distinction without a difference. What Sallie Holmes and Lalida Schnurman have in common is that the children do not reside with either of them a majority of the residential time neither and they each earn the lesser income than the other parent.

## VI. Conclusion

The Court in *In re the Marriage of Holmes*, supra, also observed that it is RCW 26.09 not RCW 26.19 that directs which parent makes a transfer payment. "RCW 26.09.100(1) as amended, vested the superior court with authority to "order either or both parents to pay child support in an amount to be determined under chapter 26.19 RCW." *In re the Marriage of Holmes*, supra at 375-376. In *McCausland*, supra, this court defined a process or methodology for courts and parties to follow not prescribed in RCW 26.19 but consistent with the goals defined in RCW 26.19.001, thereby fulfilling the obligation required under RCW 26.09.100(1).

Neither the decision below nor *State ex rel. M.M.G. v. Graham*, supra explain what provision, if any, of RCW 26.19, covers whether either parent who shares residential time of their children equally with the other parent is entitled to the presumption of a standard calculation transfer payment, and if not, how a transfer payment is to be determined. In fact there is no statute that explains to which parent the presumption of the standard calculation belongs in any residential arrangement. Parties and courts know that entitlement to the presumption of the standard calculation belongs to a parent if he or she provides residential care of the children a

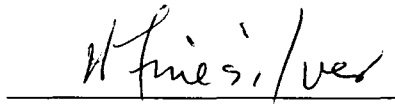
majority of the time. They only did this because the legislative history explained in *In re the Marriage of Holmes*, supra tells them so.

The decision below does not reveal that the methodology suggested by Seth Schnurman would be uniformly applicable where parents equally share residential care of their children, whether their incomes are the same or disparate since a determination of the actual and reasonable child expenses in each household that are to be encompassed through a transfer payment would be considered, quantified, and equitably shared based on the lifestyles, incomes and resources of both parents. This methodology is another vehicle through which courts and parties can fulfill the obligation imposed by RCW 26.09.100(1).

Whether or not this court agrees with his position as to the resolution of all the questions he has posed, whether or not the potential for conflict between the Divisions of the Courts of Appeal is real, or whether the decision below is in conflict with *In re the Marriage of Holmes*, supra, there are too many families state-wide who deserve a definitive answers to the questions raised here and based upon an accurate and sound rationale. Too many families deserve better than what they are left with should review be denied. Review should be accepted.

DATED this 27 day of January, 2014.

Respectfully submitted,



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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| In the Matter of the Marriage of<br>LALIDA SCHNURMAN,<br>Respondent,<br>and<br>SETH SCHNURMAN,<br>Appellant. | ) | No. 70048-1-I<br>DIVISION ONE<br>PUBLISHED OPINION<br>FILED: December 30, 2013 |



APPELWICK, J. — Lalida Schnurman and Seth Schnurman dissolved their marriage and share substantially equal residential time with their two children. In calculating the parties' child support obligations, the trial court used the child support schedule and standard calculation in chapter 26.19 RCW. The trial court found Seth to be the obligor parent and ordered him to pay a monthly transfer payment of $1,300 to Lalida. Seth argues that the standard calculation does not apply in shared residential situations. We affirm.

## FACTS

Lalida Schnurman and Seth Schnurman[1] married on June 22, 2001 and separated on July 22, 2011. They have two children, who were six and eight years old at the time of dissolution.

The trial court awarded Lalida $2,000 a month in spousal maintenance for three years. The court imputed this maintenance income to Lalida at Seth's request for purposes of calculating child support.

[1] We refer to the parties by their first names for clarity.

After a contested proceeding, the trial court entered a final parenting plan in which Lalida and Seth share equal residential time with the children throughout the year.[2] The order stated, "The children named in this parenting plan are scheduled to reside substantially equal time with both parents. Both parents are designated the custodian of the children solely for purposes of all other state and federal statutes which require a designation or determination of custody."[3]

In calculating the parties' child support obligations, the trial court found Seth's monthly net income to be $6,338 and Lalida's to be $3,380. The trial court determined Seth to be the obligor parent. Using the standard calculation for child support obligations, the court ordered Seth to pay Lalida a monthly transfer payment of $1,300 ($650 for each child).

Seth requested a downward deviation from the standard calculation for child support.[4] The trial court denied Seth's request, finding:

> While the Husband will be spending substantial time with the children, there is no evidence this will significantly increase his costs to support the children or significantly reduce Wife's expenses to support the children. Allowing a downward deviation from the standard child support calculation will also result in insufficient funds for the Wife's household.

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[2] For instance, during the school year, the children reside for two weeks with Seth Friday through Monday and Lalida Monday through Friday. Then after two weeks, the children reside with Lalida Friday through Monday and Seth Monday through Friday. This repeats every four weeks.

[3] The statute contemplates the designation of "the parent" with whom the children are scheduled to reside a majority of the time as the custodian, not both. See RCW 26.09.285. The designation is not challenged on appeal.

[4] Seth argued below that the statutory deviations in RCW 26.19.075 do not apply in shared residential situations. Therefore, he contends that he did not, in fact, seek a deviation. Because RCW 26.19.075 applies in shared residential situations, however, Seth's request for the trial court to decrease his monthly transfer payment can properly be characterized as a request for a downward deviation.

Seth appeals from the order of child support and amended decree of dissolution.

DISCUSSION

We review a trial court's order of child support for abuse of discretion. In re Marriage of Booth, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). A trial court abuses its discretion if its decision rests on unreasonable or untenable grounds. Dix v. ICT Grp., Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law or involves incorrect legal analysis. Id.

I. Shared Residential Time

Seth argues that the standard calculation for child support obligations does not apply when parents share equal residential time. He contends that only parents with whom their children spend the majority of their residential time are entitled to a support transfer payment based on the child support schedule's standard calculation. Because the parents here share residential time, Seth contends, the trial court abused its discretion in awarding Lalida a transfer payment. He insists that neither the legislature nor any Washington court has determined the proper method for calculating the amount of transfer payment when parents share equal residential time. He therefore urges us to adopt a new formula for calculating transfer payments in such cases. He argues that trial courts must consider and equitably apportion the expenses that each parent pays for shelter, transportation, and clothing.

In short, Seth is wrong. The Washington Supreme Court, affirming this court, previously held that the statutory child support schedule applies in shared residential situations like here. State ex rel. M.M.G. v. Graham, 159 Wn.2d 623, 626, 632, 152

P.3d 1005 (2007); State ex rel. M.M.G. v. Graham, 123 Wn. App. 931, 933, 99 P.3d 1248 (2004), aff'd in part, rev'd in part on other grounds, Graham, 159 Wn.2d 623, abrogated on other grounds, In re Marriage of McCausland, 159 Wn.2d 607, 152 P.3d 1013 (2007).

Chapter 26.19 RCW is the child support schedule statute. The legislature's stated intent in enacting the statute was "to insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living." RCW 26.19.001. The legislature also intended child support obligations to be "equitably apportioned between the parents." Id.

When entering an order of child support, the trial court begins by setting the basic child support obligation. RCW 26.19.011(1); Graham, 159 Wn.2d at 627. This obligation is determined from the statute's economic table, which is based on the parents' combined monthly net income, as well as the number and age of their children. RCW 26.19.011(1), .020. The economic table is presumptive for combined monthly net incomes of $12,000 or less. RCW 26.19.020, .065.

The trial court next allocates the child support obligation between the parents based on each parent's share of the combined monthly income. RCW 26.19.080(1). The court then determines the standard calculation, which is the presumptive amount of child support owed by the obligor parent to the obligee parent. RCW 26.19.011(8); Graham, 159 Wn.2d at 627. If requested, the court considers whether it is appropriate to deviate upwards or downwards from the standard calculation. RCW 26.19.011(4), (8). The court has discretion to deviate from the standard calculation based on such

factors as the parents' income and expenses, obligations to children from other relationships, and the children's residential schedule. RCW 26.19.075(1).

If the court considers a deviation based on residential schedule, it must follow a specific statutory analysis:

> 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). The trial court must enter written findings of fact supporting the reasons for any deviation or denial of a party's request for deviation. RCW 26.19.075(3); Graham, 159 Wn.2d at 627-28. After determining the standard calculation and any deviations, the trial court then orders one parent to pay the other a support transfer payment. RCW 26.19.011(9).

The residential schedule deviation was added to the child support schedule in 1991. LAWS OF 1991, 1st Spec. Sess., ch. 28, § 6. Before that, the Washington Child Support Guidelines allowed for a residential credit if the child resided overnight with both parents more than 25 percent of the time. Helen Donigan, Calculating and Documenting Child Support Awards Under Washington Law, 26 GONZ. L. REV. 13, 45 (1991). A separate worksheet provided space for determining the residential credit for each parent. Id. This special worksheet also applied to cases where parents split

residential time. Id. at 45-46. The legislature did not retain this formula for residential credit against child support with the 1991 addition of statutory deviations. See RCW 26.19.075(1)(d).

In Graham, Michelle Cunliffe and Richard Graham shared equal residential time with their two daughters. 123 Wn. App. at 933. The trial court estimated Graham's net monthly child support obligation to be $872 and Cunliffe's to be $437. Id. at 934. However, the court deviated downwards from Graham's standard calculation, finding that the girls spent significant time with him and the deviation did not result in insufficient funds for Cunliffe. Id.

Several years later, the State petitioned to modify child support. Id. at 934. Graham asked the trial court to apply In re Marriage of Arvey, 77 Wn. App. 817, 894 P.2d 1346 (1995), by analogy and split the parents' child support obligation equally, because of the children's residential time with him. Graham, 123 Wn. App. at 933. The Arvey court established a formula for determining child support when one child resides primarily with one parent and another child resides primarily with the other parent. Id. at 939.

On appeal, we refused to apply the Arvey formula to shared residential arrangements. Id. at 940-41. Instead, we held that the trial court must use the standard calculation and statutory deviations in shared residential time cases. Id. at 941. RCW 26.19.075(1)(d) permits deviation from the presumptive transfer payment based on the children's residential schedule. Id. Such a deviation could therefore be warranted when children share residential time equally between parents. Id. But, a deviation would still be discretionary and should focus on the legislature's primary intent to maintain

reasonable support for the children in each household. Id. "Thus," we concluded, "it appears that the Legislature has already considered and provided for the situation presented here." Id.

On review before the Washington Supreme Court, Graham argued that chapter 26.19 RCW does not adequately guide trial courts in calculating child support obligations when parents share residential time equally. Graham, 159 Wn.2d at 633. Therefore, Graham argued, the Arvey formula should apply in such situations. Id. The Supreme Court disagreed and affirmed our opinion. Id. at 636. The court emphasized that the plain text of RCW 26.19.075 gives trial courts discretion to deviate from the standard calculation based on residential schedule. Id. The Graham court therefore refused to read a new formula into the statute when it already contemplates shared residential situations. Id. "Because the statute explicitly gives the trial court discretion to deviate from the basic child support obligation based on the facts of a particular case, a specific formula is neither necessary nor statutorily required to ensure the parents' child support obligation is properly allocated." Id. (emphasis added).

Seth argues that the issue presented in Graham is different than the issue here, so Graham does not control. Instead, he contends that the standard calculation applies only to primary residential parents.[5] Seth ignores the express holding of Graham. The

[5] The statute does not recognize primary or secondary parents. The words "custody" and "visitation" were removed from the statute when the Parenting Act of 1987, chapters 26.09, 26.10 RCW, was adopted to remove the emotional, power-laden inference flowing from those terms. LAWS OF 1987, ch. 460, §§ 5-6; State v. Veliz, 176 Wn.2d 849, 855-56, 298 P.3d 75 (2013); see also In re Marriage of Kovacs, 121 Wn.2d 795, 800-01, 854 P.2d 629 (1993). Similarly, use of primary residential parent should be avoided. Father and Mother, or the parents' names, would be the appropriate designations here.

Graham court was presented with and rejected an alternative formula for calculating transfer payments when parents share residential time. Id. 635-36. Instead, the Graham court held that the standard calculation and statutory deviations for transfer payments apply when parents share residential time equally. Id. at 636. Graham is dispositive here. The statute already allows for deviation based on residential time and prescribes how to do it.[6]

Adopting Seth's proposed formula would also require us to ignore clear statutory language requiring courts to follow the same process for all child support obligations. A stated purpose of the child support schedule is to reduce "the adversarial nature of the proceedings by increasing voluntary settlements as a result of the greater predictability achieved by a uniform statewide child support schedule." RCW 26.19.001(3). Seth's alternative ad hoc formula defeats this predictability. The statute mandates that schedule applies "[i]n each county of the state" and "[i]n all proceedings in which child support is determined or modified." RCW 26.19.035(1). Likewise, the statute requires that "[t]he provisions of this chapter for determining child support and reasons for deviation from the standard calculation shall be applied in the same manner by the court, presiding officers, and reviewing officers." RCW 26.19.035(1). This undoubtedly includes shared residential situations like the one at issue here.

[6] Seth's reliance on In re Marriage of Holmes, 128 Wn. App. 727, 117 P.3d 370 (2005), does not compel a different conclusion. Holmes did not involve a 50/50 shared residential situation like here. Id. at 740. The Holmes court simply held that the trial court acted within its discretion in terminating the father's child support obligation. Id. at 740-41. Though the father made significantly more money than the mother, the residential schedule had changed and the son resided a majority of the time with the father. Id. at 740-41.

The trial court here followed the process mandated by the child support schedule and Graham. The court first determined the parties' combined monthly net income. The court identified Seth as the obligor parent. Using the standard calculation, the court ordered Seth to pay Lalida a $1,300 monthly transfer payment. Upon Seth's request, the court considered whether his shared residential time with the children necessitated a downward deviation. The court found that it did not, because Seth's time with the children did not significantly increase his costs to support them and a downward deviation would leave Lalida with insufficient funds. This was the correct process under the statute and under Graham for the parties' shared residential arrangement. It would have been error for the trial court to apply the alternative formula Seth requested.

We hold that the standard calculation and residential schedule deviation in the child support schedule apply when parents share equal residential time like here. Therefore, the trial court did not err in ordering a transfer payment from Seth to Lalida based on the standard calculation.

II. Attorney Fees

Lalida requests her attorney fees on appeal on three bases: the frivolous nature of the appeal, Seth's intransigence, and her need and Seth's ability to pay.

Lalida first argues that the appeal is frivolous under RAP 18.9(a), because this matter was already decided in Graham. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there is no reasonable possibility of reversal. Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. Id. An appeal that is affirmed

simply because the arguments are rejected is not frivolous. Id. Seth argues that Graham is distinguishable, because there the parties did not dispute that the standard calculation was the proper starting point for calculating transfer payments. Here, Seth argues that the standard calculation does not apply. Though this is a meritless argument treading right up to the line, it is not so entirely devoid of merit as to be wholly frivolous.

Second, Lalida argues that even if the appeal is not frivolous, Seth has been intransigent by making a straightforward application of the child support schedule unduly difficult. Intransigence is demonstrated by conduct such as litigious behavior, filing repetitive or excessive motions, or discovery abuses. In re Marriage of Wallace, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002). Lalida makes no showing of intransigence on appeal—and the trial court found none below—so we decline to award fees on this basis.

Lastly, she contends that she is entitled to fees under RAP 18.1(a) and RCW 26.09.140, because of her relative need and Seth's ability to pay. The trial court found that Lalida has the need for attorney fees, but Seth has no further ability to pay. Lalida does not argue that the trial court erred in refusing to award fees based on Seth's inability to pay. Despite her obvious need and the fact that she did not seek these added expenses, we see no evidence in the parties' available financial information of a significant positive change in Seth's ability to pay.[7] We therefore deny Lalida's request for fees.

[7] Lalida moved to strike Seth's financial affidavit as untimely filed. Seth filed his financial affidavit on November 15, 2013, two days after oral argument. This violates

III. Citation to Unpublished Opinion

RAP 10.3(a)(6) requires the argument portion of an appellate brief to include citations to legal authority. RAP 10.7 and 18.9(a) authorizes us to sanction, sua sponte, a party or counsel for failing to comply with rules of appellate procedure. In Lalida's response brief, her counsel cited and relied on an unpublished appellate decision from this court. This violates GR 14.1(a), which prohibits citing unpublished Washington court of appeals opinions as authority. For this violation, we impose a $100 sanction against Lalida's counsel, payable to the registry of this court.

We affirm.

Lupelurick, J

WE CONCUR:

Becker, J.

RAP 18.1(c), which requires a party to file a financial affidavit no later than 10 days prior to oral argument. We therefore grant Lalida's motion to strike Seth's financial affidavit.

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WASHINGTON COURTS
ADMINISTRATIVE OFFICE OF THE COURTS

Washington State Center for Court Research

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# Residential Time Summary Reports Filed in Washington from July 2009 to June 2010

## INTRODUCTION

In 2007, the Washington State Legislature directed the Administrative Office of the Courts (AOC), in consultation with the Department of Social and Health Services Division of Child Support, to report on information obtained from Residential Time Summary Reports (RTSRs). This publication presents information obtained from RTSRs from July 1, 2009, through June 30, 2010.

According to RCW 26.09.231, parties involved in dissolution matters are required to complete an RTSR and file it along with the court order. RTSRs summarize information from original or modified Parenting Plans. They contain information on the amount of time children are to spend with each parent, the representation status of the parties, whether risk factors (e.g., abuse or neglect) have been found for the mother and/or the father, the type of dispute resolution to be used by the parties, and whether the Parenting Plan was agreed to by both parties, entered by default, or decided by the court after a contested hearing. If the same residential schedule does not apply to all children in a family, separate RTSRs are completed for each child's schedule.

Because RTSRs are not signed by a judicial officer and the information contained in the report is not verified against the final Parenting Plan by any court staff, the degree to which RTSR filings represent complete and accurate information is unknown.

From July 2009 through June 2010, 5,732 Residential Time Summary Reports were filed in Washington's superior courts, an increase of 13% over the previous year. Two hundred thirty-seven families (4.1%) had more than one RTSR. The average number of children per residential schedule was 1.5. Seventy-five percent (75%) of the RTSRs summarized Parenting Plans that were part of the original orders, 6% were related to modifications of prior orders, and 19% were unspecified.

Citation: George, T. (2010). *Residential Time Summary Reports Filed in Washington from July 2009 to June 2010.* Olympia: Washington State Center for Court Research

**SUMMARY**

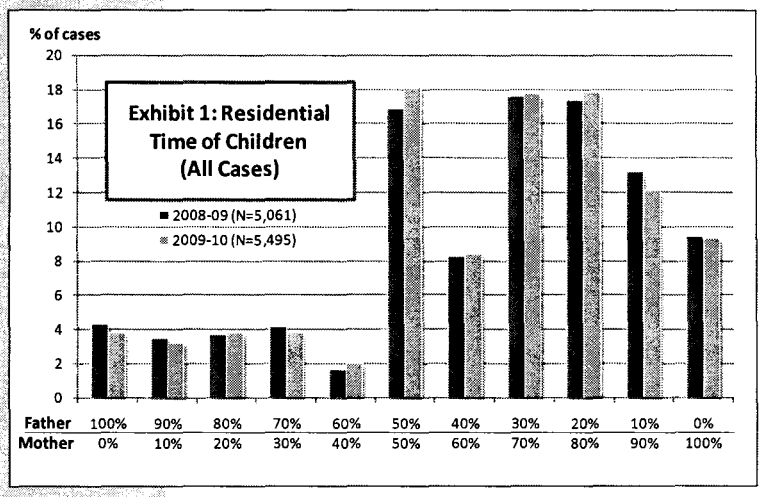
This report analyzed 5,495 Residential Time Summary Reports filed in Washington from July 2009 through June 2010. In nearly two-thirds of families, children were scheduled to spend more time with their mother than their father. The most common residential schedules (each occurring 18% of the time) were for children to spend equal time with their mother and father, 70% of their time with their mother and 30% with their father, or 80% with their mother and 20% with their father.

Parents with risk factors received less residential time with their children. Ten percent (10%) of fathers and 4% of mothers had at least one risk factor. The most common risk factor for fathers was domestic violence (4.3%), followed closely by chemical dependency (3.9%), while for mothers it was chemical dependency (1.7%). Both the number and type of risk factors were related to the residential time of children.

Self-representation continues to increase in dissolution cases. During the 2007-08 period, 44% of cases involved both parties appearing without counsel (pro se). This figure increased to 58% in 2008-09, and to 60% during the current reporting period. Fewer than one-in-five cases now involve attorneys for both parties. When one party had an attorney and the other was self-represented (23% of cases), the party with the attorney received more residential time.

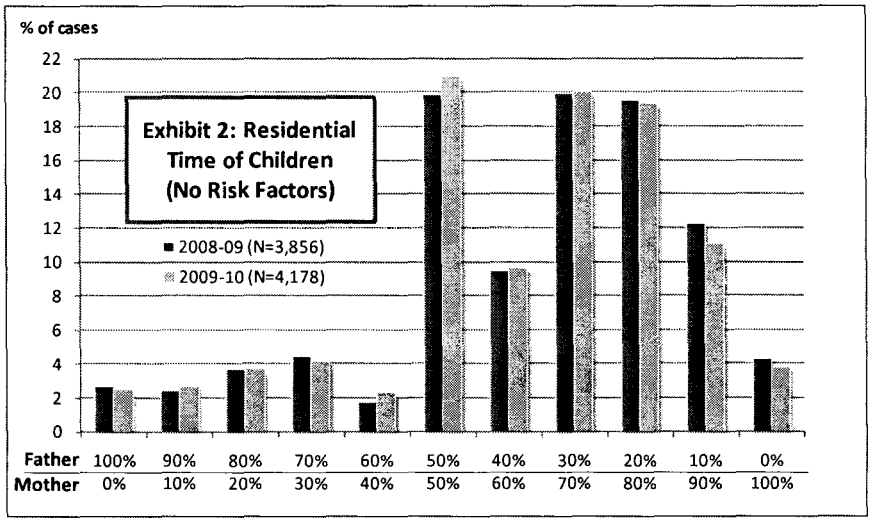
## RESIDENTIAL TIME OF CHILDREN

On the RTSR forms, respondents indicated which of 11 categories best represented the amount of time children were scheduled to reside with each of their parents. Category options were in increments of 10% (e.g., 0% with mother / 100% with father; 10% with mother / 90% with father). Exhibit 1 displays the percentage of cases falling into each of the 11 categories for the 2009-10 year in comparison to the 2008-09 year.




Across the entire sample, results indicated that nearly two-thirds of children (65%) were scheduled to spend more time with their mother than their father. Eighteen percent (18%) of the residential schedules involved an equal division of time, while 17% of the children were scheduled to spend more time with their fathers. The most common residential schedules, each occurring 18% of the time, were for children to spend equal amounts of time with both parents, or 70% or 80% of the time with their mother. Mothers had sole custody in 9% of cases, while fathers had sole custody in 4% of cases. The 2009-10 data were very similar to the 2008-2009 data, with the percentage of equal custody cases rising 1%.

Residential time may be limited by the courts if certain risk factors are established. Risk factors were more likely for fathers than for mothers (Exhibit 3); for ease of comparison, Exhibit 2 displays fathers' and mothers' residential time for those cases in which neither parent had any risk factors.




Of the 4,758 cases with complete information regarding risk factors, 4,178 (88%) did not involve any risk factors for either parent. Analysis of cases with no risk factors indicated a pattern of residential schedules that is similar to the residential schedules of all cases. In 64% of cases with no risk factors, children were scheduled to spend more time with their mother. The most prevalent schedule, occurring with 21% of cases, was for children to spend equal time with their mother and father. Sole custody occurred for just 3% of the families.

## RESIDENTIAL TIME AND TYPE OF PARENTAL RISK FACTORS

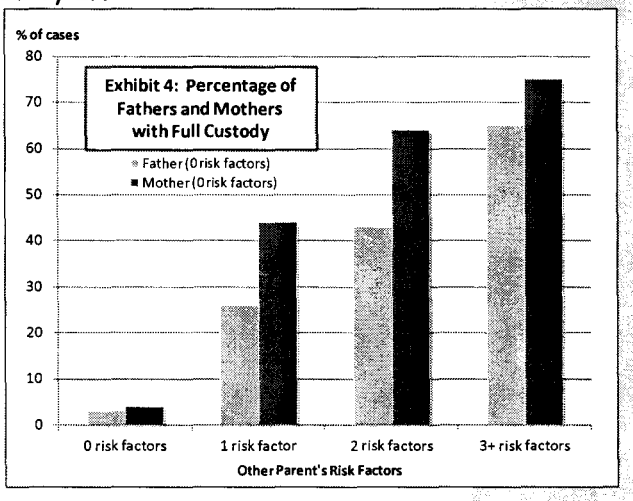
On the RTSR form, respondents indicated if the mother or the father had been found by the court to have any risk factors: history of domestic violence, abuse or neglect of a child, chemical dependency issues, mental health issues, or "other" factors that could limit or prohibit a parent's contact with the children and the right to make decisions for the children.

**Exhibit 3: Percentage of Cases Involving Types of Risk Factors**

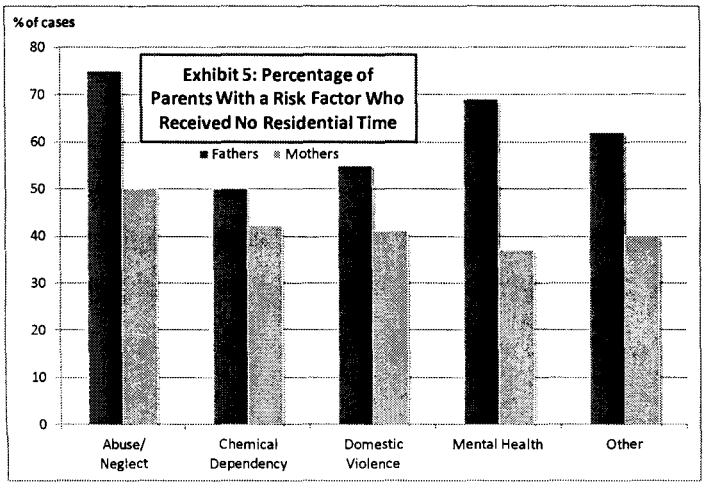
| Established Risk Factor | Mother | Father |
|---|---|---|
| Abused or neglected a child | .7 | 2.1 |
| Chemical dependency issues | 1.7 | 3.9 |
| Committed Domestic Violence | .5 | 4.3 |
| Mental health issues | .6 | .9 |
| Other Risk Factor | 1.1 | 3.6 |

Overall, 4% of mothers and 10% of fathers were found to have at least one risk factor. For mothers, the most common risk factor was chemical dependency (1.7%). The percentage of mothers with each risk factor was exactly the same as it was during the 2008-09 year. For fathers, the most common risk factor was having committed domestic violence (4.3%; see Exhibit 3). The percentage of fathers who were reported to have abused or neglected a child, have chemical dependency issues, or committed domestic violence all decreased by 1%.

As in past years, when one parent had risk factors and the other did not, the vast majority of residential schedules involved children spending most or all of their residential time with the parent with no risk factors. For example, the mothers with no risk factors obtained full custody 44% of the time when the father had one risk factor, 64% of the time when the father had two risk factors, and 75% of the time when the father had three risk factors; fathers with no risk factors obtained full custody 26%, 43%, and 65% of the time when the mother had one, two, or three risk factors, respectively (see Exhibit 4).

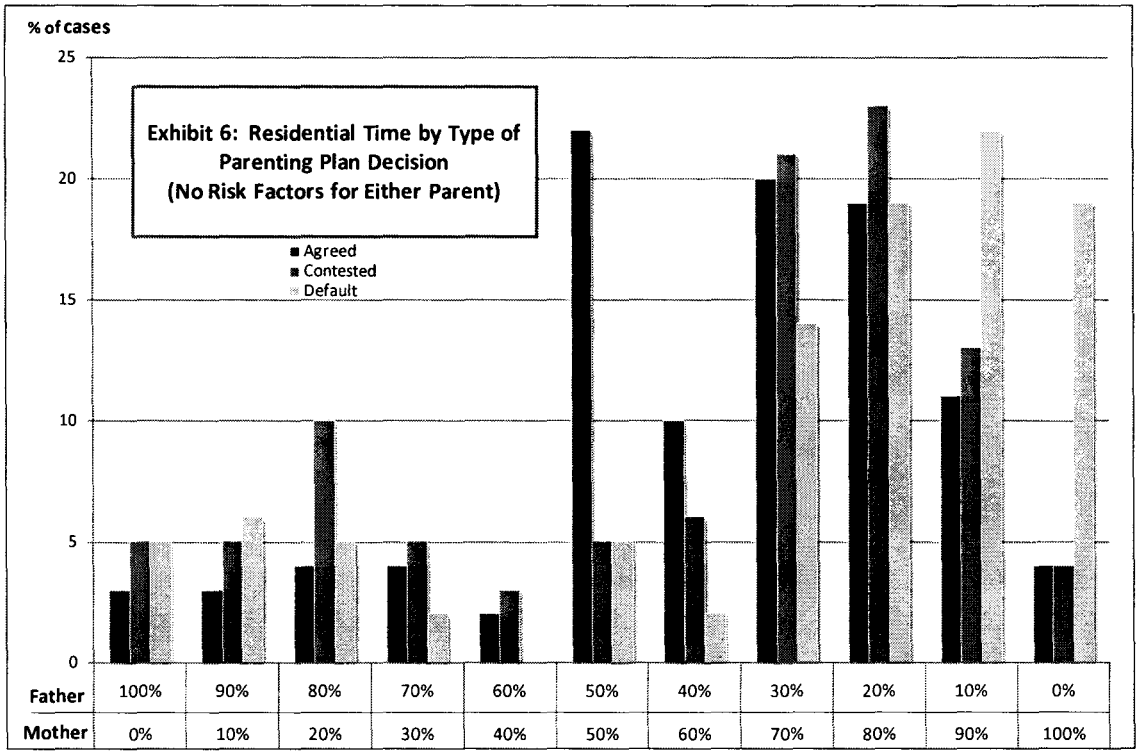



Different risk factors had different impacts on whether a parent received any residential time with a child; the impact varied by the gender of the parent (see Exhibit 5). For example, abuse or neglect of a child was associated with a ruling of zero residential time for 75% of fathers and 50% of mothers with that risk factor. Gender-related differences in the likelihood of receiving zero residential time also occurred with mental health (69% of fathers and 37% of mothers were denied any residential time), "other" issues (62% of fathers, 40% of mothers), domestic violence (55% of fathers, 41% of mothers), and chemical dependency (50% of fathers, 42% of mothers).



## RESIDENTIAL TIME OF CHILDREN AND TYPE OF PARENTING PLAN DECISION

Overall, 88% of the Parenting Plans were by agreement of the parties, 2% were decided after a contested hearing or trial, and 10% were by default. To examine whether the residential time of children was related to the type of decision, cases in which there were no risk factors for either parent were compared. For agreed cases, 64% of the mothers received the majority of time, and 22% of mothers and fathers received equal time (see Exhibit 6). For the few contested cases, 67% of mothers received the majority of time, but only 5% of mothers and fathers received equal time. And for cases resulting in default, 76% of mothers received the majority of time, and again only 5% of cases resulted in equal time between the parents. Results from the 2009-10 data are very similar to those from 2008-09 with one exception: in contested cases, the percentage of fathers receiving the majority of time increased from 15% in 2008-09 to 28% in 2009-10.



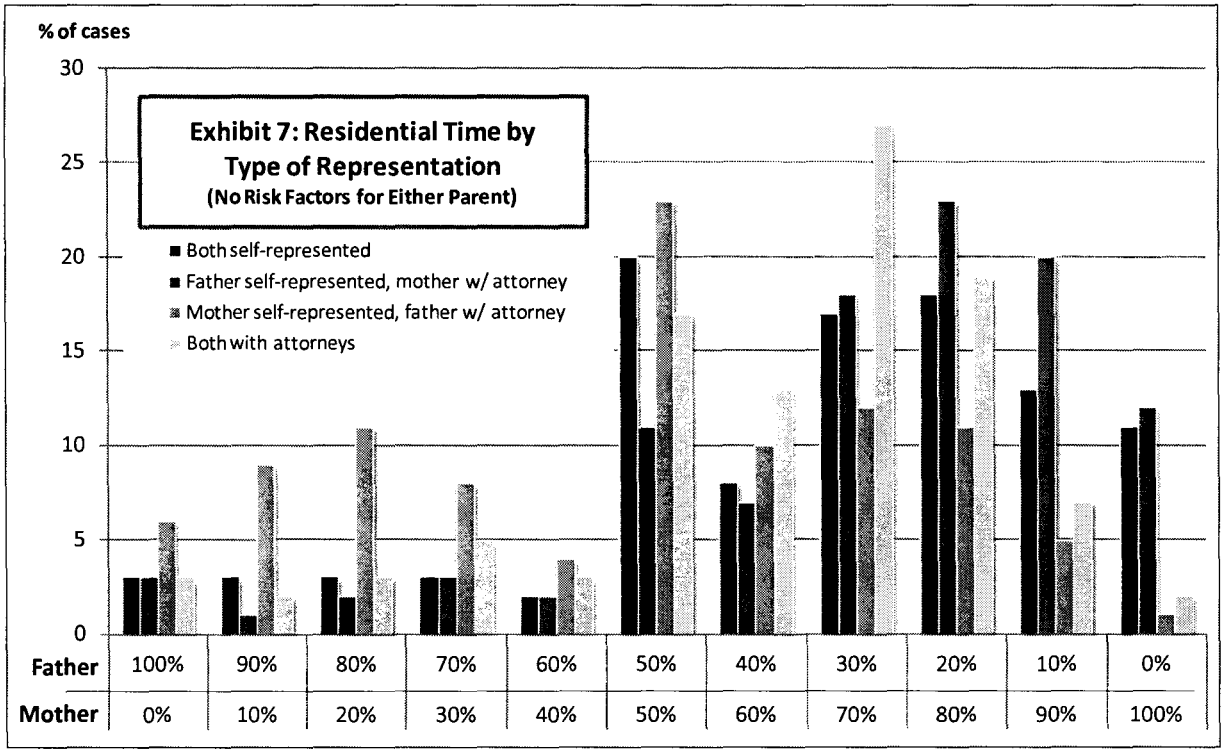

## RESIDENTIAL TIME AND TYPE OF REPRESENTATION

On the Residential Time Summary Reports, respondents indicated whether the father and mother were self-represented or represented by an attorney. For 60% of the cases, both parties were self-represented. For 23%, one party was self-represented and the other party was represented by an attorney; for 18% of the cases, both parties were represented by an attorney.

Exhibit 7 presents the residential time distributions for each combination of party representation for cases with no risk factors for either parent. Results indicated that when the father has an attorney, he is likely to get more residential time. That is, when fathers have an attorney and mothers are self-represented, the distribution of residential time is nearly equal (fathers with majority of time = 37%, mothers with majority of time = 38%, even distribution of time between

the parents = 23%). When fathers and mothers both have an attorney, the percentage of fathers receiving very little or no residential time (i.e., 0–10% of time) decreased from 24% to 9%, and the percentage of fathers with some time (i.e., 30-40% of time) increased from 25% to 40% in comparison to cases in which both parties were self-represented.

When mothers have an attorney and the father is self-represented, mothers also tend to receive more residential time in comparison to when both parties are self-represented (80% vs. 67% receiving the majority of residential time). However, mothers are more likely to receive all or nearly all of the residential time (90-100%) when both parties are self-represented in comparison to when both parties have an attorney (24% vs. 9%; see Exhibit 7).




## DISPUTE RESOLUTION

On the RTSR, respondents were asked to indicate which type of dispute resolution process the parents would use to resolve any future disagreements about the Parenting Plan: counseling, mediation, arbitration, or no dispute resolution process except court action.

Overall, 49% indicated that disputes would be resolved through mediation, 38% indicated no dispute resolution process except court action, 7% indicated counseling, and 2% indicated arbitration. Mediation was the preferred method of dispute resolution when the case involved no parental risk factors (53%), while court action was preferred when risk factors were involved (68%).

## RESIDENTIAL TIME BY COUNTY AND QUARTER

The distribution of residential time schedules when no risk factors were found for either parent is presented by county in Reference Table 1. In addition, the distribution is presented for each of the four calendar quarters of the study period. Counties in which fewer than 20 RTSRs were filed involving no risk factors for either parent were not included.

**Reference Table 1: Distribution of Residential Time Schedules by County and Quarter (when No Risk Factors for Either Parent)**

| | Mother | 0% | 10% | 20% | 30% | 40% | 50% | 60% | 70% | 80% | 90% | 100% |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Father | 100% | 90% | 80% | 70% | 60% | 50% | 40% | 30% | 20% | 10% | 0% |
| **COUNTY** | (N) | | | | | | | | | | | |
| Benton | 140 | 4% | 2% | 2% | 1% | 2% | 31% | 7% | 11% | 13% | 16% | 10% |
| Chelan | 25 | 0 | 0 | 8 | 8 | 8 | 24 | 4 | 32 | 12 | 4 | 0 |
| Clark | 332 | 2 | 2 | 5 | 5 | 2 | 19 | 13 | 23 | 14 | 10 | 5 |
| Grant | 61 | 5 | 3 | 0 | 7 | 0 | 18 | 7 | 21 | 18 | 12 | 10 |
| Island | 96 | 2 | 2 | 5 | 5 | 3 | 19 | 5 | 30 | 18 | 7 | 3 |
| King | 511 | 3 | 2 | 3 | 4 | 3 | 25 | 11 | 18 | 18 | 11 | 2 |
| Kitsap | 208 | 1 | 3 | 5 | 5 | 3 | 15 | 10 | 18 | 25 | 12 | 2 |
| Lewis | 48 | 2 | 2 | 2 | 4 | 2 | 31 | 6 | 19 | 17 | 10 | 4 |
| Lincoln | 916 | 1 | 2 | 3 | 3 | 2 | 24 | 9 | 16 | 25 | 11 | 3 |
| Mason | 54 | 2 | 4 | 6 | 7 | 2 | 19 | 4 | 26 | 20 | 7 | 4 |
| Pierce | 525 | 6 | 3 | 5 | 5 | 2 | 16 | 11 | 19 | 17 | 11 | 5 |
| Skagit | 69 | 1 | 1 | 3 | 1 | 4 | 15 | 17 | 22 | 19 | 10 | 6 |
| Snohomish | 211 | 2 | 5 | 4 | 5 | 2 | 19 | 9 | 15 | 25 | 12 | 2 |
| Spokane | 308 | 1 | 5 | 4 | 4 | 2 | 22 | 10 | 22 | 19 | 10 | 1 |
| Thurston | 218 | 2 | 5 | 4 | 5 | 3 | 22 | 9 | 17 | 21 | 8 | 5 |
| Walla Walla | 37 | 3 | 0 | 11 | 5 | 3 | 16 | 5 | 11 | 27 | 16 | 3 |
| Whatcom | 118 | 1 | 0 | 4 | 3 | 3 | 20 | 12 | 24 | 15 | 16 | 3 |
| Yakima | 162 | 1 | 1 | 1 | 7 | 0 | 20 | 5 | 48 | 9 | 6 | 2 |
| **STATE** | **4,178** | **3%** | **3%** | **4%** | **4%** | **2%** | **21%** | **10%** | **20%** | **19%** | **11%** | **4%** |
| **QUARTER** | | | | | | | | | | | | |
| July 09 - Sep 09 | 947 | 4% | 3% | 3% | 4% | 2% | 23% | 10% | 19% | 19% | 10% | 4% |
| Oct 09 - Dec 09 | 1043 | 2 | 3 | 4 | 3 | 3 | 20 | 10 | 20 | 22 | 10 | 4 |
| Jan 10 - Mar 10 | 1172 | 2 | 3 | 3 | 4 | 2 | 20 | 10 | 19 | 18 | 13 | 4 |
| Apr 10 - Jun 10 | 1016 | 3 | 3 | 4 | 5 | 3 | 21 | 8 | 22 | 18 | 12 | 3 |

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