

52622-7

52622-7

77858-2

52622-7

NO. 5622-7-1

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

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

vs.

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

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

The Honorable Ronald Kessler, Judge

REPLY BRIEF OF APPELLANT

FILED
2011 DEC 22 AM 11:13

PATRICIA NOVOTNY
Attorney for Appellant
3418 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711

TABLE OF CONTENTS

ISSUES IN REPLY	1
Introduction	1
Applying the <i>Arvey</i> analysis to shared residence arrangements deprives the children of adequate support.	2
CROSS APPEAL	8
Graham’s claim for reimbursement was properly denied as untimely, which meant the court was unable to determine whether reimbursement would harm the children.	8
ATTORNEY FEES	10

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Marriage of Stern, 68 Wn. App. 922, 932, 846 P.2d 1387
(1993)..... 9

In re the Marriage of Arvey, 77 Wn. App. 817, 894 P.2d 1346
(1995)..... 2

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 25, 482 P.2d 775
(1971)..... 7

STATUTES

RCW 26.09.140 10

RCW 26.19.001. 1

RCW 26.19.080(3), 9

OTHER AUTHORITIES

American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2000) 3

RAP 18.1. 10

Stone and Applewick, *Practice Alert: Understanding In re Marriage of Arvey*, Washington State Bar News, September 1995..... 4

Weber, 20 Wash. Practice § 37.6 (2002 Pocket Part Update)..... 4

ISSUES IN REPLY

1. The **Arvey** analysis does not apply to shared residence arrangements because it does not provide for adequate support for the children.
2. A shared residence arrangement is more costly than a split residence arrangement.
3. The trial judge's order on revision should be vacated and the cause remanded either for reinstatement of the commissioner's order or for recalculation according to the same principles as applied by the commissioner (extrapolation + residential credit) or according to the American Law Institute Principles for shared residence arrangements.

Introduction

There are two goals to be achieved by a child support calculation. First and most importantly, the goal is "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 second goal is to equitably apportion the child support obligation between the parents. *Id.* The order entered here by the superior court judge fails both these goals.

Applying the *Arvey* analysis to shared residence arrangements deprives the children of adequate support.

Graham's argument in support of an "*Arvey*-like analysis" in this case is premised on a false equivalency between split and shared residential arrangements. *In re the Marriage of Arvey*, 77 Wn. App. 817, 894 P.2d 1346 (1995). However, the important distinction between these two arrangements lies at the heart of this appeal. In short, as will be detailed below, split residential arrangements and shared residential arrangements result in entirely different economies, with the latter being simply more costly and, thus, requiring an increased level of support for the children. Ignoring this reality, as the trial judge did here, effectively reduced by half the required level of support for the Cunliffe-Graham children (i.e., from \$800 to \$400).

In a split residence arrangement, one or more children reside primarily with one parent while the other child or children reside with the other parent. Such arrangements are less economically inefficient than having the children reside in a single, primary residence, as noted by the authors of the ALI Principles of the Law of Family Dissolution. "Raising all the parties' children in one household takes advantage of economies of scale and the

diminishing marginal cost of each additional child.” American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations § 3.09, p. 492 (2000) (hereafter “ALI Principles”).¹ Such arrangements are unusual and not accounted for in the Washington Legislature’s child support statute. Accordingly, the courts had to devise a method for ensuring a standard of living in both residences sufficient to support the children and commensurate with the parties’ incomes, while minimizing disparities between the two households.

Arvey seeks to accomplish that with a three-step process. *In re the Marriage of Arvey*, 77 Wn.App. 817, 894 P.2d 1346 (1995). First, the court determines basic child support according to the guidelines for however many children are in the family. Then, the court determines each parent’s proportional share and divides by the number of children according to where they reside. Whichever parent has the larger net obligation pays the other parent the difference between the two parents’ respective obligations.

Though it matters not to this case, as a practical matter, because both children are in the same age bracket, it’s worth noting

¹ The applicable sections of the ALI Principles are attached as an appendix.

that commentators subsequent to **Arvey** suggested an improvement to the formula that takes into account the different ages of the children, just as does the child support schedule. See Stone and Applewick, *Practice Alert: Understanding In re Marriage of Arvey*, Washington State Bar News, September 1995 (pages 49-50) (suggests calculating on separate worksheets for the two households); Weber, 20 Wash. Practice § 37.6 (2002 Pocket Part Update) (recommends a similar "net-orders method").² This latter method accords more with one proposed by the ALI commissioners, though all three methods operate from similar foundations. See ALI Principles § 3.09, pages 492-498. Moreover, these approaches also implicitly acknowledge the difference in calculating for a one-child household versus a two-child household.

Certainly, as **Arvey** recognized, split and shared residential arrangements are not the same thing. 77 Wn. App. at 823 ("This residential schedule is therefore consistent with a "split-custody" arrangement and not, as the trial court found, an equally shared residential arrangement.") Effectively, a shared residence arrangement is a dual-residence arrangement, with each parent

² Effectively, both commentators agree that child support should be calculated separately for each household, rather than as if the children lived primarily in a single household, as was done in **Arvey**.

making a primary home for the same number of children. Such an arrangement is economically inefficient, as is a split residence arrangement, only more so. "When both parents have substantial residential responsibility and each provides a home for the child, child expenditure is likely to be significantly greater than it would be were the child living predominantly or exclusively in one household." ALI Principles § 3.08, p. 482. In other words, the total cost of childrearing necessarily is increased; indeed, it is estimated to rise by 50%, which is "consistent with estimates of marginal child expenditure in one-parent households." *Id.*, at 483.

In this case, the family court commissioner recognized this simple reality, observing that "[e]ach parent is required to furnish a primary household for the children. Each parent provides full clothing, toys and books for the children and pays their expenses while residing in his/her household." CP 214. Effectively, there is more of everything: four bedrooms, four bicycles, four sets of clothing, larger houses that need mortgages paid and heat paid, et cetera.

Because child expenditure must increase to support children adequately in dual-residence arrangements, overall child support must also increase. Thus, for example, the ALI proposes use of a

multiplier (1.5) to arrive at each parent's obligation. First, the child support obligation is calculated for each parent as if the other was the primary residential parent (i.e., in Washington, the basic child support obligation). The results are then multiplied by 1.5. Those results are then apportioned according to each parent's percentage of residential responsibility (here, 50%). The difference between the two resulting figures constitutes the transfer payment. ALI Principles § 3.08, page 481-482.

The attached table illustrates this calculation as applied to Cunliffe and Graham. The table also illustrates how different the results from this calculation from those arrived at under an **Arvey** analysis. See Table 1 ("split" versus "shared").

The result of the ALI analysis is a transfer payment from Graham to Cunliffe of \$817.27. Coincidentally, the family court commissioner arrived at almost the exact same figure (\$800.00) through extrapolation and application of the residential credit (RCW 26.19.075(1)(d)). First, the commissioner extrapolated using a fraction derived from dividing the actual combined monthly net income of the parties by the top of the child support guidelines ($\$8801/7000 = 1.257$). Then the commissioner applied that

multiplier to the basic child support obligation ($\$946 \times 1.257 = \$1,189 \times 2 = \$2,378$). Finally, the commissioner reduced the obligor parent's (Graham) net support obligation by half in recognition of the 50% residential care provided ($\$1,629 \times .49 = \800). In other words, by another route, the commissioner arrived at the same conclusion as would be obtained under the ALI Principles.

Graham's argument focuses, as did the trial judge, mainly on claims of inequity to Graham. The calculations performed above under the ALI formula and, in family court, by the commissioner, focus instead on the best interests of the children. On appeal, Graham argues that the trial judge's decision falls within the scope of his discretion. However, discretion must be exercised within the bounds of reason. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 25, 482 P.2d 775 (1971). And it simply does not make sense to treat shared residence arrangements as equivalent to split residence arrangements. It makes especially bad sense given the overarching concern of the child support statute: supporting the children. Because it requires more to support children in a shared

or dual-residence arrangement, the only thing that makes sense is to provide for more support.

The ALI Principles offer a reasoned formula by which to achieve that goal. The Washington Legislature has provided an alternative and the commissioner demonstrated how, by taking the extrapolation + residential credit route, a child support level adequate to provide for these children results. In any case, the trial judge's order revising the commissioner constitutes an abuse of discretion because it is untenable. Accordingly, Cunliffe asks the trial judge's order of support be vacated. Whether or not that means reinstatement of the family court commissioner's order (which seems simplest and most economical), or remand for recalculation, this Court must decide. Either way, the present order, and its illogical premise, should be reversed.

CROSS APPEAL

Graham's claim for reimbursement was properly denied as untimely, which meant the court was unable to determine whether reimbursement would harm the children.

The problem with Graham's claim for overpayment credit is timing. He did not raise this claim until his response to Cunliffe's motion for reconsideration to the trial judge. CP 330, 332. The trial

court denied his request after receiving argument and authority for why the request was untimely. CP 349-350. Accordingly, there has never been a hearing on whether the credit would work against the children's best interest. The credit is not automatic. Rather, in the unique circumstances of child support, a court considering a request for reimbursement must consider the impact on the children before ordering reimbursement (including via credits) for overpayments. *See, e.g., In re Marriage of Stern*, 68 Wn.App. 922, 932, 846 P.2d 1387 (1993). In particular, reimbursement is unavailable unless it can be demonstrated that it will not cause an "undue hardship upon the receiving parent or the child." *Id.* This principle derives from the recognition that crediting overpayments against current and ongoing payments risks depriving children of necessary support, since past payments likely have been already spent for that purpose. (There is a statutory exception for day care and special child-rearing expenses, RCW 26.19.080(3), which does not apply here.)

Thus, before ordering reimbursement of an overpayment, the court must consider how the overpayment has been spent, the current needs of the children, the current circumstances of the parties, and all other facts relevant to determining whether

effectively reducing future support payments will create a hardship for the children or Cunliffe. The factual inquiry necessary to determine whether reimbursement is appropriate in this case (i.e., given the current circumstances of the parties) was beyond the scope of the reconsideration motion and, certainly, is beyond this record on appeal. That is, regardless of who has the burden of proof (Br. Cross-Appellant, at 15), this issue was not raised below in a manner that allowed for its adjudication. Accordingly, Graham's appeal on this point should be denied.

ATTORNEY FEES

Cunliffe reiterates her request for attorney fees based on need and ability to pay and adds to that a request for attorney fees for responding to the cross-appeal. RCW 26.09.140, RAP 18.1.

Dated this 19th day of December, 2003.

RESPECTFULLY SUBMITTED,



PATRICIA NOVOTNY
WSBA #13604
Attorney for Appellant

TABLE 1: COMPARING SPLIT AND SHARED RESIDENCE CALCULATIONS IN A TWO-CHILD FAMILY WHERE BOTH CHILDREN ARE OVER 12 YEARS OF AGE AND THE PARENTS' COMBINED MONTHLY INCOME EXCEEDS \$7,000.00 AND THE PARENTAL PROPORTIONS ARE IDENTICAL TO GRAHAM AND CUNLIFFE.

Split ¹				
946 ² x 2 = 1892	1892 x .212 = 401.10	401.10 x .50 (one child)	200.55	+544.90 ³
946 x 2 = 1892	1892 x .788 = 1490.90	1490.90 x .50 (one child)	745.45	<544.90>

Shared ⁴						
946 x 2 = 1892	1892 x .212 = 401.10	1892 x .788 = 1490.90	401.10 P1 to P2 = 601.65	401.10 x 1.5 = 601.65	601.65 x .5 = 300.83	+817.27 ⁵
946 x 2 = 1892	1892 x .212 = 401.10	1892 x .788 = 1490.90	1490.90 P2 to P1	1490.90 x 1.5 = 2236.20	2236.20 x .5 = 1118.10	<817.27>

1. Split Residence: one or more children live with one parent while the other child or children live with the other parent. For illustrative purposes, this table assumes two children.
2. \$946 = basic support obligation for each child aged 12 and over based on combined monthly income exceeding \$7000.
3. This transfer payment represents the result of an **Arvey** calculation applied to the Graham-Cunliffe family as if they had a split-residence arrangement. (Total basic child support obligation of \$1892 multiplied by each parent's

proportional share, then "split" (one child with each parent), with the result obtained by subtracting the lesser figure from the greater.)

4. Shared Residence: the children together spend roughly equal periods of time in each parent's residence. The calculations in this table assume an exact 50/50 share.
5. This transfer payment reflects the result of an ALI-type calculation of child support for the Graham-Cunliffe family, arrived at as follows: Total basic child support obligation of \$1892 multiplied by each parent's proportional share, resulting in the transfer payment that would obtain if Parent 2 (P2 = Graham) provided the primary residence for the children (i.e., this is what Cunliffe would owe Graham). That figure is then multiplied by 1.5 to arrive at the estimated greater cost of supporting the children in a shared residence arrangement. That cost is then multiplied by the percentage of time the children spend in P1's residence (50%). The difference between this figure and the figure arrived at by the mirror calculation performed below for the other parent represents the transfer payment: \$817.27 from Graham to Cunliffe.
6. The calculations in this row mirror the calculations in the row above: Total basic child support obligation of \$1892 multiplied by each parent's proportional share, resulting in the transfer payment that would obtain if Parent 1 (P1 = Cunliffe) provided the primary residence for the children (i.e., this is what Graham would owe Cunliffe). That figure is then multiplied by 1.5 to arrive at the estimated greater cost of supporting the children in a shared residence arrangement. That cost is then multiplied by the percentage of time the children spend in P2's residence (50%). The difference between this figure and the figure arrived at by the mirror calculation performed above for the other parent represents the transfer payment: \$817.27 from Graham to Cunliffe.

monthly net income of \$600 as a day laborer and lives alone in a furnished room. Tim resides with his mother, whose net income is \$1,500 monthly. The child-support formula should not be applied to Herman's income. Herman should be required to make only a nominal monthly payment.

3. Trudy lives with her father, Bob, who earns \$2,000 monthly income. Trudy's mother, Justine, is remarried and attends college. Working part-time, she earns only \$600 monthly income. Justine's husband, Phil, earns \$3,000 monthly. Justine should be required to pay the amount prescribed by the formula. Although Justine's income is less than the amount required to maintain one adult at the federal poverty threshold, Justine does not rely solely or even primarily on her own income. She relies instead on her husband's more than minimally adequate income. Although Phil's earnings are not imputed to Justine, they are germane in determining whether Justine should be excused from paying her full child-support obligation.

f. When the parents have agreed to a different amount. See § 3.13.

g. The requirement of a written record. The elements of Paragraph (3) are required by federal law as well as good practice. To provide a record when there is departure from the formula, Paragraph (3) requires that the court state in writing the facts and the reasons justifying the departure. (For further treatment of the requirement of a written record, see § 1.02.)

REPORTER'S NOTES

[Statutory citations were checked using Lexis or Westlaw; the date following each citation shows the year during which the last check was made.]

Comment b. This section is required by federal law, which states that child-support rules must establish a presumption in favor of payment of the amount required by the formula, list rebuttal grounds, and include the rubric provided in Paragraph (2) of the black letter. 42 U.S.C. § 667(b)(2); 45 C.F.R. § 302.56.

§ 3.08 Determining the Child-Support Obligations of Dual Residential Parents

(1) When parents have substantially equal residential responsibility for a child, that is, when they are dual residential parents, as defined by § 3.02(5), the child-support rules should achieve the following objectives, in addition to those set forth in § 3.04.

(a) A dual-residence child-support award should accurately estimate child expenditure in the two households, recognizing that total child expenditure is significantly greater in two households than in a single household.

(b) A dual-residence child-support award should properly allocate total child expenditure between the two households.

(c) A dual-residence child-support award should assign financial responsibility for child expenditure required by the dual-residence arrangement in a manner that minimizes disparity between the child's standard of living in each of the two households.

(2) To achieve the objectives of Paragraph (1), the child-support rules should calculate each parent's child-support obligation to the other, and require the parent with the larger obligation to pay the difference between the obligations to the parent with the smaller obligation. Each parent's obligation to the other should be established by calculating the amount that each parent would pay under the § 3.05 child-support formula if the other were the sole residential parent; multiplying that amount by 1.5 to take into account the increased cost of dual residence; and multiplying the result by the other parent's proportional share of residential responsibility.

(3) A dual-residence child-support award should be readily convertible to a single-residence child-support award in the event that, despite the dual-residence order, the child primarily resides with one parent.

Comment:

a. Scope. Child support for dual-residence arrangements can be addressed in three steps. The first estimates total parental expenditure for children in two residences; the second allocates total expenditure between the two households; and the third assigns financial responsibility for that expenditure. Comments *b* and *c* discuss total expenditure for children in two residences. Comment *d* treats the allocation of total expenditure between the two residential households, and Comment *e* addresses assignment of parental responsibility for that expenditure.

b. Increased expenditure and the definition of dual residence. There is a continuum from minor residential responsibility to equal residential responsibility. At some point, the other parent begins to duplicate the fixed child expenditures of the primary residence. As the child increasingly resides in both homes, the parent with lesser residential responsibility is likely to incur substantial child-related expenditure for housing, furniture, transportation, clothing, and child furnishings such as toys, games, and books. When both parents have substantial residential responsibility and each provides a home for the child, child expenditure is likely to be significantly greater than it would be were the child living predominantly or exclusively in one household.

The rise in total expenditure typically is not gradual, but instead occurs when each parent effectively makes a primary home for the child. Once that threshold has been reached, the precise allocation of residential responsibility between the two parents should not vary the *increase in total expenditure*. Whether, for example, the dual-residence arrangement is 60-40 or 50-50, it is plausible to assume a uniform increase in total child expenditure, even though the allocation of total child expenditure between the two households should vary according to the parents' proportional residential responsibility.

The definition of dual residence may be expressed in a proportional rule of statewide application. This is appropriate when dual-residence child support is determined by a statewide formula, rather than discretionarily by the court. A rule of statewide application could reasonably define dual residence as including arrangements in which a child annually spends a minimum of at least 35 or 40 percent of nights in the home of the parent who exercises lesser residential responsibility.

c. Cost savings and cost shifting, estimates of net increase in child expenditure. At some point on the continuum from ordinary access to equal residential responsibility, a residential household also begins to experience significant cost savings, for example, savings on food. Other expenditures, such as those for a child's wardrobe or playthings, may be partly but not entirely duplicated in the two households. The cost savings in one household may represent expenditures shifted to the other household. Other expenses, such as for child care, may be partially or even entirely avoided in a dual-residence arrangement.

Although there is no empirical data on child expenditure in dual-residence arrangements, total child expenditure is frequently estimated to rise by 50 percent. This estimate is consistent with estimates of marginal child expenditure in one-parent households.

d. Allocation of total child expenditure between the dual residences. When a child lives equally in two households, one-half of total child expenditure should be allocated to each household. When dual residential responsibility is unequal, expenditure should be allocated according to each parent's percentage of residential responsibility.

Illustration:

1. Fred and Molly, who each have monthly net income of \$2,000, have one child, Sonny. After divorce, if Sonny lives predominantly or exclusively with Fred, under the ALI formula (and under a first-generation formula as well) Molly would pay Fred \$400 (20% of net income in the case of parents who otherwise have equal incomes) monthly for child support, and Fred is presumed to contribute another \$400 or so to Sonny's support. If Fred and

4. In Illustration 3, Felix and Miranda have \$2,000 and \$1,000 monthly income respectively and they have equal residential responsibility for Debbie. Applying a first-generation Marginal Expenditure formula, Felix's net payment to Miranda is \$150, with the result that Miranda's household has income of \$1,150 while Felix's household has income of \$1,850. At \$1,150 of income, Miranda's household is unable to attain a minimum decent standard of living, and there is significant disparity between the child's standard of living in the two households.

In contrast, when Felix and Miranda have equal residential responsibility for Debbie, the ALI formula prescribes a net payment from Felix to Miranda of \$382. See Reporter's Notes. In this case, Felix's residence has income of \$1,618 and Miranda's residence has income of \$1,382. Miranda's household attains 153 percent of poverty threshold and Felix's household has 180 percent of poverty threshold. (Adjusting the poverty-threshold figure downward to reflect the savings to each household from the child's disbursement from the residence, the income of Miranda's household is 163 percent of poverty threshold, while the income of Felix's household is 191 percent of poverty threshold. See Reporter's Notes.)

As the lower-earner's income rises above the level of bare adequacy, the higher-earner's relative burden decreases, i.e., there is less smoothing of the relative standards of living. This is because the reduction mechanism of the ALI formula reduces the preliminary assessments of both parties, as opposed to only that of the lower-income parent, as was the case in Illustration 4. This result is appropriate: As the lower-income parent's income rises, there is decreasing concern about basic adequacy and the goal of reducing disparity between the living standards of the two residences becomes less compelling.

Illustration:

5. The facts are as stated in Illustration 4, except that the parents' incomes are doubled. Farley has income of \$4,000 monthly, and Mira has income of \$2,000 monthly. Applying the ALI formula, Farley owes Mira a net child-support payment of \$691. See Reporter's Notes. Farley's household thus has income of \$3,309 and Mira's household has income of \$2,691. (Mira's residence has 81 percent of the income in Farley's household; by contrast, in Illustration 4 lower-income Miranda's residence has 85 percent of the income in Felix's household.)

Under a first-generation Marginal Expenditure formula, Farley's net support obligation to Mira would be \$300, leaving Farley with net income of \$3,700 and Mira with net income of \$2,300. See Reporter's Notes. Mira's residence would have only 62 percent of the income in Farley's household, a result that would not satisfy Paragraph (1)(c).

f. Convertible child-support awards. When the amount of child support is predicated on the level of residential responsibility, there should be a correction mechanism when residential predictions are not matched by parent behavior. There is frequently little relationship between the de jure award of residential responsibility and de facto residence. In order that the child-support award accurately reflect de facto residence, dual-residence child-support awards should be corrected when dual-residence prediction proves inaccurate. To facilitate such correction, a dual-residence support award may contain a default provision allocating parental support obligations in the event that dual residence becomes, de facto, single residence. Such a provision may also discourage dual-residence claims intended merely as child-support-avoidance maneuvers and encourage parents not to shirk their dual-residence responsibilities.

REPORTER'S NOTES

[Statutory citations were checked using Lexis or Westlaw; the date following each citation shows the year during which the last check was made.]

Comment b. The ALI formula takes into account routine expenditure attributable to the exercise of ordinary visitation in determining the *base* percentage of the support obligation. Yet at some point in the range of 35 percent to 40 percent residential responsibility, the arrangement becomes one of dual-residence, with substantial economic consequences. This is variously described as the shelf, cliff, or notch effect. From the perspective of child expenditure, a shelf is appropriate at the point at which a parent, in order to make a second home for the child, substantially duplicates expenditure in the child's primary residence. Moreover, in dual residence both parents experience some relief from single-parent expenditure. Often expressed objections to the shelf concern not its economic soundness, but rather the incentive that it creates for inauthentic requests for residential responsibility from parents seeking to reduce their child-support obligations and the hardship that dual-residence awards may impose on the lower-income dual residential parent. Both these concerns are substantially, but not entirely, obviated by execution of the principles expressed in Paragraphs (1)(c) and (3).

The principle of uniform increase in total child expenditure cannot be extended beyond narrow limits, that is, beyond a narrow range of proportional differences, without reaching implausible results. It should be restricted to use in the 65-35 to 50-50 dual-residence range.

Comment c. Edward P. Lazear and Robert T. Michael estimate that total child expenditure should be expected to increase by approximately 50 percent in dual-residence arrangements. ALLOCATION OF INCOME WITHIN THE HOUSEHOLD 165-169 (1988). The 50 percent increase, albeit intuitive, is one that has been adopted by jurisdictions that augment total child support in dual-residence cases. The figure is roughly consistent with recent data on child expenditure in one-parent families. See discussion of Professor Betson's estimates in Appendix, § 3.05A, Comment c. Assume that each parent earns X and the parents have 50-50 dual residence of their only child. In a single-residence arrangement, total child-support expenditure is estimated as $.25(2X)$, or $.5X$. If each parent were to make a sole primary home for the child, each parent would devote $.4X$ to child expenditure. If both parents were to make primary homes, together they would

spend .8X, or 60 percent more than they would in a single-residence arrangement. The difference between an increase of 60 percent and 50 percent may be understood to represent the combined savings that each parent experiences by having dual, as opposed to single, residences for the child.

Comment d. In calculating total child expenditure in dual-residence arrangements, arguably the base percentage should be raised to 22 percent. In other words, the base percentage of 22 percent should not be reduced by 10 percent to account for the nonresidential parent's direct child expenditure in the exercise of his custodial responsibility. See § 3.05, *Comment f.* In which case, the 150 percent figure should be .22 times \$2,000 times 1.5, or \$1,320. However, the supplement of the ALI formula is, to some extent, a function of the base percentage. That is, the two together, combined in the preliminary assessment, are calibrated to accomplish § 3.04 objectives. (See § 3.05, *Comments b and g.*) Thus, if, for example, the base percentage for one dual-residence child is restored to an unadjusted 22 percent, the supplement should arguably be reduced to 12 percent, for a total preliminary assessment of 34 percent. The effect of recalibration from "20 plus 14" to "22 plus 12" would be slight, in part because the child-support obligation of one dual residential parent serves to reduce the child-support obligation of the other. Recalibration would have the largest effect when parents otherwise have equal incomes, but even in such case, the effect would be slight. In Illustration 2, for example, after recalibration to "22 plus 12," the net transfer from Molly to Fred, who each have monthly incomes of \$2,000, would be \$132 instead of \$120.

Thus, to avoid complication for little consequence, the illustrative ALI base and supplement percentages have not been recalibrated for dual residential parents. Nevertheless, a rulemaker reasonably may choose to recalibrate the percentages for dual residential parents. A separate worksheet must, in any event, be used for dual-residence arrangements. See § 3.08 Work Sheet.

Comment e. The ALI formula applies the 1.5 multiplier to the entire support obligation of each parent, including the base and supplement percentage, if any. Nevertheless, in estimating *total* parent expenditure in dual-residence arrangements the ALI formula reaches substantially the same results as a first-generation Marginal Expenditure formula. This occurs because the ALI supplement percentage tends to cancel itself out when applied to the obligations of both parents. Thus, the 50 percent increase in child expenditure is largely, although not always entirely, restricted to the ALI base, or marginal-expenditure, percentage. (In Illustration 5, for example, the sum of the parents' obligations to each other if each were a sole residential parent is \$1,200 under a first-generation Marginal Expenditure measure formula and \$1,276 under the ALI formula.) For this reason, application of dual-residence methodology with the ALI formula is acceptably accurate in estimating the increase in child expenditure in dual-residence, as compared to single-residence, arrangements.

The minor effects of the two technical issues described above tend to wash each other out. The first may result in a slight understatement of the "true" support obligation; the second may result in a slight overstatement of the "true" obligation.

In Illustrations 3 and 4, to reflect the cost savings to each household from dual residence, the \$901 poverty-threshold figure for a one parent-one child household may be adjusted downward to \$846, or to some intermediate figure between \$846 and \$901. The calculation is: Poverty threshold for a one adult-one child household (\$901) less poverty threshold for a single adult (\$680) equals amount allocated for a full-time child in one adult-one child household (\$221) times percentage required by dual-residence child

(.75) equals \$166 plus poverty threshold for single adult (\$680) equals \$846. Although this is arithmetically plausible, any downward adjustment of poverty-threshold figures is questionable.

In Illustration 4, ALI dual-residence child support is calculated as follows. Felix owes Miranda \$2,000 times .34 times 1.5 times .5, or \$510. There is no reduction because Miranda's income is not greater than the income exemption of \$1,000 monthly. Miranda owes Felix \$1,000 times .34 times 1.5 times .5, or \$255. Miranda gets the benefit of the reduction mechanism because Felix earns more than \$1,000 a month. Her final reduction is $1/2$ ($\$1,000/(\$1,000 + \$1,000)$) times \$255, for a net obligation of \$128. Thus, Felix owes Miranda \$382 ($\$510 - \128).

In Illustration 5, ALI dual-residence child support is calculated as follows. Farley owes Mira \$4,000 times .34 times 1.5 times .5, or \$1,020, which is then reduced by \$1,020 times (1,000 divided by 5,000), or 20 percent, times the harmonizing factor of .96, for a net reduction of \$196, and a net obligation of \$824. Mira owes Farley \$2,000 times .34 times 1.5 times .5, or \$510, reduced by \$510 times (3,000 divided by 5,000), or 60 percent, times the harmonizing factor of 1.233, for a net reduction of \$377, and a net obligation of \$133. After the offset of \$133, Farley's net payment to Mira is \$691.

Under a first-generation Marginal Expenditure formula, Farley would owe Mira \$1,200 times 1.5 times .5 times $2/3$, or \$600. Mira would owe Farley \$1,200 times 1.5 times .5 times $1/3$, or \$300. Farley would owe Mira a net payment of \$300.

Comment f. Eleanor E. Maccoby and Robert H. Mnookin examined the stability of residential arrangements over time. They found that mother-residence was stable, but father-residence and dual-residence were much less stable. When dual-residence or father-residence was awarded and the children were not initially living in those arrangements (most were initially living with the mother), only 15 percent moved into conformity with the award. DIVIDING THE CHILD 167, 170 (1992).

§ 3.08 WORK SHEET FOR DUAL-RESIDENCE CHILD SUPPORT WITH ALI FORMULA

Line	Description	A	B	C (TOTAL)
1	Amount of child support each parent would pay if the other parent were the sole residential parent (§ 3.05 work sheet), without adjustment for child-care and health expenses. ¹			
2	Line 1 times 1.5			
3	The other parent's percentage of residential responsibility			
4	Multiply line 2 by line 3			
5	Subtract the smaller line 4 entry from the larger line 4 entry. The difference is payable as child support by the parent with the larger line 4 entry.			

¹For dual-residence arrangements, child-care and health expenses should be apportioned separately according to § 3.05 principles. Child-care expenses should be apportioned to each parent according to the parent's relative income, with the parent's § 3.05 final reduction figure serving as a cap on the amount that one parent may be required to contribute to the other's child-care expenditure. Health expenses should be apportioned between the parents according to their relative incomes.

**§ 3.08 WORK SHEET FOR DUAL-RESIDENCE CHILD SUPPORT WITH ALI
FORMULA
(§ 3.08, Illustration 5)**

Line	Description	A	B	C (TOTAL)
1	Amount of child support each parent would pay if the other parent were the sole residential parent (§ 3.05 work sheet), without adjustment for child-care and health expenses. ¹	1099	177	
2	Line 1 times 1.5	1649	266	
3	The other parent's percentage of residential responsibility	.5	.5	
4	Multiply line 2 by line 3	824	133	
5	Subtract the smaller line 4 entry from the larger line 4 entry. The difference is payable as child support by the parent with the larger line 4 entry.	691		

¹For dual-residence arrangements, child-care and health expenses should be apportioned separately according to § 3.05 principles. Child-care expenses should be apportioned to each parent according to the parent's relative income, with the parent's § 3.05 final reduction figure serving as a cap on the amount that one parent may be required to contribute to the other's child-care expenditure. Health expenses should be apportioned between the parents according to their relative incomes.

§ 3.09 Determining the Support Obligations of Parents When Each Parent Is the Residential Parent of One or More Children of the Parties (Split Residence)

(1) When each parent is the residential parent of one or more children of the parties, a child-support award should achieve the following objectives, in addition to those set forth in § 3.04.

(a) A split-residence child-support award should accurately estimate total child expenditure in the two residences.

(b) A split-residence child-support award should allocate parental responsibility for child expenditure in a manner that minimizes disparity between the standards of living of the parties' children in their different residences.

(2) To achieve these objectives, the child-support rules should apply the child-support formula set forth in § 3.05 to each parent to determine that parent's obligation to the child or children who reside with the other parent, and require the parent with the larger obligation to pay the difference between the two obligations to the parent with the smaller obligation.

(3) The child-support rules may apply the child-support formula described in § 3.05, unmodified, in split-residence arrangements or, alternatively, may adjust the base and supplement percentages of the § 3.05 formula to accommodate particular characteristics of split-residence awards.

Comment:

a. Scope. In split residence, sometimes called split custody, one parent assumes residential responsibility for one or more of the parties' children, and the other parent assumes residential responsibility for another child or children of the parties. Split residence is infrequent because keeping siblings together is generally thought desirable, and also, perhaps, because split residence is economically inefficient. Raising all the parties' children in one household takes advantage of economies of scale and the diminishing marginal cost of each additional child. Under these Principles, split residence should also be infrequent because custodial responsibility is allocated in accordance with past caretaking patterns (§ 2.08) and, ordinarily, siblings are raised together under similar caretaking patterns. Yet split residence may occur, particularly when adolescent children express a strong desire to live with one parent.

b. Minimizing significant disparity between the standards of living of siblings who reside in different households. When siblings reside with different

parents, a child's relationship with both parents as well as with siblings is best served by a child-support award that minimizes disparity between the standards of living of the two residential households. Paragraph (1)(b) expresses this objective.

c. Accurately estimating child expenditure in both households. This objective is explicitly stated in Paragraph (1)(a) to disapprove the practice, in some first-generation Marginal Expenditure jurisdictions, of calculating a child-support order for the total number of children, dividing that amount by the number of children, and assigning the per capita shares to each parent according to the number of children residing with that parent. This practice understates child expenditure and unjustifiably favors households with more children over households with fewer children. Essentially, it ignores the economy of households and the principle of declining marginal expenditure for each additional child.

d. Calculating a split-residence child-support award. In a split-residence child-support award, each parent is both a payor and a payee. Each parent's contribution to the support of the children of the parties who reside in the other parent's household is determined by the generally applicable child-support formula, or by a child-support formula specially adjusted for split-residence arrangements. See Comments *e* and *f*. Each parent's child-support obligation is determined as though the children who reside with the other parent were the only children of the parties. The parent with the higher obligation pays the other parent the difference between the two obligations.

When the parents otherwise have equal incomes before the net child-support transfer, the two households will enjoy equal standards of living. When the two households have substantially unequal incomes before the payment of child support, application of the unmodified illustrative ALI formula considerably reduces any disparity between the standards of living of the two households.

When each parent has equal income before the payment of child support and each has residential responsibility for the same number of children, there generally will be no child-support payments. Each parent will fully fund his or her household. (Child-support payments are indicated only when one parent incurs disproportionate additional expenditure, such as for day care required by the parent's employment.)

When the parents have equal incomes before payment of child support but each parent has residential responsibility for an unequal number of children, or when parents have unequal incomes, there will be a net child-support transfer. The following Illustrations apply the § 3.05 illustrative ALI formula to split-residence arrangements. The Bureau of Labor Statistics (BLS) household-equivalence scale has been used to formulate a table for comparing, after payment of child support, the standard of living in single-parent households with different numbers of children, adjusting for parents' unequal expenditure to exercise their

allocation of custodial responsibility for children who reside with the other parent. See Reporter's Note to this Comment.

Illustrations:

1. Rick and Amy, the parents of three children, are seeking a divorce. Pursuant to their parenting plan, Amy will have residential responsibility for their two daughters, and Rick will have residential responsibility for their teenage son. Rick and Amy each have monthly income of \$3,000. Because they have equal incomes, they both pay at the base percentages (already reduced to reflect each obligor's expenditure to exercise custodial responsibility for the child or children residing with the other parent), which are 20 percent for one child and 32 percent for two children. Thus, Rick owes Amy \$960 (\$3,000 times .32), and Amy owes Rick \$600 (\$3,000 times .20), for a net obligation of \$360, payable by Rick to Amy. Applying the BLS household-equivalence table adjusted for split-residence arrangements, after payment of child support each household will enjoy an equal standard of living, each experiencing a 14 to 15 percent decline from the marital standard of living. The result would be identical under a first-generation Marginal Expenditure formula using the same base (marginal expenditure) percentages.

2. Rhonda and Allen are the parents of two teenagers, Sara and Tim. Sara will reside with Rhonda, and Tim will reside with Allen. Rhonda, a civil servant, has net monthly income of \$3,000. Allen, a social worker, has net monthly income of \$2,000. Applying the ALI formula, Rhonda owes Allen child support of \$758 monthly. Allen owes Rhonda child support of \$261 monthly. Rhonda owes Allen a net payment of \$497 (\$758 less \$261). (For application of the formula, see Reporter's Note.) Applying the BLS household-equivalence table for split-residence arrangements, after payment of child support, each household experiences a 13 percent decline from the marital standard of living.

Application of a first-generation Marginal Expenditure formula, in contrast, would require that Rhonda pay \$600, and Allen pay \$400, for a \$200 net payment from Rhonda to Allen. Applying the BLS household-equivalence table, after payment of child support, Rhonda's household would experience a two percent decline in standard of living and Allen's household would experience a 23 percent decline.

3. Sandra and Bob are the parents of two teenagers, Becky and Ramona. Becky will reside with Sandra, and Ramona will reside with Bob. Sandra, a university professor, has net monthly income of \$4,000. Bob, a school teacher, has net monthly income of \$2,000. Applying the ALI formula, Sandra owes Bob child support of \$1,099 monthly. Bob owes Sandra child support of \$177 monthly. Sandra owes Bob a net payment of \$922 (\$1,099

less \$177). (For application of the formula, see the Reporter's Note.) Applying the BLS household-equivalence table, after payment of child support, Sandra's household experiences a 10 percent decline from the marital standard of living and Bob's household experiences a 15 percent decline.

Application of a first-generation Marginal Expenditure formula, in contrast, would require that Sandra pay \$800 and Bob pay \$400, for a \$400 net payment from Sandra to Bob. Applying the BLS household-equivalence table, after payment of child support, Sandra's household would experience a five percent increase in standard of living and Bob's household would experience a 30 percent decline.

e. Adjusting the supplement percentages of the illustrative ALI formula (§ 3.05). The supplement percentages used in the illustrative ALI formula were selected for the outcomes they yield in a broad range of single-residence and dual-residence cases. In those cases, the supplement percentages are moderately redistributive when basic adequacy for the child is at issue and mildly redistributive when it is not. However, when the illustrative ALI supplement percentages are applied in split-residence cases where one parent is the residential parent of one child and the other parent is the residential parent of one or more children, the results are considerably more redistributive. Although household standards of living are never equalized and the higher-income parent always enjoys a higher standard of living than the lower-income parent, some rulemakers may nevertheless conclude that the outcomes do not give adequate weight to the higher-income parent's interest in enjoying the fruits of his labor. Other rulemakers may consider the outcomes appropriate because they effectuate the objective of avoiding significant disparity between the standards of living of siblings who reside in different households. It is a question on which rulemakers may reasonably disagree.

The rulemaker wishing to increase wealth disparity between the two households may do so by reducing the supplement percentages applied in split-residence cases. Reduction of the supplement percentages will yield net obligations that fall between those prescribed by a first-generation Marginal Expenditure formula and an unmodified ALI formula.

f. Adjusting the base percentages of the illustrative ALI formula (§ 3.05) to reflect the ages of the split-residence children. Although the illustrative ALI formula does not generally adjust for the age of children, the data show that expenditure on children increases substantially as children grow older. With single-residence and dual-residence arrangements, not taking age into account and instead using average figures generally works rough justice over the course of the child's minority, and produces an award that is simpler to administer than one requiring periodic updating for the age of the child. (The relationship between a child's age and child expenditure, and whether age should be taken into account

in the general formula are discussed in Appendix, § 3.05A, Comment *l* and Reporter's Note to Comment *l*.)

However, a split-residence arrangement may be prompted by large differences in the ages of the parties' children. In this case, application of a formula that is not age-adjusted shortchanges the parent who has residential responsibility for the older child and unwarrantedly benefits the parent who has residential responsibility for the younger child. The cure is adjustment of the base percentages when there is substantial age disparity between split-residence children. This is done by adjusting the base percentages to reflect the age of the children. Reflecting child-expenditure data, the rulemaker might, for example, in the case of one child, reduce the base percentage from 20 percent to 17 percent for a child under the age of six, keep the base percentage at 20 percent for a child six to 11, and increase the base percentage to 23 percent for a child 12 to 17. The adjustment will more accurately estimate relative child expenditure when the parents have split residential responsibility for children of widely different ages.

Illustration:

4. Michelle and Harlan are the divorcing parents of 15-year-old Phillip and two-year-old Kathy. Phillip has expressed a strong preference to live with his father, and Kathy is deeply attached to her mother. The parties have therefore decided on split residence. Each has equal monthly income of \$3,000, so each parent owes the other the base-percentage amount. If the ALI illustrative formula is adjusted, as indicated above, to account for the age of the child in disparate-age split-residence cases, Michelle will pay Harlan \$180 child support monthly. (\$690 (23% of \$3,000) less \$510 (17% of \$3,000).) Additionally, if Michelle's employment requires that she purchase day care for two-year-old Kathy, Michelle and Harlan will each pay half the cost of day care. See § 3.05, Comment *j*.

REPORTER'S NOTES

[Statutory citations were checked using Lexis or Westlaw; the date following each citation shows the year during which the last check was made.]

Comment d. The following data are derived from Bureau of Labor Statistics, U.S. Department of Labor, REVISED EQUIVALENCE SCALE FOR ESTIMATING EQUIVALENT INCOMES OR BUDGET COSTS BY FAMILY TYPE 4 (Table 1), Bulletin No. 1570-2 (1968).

The Bureau of Labor Statistics (BLS) Household Equivalence Scale

Percentages of total family income required to maintain the intact household standard of living in each of the two split-residence households:

one parent and one child	57%
one parent and one child	<u>57%</u>
total as % of total family income	114%
one parent and one child	49%
one parent and two children	<u>66%</u>
total as % of total family income	115%
one parent and one child	43%
one parent and three children	<u>73%</u>
total as % of total family income	116%
one parent and two children	58%
one parent and two children	<u>58%</u>
total as % of total family income	116%

Adjusting for the nonresidential parent's exercise of custodial responsibility with respect to split-residence children who reside with the other parent. When parents have residential responsibility for an equal number of children, no adjustment is required. Each parent's expenditure in the exercise of custodial responsibility for a nonresidential child is offset by the other parent's expenditure. However, when parents have residential responsibility for unequal numbers of children, the parent who has residential responsibility for fewer children should be credited with 10 percent of the difference between the percentages required by each parent in order to account for that parent's greater expenditure in the exercise of custodial responsibility for the children who reside with the other parent. See Glossary. The following table makes such adjustment to the chart immediately above.

Percentages of total family income necessary to maintain the intact household standard of living in each of the two split-residence households, adjusted for each parent's exercise of custodial responsibility for nonresidential children when the parents have residential responsibility for an unequal number of children.

one parent and one child	57%
one parent and one child	<u>57%</u>
total as % of total family income	114%
one parent and one child	51%
one parent and two children	<u>66%</u>
total as % of total family income	117%
one parent and one child	46%
one parent and three children	<u>73%</u>
total as % of total family income	119%
one parent and two children	58%
one parent and two children	<u>58%</u>
total as % of total family income	116%

This table is used to compare household standards of living in § 3.09 split-residence arrangements.

Application of the formula in Illustrations 2 and 3.

Illustration 2. Applying the ALI formula, Rhonda owes Allen child support of \$758 a month. (\$3,000 times .34 for a preliminary assessment of \$1,020. The reduction fraction is $1,000/(1,000 + 3,000)$, for a preliminary reduction of \$255 times the harmonizing factor, 1.029, for a final reduction of \$262, and a final obligation of \$758.) Allen owes Rhonda child support of \$261 a month. (\$2,000 times .34 for a preliminary assessment of \$680. The reduction fraction is $2,000/(2,000 + 2,000)$, for a preliminary reduction of \$340 times the harmonizing factor, 1.233, for a final reduction of \$419, and a final obligation of \$261.) Rhonda owes Allen a net payment of \$497 (\$758 less \$261).

Illustration 3. Applying the ALI formula, Sandra owes Bob child support of \$1,099 monthly. (\$4,000 times .34 for a preliminary assessment of \$1,360. The reduction fraction is $1,000/(1,000 + 4,000)$, for a preliminary reduction of \$272 times the harmonizing factor, .96, for a final reduction of \$261, and a final obligation of \$1,099.) Bob owes Sandra child support of \$177 monthly. (\$2,000 times .34 for a preliminary assessment of \$680. The reduction fraction is $3,000/(3,000 + 2,000)$, for a preliminary reduction of \$408 times the harmonizing factor, 1.233, for a final reduction of \$503, and a final obligation of \$177.) Sandra owes Bob a net payment of \$922 (\$1,099 less \$177).

Most jurisdictions that explicitly address split-residence arrangements in their child-support guidelines use the methodology prescribed by this section (in the context of a first-generation Marginal Expenditure formula). These jurisdictions include Arizona, Delaware, Hawaii, Indiana, Kansas, Maine, Michigan, New Jersey (N.J. Rules of Court, Rule 5:6A Child Support Guidelines Appendix IX-A, Section 15. Split-Parenting Arrangements (1997)), Ohio, Oklahoma, Pennsylvania, and Vermont. NATIONAL CENTER FOR STATE COURTS, CHILD SUPPORT GUIDELINES: A COMPENDIUM (1990).

Other jurisdictions calculate child-support shares per capita as described and disapproved in Comment *c*. They include Alaska, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, West Virginia, and Wisconsin. *Id.* Connecticut and North Carolina leave the matter to the discretion of the trial court. *Id.*

Comment f. "Expenditure on children," which is the foundation for the base percentages used in the formula, does not include most day-care expenditure, which is of course much higher for younger children than for older children when both parents are gainfully employed. See Appendix, § 3.05A, Comment *o* and Reporter's Note to Comment *o*.

§ 3.10 Determining Child-Support Obligations When a Nonparent Exercises Residential or Custodial Responsibility

(1) If, pursuant to a § 2.18 allocation of custodial responsibility, a person who is not a parent, as defined by § 3.02, is the residential caretaker or a dual residential caretaker of a child, that person has no child-support obligation to the child's parents and the parents' child-support obligation to the caretaker should be adjusted to take into account the absence of any caretaker support obligation.

(2) A person who is not a parent, as defined by § 3.02, but is nevertheless awarded a small amount of custodial responsibility

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

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

No. 52622-7-I
DECLARATION OF
SERVICE

2003 DEC 22 11:11:13
CLERK OF COURT

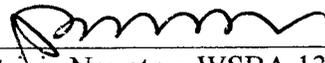
Patricia Novotny, counsel for appellant, certifies as follows:
On December 19th, 2003, I served upon the following copies of the Appellant's
Reply Brief and this Declaration, by:
 depositing same with the United States Postal Service, postage paid
 arranging for delivery by legal messenger.

David Ordell
705 Second Avenue, #1300
Seattle, WA 98104

Lori Smith, State of Washington
900 4th Avenue, 9th Floor
Seattle, WA 98164

Catherine Smith
1109 1st Ave, Suite 500
Seattle, WA 98101-2988

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



Patricia Novotny, WSBA 13604

