No. 77858-2

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

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

Nominal Respondent,

vs.

RICHARD SCOTT GRAHAM, Father,

Petitioner,

And

MICHELE LEANN CUNLIFFE, Mother,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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

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I. ISSUES PRESENTED FOR REVIEW

This Court accepted review of the father's petition for review of Division One's decision, published at 123 Wn. App. 931, 99 P.3d 1248 (2004), rejecting application of an ***Arvey*** credit to equitably apportion the parents' child support obligation where the parties have combined monthly net income that exceeds $7,000 and equally share residential time with their children in "blended" families. The following issues were presented for review:

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

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

II. SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner Scott Graham and respondent Michele Cunliffe have two daughters, born December 16, 1989, and March 23, 1991. (CP 117) Since their dissolution in 1994, the parties have

equally split residential time, with both children alternating households each week. (CP 118) The mother is designated as custodian in even-numbered years, and the father in odd-numbered years. (CP 120)

Both parents remarried after their divorce, and each has other children in their households. The mother and her husband have five children. (CP 97, 142) The father and his wife have a son, and the father's wife has primary residential care of her daughter from a previous marriage. (CP 96, 142)

The parties' combined net monthly income has always exceeded $7,000. The family court commissioner found that the mother's household had actual monthly income of $5,709, exclusive of income imputed to and earned by the mother, while the father's net monthly income was calculated at $6,654.[1] (CP 214)

This action was commenced in October 2002, when the State petitioned for modification of child support on the grounds that more than two years had passed since the previous order, the

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[1] Division One's opinion "notes," without citation to the record, a "disparity between the parties' respective household incomes; over $10,000 per month for Graham and around $2,000 per month for Cunliffe." (Opinion at 3, 123 Wn. App. at 935) This misstatement may have been based on the required worksheets, which calculated the father's net monthly income at $8,018.21 and *imputed* income to the mother of $1,957. (CP 268)

parents' income had changed, and their younger daughter had moved into a new age category. (CP 4) The trial court increased the father's transfer payment to the mother from $300 to $455, which had the effect of equalizing the parents' household incomes and support obligations. (CP 80-81, 100; *see* Chart at 15, *infra*)

The trial court calculated the transfer payment by setting off the amount that the mother would owe the father from the amount that the father would owe the mother given that each parent has the children half-time. (CP 271) The trial court's calculation of child support in this manner was consistent with the reasoning of ***Marriage of Arvey,*** 77 Wn. App. 817, 894 P.2d 1346 (1995), in which the court established how child support should be calculated when the parents split residential time, with each parent having primary care of one child.

The trial court declined to extrapolate support from the Child Support Schedule. (CP 260) Support had not been extrapolated in either of the two child support orders entered before the order at issue here. (CP 15)

The mother appealed, asserting that the trial court erred in equitably apportioning child support by analogy to ***Arvey*** and in refusing to extrapolate. The Court of Appeals reversed in a

published opinion, rejecting equitable apportionment of the child support obligation of parents who share, rather than split, residential time, and encouraging the trial court on remand to reconsider its decision not to extrapolate in calculating the appropriate "deviation" from the Child Support Schedule. This Court granted the father's petition for review.

III. SUPPLEMENTAL ARGUMENT

Based on the language of the Washington Child Support Schedule, RCW ch. 26.19, and existing case law, this Court should establish the following general principles governing support when the parties have combined monthly net income that exceeds $7,000 and equally share residential time with their children in "blended" families:

- Both parents should be considered both child support obligees and obligors when the parents equally share residential time, and equitably apportioning support between the parents is not a "deviation" from the Child Support Schedule.

- Child support is not a "deviation" from the Child Support Schedule where the parents' combined net monthly income exceeds $7,000.

- There is no presumption that the court should extrapolate or otherwise mechanically alter the Child Support Schedule when the parents equally share residential time or have combined net monthly income exceeds $7,000.

- A trial court may equitably apportion the child support obligation of parents who equally share residential time by analogy to the analysis of ***Arvey.***

A. Both Parents Should Be Considered Both Child Support Obligees And Obligors When The Parents Equally Share Residential Time, and Equitably Apportioning Support Between The Parents Is Not A "Deviation."

Division One reversed the trial court with the admonishment that the trial court can "deviate" from the "basic child support amount" only "so long as doing so will not result in insufficient funds in the household receiving the support to meet the needs of the children while they are residing in that household." (Opinion at 9-10, 123 Wn. App. at 931); *see* RCW 26.19.075(1)(d). But the Washington Child Support Schedule does not define the child support obligee and obligor based on which parent has more income, but in terms of the parents' residential time. When parents equally share residential time, each have an identical and equally important obligation "to meet the needs of the children while they are residing in that household," and both parents should be considered both child support obligees and obligors.

The Washington State Child Support Schedule was enacted in 1988, after Congress required every state seeking federal funding for its welfare program to enact laws establishing advisory child support guidelines. ***Harmon v. DSHS,*** 134 Wn.2d 523, 533,

951 P.2d 770 (1998), Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984), The Family Support Act of 1988, 42 U.S.C. § 667(b)(2). The purpose was to "enforc[e] support obligations owed by *noncustodial* parents to their children and the spouse (or former spouse) with whom such children are living." 42 U.S.C.A. § 651 (emphasis added). Congress used the term "child support" throughout Title IV of the Act and its amendments as a term of art, referring exclusively to payments from "absent parents." ***Sullivan v. Stroop***, 496 U.S. 478, 481-82, 110 S.Ct. 2499 (1990). Further confirming its intentions, the term "absent parent" throughout the Act was changed to "noncustodial parent" in 1996. 1996 Amendments, Pub. L. 104-193, § 395(d)(1)(A).

The Court of Appeals' analysis improperly presumes that the parent with less income is the child support obligee when the parents split time, and that the parent with more income is only entitled to a "deviation" for significant time spent with the child. This is contrary to the language and legislative history of RCW ch. 26.19.075(1)(d), which defines "significant time" for purposes of residential credit as something less than equally shared time:

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

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

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

The intention of Congress, and of the Washington State legislature in enacting RCW 26.19, was clear: for purposes of child support, the obligor parent is the parent with whom the parent does not reside at least half of the time. Where, as here, the children reside equally with both parents, both parents should be considered both child support obligees and obligors, and equitably apportioning the parents' child support obligations is not a "deviation" from the Child Support Schedule.

B. Where Combined Net Monthly Income Exceeds $7,000, Apportioning Child Support Is Not A "Deviation" From The Child Support Schedule.

The child support calculation in this case also was not a "deviation," contrary to Division One's analysis,[2] because the parties' combined net monthly income exceeds $7,000. The Child Support Schedule is only a guide, and not mandatory, in over-$7,000 cases. RCW 26.19.020; RCW 26.19.065(3). Division One's characterization of the calculation of support in this case as a "deviation" unnecessarily confuses the analysis of child support in an area that is already fraught with inconsistency and doubt.

"Since incomes above $7,000 are not in the economic table, setting support for incomes above $7,000 does not require a deviation." ***Marriage of Daubert/Johnson***, 124 Wn. App. 483, 99 P.3d 401 (2004), *citing* ***Marriage of Leslie/Verhey***, 90 Wn. App. 796, 804, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003

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[2] *See. e.g*, Opinion at 1, 123 Wn. App. at 934 ("The commissioner extrapolated an increased net support obligation, and deviated below. . ."); Opinion at 9, 123 Wn. App. at 941 ("Such a deviation could be warranted in a situation where the children's residential time is shared between parents . . ."); Opinion at 9-10, 123 Wn. App. at 941 ("[A] trial court must calculate the basic child support amount and may then deviate . . . We remand for recalculation of the basic child support obligation and consideration of any deviation not based on ***Arvey*** that the court deems appropriate.")

(1999) ("[I]n couching its order in terms of 'deviation,' the trial court inappropriately narrowed the scope of its inquiry and contravened legislative intent.") The characterization of support in over-$7000 cases as a "deviation" may have profound unintended consequences for child welfare policy in this state, and should be discouraged by this Court.

Federal funding of family aid depends upon consistent child support orders. The State is obligated to track and report compliance with the child support schedules in child support orders. 42 C.A. §654(15)(a); 45 C.F.R. §302.56(h) (purpose of "review of the guidelines to ensure that deviations from the guidelines are limited."). Recent reviews report much larger deviation rates in Washington state (29%) than the national average (17%). Policy Studies Inc., "Washington State Child Support Schedule: Selected Issues Affecting Predictability and Adequacy" at 3 (Report for DSHS, January 20, 2005). This reported level is artificially inflated if the calculation of support in over-$7,000 or split time cases is characterized as a "deviation" from the Child Support Schedule.

C. There Is No Presumption That The Court Should Mechanically Increase Support Over The Child Support Schedule When The Parents Share Time Or Have Combined Net Monthly Income That Exceeds $7,000.

Division One encouraged the trial court on remand to extrapolate, emphasizing "that the trial court is not precluded from reconsidering extrapolation, in light of our rejection of the ***Arvey*** formula." (Opinion at 11) Yet there is nothing about the trial court's order that suggests that its rejection of extrapolation was related to its analogy to ***Arvey***, and there should be no presumption that the court should mechanically increase support over the Child Support Schedule when the parents share time or have combined net monthly income exceeds $7,000.

The child support statutes expressly require written findings whenever support is established at an amount in excess of the Child Support Schedule:

> When combined monthly net income exceeds seven thousand dollars, . . . the court may exceed the advisory amount of support set for combined monthly net income of seven thousand dollars upon written findings of fact.

RCW 26.19.065(3). There is no statutory basis for what amounts to a presumption in favor of extrapolation in orver-$7,000 cases:

> Extrapolation programs do not base calculations on economic data. Instead, they merely extend the numbers on the tables out to the appropriate income

> level and provide a child support number. Therefore, the figures provided by the extrapolation program are not based on the child's specific, articulable needs. They merely continue the economic table past the $7,000 mark. Had the Legislature intended this result, the Legislature would not have capped the table at $7,000.

Marriage of Rusch, 124 Wn. App. 226, 233, 98 P.3d 1216 (2004). Rather than a statutory mandate, extrapolation is a marketing feature of proprietary software programs sold to family law practitioners to facilitate calculation of child support under the statutory guidelines, and it should be rejected by this Court.

The father anticipates that, in addition to extrapolation, the Court will be asked to approve a presumptive increase from the Child Support Schedule of 50% in shared time cases, on the basis of § 3.08 of the ALI Principles of the Law of Family Dissolution (2000).[3] But the ALI Principles establish child support obligations in a manner fundamentally inconsistent with the "income shares" analysis of the Washington child support schedule, relying in part on a custodial parent's "marginal expenditures," *i.e.,* only those expenses that would not otherwise be incurred were the parent not

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[3] Having never brought the ALI Principles to the attention of the trial court, the mother first suggested this "solution" on appeal below. *See* 123 Wn. App. at 941, n.2. For that reason alone it should be rejected.

supporting the parties' children. *See* Comment c., §3.05, ALI Principles at 444. The Washington Child Support Schedule "income shares" model instead recognizes that some "fixed" costs are necessary to adequately support the child, and therefore presumes an initially larger transfer payment.

Further, the 50% increase proposed by § 3.08 of the ALI Principles is admitted by the Reporter to be "intuitive," and based on no economic analysis whatsoever. Comment c., § 3.08, ALI Principles at 487. Petitioner has been unable to find a single instance of adoption of the Principles' proposal to unilaterally increase one parent's transfer obligation by 50% when the parents share residential time. Just as is the case in extrapolation programs, there is no reasoned basis for adoption of this mechanical formula, particularly since it fails to address the consequence of the increased support obligation on the household of the parent making a transfer payment and would have the consequence of increasing the disparity in household income between the parents.

Washington's Child Support Schedule creates a presumption that the guidelines "are adequate to meet a child's basic needs." RCW 26.19.001. Both extrapolation and shared-time formulas

premised on marginal expenditures on behalf of the child are artificial constructs that do not address the children's needs or the parents' obligation to provide additional support consistent with RCW 26.19.001.

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

Having recognized that each parent is both a child support obligee and obligor, and that calculation of support in over-$7,000 cases does not require "deviation," this Court can encourage equity, predictability and consistency in child support orders by approving use of the ***Arvey*** formula for equitable apportionment of child support in cases where the parents equally share residential time with their children. ***Marriage of Arvey***, 77 Wn. App. 817, 894 P.2d 1346 (1995).

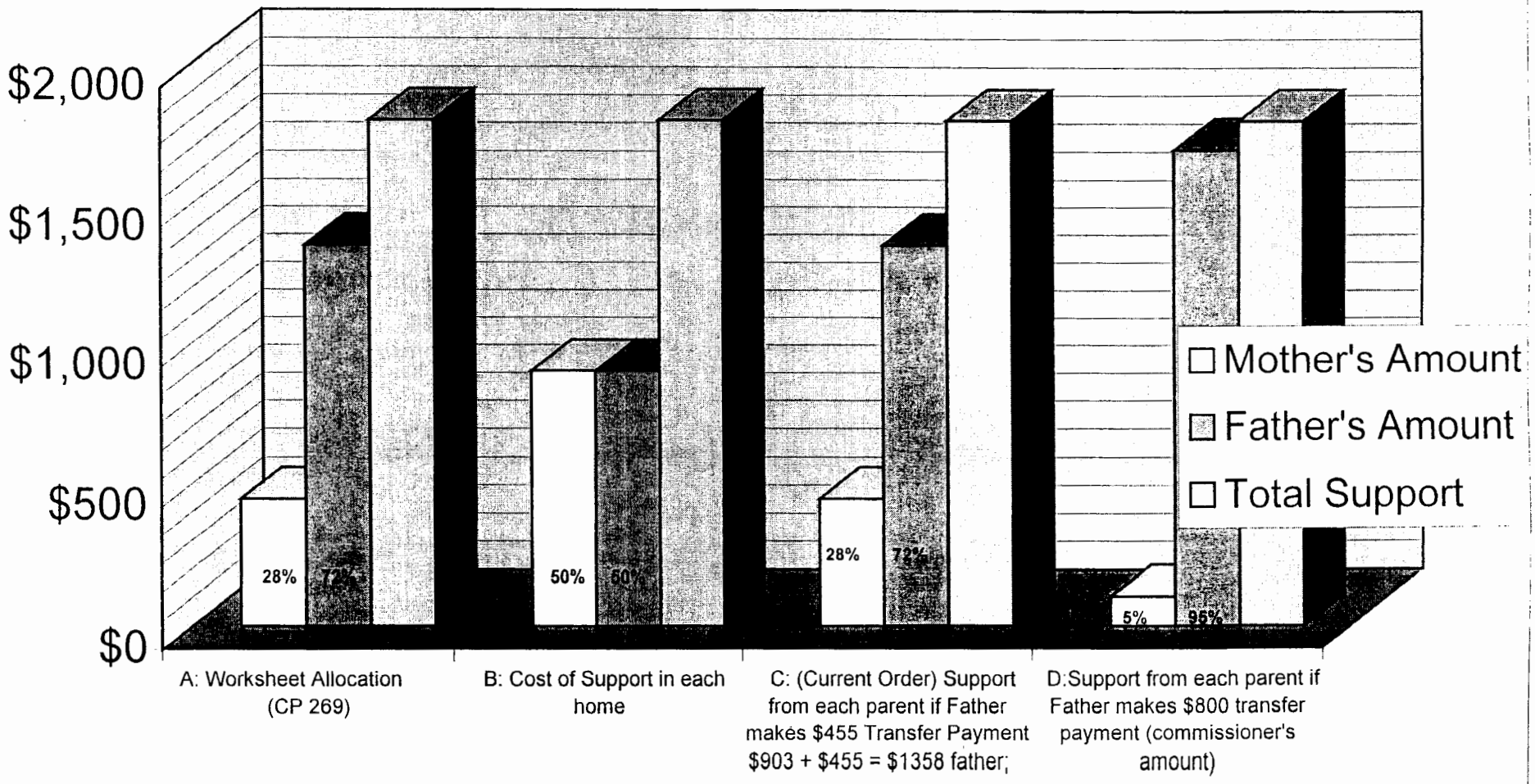
In ***Arvey***, each parent had one child for approximately 60 percent of the time and the other child for approximately 40 percent of the time. Division One vacated an order designating only the father as the child support obligor and the mother as the child support obligee because the order failed to recognize each parent's primary caretaking responsibility. The court held that the trial court should equitably allocate each parent's support obligation in

proportion to his or her caretaking responsibility. ***Arvey***, 77 Wn. App. at 825.

The Court of Appeals in this case rejected equitable apportionment by analogy to ***Arvey*** on the grounds that it "would result in disparate financial circumstances to the detriment of the children . . ." (Opinion at 9, 123 Wn. App. at 940) But the child support order in this case in fact had the effect of *equalizing* the income in each parent's household. (CP 80-81, 100) As set out in the chart reproduced on the next page, the trial court's order made the father responsible for 72% of the children's support, consistent with the parents' actual and imputed income. (Columns A, C):

NET Support Obligation: $1806 (CP 335)

Father's Share: $1358 Mother's Share: $448



The calculation proposed by the mother instead would impose 95% of the child support obligation on the father. (Column D) The mother's proposal and the Court of Appeals' analysis of household income improperly confounds the parents' real and imputed income, which must be relied upon in the worksheet standard calculation, RCW 26.19.071(1),(3),(6), and their household income, including the income of other adults in the household, which is relevant to the determination of a residential credit. RCW 26.19.071(1); RCW 26.09.075(1).

IV. CONCLUSION

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

September 18, 2006.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 18, 2006, I arranged for service of the foregoing Supplemental Brief of Petitioner, to the court and counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 18th day of September, 2006.

Tara D. Friesen