

Residential Credit Draft Report

Overview

The Residential Credit Subcommittee's mission was to recommend to the legislature a framework for standardizing and expanding residential credit beyond the current deviation approach under existing law.

Key Issues

- Researching how other states approach residential credit.
- Finding a way to address residential credit in the administrative forum.
- Recommending a residential credit calculation formula.
- Addressing concerns with visitation compliance after a residential credit is awarded.
- Evaluating the available residential credit data and identifying data gaps to help with decision-making.

Findings and Recommendations

The subcommittee makes the following recommendations:

RECOMMENDATION ONE

Recommendation One: The residential schedule deviation per RCW 26.19.075 (1)(d) should have a formula based on the residential schedule of the children for whom support is being set.

- The unit of measurement for determining the residential schedule deviation should be the number of overnights that the children spend with each parent.
- There should be 20% of overnights (i.e. 73 overnights) required before a residential schedule deviation may be applied.

Background for Recommendation One:

The Subcommittee agreed that when the children spend a significant amount of time in both parents' homes, both parents have expenses when the children are residing with them. These additional expenses, the Subcommittee felt, should be recognized by a reduction in the amount of the paying parent's monthly transfer payment. The added expenses, the Subcommittee felt, could vary determining how much time the children spent with each parent. For instance, although one could assume that children who spend very little time with the paying parent wouldn't each need a private bedroom dedicated to their own use, it can be argued that the more time that the children spend in that parent's home, the higher the need for permanently available sleeping and living area. It also was agreed that no matter how much time the children spent with the paying parent, there would be increased expenses in that household for food and other incidentals that would not be incurred if the children were not there. On the other hand, there was no agreement that the children's absence from the custodial parent's home always results in the same amount of decreased expenses. Many Subcommittee members felt that most of the custodial parent's household expenses remain the same no matter how much time the children spend with the other parent. No matter how much time the children spent in each household, the Subcommittee agreed that the "typical" residential schedule from the time the Washington State Child Support Schedule (WSCSS) was adopted has changed and does not represent current parenting plans. Over the years, most families have parenting plans or residential schedules that give a significant amount of time to the paying parent, and 50-50 schedules, where the children spend an equal amount of time in each home, have become much more popular. The Subcommittee recommends that the

concept of the residential schedule deviation be updated to reflect current trends in parenting plans and residential schedules.

Discussion of Recommendation One:

What unit of measurement should be used? The “Unit of Measurement” Subcommittee recommended to the Subcommittee that the unit of measurement for determining the residential schedule deviation should be the number of overnights that the children spend with each parent. The Subcommittee then adopted this as a consensus recommendation recognizing that courts have discretion to consider the individual facts of each case. While recognizing that there are many approaches to calculating a residential schedule deviation, the Subcommittee decided that the easiest method for determining the deviation would be a method based on the number of overnights which the child spends with each parent. Although there are some family situations which would not fit nicely into the “overnights” scenario, the Subcommittee members believed that the majority of cases would be amenable to such a calculation method for the residential schedule deviation.

Should there be a threshold before the residential schedule deviation is allowed?

The Subcommittee members had many discussions on how many overnights would qualify a parent for a residential schedule adjustment. Any minimum number of overnights required is often referred to as the “threshold” number. Opinions put forward ranged from no threshold at all to a minimum of 25% of the nights in a year. Some Subcommittee members were of the opinion that the support amounts in the Economic Table were based on an assumption that the parents would have the “typical” residential schedule from the time when the Washington State Child Support Schedule (WSCSS) was first adopted. These members felt that since the support amounts did not presume that the children would reside with the custodial parent all of the time, there was already some kind of residential schedule credit built into the WSCSS. This led them to recommend that there should be a threshold amount for the residential schedule deviation based on the “typical” residential schedule, which came out to approximately 20% of annual overnights (or 73 nights).

The Subcommittee recommends that the residential schedule deviation be available as soon as the children spend seventy-three nights in the other parent’s household. The Subcommittee finds this recommendation is a good first step but encourages future Subcommittees to consider lowering the threshold to avoid “cliff effects” which occur whenever a minimum amount or threshold is used in public policies. If a threshold were to be utilized in a residential schedule credit, one single oversight (or the unit of measurement chosen) could impact whether a deviation based on the residential credit is granted.

As an example, if the threshold for the deviation is 73 overnights (the parent obligated to pay support has roughly 20 percent of residential time under the parenting plan):

- A custody arrangement where the parent paying support has the child(ren) for 72 overnights would not have any residential schedule deviation and the support amount would not be reduced. This option provides no financial relief for the parent paying support.
- A custody arrangement where the parent paying support has the child(ren) for 73 overnights would allow for a deviation, which would reduce the support amount owed by that parent, which results in a reduction in the amount of support being received by the parent with whom the child resides a majority of the time.
- This example does not deal with a situation where the parents share residential time on a 50-50 basis.

RECOMMENDATION TWO

Recommendation Two: The residential schedule deviation should be available in both the court and administrative processes.

Background for Recommendation Two:

Since the 2007 Child Support Schedule Subcommittee, all of the quadrennial Subcommittees convened under RCW 26.19.025 have felt strongly that a residential schedule deviation available under the Washington State Child Support Schedule (WSCSS) should be applicable not only in superior court, but also in the administrative forum. They agreed that whatever child support schedule is ultimately adopted, it must provide certainty and consistency while allowing flexibility to deal with unjust or inappropriate outcomes, and cover the greatest possible number of families.

Discussion of Recommendation Two:

Should a Residential Schedule Deviation be Available in the Administrative Forum as well as in the Superior Court? The 2015 and 2011 Subcommittees started out their discussions after reviewing a report prepared by the Division of Child Support using data compiled from child support court and administrative orders. Those reports indicated that almost one-half of the child support orders issued in Washington each year are administrative orders.

- Out of the 1,056 randomly selected child support orders studied in the 2023 Child Support Order Review, there were 398 (43.8%) were administrative orders and 640 (61.7%) were court orders.

The Subcommittee members quickly agreed that they did not think it was fair to allow a residential schedule deviation only in the superior courts. This approach supports the general concept of access to justice, as the Subcommittee recognized that many families use the administrative process for child support orders because they cannot afford to hire attorneys to file a case in superior court. In addition, many administrative support orders are established by DCS so soon after the parties separate that they may not have had a chance to decide whether the separation will be temporary or permanent. A permanent end to the relationship would entail filing a court proceeding such as a dissolution of marriage, which requires the parties to deal with many issues other than child support. As a matter of fact, many parties to administrative support orders choose to continue their administrative orders throughout and even after any court proceedings because doing so allows them to limit the issues they need to litigate in court. Should the Same Residential Schedule Deviation be Applied in Both the Administrative Forum and the Superior Court? The Subcommittee reached consensus that the same residential schedule deviation and formula method should be available whether the parties were in court or in the administrative forum.

- The Subcommittee discussed that the availability of the residential schedule deviation should not depend on whether there was an existing residential schedule or parenting plan and that superior courts continue to base residential schedule deviations on existing residential schedules or parenting plans as a best practice.
- The current process used to obtain a residential schedule deviation in superior court should not change.
- The subcommittee agreed that the deviation could be applied in the administrative forum
- The subcommittee agrees that a parenting plan is not necessary to apply a residential credit deviation.
- The department could apply the deviation if both parties agreed to the number of overnights.
- That if the parties did not agree, that an administrative law judge could apply the deviation based on findings of fact in the administrative hearing. Most often, in superior court, a child support order is ordered at the same time as the parenting plan for the children of the parties. Subcommittee discussions recognized that the administrative process cannot be used to establish a parenting plan; such orders are available only in court. A majority of the Subcommittee suggested that, since many parents with administrative child support orders have not had the

opportunity (for whatever reason) to get a court ordered parenting plan, the residential schedule deviation should be available even without a plan. Their proposed solution to this issue was that a child support order be based either on the agreement of the parties or the findings of fact by an administrative law judge regarding the number of overnights the children spent with each parent. The Division of Child Support is a creature of statute and has only those powers granted to it by statute. There is no statute allowing an administrative parenting plan. However, one of the reasons expressed for requiring an existing parenting plan was the fear that an administrative support order containing a residential schedule deviation might be interpreted at a later date as an “official” parenting plan.

RECOMMENDATION THREE

Recommendation Three: There should be rules on when the residential schedule deviation may not be applied.

- The Subcommittee agrees that the residential schedule deviation should not be applied if it would result in insufficient funds in the recipient’s household to meet the basic needs of the child, if either household has income of less than 200% of the Federal Poverty Level, or if the children receive TANF.

Background for Recommendation Three: RCW 26.19.075(1)(d) currently provides that the court may not deviate based on the residential schedule of the child 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 (TANF). The Subcommittee recommends that these existing “low income limitations” should continue to apply to any residential schedule deviation adopted by the Legislature. The Subcommittee recommends including a provision that the residential schedule deviation should not be allowed if either parent’s household income is less than 200% of the Federal Poverty Level to provide low-income protections.

RECOMMENDATION FOUR

Recommendation Four: The statute should specify how and when the residential schedule deviation is to be calculated.

- If the deviation is granted, then the calculation of the deviation should be based upon a specific formula.
- In statute, the formula should be expressed as a table, not just a formula.
- The unit of measurement for determining the residential schedule deviation should be the number of overnights that the children spend with each parent.
- There should be 20% of overnights required (or 73 overnights) before a residential schedule deviation may be applied.
- The formula should be applied to the basic child support obligation.
- The formula should be readily accessible including the DCS website and other appropriate places.
- The formula should be easy to understand.
- The revision should be called a residential schedule deviation. See RCW 26.19.065(2) and WAC 388-14A-3410 for a discussion of the Self-Support Reserve (SSR) of 125% of the federal poverty guideline. RCW 26.19.065(2) does not specify that the SSR should be calculated as 125% of the amount shown for a one-person family in the federal poverty guideline. However, DCS adopted this interpretation in WAC 388-14A-3410 and the Child Support Schedule Subcommittee recommends that the statutory language be corrected.

Background for Recommendation Four:

The Subcommittee recommends that there be a formula on which the residential schedule is calculated. The Subcommittee further recommends that this formula should not be recited or set forth in the statute, but rather that the statute should contain a description of the formula as well as a reference table based upon that formula, with the result that there would be no need to perform a full calculation of the residential schedule deviation in each case but instead one could merely find the correct number on the table. The Subcommittee agreed in a strong majority that the formula to be used is a time-based formula where the percentage of time with the non-custodial parent is multiplied with the combined basic support obligation then subtracted from NCP's proportional basic support obligation.

Discussion of Recommendation Four:

Should there be a formula? In order to assure a consistent and predictable method from case to case and forum to forum, the Subcommittee agreed there should be a formula. Should the statute contain a table based on the formula? When applying the deviation, the Subcommittee agreed that the formula used should be easy to apply and should be available in a table format. Some individuals, including unrepresented parents, might find the formula intimidating, so a table seemed a reasonable and accessible method of providing the same calculation that a formula would. In addition, the committee felt that the department or courts should offer an online calculator for the residential schedule deviation much as they do for the economic table itself. This recommendation analogizes the way that RCW 26.19.020 contains only the Economic Table, which although based on a formula only requires one to find the correct place in the table. Should a time based be the formula used? A strong majority of the Subcommittee members say yes. The time formula assumes that there is a breakpoint in the costs and expenses related to parenting time when a child resides in a parent's household at least twenty-percent of the nights per year.

A residential schedule deviation for a parent that resides with the child over the breakpoint of twenty percent is calculated by multiplying the percent of nights in a year, over the breakpoint, that a child resides with the parent by the combined basic support obligation then subtracting that amount from the NCP's proportional share of the basic support obligation. The time-based formula should be used:

- To avoid the conflict-promoting threshold inherent in the cross-credit calculation.
- The formula is simpler than the cross-credit calculation.
- Since the formula is recommended for a deviation not an adjustment, judges will have abundant discretion to address cases with highly unequal parent incomes.
- The formula will not be used at all in low-income situations that are less than 200% of the Federal Poverty Level.
- The uniformity it would bring to applications of residential schedule deviation is an admirable goal and one the federal government certainly wants us to work towards. Legal Services represented the one minority vote in opposition to adoption of Dr. Plotnick's formula.

Should the residential schedule formula be applied to the basic child support obligation or the standard calculation?

- The Subcommittee members discussed whether to apply the formula to the basic child support obligation or the standard calculation. The subcommittee reached a consensus agreement to apply the formula to the basic child support obligation. Health care, day care, and special child rearing expenses should be prorated based upon the income of the parents.

RECOMMENDATION FIVE

Recommendation Five: These recommendations require revision of the existing WSCSS Worksheets.

- There should be a new line added to the “Additional Information Calculations” section of the WSCSS worksheet (part VII) in order to show the dollar amount of the potential residential schedule deviation.
- The WSCSS Worksheet should not automatically apply the residential schedule deviation.

Background for Recommendation Five:

The Subcommittee members felt that the WSCSS Worksheets should be revised to provide enough information concerning the residential schedule deviation that it would be easy for unrepresented parties to calculate the amount of deviation before determining whether the deviation was appropriate.

To this end, the Subcommittee recommends that the WSCSS Worksheets should set out the amount of the residential schedule deviation but that the WSCSS Worksheets should not automatically calculate the support obligation that results from the application of the deviation. As discussed in Recommendation Four, the Subcommittee recommends that the dollar value of the residential schedule deviation be predictable. This means that two cases where the parents had the same number of children on the WSCSS Worksheet, the same combined monthly net income, the same proportionate share of income, and the same number of overnights would, if the residential schedule deviation were applied, have the same deviation. In order to assure this, the Subcommittee recommends that the WSCSS Worksheets be revised to show the dollar amount of the potential deviation.

Discussion of Recommendation Five:

Just as the Subcommittee recommends that there be an easy-to-use Table such as the one shown in Appendix IX, the Subcommittee recommends that the WSCSS Worksheets include a line that shows the amount of residential schedule deviation that could be applied in the case. The Subcommittee recommends that a new line be put into the WSCSS Worksheet in Part VII, which contains “Additional Informational Calculations.” Currently, this section shows the amounts of 45% of each parent's net income and 25% of each parent's basic support obligation. The Subcommittee recommends that the amount of each parent’s possible residential schedule deviation be shown as one of these additional informational calculations. This revision to the WSCSS Worksheet would allow the parties, their attorneys or the court to see at a glance what the residential schedule deviation would be if there are no reasons why the deviation should not be applied. This information would provide a basis for the determination of whether the residential schedule deviation were applied, and would allow a quick review of whether the deviation would result in insufficient funds in the household. The Subcommittee recommends that the WSCSS Worksheet not allow for the automatic application of the residential schedule deviation. Doing so would create the potential for confusion and mistakes for self-represented parties or inexperienced practitioners, who could easily think that because the deviation gets applied in the Worksheet calculations, it must be required. Because of the low-income protections currently in the WSCSS and recommended by the Subcommittee, this misunderstanding could result in grossly unfair child support orders.

RECOMMENDATION SIX

Recommendation Six: The Subcommittee recommends that, if the parent receiving the residential schedule deviation does not spend time with the children in the same amount as used as the basis for the deviation, then there should be enforcement remedies available.

- The deviation should be removed, or at least revised, if the parent spends less time with the children than contemplated.

- The deviation should be increased if the parent spends more time with the children than contemplated.
- There should be the option to bring a contempt action to ask the court to suspend, waive, or reduce the residential schedule deviation.
- The Subcommittees recommends modifications to RCW 26.09.075 the corresponding statute related to the administrative process to add a request to suspend, waive, or reduce the residential schedule deviation as a basis to modify or adjust the child support order.
- Any support order granting a residential schedule deviation should contain warnings advising the parties about what can happen if the residential schedule is not followed.
- The DCS Abatement model should be followed to provide a remedy if a party has been noncompliant with a residential schedule for three months with a pattern of 10% of misusing residential credit.

Background for Recommendation Six:

Based on the recommendations of the 2015 Child Support Schedule Subcommittee Parenting Plan Subcommittee, the Subcommittee discussed ways to make sure that the parent who received a residential schedule deviation continues to maintain that residential schedule. The Subcommittee wanted to cover both kinds of “noncompliance” with a residential schedule: what happens if the parent spends less time with the children than contemplated, and what happens if the parent spends more time with the children than contemplated?

Discussion of Recommendation Six: The 2015 Parenting Plan Subcommittee recommended that the legislature create new sections in Chapter 26 RCW and RCW 74.20A.059 to the effect that, if a residential schedule deviation is given; but a parent does not spend the time with the children, then the other party may file one of the following:

- A petition to modify the child support order to ask the court or administrative tribunal to modify the residential schedule deviation;
- A motion to adjust the child support order to ask the court to adjust the residential schedule deviation; or
- A motion for contempt, and ask the court to coerce compliance with the order by suspending or temporarily reducing the residential schedule deviation. The Subcommittee discussed whether in a contempt action the courts would be willing to sanction a party for the violation of a parenting plan by failure to exercise the residential provisions of the parenting plan or the use by either or both parents of the residential schedule deviation as a dodge to avoid child support obligations. Several Subcommittee members maintained that the court has inherent power to enforce its orders by any means necessary to compel compliance. Among the chief sanctions used to enforce child support orders and parenting plan violations is contempt. The Subcommittee members agreed that using the residential schedule or residential schedule deviation as a dodge to avoid paying child support should be discouraged as a matter of public policy, and that the contempt process appeared to be one avenue for enforcement. Some Subcommittee members found the contempt process not very user friendly for self-represented parties. The subcommittee felt it was important to identify the additional remedies of modification and adjustment processes for reconsideration of the deviation. The subcommittee discussed a variety of threshold ideas, including missing a substantial percentage of residential time and determined that 10% was a substantial percentage. They also discussed whether there should be a specified time period of noncompliance. The subcommittee reached consensus that there should not be a threshold of three months defined in statute of how much residential time is missed before one of the parties could seek enforcement or reconsideration of the residential schedule deviation.

RECOMMENDATION SEVEN

Recommendation Seven: The subcommittee would like to request that the Legislature direct the Gender and Justice Commission (or any other agency) to form a Residential Credit subcommittee to include representatives from various organizations (i.e. OAH, the Bar, AOC, DCS, Courts, parents) with a mandate to research and develop recommendations to the Legislature by a specific date.

RECOMMENDATION EIGHT

Recommendation Eight: The subcommittee would like to recommend that hard data regarding parenting plans, shared custody, and the associated costs in the state of Washington be gathered, to better inform the work of future subcommittees.

Citations