

Residential Schedule Credit Subgroup Report May 31, 2008 Meeting

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Washington's Current Statute and Case Law Interpretation of RCW 26.19.075(1) (d) Residential Schedule Deviations

Survey of Residential Schedule Treatment in Other Jurisdictions

Current Statutes

The trier of fact begins by setting the basic child support obligation which is generally determined from the economic table in the child support schedule and is based on the parents' combined net income and the number and age of the children. RCW 26.19.020.

The court then determines the standard calculation which is the presumptive amount of child support owed by the obligor parent to the obligee parent. RCW 26.19.011(8).

Discretion has been granted to the trier of fact to determine if it would be appropriate to deviate from the standard calculation based on the factors set forth in RCW 26.19.075; if a deviation is granted it must be supported by written findings of fact supporting the reasons for the deviation.

RCW 26.19.075(1)

(d) **Residential schedule.** The court may deviate from the standard calculation if the child spends a significant amount of time with the parent who is obligated to make a support transfer payment. The court may not deviate on that basis if the deviation will result in insufficient funds in the household receiving the support to meet the basic needs of the child or if the child is receiving temporary assistance for needy families. When determining the amount of the deviation, the court shall consider evidence concerning the increased expenses to a parent making support transfer payments resulting from the significant amount of time spent with that parent and shall consider the decreased expenses, if any, to the party receiving the support resulting from the significant amount of time the child spends with the parent making the support transfer payment.

The statute does not define "a significant amount of time" or "insufficient funds" and it does not provide a formula or standard for adjusting the standard calculation of child

support. The court has a broad grant of discretion and there is little case law that has been developed to assist the trier of fact. In general appellate deviation cases make it clear that the decisions of the trier of fact are made on a case by case basis from the facts and circumstances of each case and must be supported by written findings.

According to Kate Sterling's 2002 review of Washington Support orders, about 13% of the deviations from the standard calculation were based on a residential schedule credit and the average downward deviation was \$315 per month. This information is presented in the 2005 PSI report Washington State Child Support Schedule: Selected Issues Affecting Predictability and Adequacy p. 26.

The 2005 workgroup did not formally discuss treatment of the residential schedule and their January 2006 report did not include a recommendation.

The WSBA Family Law Section recommendation to the 2005 workgroup report was based in part on input from a 2005 summer meeting of interested parties at the WSBA Office.

Residential Schedule Credit: A residential schedule credit that encourages both parents to spend time with their children, discourages manipulation of the schedule based on financial considerations and does not result in residential parents and children living below the poverty level is our goal. The cross-credit approach that is used in several other states is supported by FLEC. The basic support obligation is multiplied by 150% to account for child-rearing expenses that are duplicated by each parent such as housing. The percentage of time each parent spends with the child is calculated and applied to each parent's pro rata share of the basic support that has been multiplied by 1.5 and cross-credits are determined. An example of the application of the cross-credit approach is contained at page 30 of the Policy Studies Inc. Selected Issues Affecting Predictability and Adequacy Report.

Selected Case Law Interpretations

State ex rel MMG v. Graham, 159 Wn. 2d 623, 152 P.3d 1005 (2007)-shared residential

The Supreme Court has determined that the *Arvey* formula does not apply to shared residential situations for two reasons:

First, in a split residential situation, each parent has residential time with one or more children. If the children are different ages or have different needs, the parents' respective burdens are different and the child support obligation must take those differences into account, a fact that the *Arvey* court acknowledged but did not resolve. 77 Wn. App. 817, 894 P.2d 1346 (1995).

Second, the plain text of RCW 26.19.075 gives the trial court discretion to deviate from the basic child support obligation based on a variety of factors, one of which is the amount of residential time the children spend with the parents. A court will not read things into a statute that are not there. *Cerrillo v. Esparza*, 158 Wn.2d 194, 142 P.3d 155 (2006) (citing *Kilian v. Atkinson*, 147 Wn.2d 16, 50 P.3d 638

(2002)). Because the statute explicitly gives the trial court discretion to deviate from the basic child support obligation based on the facts of a particular case, a specific formula is neither necessary nor statutorily required to ensure the parents' child support obligation is properly allocated. 635-636.

In re Marriage of Scanlon, 109 Wn.App. 167, 34 P.3d 877 (2001), review denied, 147 Wn.2d 1026 (2002)-low residential time.

The Scanlon court determined that it was reversible error for the court to grant an upward deviation based on the obligor's unusually low residential time. "No statutory basis exists to increase a child support obligation based upon the number of overnights per year the children spend with the nonprimary residential parent. A court may reduce an obligor's child support obligation if the children reside with that parent for a significant period of time. But the statute neither states nor implies the reverse."

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

Division I of the Court of Appeals determined that in split residential cases (one child with each parent) despite a lack of a formula in the child support statute that it was appropriate to reduce each parent's obligation by half in order to reflect the fact that each bears an equivalent residential support burden and to net the support transfer payment so that both parents are obligee and obligor. The presumptive amount of child support is calculated by determining the total child support obligation for all children and then determining each parent's basic obligation based on the proportionate share of each parent. Then it is necessary to adjust the basic obligation based on the number of children in each household and if necessary subtract one amount from the other to yield the transfer payment.

Survey of Treatment in Other Jurisdictions

See p. 25-35 of the PSI Report Washington State Child Support Schedule: Selected Issues Affecting Predictability and Adequacy for a more thorough discussion of the treatment of the residential schedule in other jurisdictions.

34 states have a formula or a deviation factor with a formula

14 states (including WA) allow for a deviation but don't specify a formula

3 states do not address shared parenting time

Almost all the income shares model states except 5 including WA specify a formula to adjust for shared parenting time.

The formulas in place seem to fall into three categories: 1) cross credit approach (21 states) with all but 2 using a multiplier to account for duplicated child rearing expenses in each home; 2) Indiana approach and variations (5 states) is based on the concept of three types of child rearing expenses: variable (food); fixed duplicated (housing); and fixed non-duplicated (child's clothing); 3) other methods (8 states) 3 are per diem based on a threshold and the other 5 have unique adjustments.

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Questions to be Considered

Is a parenting plan/residential schedule necessary?

Do we continue with a deviation or change to an adjustment? (permissive or presumptive or some combination of the two)

Do we continue with a broad grant of discretion as the standard or do we adopt a formula?

How do we measure the time?

What should the time sharing threshold be?

After the credit is granted if the time is not exercised what happens?

Should Arvey formula continue to apply in split residential placement?

Is a 50/50 shared plan different than other shared parenting plans?

If the self support reserved is applicable in the scenario of either household should a schedule credit be available?