Deviations
(RCW 26.19.075)

An upward deviation based on **unusually low residential time** is reversible error. "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 parent'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." (*Scanlon*, but see *Krieger* below.)

In re Marriage of Scanlon, 109 Wn. App. 167, 178, 34 P.3d 877 (2001), *review denied*, 147 Wn.2d 1026 (2002)

"The trial court's to the contrary was error. We hold that Krieger's **failure to spend any residential time** with the children may provide a basis for a support award above the advisory amount…." (But see *Scanlon* above.)

In re the Marriage of Krieger, 147 Wn. App. 952, 964, 99 P.3d 450 (2008)

The **residential credit threshold** of 91 overnights was repealed in 1991. The legislative history of the repeal contains a colloquy in which the Senate sponsor of the bill, Senator Nelson, stated: "'Significant time' is not defined in the legislation. It will be determined on a case-by-case basis. The section does reject the idea of the bright-line 90-day rule adopted by the commission. The majority of parenting plans still have residential split across households in the 80/20 to 65/35 range. Presently, residential time in excess of 35 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." (For admissibility of legislative history, see Statutory Construction, below.)

Senator Nelson, JOURNAL OF THE SENATE, 52nd LEG. 3930 (1991)

Residential credits are discretionary and the court *shall* consider evidence of the increased costs to the obligor and decreased costs to the recipient (implying it's the obligor's burden to present such evidence).

State ex rel. Sigler v. Sigler, 85 Wn. App. 329, 338, 932 P.2d 710 (1997)

Residential credits are impermissible if the support recipient is receiving TANF (temporary assistance for needy families). (The *Sigler* court interpreted this to mean AFDC generally.)

RCW 26.19.075(1)(d)

State ex rel. Sigler v. Sigler, 85 Wn. App. 329, 333, 932 P.2d 710 (1997)

"Because *Arvey* addresses 'split-custody' situations rather than shared residential arrangements, and its application often would result in disparate financial circumstances to the detriment of the children, contrary to the intent of the child support statutes, we conclude that ***Arvey* is not applicable to shared residential arrangements**."

State v. Graham, 123 Wn. App. 931, 99 P.3d 1248 (2004)

SSI, AFDC, food stamps and other public assistance must be disclosed, but are not income and are not grounds for deviation.

RCW 26.19.071(4)

"[T]he appendix to chapter 26.19 RCW does not list a worksheet entitled '**Whole Family Formula Deviation**.' The trial court's acceptance of, and reliance on, these worksheets without [written] findings showing consideration of all household circumstances constitutes error similar to that our Supreme Court noted in *McCausland*. As in *McCausland*, any deviation from the standard calculation is necessarily a fact-intensive decision."

In re Marriage of Choate, 143 Wn. App. 235, 242-44, 177 P.3d 175 (2008)

The **Whole Family Formula** is encouraged, provided it should not be used to the exclusion of other applicable factors allowed by law.

In re Marriage of Bell, 101 Wn. App. 366, 374-76, 4 P.3d 849 (2000)

"Child support is not a first-come, first-served proposition." (*Bell*) A parent's duty to support **other children** can support a deviation, taking into consideration the total circumstances of both households.

RCW 26.19.075(1)(e)

State ex rel. J.V.G. v. Van Gilder, 137 Wn. App. 417, 424, 154 P.3d 243 (2007);
In re Marriage of Bell, 101 Wn. App. 366, 373, 4 P.3d 849 (2000);
In re Marriage of Pollard, 99 Wn. App. 48, 53, 991 P.2d 1201 (2000)

"Even though there is no explicit requirement that the trial court treat each child equally, it violates the purpose of the child support statute to create a situation where **earlier-born children** receive substantially more support than later-born children by virtue of an earlier child support order. [Citing *Marriage of Bell*, 101 Wn. App. 366 at 373.] The mother argues that Bell is factually distinguishable from this case because it involved a support order for later-born children based on a pre-existing support order for children from an earlier relationship and none of the children lived with the parent requesting the downward deviation. [*Id.*] These are distinctions without a difference…. Certainly the fact that the father's four other children live with him does not somehow negate his support obligation to them. [Citing *Fernando v. Nieswandt* 87 Wn. App, 103 at 111.]"

State ex rel. J.V.G. v. Van Gilder, 137 Wn. App. 417, 424-25, 154 P.3d 243 (2007)

"[W]e hold that, when considering the total circumstances of both households, a court should first consider whether the basic needs of **all the children** can be met."

State ex rel. J.V.G. v. Van Gilder, 137 Wn. App. 417, 426, 154 P.3d 243 (2007)

"**Back taxes** are not a debt involuntarily incurred… allowing a subsequent credit for leaving the tax obligation outstanding would be a double deduction."

In re Marriage of Daubert, 124 Wn. App. 483, 499, 99 P.3d 401 (2004)

A court may not simply deduct **child support owed for other children** from the income of the obligor when calculating support but should consider the overall financial circumstances of both parties.

In re Marriage of Bell, 101 Wn. App. 366, 4 P.3d 849 (2000)

Deviation *approved* due to **disparate income**.

In re Marriage of Crosetto, 82 Wn. App. 545, 918 P.2d 954 (1996)

Deviation *denied* due to **disparate income**.

In re Marriage of Oakes, 71 Wn. App. 646, 861 P.2d 1065 (1993)

Upward deviations may be supported by the existence of **assets or income opportunities**.

In re Marriage of Glass, 67 Wn. App. 378, 835 P.2d 1054 (1992)

High cost of living (i.e. Alaska) may support a deviation.

In re Marriage of Dortch, 59 Wn. App. 773, 801 P.2d 279 (1990)

Needs of the child will only support a deviation when the child's particular needs exceed the needs necessarily and usually associated with raising a child; i.e. special needs under RCW 26.19.075(1).

State ex rel. Stout v. Stout, 89 Wn. App. 118, 123, 948 P.2d 851 (1997)

The trial court must take into consideration **wealth acquired through the income of a new spouse** (including 50% of the *passive income* earned by the new spouse, absent evidence that the income was separate property, *Scanlon*) when deciding whether to grant a deviation in child support. (But see following section.)

In re Marriage of Scanlon, 109 Wn. App. 167, 178-79, 34 P.3d 877 (2001), *review denied*, 147 Wn.2d 1026 (2002);
Brandli v. Talley, 98 Wn. App. 521, 991 P.2d 94 (1999)

The court may order the **majority residential parent to pay support** to the minority residential parent where the income of the minority residential parent is insufficient to provide for the basic needs of the child (*Casey*); however, mere difference in income, no matter how large, is not sufficient basis for such a deviation (*Holmes*).

In re Marriage of Holmes, 128 Wn. App. 727, 117 P.3d 370 (2005);
In re Marriage of Casey, 88 Wn. App. 662, 667, 967 P.2d 982 (1997)